

**Constitutionalism, Constitutionalisation and  
Legitimacy: Reforming *Al-Shura* Council  
Law in Saudi Arabia**

A Thesis Submitted for the Degree of Doctor of Philosophy in  
Law

By

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## **Declaration**

I declare that the work submitted for this dissertation is my own, and it has not been submitted for any other degree or professional qualification.

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## Abstract

Saudi Arabia is being challenged by increasing demands for democratic reform. Although many Saudi citizens desire such change, in order to maintain stability, dramatic and rapid reform is not considered prudent. Nor is the adoption of a Western model of democracy seen as a way forward. Indeed, such a shift would be counterproductive for most Islamic nations. A more measured approach, introducing reforms that build on traditional Islamic democratic ideals, would help to maintain stability and legitimacy for the various stakeholders involved.

Consequently, attention has been turned to the '*Majlis Al Shura*' or the *Al-Shura* Council, an Islamic Advisory Council that ensures policies and laws follow the principles of Islam. *Shura*, developed from the Holy *Quran*, is an ancient practice that has profound significance in Arab culture and history. It provides a framework which ensures scholars and experts from a variety of backgrounds are consulted on issues related to governance. Currently, the role the members play in governance of the Saudi State is decided by the King, who appoints individuals to the Council according to their perceived suitability.

However, the Saudi Arabian *Al-Shura* Council is a highly respected institution. Allowing citizens to elect members, rather than having the King holding the authority to appoint them, would not only be well received, but would create a more effective check on governmental power, help satisfy the demand for more citizen input into public affairs, and pave the way for future, more substantial reform, if desired by Saudi society.

## Table of Contents

Constitutionalism, Constitutionalisation and Legitimacy: Reforming <i>Al-Shura</i> Council Law in Saudi Arabia.....	i
Declaration.....	ii
Abstract.....	iii
Acknowledgments.....	ix
List of Abbreviations.....	x
Glossary.....	xii
List of Statutes (Saudi Arabia).....	xvi
List of International Instruments.....	xvii
Other Laws Referenced within the thesis.....	xviii
List of Figures.....	xix
List of Tables.....	xix
Chapter One: General Introduction to Constitutionalism, Constitutionalisation and Legitimacy: Reforming <i>Al-Shura</i> Council Law in Saudi Arabia.....	1
1.1 Introduction.....	1
1.2 Significance of the Research.....	6
1.3 Research Challenges.....	7
1.4 Research Objectives.....	7
1.5 Research Questions.....	8
1.6 Methodology.....	8
1.7 Organisation of Research.....	8
Chapter Two: Constitutionalism, Constitutionalisation, Legitimacy.....	10
and International Governance.....	10
2.1 Introduction.....	10
2.2 Constitutionalism: Variations on a Theme.....	13
2.3 Constitutionalisation.....	21
2.4 Human Rights and the Rule of International Law.....	24

2.4.1. Rule of Law among Nations .....	24
2.4.2 Erga Omnes.....	26
2.5 Global Constitutionalisation and Legitimacy of Power .....	34
2.5.1 Legitimacy .....	34
2.5.2 Constitutional Legitimacy – A Moral Concept .....	38
2.5.3 Normative Democracy.....	39
2.5.3.1 Cosmopolitan Democracy.....	39
2.5.3.2 Legitimacy and Deliberative Democracy .....	42
2.5.4. International Rule of Law and Cultural Relativism.....	43
2.5.5 International Constitutionalisation, Practical Solutions.....	47
2. 6 Conclusion.....	54
Chapter Three: Constitutionalism and Legitimacy – An Islamic Perspective .....	56
3.1 Introduction.....	56
3.2 The Development of Islamic Jurisprudence.....	58
3.3 Islamic and Western Jurisprudence.....	59
3.4 Islamic Schools of Law .....	62
3.5 Islam and Democracy.....	65
3.5.1 Siyasah and Public Good .....	67
3.6 Islamic Constitutionalism.....	69
3.6.1 The Islamic Social Contract -Umma (Community).....	80
3.6.2 Shura – Consultation and Deliberation in Islam .....	85
3.6.3 Islamic Separation of Powers: Fiqh and Siyasah.....	86
3.7 Is Democracy in Islam A False Promise? .....	91
3.8 Conclusion.....	94
Chapter Four: <i>Shura</i> : Deliberative Democracy, An Islamic Perspective .....	96
4.1 Introduction.....	96
4.2 The Nature of <i>Al-Shura</i> .....	96
4.2.1 Shura before Islam.....	98

4.2.2 Islamic Influence on Shura .....	99
4.3 The Significance of <i>Shura</i> in Modern Islamic States.....	104
4.4 The Role of <i>Majlis Al-Shura</i> in Islamic Polity.....	107
4.5 <i>Shura</i> and Contemporary Issues.....	108
4.5.1 Shura – Obligatory or Optional?.....	109
4.5.2 Shura and Legitimacy .....	113
4.6 Building upon <i>Shura</i> .....	115
4.7 <i>Shura</i> - A Resurgence .....	119
4.8 <i>Shura</i> and Deliberative Democracy .....	120
4.9 Conclusion.....	121
Chapter Five: Contemporary Politics in the Arabian Gulf - Power, Legitimacy and the Need for Reform.....	123
5.1 Introduction.....	123
5.2 Pressures for Reform come to the Arabian Gulf.....	123
5.3 The Current Saudi State and Legitimate Rule.....	127
5.4 Saudi Arabia Responds .....	131
5.5 The Arab Spring.....	136
5.5.1 The Arab Spring and Saudi Arabia.....	138
5.6 Conclusion.....	139
Chapter Six: Contemporary Governance and Law in Saudi Arabia .....	142
6.1 Introduction.....	142
6.1.1 Brief History of the Modern State .....	142
6.2 Institutions of Authority in Contemporary Saudi Arabia.....	143
6.3 Executive Authority .....	143
6.4 Legislative Authority .....	145
6.5 Statutory Law .....	146
6.6 Sources of Islamic Law .....	149
6.6.1 Primary Sources.....	149

6.6.2 Secondary Sources of Law and the Evolution of a Dual System .....	149
6.6.2.2 Siyasa .....	154
6. 7 Dual Judiciary .....	155
6.7.1 Shar’ia Courts .....	156
6.7.2 Board of Grievances .....	158
6. 7.3 The Independence of the Judiciary .....	159
6.8 Jurisdiction .....	160
6.9 Case Law .....	163
6. 10 State Authority and Hierarchy of Powers .....	164
6. 11 Human Rights and International Law in Saudi Arabia .....	165
6. 11.1 Reservations on International Human Rights: The Vienna Convention on the Law of Treaties .....	167
6. 12 Conclusion.....	176
Chapter Seven: The Evolution of <i>Majlis Al-Shura</i> ( <i>Al-Shura</i> Council) in Saudi Arabia.....	178
7.1 Introduction.....	178
7.2 Development of <i>Majlis Al-Shura</i> in Saudi Arabia .....	178
7.3 <i>Shura</i> Council Law (1992).....	181
7.4 Conclusion: Working Toward Mutual Understanding.....	198
Chapter Eight: Achieving Further Constitutional Reform in Saudi Arabia;.....	200
A More Democratic <i>Shura</i> Council .....	200
8.1 Introduction.....	200
8.2 Saudi Arabia’s Reform Movement – Post-Arab Spring .....	201
8.3 The <i>Al-Shura</i> Council, Potential for Balance.....	205
8.4 Reform Begets Reform .....	207
8.5 Conclusion.....	209
Chapter Nine: Recommendations and Conclusion .....	211
9.1 Recommendations for Constitutionalising the <i>Al-Shura</i> Council.....	214
9.1.1 Electing Council Members .....	214

9.1.2 Transparency.....	215
9.1.3 Increasing the Legislative Power of the Al-Shura Council .....	215
9.2 Conclusion.....	217
APPENDIX I.....	219
APPENDIX II .....	224
Bibliography.....	226



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## List of Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EU	European Union
FPLC	Force patriotique pour la libération du Congo [Patriotic Force for the Liberation of Congo]
GCC	Gulf Cooperation Council
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICESCR – OP	Optional Protocol to the Covenant on Economic, Social and Cultural Rights
ICCPR-OP1	Optional Protocol to the International Covenant on Civil and Political Rights
ICCPR-OP2	Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty
ICJ	International Court of Justice

## List of Abbreviations

ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IMF	International Monetary Fund
NATO	North Atlantic Treaty Organization
OCC	Omani Consultative Council
OP-CEDAW	Optional Protocol to the Convention on the Elimination of Discrimination against Women
OP-CRC-AC	Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
OP-CRC-SC	Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
OP-CAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OP-CRPD	Optional Protocol to the Convention on the Rights of Persons with Disabilities
PBUH	Peace Be Upon Him
SCC	State Consultative Council
UDHR	Universal Declaration of Human Rights
WTO	World Trade Organisation

## Glossary

<i>Ahl al-'ilm</i>	People of learning
<i>Ahl al-khibra</i>	Experts
<i>Ahl al-ra'y</i>	Shapers of opinion
<i>Ahl-al-Sunna</i>	People of the Tradition
<i>A'imat al-Muslimin wa 'ammatihim</i>	Doing what is right and good and forbidding the doing of what is wrong and evil
<i>A'imma</i>	Political rulers
<i>Al-masalih al-mursala</i>	Public interest
<i>Al-maslaha al- 'amma</i>	The interests of all Saudi citizens
<i>Al-salat</i>	The practice of the worship of Allah
<i>Amanah</i>	The nature of trust
<i>Aqd siy`asi</i>	A political pact
<i>Aza'im al-ahkam</i>	The commandments, which are obligatory for the ruling authority and the Muslim people
<i>Āyāt</i>	A verse
<i>Bayah</i>	A pledge of allegiance
<i>Dalil</i>	Proof or an indication of evidence
<i>Diwan Al-Mazalem</i>	Board of Grievances
<i>Fitnah</i>	To repel
<i>Hadith</i>	The verbalised form of a tradition of the Prophet
<i>Hukm shar'i</i>	Legal ruling
<i>Hijra</i>	The journey of Muhammad and his followers from Mecca to Medina in June 622 CE

## Glossary

<i>Huquq</i>	A form of rights
<i>'Iddah</i>	A waiting period
<i>Ijma'</i>	Islamic legal consensus
<i>Ijtihad</i>	Juridical reasoning of a qualified Muslim jurist
<i>Ijtihad jama'i</i>	Collective deliberation
<i>'Ird</i>	Honour
<i>Istihsan</i>	Juristic preference
<i>Istishab</i>	Presumption of continuity
<i>Kaffarat</i>	Oaths and penances
<i>K`anun</i>	Monarchy limited by law
<i>Khilafa</i>	Popular vicegerency
<i>Khitab</i>	Divine communication
<i>Masjid</i>	Mosque
<i>Maslaha 'amma</i>	Public interest
<i>Maslahah</i>	Public welfare
<i>Mas'uliyya jama'iyya</i>	Collective responsibility
<i>Mehrem</i>	Male guardianship over women
<i>Mujtahid</i>	An early Islamic jurist
<i>Mukallaf</i>	Human receiving the law
<i>Nabi</i>	The Prophet
<i>Nasiha</i>	Advice
<i>Naskh</i>	The abrogation of a ruling

## Glossary

<i>Nasab</i>	Apatrilineage
<i>Qadhif</i>	Adultery and false accusation
<i>Qiyas</i>	Analogical reasoning
<i>Raj'ah</i>	Revocation
<i>Rida al awam</i>	Popular consent
<i>Sa,fwat al-rijal'</i>	'The cream of men'
<i>Salāh</i>	Matters of faith
<i>Salat al-jamaah</i>	Collective prayer
<i>Shaor</i>	To consult or to ask for advice
<i>Shar'ia</i>	Islamic law
<i>Siyām</i>	The practice of fasting
<i>Shura</i>	Consultation
<i>Siyasah</i>	Administration
<i>Sunna</i>	The tradition of the prophet Muhammad
<i>Surat</i>	A chapter
<i>Taklifi</i>	Defining laws
<i>Taqlid</i>	Past traditions
<i>Tawhid</i>	The oneness of God
<i>Tazir</i>	Minor crimes not mentioned in the <i>Quran</i>
<i>Ulama</i>	Scholars or jurists
<i>Ummah</i>	The Muslim community at large
<i>Usul-fiqh</i>	The methodology of law or the science of the sources

## Glossary

<i>Usul al-fiqh</i>	The process of developing evidence to authenticate Islamic law
<i>Wad'i</i>	Declaratory laws
<i>Wahy</i>	To bear witness to the authority of divine revelation as being above any man- made legislation no matter how rational
<i>Wilayat</i>	The authority vested in the Prophet
<i>Wulat</i>	Political rulers
<i>Zakāh</i>	Legal alms

## **List of Statutes (Saudi Arabia)**

Appendix One: List of Human Rights ratified or not by Saudi Arabia

Basic Law of Governance, 1992

Law of the Judiciary, 1975

Law of the Judiciary, 2007

Law of the Board of Grievances

Law of Combating Bribery, issued by Royal Decree no. 43 dated 29/11/1377 H

Law of Handling Public Funds issued by Royal Decree No. 77 dated 23/10/1395 H

Basic Laws of Civil and Political Rights, 1992

Law of Criminal Procedures, 2001

International Convention on the Elimination of All Forms of Discrimination against Women, 1979, ratified in 2000

Shura Council Law, 1992

Law of Procedure (*Shar'ia* Courts)



## **List of International Instruments**

United Nations: articles on Responsibilities of States for Internationally Wrongful Acts, 2001.

International Bill of Human Rights incorporating:

- Covenant on Civil and Political Rights (and its First Optional Protocol)
- Covenant on Economic, Social and Cultural Rights
- Universal Declaration of Human Rights.

International Convention on the Elimination of All Forms of Racial Discrimination

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Vienna Convention on the Law of Treaties, 1969

Convention on the Elimination of All Forms of Discrimination against Women, 1979

Convention on the Rights of the Child, 1996

International Convention on the Elimination of All Forms of Racial Discrimination, 1997

Convention on the Elimination of All Forms of Discrimination against Women 2000

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1997

International Criminal Court (established in 2000 and known as the Rome Statute)

## Other Laws Referenced within the thesis

Objectives Resolution, Pakistan, 1949

Ottoman Fundamental Law, 1876, including:

- Constitution of 1876, which added *Shar'ia* as the main source of legislation
- Further countries followed suit, by 2000, 24 nations had recognised *Shar'ia* as their main source too.

## **List of Figures**

<b>Title</b>	<b>Page Number</b>
Fig. 1: Schools of Islamic Jurisprudence	63
Fig. 2: Saudi Arabian political system	129
Fig. 3: Structure of <i>Shar'ia</i> Courts	158
Fig. 4: Board of Grievances	159
Fig. 5: The Stages of making legislation in the <i>Majlis</i> from the beginning through to the issuance of law by the King	184

## **List of Tables**

Table 1: Occupational Backgrounds of the Members of the 1997 Majilis al-Shura	186
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## **Chapter One: General Introduction to Constitutionalism, Constitutionalisation and Legitimacy: Reforming *Al-Shura* Council Law in Saudi Arabia**

### **1.1 Introduction**

A growing demand for democracy has seemingly gripped the Middle East. Citizens are no longer willing to submit to government power they perceive as being illegitimate. These demands are growing more urgent according to the Secretary-General of the United Nations who reports, “In the Middle East, North Africa and elsewhere, grass-roots demand for greater accountability, transparency and the rule of law is driving political changes at a breathtaking pace.”<sup>1</sup> While legal and political scholars speak of constitutionalism, constitutionalisation and the ‘victory’ of liberal normativism, the underlying, driving force of unrest in a nation State inevitably has to do with the legitimacy of its source of power. Legitimacy of authority in modern States is bound by legal, rational rules. Authority rests “... on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority).”<sup>2</sup> Max Weber observed that legitimacy of authority in modern nations is based on the belief that authority is bound by legal rules, and those legal rules are rational.<sup>3</sup> For Weber, authority is the legitimate use of power and legitimate rule is accepted because it is based on law.

Rule following law is not a concept that was new to Weber. Nor was it new to A.V. Dicey who made the phrase “rule of law” famous in his 1885 publication *An Introduction to the Study of the Law of the Constitution*. Indeed, Aristotle, in his *Politics and Athenian Constitution*, is known to have said, “It is better for the law to rule than one of the citizens.”<sup>4</sup> Even the Guardians who would rule in Aristotle’s ideal State would have to abide by the law. So, the recognition that legitimacy in rule must come from its adherence to law has a long and rich tradition.

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<sup>1</sup> United Nations Security Council, ‘The Rule Of Law And Transitional Justice In Conflict And Post-Conflict Societies Report Of The Secretary-General’ (12 October 2011) 2.

<[http://www.unrol.org/files/S\\_2011\\_634EN.pdf](http://www.unrol.org/files/S_2011_634EN.pdf)> accessed 29 January 2015.

<sup>2</sup> Max Weber, “The Types of Legitimate Domination” in Laura Desfor Edles and Scott Appelrouth (eds) *Sociological Theory in the Classical Era* (Sage Publications 2005) 175.

<sup>3</sup> *ibid.*

<sup>4</sup> As cited in Tom Bingham, *The Rule of Law* (Penguin Group 2010) 3.

When rule has legitimacy, not only individuals but States have a tendency to obey. Put simply, legal scholars have asked why obey and for what purpose are laws obeyed?<sup>5</sup> That this line of inquiry has “energized the legal philosophers in their speculations about societies of natural persons, as opposed to States, is not so different as to justify the alienation of the two branches – the national and international – of legal philosophy.”<sup>6</sup> Thomas M. Franck, the author of *The Power of Legitimacy Among Nations* (1990), argues that the same aspects of the legitimacy of power/law motivates both citizens and nations to follow rules. This recognition is supported in sophisticated ideas related to polis. Citizens are part of polis/community and this affiliation necessitates reciprocal rights and obligations upon which a social construct of power is built. Likewise, “Teleologically speaking, one might hypothesize that nations obey rules of the community of States because they thereby manifest their membership in that community, which in turn, validates their Statehood.”<sup>7</sup>

Legitimacy is also strengthened when rule of law has traditional elements. With traditional authority, political authority is based on the perceived sanctity of customs, conventions and traditions.<sup>8</sup> When citizens no longer accept the legitimacy of their government, unrest and uprisings will almost always occur, especially when the power of the State is used against its own people. As the State loses legitimacy, its citizens demand reforms, and if reform does not take place, then violence, chaos and the toppling of the State is often the end result.<sup>9</sup>

A government loses legitimacy for a variety of reasons, but most often because its citizens have been stripped of their rights to political power. Their government, which is supposed to represent and support them, has become corrupt, and its rule has fallen out of the legitimate boundaries as previously accepted by its polity. In other words, these governments are no longer following a rule of law, but have placed themselves above or outside a rule of law previously accepted by the polis. When large numbers of citizens break laws, the motivations to obey no longer

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<sup>5</sup> Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990) 5.

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.* 8.

<sup>8</sup> Weber (n 2)175.

<sup>9</sup> Shaun Best, *Introduction to Politics and Society* (Sage Publications 2002) 10.

apply. Recent uprisings in the Middle East, including Tunisia, Egypt and Syria, are examples of what happens when a government has lost the support of its people.

Governing authority in modern societies is being challenged by global constitutionalism. With regard to global constitutionalism under the normative school of thought, scholars assume that domestic constitutionalism is deficient and needs to be supplemented by global legal constitutional practices that guide the political reform of States. States that do not conform to international legal precedents and standards are increasingly likely to be identified as illegitimate because they are in violation of those normative standards.

While most of the States in the Arabian Gulf region are relatively stable, the various regimes, including that of Saudi Arabia, are aware that reforms are necessary. However, Saudi Arabia has accomplished what most, more modern, governments in the Middle East have not—long-term legitimacy. Saudi Arabia's success is due to a variety of factors, including a traditional political culture that accepts the legitimate authority of the King; wealth and its wide distribution from oil revenues; and the ability of the monarchy to balance the need for modernisation with the need to maintain traditional customs and policies. The monarchy has also been successful in maintaining mutually beneficial alliances with wealthy and influential tribal leaders and most importantly, its alliance with religious leaders has been sustained over many decades, which is critical due to the strong Islamic values held by most Saudi Arabian citizens.

Although Saudi Arabia has been able to protect its authority, it is confronting political, economic, social, and diplomatic challenges shaped by a new millennium. Additionally, information technologies, globalisation, and the inability of governments to control information and social networking, has allowed outside influences to make an impact on the region's various societies. Many of the Gulf States have participated and signed international treaties, agreeing to abide by international law. However, conservative Muslim States like Saudi Arabia remain hesitant to become signatories to international treaties, claiming that *Shar'ia* law supersedes secular laws even at the international level.<sup>10</sup> For example, Saudi Arabia

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<sup>10</sup> Abdulhamid A. Al-Hargan, 'Saudi Arabia and the International Covenant on Civil and Political Rights 1966: a stalemate situation' (2005) 9 (4) International Journal of Human Rights 491.

refused to sign the International Covenant on Civil and Political Rights (ICCPR) of 1966, among others, because it claimed the ICCPR is not compatible with some aspects of *Shar'ia* law, and since *Shar'ia* is the supreme law of the land, it cannot ratify the treaty without violating *Shar'ia*.<sup>11</sup> The failure to ratify several international treaties related to human rights and discrimination has provided more evidence for human rights organisations to accuse the country of evading responsibility for its human rights violations. The Saudi State has been accused of using *Shar'ia* as an excuse to avoid recognition and implementation of international human rights law.<sup>12</sup> Yet, some Muslim States have actually worked within the frame of *Shar'ia* to redress human rights issues and have passed new legislation and human rights legal protection. Research has shown that *Shar'ia* has a relatively minimal influence on human rights violations in Muslim countries;<sup>13</sup> cultural practices and customs are the main causes of the violations, especially in relation to women and children who find themselves in heavy-handed patriarchal social environments. Indeed, although Muslim nations have the common denominator of *Shar'ia* as their source of law, *Shar'ia* does not necessarily determine whether or not the country will comply with international law.<sup>14</sup>

Although there are both external and internal pressures to comply with human rights standards, each Muslim State will respond to demands from citizens in its own way. The nature of that reform will be shaped by the State's history, culture and circumstances. If constitutionalism is truly a force for change in the Middle East, as is claimed by many, certain fundamentals are required to drive that change. Constitutionalism is rooted in the 'Rule of Law,' with government being legally limited in its powers. A government's continuing legitimacy will depend on whether or not it is observing these limitations. Constitutionalisation, then, has the primary characteristic of imposing legal restraints on government, resulting in a balance between the power of the State and the power of the people.

One of the defining questions of the modern constitutional debate is whether constitutional law needs to be modified or even replaced by constitutionalism that

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<sup>11</sup> Al-Hargan (n 10) 491.

<sup>12</sup> Nisrine Abiad, *Shar'ia, Muslim States and International Human Rights Treaty Obligations* (British Institute of International and Comparative Law 2008) xv.

<sup>13</sup> *ibid* xvi.

<sup>14</sup> *ibid* xi.

extends beyond the State. The blurring of national borders has presented a challenge to the traditional concept that constitutions fall within the realm of the nation, not beyond. Additionally, nation States that have no formal manifestation of the ideals of constitutionalism are being pressured by the global community to constitutionalise.

In an attempt to respond to the need for more democracy in the governance of Saudi Arabia, attention has been turned to the '*Majlis Al Shura*' or the *Al-Shura* Council. The *Al-Shura* Council is an Islamic Advisory Council, which ensures policies and laws follow the principles of Islamic legislation. The *Al-Shura* Council comprises various consultants who propose laws, interpret *Al-Shar'ia* law and make decisions about the applicability of certain policies and practices proposed. *Shura* refers to the framework developed from the Holy *Quran* which is used to build a political system where scholars and others consult on issues related to *Shar'ia* law. The *Shura* framework, however, only provides general, universal principles; the details of how they are applied are left open to interpretation by the various nations affected. This allows a great degree of flexibility, which makes *Shura* a progressive political system that can respond to the nation's interests during any era. Allowing the *Shura* to be open and unspecified is considered an advantage because it can be adapted to the needs of the citizens at a given time.

The attention given to the *Al-Shura* Council through this research and other studies is partly due to the profound significance that *Shura* has in Arab culture and history. The *Shura* method of public consultation is associated with the ancient Arab tradition of the Open *Majlis* or 'Council.' *Shura* guarantees that governance under Islam is guided by the consultation of others.

The Saudi Arabian form of *Shura* manifested itself in the creation of the *Al-Shura* Council in 1924<sup>15</sup>. Originally, members of the Council were elected. Today, the representatives of the *Al-Shura* Council are appointed by the King, who decides on their suitability according to the needs of the government. Because the representatives are appointed by the King, the *Al-Shura* Council, as a governing mechanism, is not really separated from the King's authority. Still, citizens are not demanding a separation of power. Rather, they seek more democracy through citizen

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<sup>15</sup> Nasser M. Al-Asaaf (tr), *The Shura Council in the Kingdom of Saudi Arabia* (The Information Department of the Shura Council 2004) 4.



participation by being able to elect who becomes a member of *Al-Shura*. The election of members to the Council will help to guarantee that the broad interests of all citizens are addressed more evenly because the people will choose who they believe will best represent their needs.

## **1.2 Significance of the Research**

There is increasing pressure from the global community for constitutionalism to be a normative force in States that are considered undemocratic, and for them to constitutionalise at least part of their governing process. The normative forces for political reform are especially salient in relation to human rights issues. Nation states that are perceived to be violating the rights of their citizens are under scrutiny from the international community. As pressure increases for political reforms in Saudi Arabia, both externally and internally, this research is an evaluation of the kind of reforms that could be made in order to constitutionalise the governance in a way that satisfies various stakeholders. The research emphasises the Saudi Arabian *Al-Shura* Council as the primary government structure for possible reform.

The election of members to the *Al-Shura* Council would be a first step leading to a significant and positive change for both the current ruling body and for citizens who are seeking more public participation and a balance in Saudi Arabian governance. Electing members to the *Al-Shura* Council will, in itself, constitute a fundamental change, which in a conservative State, represents a significant step towards reform. Constitutionalising the *Al-Shura* Council would pave the way for continued constitutionalisation to further balance the power between the State and its people. Many constitutional scholars claim that Islam and democracy are not compatible. However, defining Islam and democracy as more or less incompatible fails to recognise, and thereby fails to support, the true nature of Islamic governance and the potential of Islamic societies to constitutionalise according to the relevancy and legitimacy required to sustain them. Additionally, one has to wonder, if the legitimacy of the State can remain intact in the long-term if relatively strong measures of constitutionalisation are not implemented.

### **1.3 Research Challenges**

This research is guided by a normative approach to constitutional law which holds the view that constitutionalism is a legal or moral framework that guides the progression of reform of legal and political practices of the State which represent a commitment to constitutional standards.<sup>16</sup> Ultimately, then, law and politics are interdependent. Each frames the other where laws are the result of a political process, and political process is determined by laws. Scott states that, “The two phenomena are therefore inseparable; in a certain sense, all law is politics and all politics is law.”<sup>17</sup> In other words, laws created in any society will be shaped by the political nature of the society and its governance. Consequently, in considering the power of modern constitutionalism and its impact on Saudi Arabia, there needs to be an analysis of both the legal and political forces at play.

### **1.4 Research Objectives**

Saudi Arabia has taken small and incremental steps toward reform to meet the growing demands, both external and internal in origin, for more democratic practices in its governance. The objective of this research is to analyse the current status of said reforms and pressures for further reform and to recommend the most appropriate way to constitutionalise aspects of the government to meet the needs of various stakeholder groups in the country, while simultaneously allowing the current regime to maintain stability and legitimacy. In other words, I will try to identify the most appropriate processes of constitutionalisation that are necessary for Saudi Arabia to maintain its stability yet provide enough change that citizen participation in governance can occur. Saudi Arabia is at a point where if certain specific reforms are made, the monarchy can maintain its legitimacy and thus maintain the stability of the State.

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<sup>16</sup> Rosanna Deplano, ‘Fragmentation and Constitutionalisation of International Law: A Teleological Inquiry’ (Ph.D. thesis, Brunel Law School 2012) 1.

<sup>17</sup> Paul Scott, ‘Political Constitutions and Political Constitutionalism’ (2013) 14 (12) *German Law Journal* 1257.

## **1.5 Research Questions**

- 1) What are the political, cultural, historical, social and economic forces that are making constitutionalism and constitutionalisation normative trends for guiding legal and political reform at the State level and beyond?
- 2) What is the Islamic perspective regarding constitutionalism?
- 3) To maintain legitimacy in governance, what democratic reforms are the most appropriate for Saudi Arabia's legal and/or political system to implement at this time?

## **1.6 Methodology**

The research will adopt a qualitative research methodology and content analysis; therefore, analytical methods are applied throughout. They will be used to analyse various bodies of literature, regulations, policies, laws, and juristic opinions related to power, legitimacy, international law, constitutionalism and Islamic constitutionalism; *Shar'ia* and its relation to international law; constitutionalisation and the structure of governance in Saudi Arabia. In considering a process of reform in Saudi Arabia, this study will focus on the *Al-Shura* Council in Saudi Arabia in order to identify gaps between the original intent of *Shura* and its current practice in the country, so that constitutional reforms that will best suit the nature and needs of the citizens can be recommended.

## **1.7 Organisation of Research**

This thesis is divided into nine chapters. Chapter One introduces the general topic, "Constitutionalism, Constitutionalisation and Legitimacy: Reforming *Al-Shura* Council Law in Saudi Arabia." Chapter One also includes a discussion on the significance of the research, research challenges, research objectives, research questions, and the methodology used to conduct the research.

Chapter Two reviews the political and legal scholarly discourse on Constitutionalism and trends of Constitutionalisation at both the domestic and international levels. Then issues of legitimacy of power and issues of international governance are addressed. The discourse on international constitutionalisation leads to the consideration of human rights and international law because the concern over

human rights has become the common ground to develop international law and conventions that are meant to subordinate national laws related to human rights. Gross violations of human rights have been one of the driving forces to bring universal normative processes to bear on perpetrators and to prevent further violations from taking place. International constitutionalism is related to the concepts of legitimacy of power and the normative principles developed to address how the world responds to actions taken at the State level.

Chapter Three extends concepts of constitutionalism and legitimacy of State power from an Islamic perspective. Issues of Islam's compatibility with democracy are explored in this chapter. For example, what traditional Islamic practices are inherently democratic, if any?

Chapter Four focuses more specifically on the nature of *Shura* and its relationship to democracy and maintaining legitimacy in Islamic nations.

Chapter Five explores the current political climate and issues of legitimacy and power in the Arabian Gulf, especially Saudi Arabia, which are causing increased demands for reform.

Chapter Six is a presentation on the governing structures of Saudi Arabia, highlighting executive and legislative authority. The development of Saudi Arabian law is discussed, along with the nature of its judicial system. This chapter also explores Saudi Arabia's legal and constitutional practices regarding human rights, as this is a continuing area of contention between Saudi Arabia and the global community.

Chapter Seven explores the history and evolution of *Majlis Al-Shura* in Saudi Arabia, emphasising its importance to Saudi society. Although *Shura* has already been discussed extensively, each State has framed *Shura* differently, so this chapter focuses on its history in Saudi Arabia.

Chapter Eight investigates achieving further constitutional reform in Saudi Arabia. What are the needs? What are the barriers?

Chapter Nine makes the specific recommendations of how that constitutionalisation should be implemented.

## Chapter Two: Constitutionalism, Constitutionalisation, Legitimacy and International Governance

### 2.1 Introduction

As the power of international institutions increases and economic dependence between nations becomes more intertwined, ideals of constitutionalism and constitutionalisation have become prominent in the sphere of public discourse. Now is an era where terms, such as, global dynamics, global economies and global governance characterise an interconnected world.<sup>18</sup> National independence is being re-defined, and the sovereignty of nation-States has become blurred. Various terms are used to describe the diminishing of State authority, such as, a hollowing-out, disaggregation, or de-centring of the State;<sup>19</sup> but regardless of the term used, it would appear that State sovereignty has been reduced by the legal, economic, and political activities carried out by international entities. In addition, normative processes have emerged to try to exert control over nation-States that have crossed the lines of what is considered legitimate behaviour.

As well as an apparent common consensus that the power of the State has declined, there is also agreement that the “transfer... of functions to specialized regulators, along with the development of new types of public/private interactions” has grown significantly.<sup>20</sup> For example, transnational trade by privately-owned multinational corporations is widespread.<sup>21</sup>

In response, transnational regulatory networks have been developed to manage these globalised transactions. There are three different types of transnational networks: networks of national agents formed within the established context of international organisations; networks of national agents, created under a formal agreement by heads of State; and networks of national regulators that have developed without any formal type of framework and whose members make policies and

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<sup>18</sup> Christian Joerges and Ernst-Ulrich Petersmann (eds) *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing 2006) 3.

<sup>19</sup> Sol Picciotto, ‘Constitutionalizing Multilevel Governance?’ (2008) 6 (3-4) *Comparative Political Studies* 459.

<sup>20</sup> *ibid* 460.

<sup>21</sup> Anne-Marie Slaughter, ‘Global government networks, global information agencies, and disaggregated democracy’ (2001) Harvard Law School Working Paper 4, 8.

decisions at the international level.<sup>22</sup> This third type is often formed by business leaders, experts, State officials and so forth, who share information, coordinate policies and address common issues, but are not closely regulated by the policies of their respective governments. The activities of these networks are rarely visible, and they are so distant from the general population to be made accountable under the usual processes of representative democracy.<sup>23</sup> Consequently, growing numbers of legal and constitutional scholars, jurists, politicians, and professionals are increasingly demanding the establishment of general norms of accountability due to the immense impact these organisations can have on the lives of ordinary people.<sup>24</sup>

Ideals of constitutionalism have influenced the nature of government since the 18th century. However, constitutionalisation as a topic for debate by legal scholars is a relatively new phenomenon, especially in terms of international relations. As demands continue to spread for a globalised body of law that reaches beyond the State, contemporary circumstances will no longer tolerate complacency toward the subject of international law and relations.<sup>25</sup>

In 1990, Thomas Franck was concerned at the lack of interest on the part of legal philosophers/scholars on the subject of international constitutionalism. However, since then, legal scholars have turned much more attention to the issues of global governance, perhaps out of necessity. With interdependencies becoming more complex, the actions taken by one nation often impacts other nations, at least on a regional level if not a global one. So, global-level policies are increasingly being viewed as an appropriate response.

Constitutionalisation has, then, become a source of debate due to the increased governance occurring through arrangements that are not well managed at the nation-State level.<sup>26</sup> As international agencies and their power over nations increase, it follows that concern regarding the legitimacy of this power is also

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<sup>22</sup> Slaughter (n 21) 4.

<sup>23</sup> *ibid.*

<sup>24</sup> Picciotto (n19) 459.

<sup>25</sup> K Milewicz, 'Emerging patterns of Global Constitutionalisation' (2009)16 (2) *Indiana Journal of Global Legal Studies* 415.

<sup>26</sup> Martin Loughlin, 'What is Constitutionalization?' (nd) *Jus Politicum* <[http://www.juspoliticum.com/IMG/mp3/loughlin\\_IMV\\_constitutionalisation.mp3](http://www.juspoliticum.com/IMG/mp3/loughlin_IMV_constitutionalisation.mp3)> accessed 10 January 2013.

increasing. International organisations like the World Trade Organisation create policies that have a profound impact on the lives of ordinary citizens. Consequently, growing numbers of public actors/agents are calling for these supranational organisations to be constitutionalised – in other words, subjected to the processes of constitutional procedures and norms, such as accountability, equal representation and legitimate use of power.<sup>27</sup> In fact the issue of international constitutionalisation has been identified as an important legal and practical challenge.<sup>28</sup>

One of the defining questions of modern constitutional debate is whether constitutional law needs to be modified, or even replaced, by a constitutionalism that extends beyond the State.<sup>29</sup> The blurring of national borders has presented a challenge to the traditional concept that a constitution falls within the realm of the nation, not beyond it. Additionally, nation States that lack any formal manifestation of the ideals of constitutionalism are being pressured to constitutionalise by a variety of stakeholders.

In recent years, contemporary concern with the interpretation of rights has caused some to celebrate the “final triumph of liberal normativism”,<sup>30</sup> which is the assumption that legal constitutional constraints will be imposed on political bodies, and that the rules for this imposition have been mutually agreed upon, overriding other forms of political arrangement. However, not everyone would agree with this statement.<sup>31</sup> Many issues are still open to debate within the context of constitutionalism, constitutionalisation and the philosophies that drive them. The idea that liberal normativism has triumphed across nations, cultures and even within scholarly groups is premature and perhaps not even desirable.

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<sup>27</sup> Gavin Anderson, ‘Beyond Constitutionalism Beyond the State’ (2012) 39 (3) *Journal of Law and Society* 360.

<sup>28</sup> A. Kemmerer, ‘Kelsen, Schmitt, Arendt, and the Possibilities of Constitutionalization in International Law: Introduction’ (2010) 23 *Leiden Journal of International Law* 721.

<sup>29</sup> Anderson (n27) 360.

<sup>30</sup> *ibid* 361.

<sup>31</sup> See for example (among others) Anne-Marie Slaughter ‘Global government networks, global information agencies, and disaggregated democracy’ (20 September 2001) 8 *Harvard Law School Working Paper* 4; Jeffrey Dunoff and Joel Trachtman, ‘Ruling the world? Constitutionalism, International Law and Global Governance’ (10 December, 2009) *Talk! European Journal of International Law (EJIL)* <<http://www.ejiltalk.org/ruling-the-world-constitutionalism-international-law-and-global-governance/>> accessed 15 April 2012; Robert Manzer, ‘Hume’s Constitutionalism and the Identity of Constitutional Democracy’ (1996) 90 (3) *The American Political Science Review* 488; Clyde W. Barrow, ‘The Return of the State: Globalization, State Theory and the New Imperialism’ (2005) 27 (2) *New Political Science* 123.

## 2.2 Constitutionalism: Variations on a Theme

Attempts to clarify the meaning of constitutionalism often begin with definitions of a constitution, which, simply put, consists of written documents that share certain formal characteristics. For one thing, a constitution has precedence over ordinary law, and mandates specific procedures for amendments to protect constitutional laws from modifications which are poorly conceived or driven by trends.<sup>32</sup> Parpworth points out that constitution might have a different meaning depending on the context in which it is used.<sup>33</sup> In general, though, Parpworth defines constitution as a body of rules that regulate a system of governance. It establishes the institutions and bodies and the powers each uses, and determines how different parts of government interact with the other. Constitution is concerned with the relations between citizens and their government.<sup>34</sup> A constitution, therefore, provides procedural functions to institutionalise the legal norms of a polity. From a very broad and loose, perspective, constitutionalism refers to the use of constitutions. Although there are some nation States in the modern world such as the UK and Israel that do not have a formal written constitution, most follow a rule of law and might even refer to themselves as constitutionalists. However, most constitutionalists have something much more specific in mind. The purpose of a constitution is almost always to reduce dangers that can be posed by the State:

All constitutional government is by definition limited government. . . Constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law."<sup>35</sup> This understanding of constitutionalism highlights three essential features: (1) the supremacy principle, (2) the limited government principle, and (3) the entrenchment principle.<sup>36</sup>

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<sup>32</sup> Milewicz (n25) 415.

<sup>33</sup> Neil Parpworth. *Constitutional and Administrative Law* (7<sup>th</sup> edn, Oxford University Press 2012) 3.

<sup>34</sup> *ibid.*

<sup>35</sup> James Worley, 'Deliberative Constitutionalism' (2009) 2 *Brigham Law University Law Review* 436.

<sup>36</sup> *ibid.*



With its origins in the 17th and 18th centuries,<sup>37</sup> constitutionalism is a political movement or trend that contains the underlying values that subjugate political powers to laws, thus creating a government dictated by those laws, not by men. Ideologically speaking, constitutionalism embodies the values and philosophical perspectives that shape the institutional provisions in a specific constitution.<sup>38</sup> Modern constitutionalism, for the most part, has added the broader values of human rights that go beyond the traditional rules and procedures of government.<sup>39</sup> Professor Louis Henkin stated, “Ours is the age of rights. Human rights is the idea of our time, the only political-moral idea that has received universal acceptance.”<sup>40</sup> Antonio Moreira Maués (2012) found that in response to the European Convention on Human Rights (ECHR), 18 countries all underwent structural changes in their constitutional systems<sup>41</sup> Contemporary constitutional discourse, therefore, examines the formal and substantive elements that mandate equality for all people under the rule of law.<sup>42</sup>

A growing concern for human rights that protect equal treatment under established law is evident through such modern developments as the International Human Rights treaties, the UN Charter, and the increasing number of international courts that focus on protecting human rights in general.<sup>43</sup> It has been predicted that, as seen in Europe, international constitutional law is likely to evolve out of common concepts of constitutionalism, especially those related to issues of human and social rights.<sup>44</sup> However, there is disagreement about constitutionalising human rights because of uncertainty as to the extent of the welfare obligations of a democratic nation.<sup>45</sup> “Not everyone seems to agree that social rights

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<sup>37</sup> Milewicz (n25) 415.

<sup>38</sup> JHH Weiler and Marlene Wind, *European Constitutionalism Beyond the State* (Cambridge University Press 2003) 15.

<sup>39</sup> Milewicz (n25) 416.

<sup>40</sup> In Elkins et al, ‘Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice’ (2013) 54 (1) Harvard International Law Journal 61.

<sup>41</sup> Antonio Moerira Maues, ‘Supra-Legality of International Human Rights Treaties and Constitutional Interpretation’ (2013) 18 International Journal on Human Rights.

<sup>42</sup> *ibid* 417.

<sup>43</sup> Johnson in E. Petersmann, ‘Towards World Constitutionalism: Issues in the Legal Ordering of the World Community’ (2007) 44 (5) Common Market Law Review 1535.

<sup>44</sup> *ibid*.

<sup>45</sup> Murray Wesson, ‘Disagreement and the Constitutionalisation of Social Rights’ (2012) 12 (2) Human Rights Law Review 221.

will be regarded as principles capable of constituting the political space but rather will be regarded as political claims.”<sup>46</sup>

The development of a constitution and constitutionalism are interdependent. A constitution is formed based on the views that a society has associated with constitutionalism, bearing in mind that there is no single universal ideology embraced by constitutionalism. Citizens do not view constitutions simply as a set of legal and political instructions; they are also seen as, “... [a society’s] moral commitment and identity... our constitutions are said to encapsulate fundamental values of the polity, and this, in turn, is said to be a reflection of our collective identity as a people, as a nation, as a State, as a Community, as a Union.”<sup>47</sup>

Disagreement about the nature of constitutionalism is unsurprising. Even though institutions of democracy have gained growing support, there is uncertainty about which type of institutional framework of democracy would serve the needs and interests of all citizens, and what type of democratic institution would solve the problems that are an inherent part of political participation.<sup>48</sup> Additionally, there is still resistance from those who see democracy as a threat to their valued beliefs or established privileges.<sup>49</sup>

Modern perceptions of constitutionalism are complicated by differentiations between liberal constitutionalism and constitutional liberalism, among other issues. While liberal constitutionalism provides safeguards of individual liberty and private autonomy, constitutional liberalism emphasises the freedom of individuals to choose the type of political/constitutional environment they prefer.<sup>50</sup> Liberal constitutionalism emphasises negative rights, meaning that outside forces are restrained from interfering with individual freedoms, and where a system of laws is created to protect this private domain.

Constitutional liberalism, on the other hand, is more about procedure; it emphasises the way that a system of laws becomes legitimate. Constitutional liberalism does not prescribe specific standards of rights; rather it is a procedure

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<sup>46</sup> Wesson (n 45) 221.

<sup>47</sup> Weiler and Wind (n 38) 17.

<sup>48</sup> Viktor Vanberg, ‘Liberal Constitutionalism, constitutional liberalism and democracy’ (2011) 22 *Constitutional Political Economics* (Springer) 1.

<sup>49</sup> *ibid* 2.

<sup>50</sup> *ibid*.

where the source of legitimacy for the rules of a particular society come from its citizens.<sup>51</sup> This view of constitutional liberalism, much like private individuals entering contracts voluntarily within a framework of contract law, requires that individuals are able to freely enter into a system of government and its function. In other words, citizens are free to develop rules under which they can live by voluntary agreement.<sup>52</sup> Liberal constitutionalism is concerned with substantive law and constitutional liberalism is concerned with procedural law.

Jurgen Habermas states that liberal democracy requires the rule of law to function, so that self-determination of the populace can be achieved, and indeed, without the structure of such law, liberty cannot be assured.<sup>53</sup> Self-determination, where the state is a reflection of the unrestricted will of the people, is a fundamental principle of constitutional liberal democracy. Habermas argues:

... the political autonomy of citizens is embodied in the self-organization of a community that freely makes its own laws. If the normative justification of constitutional democracy is to be consistent, then it seems one must rank the two principles, human rights and popular sovereignty. To be legitimate, laws, including basic rights, must either agree with human rights (however these in turn are legitimated) or issue from democratic will-formation.<sup>54</sup>

Liberal ideology in law emphasises individualistic values, interests, and negative rights against the State.<sup>55</sup> However, this is not the only philosophical perspective that is used to discuss constitutionalism. At times, the ideologies that underlie the use of terms and concepts are not even recognised. For example, social liberalism is another driver of constitutionalism, yet it has an underlying ideology that is very different from traditional concepts, even though the differentiation is not always acknowledged. Unlike traditional classical liberalism that promotes individual liberty and the limitation of political power, today's debates about

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<sup>51</sup> Vanberg (n 48) 3.

<sup>52</sup> *ibid.*

<sup>53</sup> Jurgen Habermas, 'Constitutional Democracy A Paradoxical Union of Contradictory Principles?' (2001) 29(6) *Political Theory* 767.

<sup>54</sup> *ibid.*

<sup>55</sup> Michael G. Salter, *Carl Schmitt: Law as Politics, Ideology and Strategic Myth* (Routledge 2012) 54.

constitutionalism also contain heavy emphasis on human rights and include substantive principles.<sup>56</sup> Consequently, rather than simply promoting negative rights, positive rights (social liberalism) are emphasised, with an additional requirement to provide certain social benefits.

It can be assumed that social liberalism advocates rights to housing, education and health care, and that these rights should be constitutionalised. If this is the assumption and one is committed to these rights, then the person is obliged to advocate that social rights are constitutionalised without challenge, even though they are viewed as positive rights.<sup>57</sup> Within this frame, constitutionalism has become value-laden, emphasising positive rights.<sup>58</sup>

Many modern scholars work from either of the two assumptions, where constitutionalism implies either a liberal approach where a government prioritises individual negative freedoms or social liberalism where positive rights are also emphasised.

Duly noting the various interpretations related to constitutional discourse, the most common definition of constitutionalism is that it is a mechanism to limit government in order to serve the needs of the people and where governmental authority is rooted in popular consent.<sup>59</sup> But this definition is a specifically American view. Consequently, broader interpretations are sought. Stanley Katz, for example, began redefining his admittedly American perspective after founding a project in 1987 to study constitutionalism both within and outside the United States. To broaden the context, constitutionalism was defined as a manifestation of liberal individualism, according to the Enlightenment (classical liberalism) view.<sup>60</sup>

Underlying the classical liberal viewpoint is the assumption that there are discoverable standards that can be used to evaluate whether or not a policy impinges upon human dignity. This version exemplifies classical Western notions of constitutionalism because, at its core, it emphasises human worth and dignity. The

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<sup>56</sup> Milewicz (n25) 420.

<sup>57</sup> Cecile Fabre, 'Constitutionalizing Social Rights' 1998 (6) 3 *The Journal of Political Philosophy* 264.

<sup>58</sup> Milewicz, (n25) 420.

<sup>59</sup> Stanley Katz, '*Constitutionalism and Civil Society*' (25 April 2000) The Jefferson Lecture, Princeton University 4. <<http://www.princeton.edu/~snkatz/papers/JeffersonLecture.pdf>> accessed 2 February 2012.

<sup>60</sup> *ibid* 1.

Western view supports the notion that in order to protect the value of citizens, they must be able to participate in the political process, and their government must be constrained by substantial boundaries as to what it can do, even when it is acting on behalf of the popular will.<sup>61</sup>

The classical liberal view of constitutionalism is also represented as a social contract between the State and civil society. This contract sets forth the purpose of government, its form and the power given to each section, and the limitations placed on this power.<sup>62</sup> In a liberal constitutional system, there is no unilateral power that can repeal or modify constitutional law. This is the difference between constitutional law which is mostly immune from change, and ordinary law which can be modified by a national legislature.<sup>63</sup> Using a liberal view of constitutionalism, any discussion of constitutionalism includes, first and foremost, constitutionalism as a manifestation of liberalism.<sup>64</sup>

In this liberal system, the power of the government is regulated by the constitution which preserves the sovereignty of the people; this sovereignty is the only one recognised by the constitution, which is the supreme legal power.<sup>65</sup> Individual liberalism is based on the presumption that people are ruled by self-interest, and that ordinary men as well as rulers need to be ruled, and both groups need to be limited by laws.<sup>66</sup>

The liberal Western perspective on constitutionalism is, however, only one approach; there are many others. For example, although more visible in the 1980s, socialists declared that they too were constitutionalists. Today, developing countries also propose their own versions of constitutionalism, concerned with the creation, distribution, effects and reproduction of power, regardless of whether or not that power is exercised by the State or some other organised entity.<sup>67</sup>

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<sup>61</sup> Katz (n 59) 2.

<sup>62</sup> Bo Li, 'What is Constitutionalism?' (2000) 1 (6) Perspectives  
<[http://www.oycf.org/perspectives2/6\\_063000/contents.htm](http://www.oycf.org/perspectives2/6_063000/contents.htm)> accessed 2 February 2012.

<sup>63</sup> *ibid.*

<sup>64</sup> *ibid.*

<sup>65</sup> Vanberg (n 48)1.

<sup>66</sup> *ibid.*

<sup>67</sup> *ibid* 2.

Constitutionalisation in this regard is the body of laws created to apply to organised power.<sup>68</sup> As a result, emphasis has been on constitutions, not constitutionalism.<sup>69</sup> In other words, many developing countries have been going through a process of constitutionalisation but have not yet managed to embrace some of the basic mandates (limits of power, protection of individual rights, and political participation of citizens) of constitutionalism per se. The existence of a constitution does not guarantee democracy.<sup>70</sup>

This emphasis on the process of constitutionalisation is seen in many new democracies who struggle to find a government framework that advances the needs of society in a way that adheres to the basic principles of constitutionalism. These societies are still striving to find a balance between constitutional authority and those who are supposed to benefit from that authority's use of power.<sup>71</sup>

Over the past decade constitutionalism has been framed in a variety of ways,<sup>72</sup> and the models created to differentiate between perspectives have continued to develop as well. For example, some models are very formalistic and rely on examining the structural factors of constitutions; they also rely on liberal individualism for their normative implications. This view of constitutionalism is absolutist in nature.<sup>73</sup> Other models rely on studying constitutionalism as an ongoing process which finds its basis in social realities; Katz asserts constitutionalism is an active political process. It is not static in its distribution of power, rights, and duties.

In essence, constitutional legitimacy is, in most circumstances, defined by the existing political and social realities and not by formal legal criteria.<sup>74</sup> When recognising constitutionalism as a process informed by the context of circumstances, a realist, functionalist view of constitutionalism emerges. This pivots around a political practice, which merges with democracy in aspiring to achieve equilibrium between the power of the State, the rights of individuals and their combined rights as a whole. In so doing, it uses, as its source, the origins of the cultural and historical

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<sup>68</sup> Okoth in Katz (n59) 2.

<sup>69</sup> Katz (n59) 2.

<sup>70</sup> M. J. Nkhata, *Rethinking Governance and Constitutionalism*. (DPhil thesis, University of Pretoria 2010) 1.

<sup>71</sup> Katz (n59) 2.

<sup>72</sup> Nicole Scicluna, 'EU Constitutionalism in Flux' 2012 (18) 4 *European Law Journal* 490.

<sup>73</sup> Katz (n59) 8.

<sup>74</sup> *ibid* 3.

contexts, which defines the nature of the population's consciousness.<sup>75</sup> The realist, functionalist approach argues that if and when constitutionalism develops in a society, its form relies on the specific cultural/political/historical reality of that particular society, there are few absolutes, and the outcomes are not predictable.

Other scholars use a 'tripartite' approach, dividing constitutional scholarship into three – the normative, the functionalist, and the pluralist schools.<sup>76</sup> These schools agree that international constitutionalism is situated between law and politics. The normative school embraces an inherent deficiency in national constitutionalism, and seeks to supplement State authority at the international level. Consequently, the normative perspective conceives international constitutionalism as a framework guided by legal and moral concepts that extend beyond the State to become constitutional standards.<sup>77</sup>

The functionalist school emphasises the process of constitutionalisation in order to establish constitutional norms for the development of international law.<sup>78</sup>

The pluralistic school is a combination of the normative and functionalist schools in which "... Some take a critical approach to universalist assumptions and theorise constitutional change as contextualised, contingent and constitutive, but others attempt to reconcile the new constitutional forms with more traditional universal constitutional ideals."<sup>79</sup>

Of all the definitions of constitutionalism presented, the realist, functionalist perspective seems the most inclusive, not necessarily emphasising classical liberalism (where negative freedoms are guaranteed) or social liberalism (where positive rights and freedoms are guaranteed). Instead, the emphasis is that various social realities will require variations on the themes of constitutionalism, with no expectation of absolute outcomes based on preconceived notions of constitutionalism in other contexts.

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<sup>75</sup> Katz (n59) 8.

<sup>76</sup> Deplano (n 16) 1.

<sup>77</sup> *ibid* 2.

<sup>78</sup> Peter L. Lindseth, 'The Contradictions of Supranationalism: Administrative Governance and Constitutionalisation in European Integration since the 1950s' (2003) 37 *Loyola Law Review* 367.

<sup>79</sup> Deplano (n.16) 3.

## 2.3 Constitutionalisation

The concept of constitutionalism can be compared to the ‘Rule of Law’, that advocates the limitation of governmental power and its adherence to these constraints in order to maintain authority.<sup>80</sup> Rule of law is a fundamental doctrine of constitution.<sup>81</sup> Like constitution, rule of law has different meanings in different contexts.<sup>82</sup> In contrast constitutionalisation, technically speaking, is the process of making a group or nation subject to a constitution.<sup>83</sup> Constitutionalism and constitutionalisation are often used interchangeably, with vague results.<sup>84</sup> However, it is appropriate to regard constitutionalisation as an ongoing process that is intended to limit governmental authority and increase citizen participation in the political process.<sup>85</sup> In recent years, the definition of constitutionalisation has been broadened to include various levels of authority and could be described as a series of practices which are influencing government decision-making at all levels, from local to international.<sup>86</sup>

Constitutionalisation has emerged over the last few decades while national and supranational entities like the European Union have been undergoing constitutional reform. The term ‘constitutionalisation’ was first used by Stein to describe the processes he observed unfolding in Europe: “Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe.”<sup>87</sup>

While constitutionalism denotes the underlying values and beliefs related to the functions of government, constitutionalisation is the process that a governmental

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<sup>80</sup> ‘*Constitutionalism*’ Stanford Encyclopedia of Philosophy (10 January 2001) <<http://plato.stanford.edu/entries/constitutionalism/>> accessed 15 January 2013.

<sup>81</sup> Parpworth (n 33) 34.

<sup>82</sup> *ibid.*

<sup>83</sup> Martin Loughlin, ‘What is Constitutionalisation?, The Concept of a Constitution’ (nd) *Jus Politicum* <<http://www.juspoliticum.com/What-is-constitutionalisation.html>> accessed 13 February 2012.

<sup>84</sup> Clemens Mattheis, ‘The System Theory of Niklas Luhmann and the Constitutionalisation of the World Society’ (2012) 4 (2) *Goettingen Journal of International Law* 626.

<sup>85</sup> *ibid.*

<sup>86</sup> Loughlin (n 83).

<sup>87</sup> Eric Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’ (1981) 75 *American Journal of International Law* 1.



entity undergoes to meet the requirements espoused by constitutionalism.<sup>88</sup> Constitutionalisation is a way to set forth the basic norms and decision-making processes of a society in an institutionalised format.

The term ‘constitutionalisation’ is also used to refer to the process of constitutionalising international organisations or systems. For example, international trade law, as undertaken by the appellate body of the World Trade Organisation, appears to have gone through a process of constitutionalisation because a set of constitutional-type norms and structures have been created through the judicial decision-making.<sup>89</sup>

Through the process of constitutionalisation, a map of authority is developed and implemented that shapes the political order and establishes the political institutions of a nation or even the world. In other words, a blueprint for the way public power will be used is created through the constitutionalisation process.<sup>90</sup> When a government’s responsibility to its people has been clearly outlined, constitutional law emerges.<sup>91</sup> In organising and regulating political activity, constitutionalisation provides the way through which power will be allocated within a particular system.

Since the beginning of the constitutional process in the European Union, nearly every constitutional revision has included an increased function of the judiciary. This trend is considered a significant development in the political arena and perhaps one of the most significant trends in contemporary government.<sup>92</sup>

Constitutional authority is supreme over other legal and political domains. However, the very nature of constitutional supremacy is one of the complicating issues of the process of constitutionalisation at the supranational level. For example, in 2005, the Court of First Instance of the European Union made two significant decisions in the cases of Yusuf and Kadi; the decisions tested the legality of the United Nations Security Council’s actions related to the cases, and triggered an

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<sup>88</sup> Milewicz (n25) 421.

<sup>89</sup> Deborah Z. Crass, ‘The Constitutionalisation of International Trade Law’ (2001) 12 (1) EJIL 39.

<sup>90</sup> Heidrun Abromeit and Tanja Hitzel-Cassagnes, ‘Constitutional Change and Contractual Revision’ (1999) 5 (1) European Law Journal 28.

<sup>91</sup> Andre Nollkaemper, ‘Constitutionalisation and the Unity of the Law of International Responsibility’ (2009) 16 (2) Indiana Journal of Global Legal Studies 540.

<sup>92</sup> Ran Hirschl, ‘The Political Origins of Judicial Empowerment through Constitutionalisation: Lessons from Four Constitutional Revolutions’ (2000) 25 (1) Law & Social Inquiry 93.

ongoing debate about international law in general. The main issue was whether or not the United Nations Charter held supremacy over other international institutions, including the European Union itself. According to many legal scholars the issue was not resolved satisfactorily.<sup>93</sup> However, the aftermath of decisions related to Yusuf and Kadi:

... represent a microcosm of some of the most fundamental debates in international law today. Those debates have to do with the specialization that takes place in international law, a process referred to as fragmentation: international human rights law has become a more or less self-contained system, as has international trade law.<sup>94</sup>

The exact nature of the supremacy (constitutional authority) of these systems has yet to be fully defined. What is clear about the current trends of constitutionalisation is that such authority obliges the regulatory system to protect human rights and limit State power. So, although constitutionalism may be different based on social traditions and values through the process of constitutionalisation, the resulting constitution is usually meant to limit political power in general in order to protect the rights and liberties of citizens. Both regulatory and constitutive functions are established in order to create political stability and order. The relationship of the State and its citizens is clarified and regulated through the process of constitutionalisation. Therefore a normative definition holds that constitutions should include three fundamental principles – rights, the separation of power, and representative democracy.<sup>95</sup>

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<sup>93</sup> Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalisation of International Law* (Oxford University Press 2009) 2.

<sup>94</sup> *ibid* 3.

<sup>95</sup> Berthold Rittberger and Frank Schimmelfennig, 'The Constitutionalisation of the European Union, Explaining the Parliamentarization and Institutionalization of Human Rights' (2005) 8 *The State of the Union*, Princeton University.  
<<http://www.princeton.edu/~smeunier/Rittberger&Schimmelfennig%20Princeton%20memo.pdf>>  
accessed 20 January 2013.

A more inclusive definition of normative constitutionalisation is that it includes all of the processes where the identified and agreed-upon fundamental rights, separation of power and principles are applied to a legal framework.<sup>96</sup>

Constitutionalisation also creates control over illegal activities and is an organising principle of the function of governing. Non-compliance is subject to some form of legal processing. The process ensures recognition of the public interest of an entire polity, rather than emphasising individual interests.<sup>97</sup> Laws are an attempt to require compliance with the stated social and cultural norms,<sup>98</sup> and punishment is meant to act as a deterrent.

Lawyers and legal scholars “yearn to be prescriptive”,<sup>99</sup> consequently, the constitution that emerges from the constitutionalisation process is normative, but it is also symbolic. A constitution is meant to create both loyalty and identity among the citizens involved.<sup>100</sup> The nation’s constitution embodies the ideological values that are held by the majority of citizens, and from which, ideally, they derive national pride and trust in the system. While many constitutions are similar, there are also important differences based on the model of constitutionalism used. Some are frameworks of government, setting forth the basic political relationships; others are simultaneously more instrumental and rigid, being detailed State codes that allocate responsibility and procedures, “mirroring an established political order and even seeking to constitutionalize social complexity.”<sup>101</sup>

## **2.4 Human Rights and the Rule of International Law**

### ***2.4.1. Rule of Law among Nations***

Although international law is considered a separate branch of legal study, it has similar principles and goals as that of national law and observance of the rule of law is considered as important if not more so.<sup>102</sup> The requirement to obey international law is seen in the British Ministerial Code which requires all Ministers

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<sup>96</sup> Rittberger and Schimmelfennig (n 95) 3.

<sup>97</sup> Noellkaemper (n91) 539.

<sup>98</sup> Graham Walker, ‘The Constitutional Good: Constitutionalism’s Equivocal Moral Imperative’ (1993) 26 (1) Polity 96.

<sup>99</sup> John Whyte, ‘Normative Order and Legalism’ (1990) 40 (3) The University of Toronto Law Journal 491.

<sup>100</sup> Abromeit and Hitzel-Cassagnes (n90) 32.

<sup>101</sup> *ibid.*

<sup>102</sup> Franck (n 5) 110.

to comply with laws, including international law and obligations of international treaties.<sup>103</sup>

The United Nations considers international rule of law initiatives to be essential for international peace and security.<sup>104</sup> One of the current goals of the UN is to help countries establish a rule of law that ensures accountability and helps to build confidence by reinforcing norms, promoting justice and security and promoting equality among disparate groups. According to the Secretary-General, the United Nations “is increasingly focused on emerging threats to the rule of law, such as organized crime and illicit trafficking, and the root causes of conflict, including economic and social justice issues.”<sup>105</sup> The call for the UN to promote the rule of law among nations was first published in 2004 and reports have been submitted in the years since (such as that in 2011), to determine the progress being made. The United Nations has made a commitment to reinforce the rule of law in any of its initiatives, especially in areas of human rights. Representative of the growing need for legitimacy and an international rule of law, the United Nations states that to ensure its legitimacy, the Security Council needs to observe the basic rule of law principles.<sup>106</sup> Increasingly, rule of law is being called for in international relations, as the lack of such is a threat to international security, and often results in the gross violation of human rights. The reliance on the rule of law is obviously preferable in international relations as compared to the arbitrary use of power. Professor William Bishop argues that this law “can and should be used as an instrumentality for the cooperative furtherance of social aims, in such fashion as to preserve and promote the values of freedom and human dignity for individuals.”<sup>107</sup>

The United Nations is a manifestation of the desire of nations to cooperate at the international level. Its members are part of the international community and are motivated by the same need to obey as citizens are obligated to their particular polity. In other words, they are obligated to obey the laws of the community of States.

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<sup>103</sup> Article 1.2 of the Ministerial Code (2010) reads, “The Ministerial Code should be read alongside the Coalition agreement and the background of the overarching duty on Ministers to comply with the law including international law and treaty obligations and to uphold the administration of justice and to protect the integrity of public life.” 1.

<sup>104</sup> United Nations Security Council (n 1) 2.

<sup>105</sup> *ibid.*

<sup>106</sup> *ibid* 5.

<sup>107</sup> Bingham (n. 4) 111.

### 2.4.2 *Erga Omnes*

For certain constitutional scholars, both international constitutionalism and constitutionalisation have a core ethical base in the concept of *erga omnes*, or ‘obligations owed towards all’.<sup>108</sup> In international law, this concept refers to established obligations that States as members of an international community are expected to honour.<sup>109</sup> In the same way that individuals are motivated to obey because of their status as a citizen in a specific polis, nations are motivated to obey because of their status in the international community of States. These obligations are mostly related to the protection of human rights such as the outlawing of acts of aggression, genocide, and the principles and rules concerning the basic rights of the individual, including protection from slavery and racial discrimination.

Eric Posner distinguishes between ordinary norms and *erga omnes* norms. He explains this difference with the example that if a State takes an action that violates an ordinary norm and the state is injured, then the State has a legal claim against the violating State. However, if the first State violates an *erga omnes* norm, then all States have legal claims against the violating State and are entitled to take measures against it.<sup>110</sup> This understanding of *erga omnes* gained significance in the ruling of the Barcelona Traction case heard before the International Court of Justice (ICJ) in 1971, where the ICJ identified a set of international obligations called *erga omnes*, which are said to be owed by all States to the international community. The intent of *erga omnes* is to promote the basic values and common interests of all, such as prohibiting aggression and genocide, and the right to be protected from slavery and other heinous crimes against humanity.<sup>111</sup> Ever since the Barcelona Traction case, the concept of *erga omnes* has grown in significance in international law.<sup>112</sup>

For over 45 years, attempts were made by the United Nations to codify the conduct (*erga omnes*) of States and their obligations to the global community.

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<sup>108</sup> Including, eg, Erika deWet, Christine Schwobel, Jost Delbruck, and Geir Ulfstein, among others.

<sup>109</sup> Ardit Mehmiti and Bekhim Nuhija, ‘The Concept of Erga Omnes in International Law’ (2013) 14 New Balkan Politics 22.

<sup>110</sup> Eric Posner, ‘Erga Omnes Norms, Institutionalization, and Constitutionalism in International Law’ (2008) University of Chicago Public Law and Legal Theory Working Paper 224, 3 <<http://www.law.uchicago.edu/academics/publiclaw/index.html>> accessed 26 August 2014.

<sup>111</sup> Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford University Press 2002) 5.

<sup>112</sup> Ardit Mehmiti and Bekhim Nuhija (n. 109)2.

Eventually, *erga omnes* was addressed more effectively in the International Covenant on Civil and Political Rights, where distinctions are made between breaches of bilateral obligations, including obligations toward the international community in general.<sup>113</sup> According to Article 2 of the United Nations Articles of Responsibility of States for Internationally Wrongful Acts, a State has committed a wrongful act if an action or omission: is (a) attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.<sup>114</sup> If a State commits an act that does not conform to the international obligations required of it, it is in breach of that international obligation. According to Article 30 of the Articles on Responsibilities, if a State breaches its obligations by committing a wrongful act, it is obliged, “(a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.”<sup>115</sup> The State is also responsible for reparations of harm done during the breach. The Articles differentiate from an ordinary breach and a more serious breach as outlined in Chapter III (“Serious Breaches Of Obligations Under Peremptory Norms Of General International Law”) of the Articles, beginning with Article 40 which describes a serious breach as, “A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.”<sup>116</sup>

The codification of *erga omnes*, such as is found in the ILC draft article of 2001, is seen as a necessary step toward a new global order based on international law:

...*erga omnes* norms exist alongside *jus cogens* norms, and constitute a category of norms in their own right....they are a new element in the hierarchy of international law and thereby attest to the ongoing process of constitutionalisation of international law. The existence of *erga omnes* norms articulates basic interests and needs as well as fundamental values of the

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<sup>113</sup> Erika de Wet, ‘The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation?’ (2009) 5 (2) European Constitutional Law Review 209.

<sup>114</sup> United Nations, ‘Responsibilities of States for Internationally Wrongful Acts 2001’ (2005) <[http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf)> accessed 20 January 2015.

<sup>115</sup> *ibid*, accessed 20 June 2013.

<sup>116</sup> *ibid*, Chapter III, Article 40.

international community as a whole; in short, the public interest.<sup>117</sup>

The primary emphasis of *erga omnes* and the protection of fundamental human rights are part of normative constitutionalism. While normative constitutionalism includes the key principles of global constitutionalism; limits of power; institutionalisation of power; setting of standards, and the protection of human rights; it also emphasises the need to shift the protection of human rights from being a political process towards being a legal process. Caution is required though. Not all *erga omnes* rise to the level of *jus cogens* where no abrogation of any kind is allowed. Nevertheless, the argument for normative constitutionalism rests on the belief that an international legal order sets superior norms over the systems.<sup>118</sup> The passage of the UN's Articles of Responsibility is a manifestation of this faith.<sup>119</sup>

The claim for the argument of the superiority of international law is that it has undergone a paradigm shift from law that is made through consent, to a law that has been shaped largely by specific, shared global values.<sup>120</sup> Different legal and constitutional authors might describe those values in different ways, but they all include fundamental norms that address public interests and the needs of the international community.<sup>121</sup> Consequently, developing constitutional doctrine is now seen more as a continuing process and is not finite. This recognition is an important feature of the formation of the jurisprudential constitution which influences the concept of the constitutional freedoms of a person. Constitutional case law (and not the formal amendment procedure) assumes the task of adjusting constitutional norms to changing political and social contexts and of developing those norms beyond the originally intended scope.<sup>122</sup>

There are two elements of normative reality with these recognitions—the creation of constitution and the constitutional jurisprudence that goes with it. Human

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<sup>117</sup> Christine EJ Schwobel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff Publishers 2011) 41.

<sup>118</sup> *ibid.* 42.

<sup>119</sup> United Nations (n114).

<sup>120</sup> Schwobel (n117) 42.

<sup>121</sup> *ibid.*

<sup>122</sup> Toma Brimontiene, 'Social Rights In The Jurisprudence Of The Constitutional Court Of Lithuania' (2008) 9 (111) *Jurisprudencija: Mokslo Darbai* 7.

rights rulings, then, have gained more authority from a “newly identified social source of law.”<sup>123</sup>

An example of the new authority was seen in the International Court of Justice’s judgement in the case concerning East Timor, Portugal vs. Australia (June 1995). In the case, the ruling stated, that Portugal’s claim that it had the right of self-determination, has “an *erga omnes* character,” and so “is irreproachable.” The court went on to say that, “The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court; it is one of the essential principles of contemporary international law.” However, the Court decided it could not rule on the lawfulness of the situation because “its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case.” The ruling did state, however, that the territory of East Timor remains a non-self governing territory and its people have the right to self-determination. The dissenting opinion claimed that because East Timor had been annexed, its right to self-determination was eroded.<sup>124</sup>

The increasingly influential moral imperatives that have pushed the progress of protecting and facilitating human and civil rights are seen in the principles of equality and non-discrimination, as voiced in the preamble to the Universal Declaration of Human Rights (UDHR). The Preamble states, “the recognition of the inherent dignity and equal and inalienable rights of all members of the human family.”<sup>125</sup> Many human rights treaties, at both the regional and international levels, embrace the principles present in the UDHR. Through the development of such agreements at many levels, the question has been raised as to whether international legal norms of equality exist (international *jus cogens*). A classic dissenting opinion, rendered by Tanaka in *South West Africa* regarding the practice of apartheid in South Africa, influenced later development on principles of human rights and equality. Tanaka argued that a legal norm of equality did exist and, therefore, South Africa was in violation of international law. Tanaka argued that *jus cogens* should be introduced in international law, in part because the protection has received

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<sup>123</sup> Toma Brimontiene (n 122) 7.

<sup>124</sup> Summary of the Judgment, East Timor (Portugal v. Australia) International Court of Justice, June 1995.

<sup>125</sup> ‘Preamble’ The Universal Declaration of Human Rights, para 1.

<<http://www.un.org/en/documents/udhr/>> accessed 1 September 2014.



recognition under three main sources of international law-- (1) international conventions, (2) international custom, and (3) the general principles of law. In his dissenting opinion on the case of Southwest Africa, Tanaka claimed that in the consideration of human rights, the legal system needed to be less rigid and not so bound by specific laws. There are human rights norms to be followed. Tanaka wrote in his dissent:

Each member of a human society-whether domestic or international -is interested in the realization of social justice and humanitarian ideas. The State which belongs as a member to an international organization incorporating such ideas must necessarily be interested. So far as the interest in this case affects the rights and obligations of a State, it may be called a legal interest. The State may become the subject or holder of a legal interest regarding social justice and humanitarian matters, but this interest includes its profound concern with the attitude of other States, particularly member States belonging to the same treaty or organization. In short, each State may possess a legal interest in the observance of the obligations by other States.<sup>126</sup>

With such notable discourse, a consequence is that international judicial power has been expanded primarily in the area of human and civil rights. This expansion has also resulted in the establishment of more authoritative judiciaries and supreme courts. Just as national democracy implies the presence of a judiciary that is separated from a society's politics as an impartial arbiter of political or legal disputes,<sup>127</sup> a similar judicial component is necessary for multi-layered federalist countries such as the United States, Germany, or Canada. The same component is also necessary in the developing supra-national polities such as the European Union.<sup>128</sup>

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<sup>126</sup> Dissenting Opinion of Judge Tanaka, International Justice Court Organization Docket File No. 4945 253 <<http://www.icj-cij.org/docket/files/46/4945.pdf>>

<sup>127</sup> Hirschl (n92) 73.

<sup>128</sup> *ibid.*

Constitutionalisation is seen as a characteristic that develops in relation to international law.<sup>129</sup> More and more often, international obligations have come from legal decisions made through international organisations such as the United Nations, international treaties, or international courts. As the power of international organisations increases, so should guarantees that these powers will not be abused; this is the core of global constitutionalisation.<sup>130</sup>

The protection of basic human rights has been the primary dynamic to establish international agreements binding parties to follow certain established accepted moral standards of conduct related to the treatment of human beings. As long ago as 1948, the United Nations established the United Nations General Assembly, which then adopted the Universal Declaration of Human Rights as a common “standard of achievement” for all UN members. Obviously, human rights standards have not always been followed in the decades since. Consequently, the UN has drafted a series of international human rights treaties and other instruments to establish legal forms related to human rights to create a body of international human rights. In 1966, the United Nations General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) (and its First Optional Protocol) and The Covenant on Economic, Social and Cultural Rights, which, combined with the Universal Declaration of Human Rights are now known as the International Bill of Human Rights. Additionally, most regions and States have developed their own laws and/or mechanisms of protection of human rights. Nevertheless, international treaties and customary law are the foundation of international human rights law; although, there are other instruments that have been adopted, such as declarations, guidelines and principles. All contribute to the implementation of human rights standards. There seems to be agreement among most nations that developing the rule of law at both national and international levels is essential for the protection of human rights.<sup>131</sup>

Combining the different human rights instruments together was meant to reaffirm the commitment made at the international level for all States who participate to honour the principle that "All peoples have the right of self-determination" and

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<sup>129</sup>Geir Ulfstein, ‘International Constitutionalisation: A Research Agenda’ (May 2010) Guest Editorial ESIL Newsletter 1.

<sup>130</sup> *ibid.*

<sup>131</sup> The Office of the High Commissioner for Human Rights, United Nations ‘International Human Rights Law’ (2014) <<http://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>> accessed 15 April 2013.

"By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>132</sup> When sovereign States become parties to these types of international treaties, they knowingly assume the obligations and duties under international law to respect, to protect and to fulfil human rights. This means they must not interfere or limit the enjoyment of human rights. The State is obligated to protect individuals from human rights abuses, and take actions to facilitate that all people under its domain live with the promise of having their basic human rights ensured.<sup>133</sup>

Fortunately, in the last ten years, as the world has witnessed genocide and gross violations of human rights during times of regional crisis, there has been more willingness to bring the power of international law to bear down on those State actors found guilty of human rights violations. Various legal institutions have been created to enforce international treaties related to human rights, including the European and American Conventions/Commissions on Human Rights. These organisations are meant to ensure that any State that is a signatory of a human rights treaty abides by the treaty or faces consequences. These actions have led human rights to become a growing body of international law.<sup>134</sup> As important as the treaties and declarations are in the acceptance of universal human rights guarantees, legally, these documents are not binding. To establish an international legal framework to protect human rights, then, the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights were created.<sup>135</sup> Articles 18 and 19 of the International Covenant on Economic, Social and Cultural Rights, review and make recommendations about actions to take when human rights have become a concern. For example, Articles 18 and 19 establish that the Economic and Social Council may make arrangements with the specialised agencies to ask for reports to be submitted to the Council for its study and general recommendation or,

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<sup>132</sup> The Office of the High Commissioner for Human Rights (n 131).

<sup>133</sup> *ibid.*

<sup>134</sup> Legal Information Institute, Cornell University Law School 'Human Rights, an Overview' (2014) <[http://www.law.cornell.edu/wex/human\\_rights](http://www.law.cornell.edu/wex/human_rights)> accessed 2 May 2013.

<sup>135</sup> *ibid.*

as appropriate, for information on the reports concerning human rights submitted by States in accordance.<sup>136</sup>

To build a substantial legal framework for enforcement of international human rights law, there have been ten core treaties and associated monitoring bodies created since 1965. For example, in association with the International Convention on the Elimination of all Forms of Racial Discrimination, The Committee on the Elimination of Racial Discrimination (CERD) was created. It is a body of independent experts that monitors implementation of the Convention by State parties. According to the United Nations, all the State parties are required to send the Committee a report on how these rights are being implemented by them. The States must report one year after ratifying the Convention and then every two years. The Committee then evaluates these reports and addresses its concerns and recommendations to the State party in the form of “concluding observations”.<sup>137</sup> In addition, the Committee performs its monitoring with three main functions: an early-warning procedure, the examination of inter-State complaints and the examination of individual complaints. The early warning procedure is meant to prevent existing situations from escalating into conflicts. If needed, procedures are initiated to respond to problems that require immediate attention to prevent or reduce the number of serious violations of the Convention.<sup>138</sup> The core treaties and their associated monitoring body are the basis of the international legal framework (See Appendix I).

Additionally, for each treaty a committee of experts is formed to monitor implementation of the treaty provisions by participating States. The party States, submit a report to the committee on a regular basis to show the ways they have complied with the Treaty’s articles of law. Some of the treaties are supplemented by optional protocols dealing with specific concerns (See Appendix I).<sup>139</sup>

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<sup>136</sup> Office of the High Commissioner on Human Rights, United Nations ‘International Covenant on Economic, Social and Cultural Rights’ (1966).

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>> accessed 15 April 2013.

<sup>137</sup> Office of the High Commissioner on Human Rights, United Nations. ‘The Core International Human Rights Instruments and their monitoring bodies’ (2014)

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>> accessed 20 January 2014.

<sup>138</sup> *ibid.*

<sup>139</sup> *ibid.*

## 2.5 Global Constitutionalisation and Legitimacy of Power

### 2.5.1 Legitimacy

An authoritative institution that is considered to be legitimate is seen as having the right to rule, which is a normative perspective. Rule would be the promulgation of law and the attempts to secure compliance, with punitive consequences for noncompliance.<sup>140</sup> From a normative perspective, then, political legitimacy is understood as the justification for authority and follows the view of Locke and natural law. The basic assumption is that all individuals are equal and free in a natural state. However, for there to be stability and order in a society, a system of governance needs to be formed. In a state of equality, a social contract is created which assigns political authority to a civil State, and citizens agree to obey and follow the laws set in place.<sup>141</sup> Under the concept of the rule of law, “The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.”<sup>142</sup>

The legitimacy of the authority depends then on the consent of those who are governed by it. Those who have consented are thus bound by the laws created by the authority of the State. From this perspective, whether an actual political regime is legitimate turns on whether it respects the constraints of the natural law. When a political authority oversteps the boundaries of the natural law, it ceases to be legitimate and, therefore, there is no longer an obligation to obey its commands. For Locke—unlike Hobbes—political authority is thus not absolute. In fact, absolute political authority is necessarily illegitimate because it suspends the natural law.<sup>143</sup>

Legitimacy is sometimes connected to the use of coercive power. Rawls considered under what conditions citizens could use coercive power over other citizens in a way that fulfils a social contract. His solution was that the use of political power is only legitimate when it follows a written constitution. He said “... political power is legitimate only when it is exercised in accordance with a

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<sup>140</sup> Allan Buchanan and Robert Keohane, ‘The Legitimacy of Global Governance Institutions’ (2006) 20 (4) *Ethics & International Affairs* 406.

<sup>141</sup> Peter Fabienne, ‘Political Legitimacy’ *The Stanford Encyclopedia of Philosophy* (2014) Edward N Zalta (ed) <<http://plato.stanford.edu/archives/spr2014/entries/legitimacy/>>accessed 15 April 2013.

<sup>142</sup> Bingham (n 4) 55.

<sup>143</sup> Fabienne (n141) 1.

constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason.”<sup>144</sup>

Contemporary political, philosophical discourse questions whether democracy is a requisite for the acquisition of political legitimacy.<sup>145</sup> A polity may accept authority based on other values and principles other than just those found in democratic philosophy. Regardless, when a society begins to demand a process of constitutionalisation, it is generally due to some dissatisfaction that exists in the relationship between authority and its citizens. Governmental legitimacy often resides within this relationship. In constitutional democracies, authority and its legitimacy is derived from public consent. Such consent is dependent upon the ability of the system to inspire and retain the belief of the public that its political institutions are those that best serve the society.<sup>146</sup> Some scholars argue, however, that this view is simplistic in that constitutional authority is rooted to the inadequacy of pure democracy. So there needs to be a way to improve democratic practice by subordinating democratic choice to a superior or original law; “A constitution is thus commonly understood to be both the means to better democracy and above democracy.”<sup>147</sup>

Constitutional authority and legitimacy are not by any means permanent. In fact, constitutional authority can be seen as being inherently frail.<sup>148</sup> Time and circumstances often throw the legitimacy of the constitutionalised structure into question. Consequently, the soundness of modern constitutionalism has been questioned and to a certain extent weakened, which may partly explain the current renewal of the topic of constitutionalisation in general.<sup>149</sup>

Although constitutional authority and legitimacy are not absolute, in most constitutionalising democracies, there are three different aspects needed to achieve democratic legitimacy. They are:

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<sup>144</sup> Rawls, in *The Stanford Encyclopedia of Philosophy* (2014) Edward N Zalta (ed) 3  
<<http://plato.stanford.edu/archives/spr2014/entries/legitimacy/>> accessed 15 April 2013.

<sup>145</sup> *ibid.*

<sup>146</sup> Seymour Martin Lipset in Richard Fallon, ‘Legitimacy and the Constitution’ (2005)118 (6) Harvard Law Review 1795.

<sup>147</sup> Robert Manzer, ‘Hume's Constitutionalism and the Identity of Constitutional’ (1996) 90 (3) The American Political Science Review 40.

<sup>148</sup> *ibid.*

<sup>149</sup> *ibid.*

Formal legitimacy - found in the institutional authority to initiate it.

Popular legitimacy - which contains a belief component, but is not just related to citizens' pro or con attitudes. Popular legitimacy depends on the extent that people have true opportunities to have an influence on reform.

Deliberative legitimacy -- the extent that the deliberative process of citizens offering reasons to each other in mutual justification plays some role, such as an influence over the process of drafting of the constitution or parts of a constitution.

Deliberative legitimacy is usually measured by the quality of deliberation: that is, either by qualities such as the freedom, openness or publicity of the deliberative process, or by the quality of the reasons or outcomes, as measured by some independent standard. While the latter, more epistemic standard is preferred in some forms of inquiry, it is unlikely that a constitutional proposal can be settled by appeal to some procedure-independent standard.<sup>150</sup>

Perhaps because of the amount of scholarship on global constitutionalisation, there are cautionary tones in scholarly discussions related to constitutionalisation. It can be a new beginning, the politicisation of law, but, “it can also limit government power by a juridification of politics. The ambiguity of the term constitution is notorious.”<sup>151</sup> There is a certain incoherence in the public discourse on

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<sup>150</sup> James Bohman, ‘Institutional Reform and Democratic Legitimacy: Deliberative Democracy and Transnational Constitutionalism’ *Revue européenne des sciences sociales* (2007) T. 45 (136) *Démocratie délibérative, démocratie débattante, démocratie participative* 97.

<sup>151</sup> Kemmerer (n 28) 718.

constitutionalisation. At the core of this inquiry into constitutionalisation, there “still lies the paradox of the relation between constituent power and constitutional form, politics and law.”<sup>152</sup>

In spite of the various terms used to describe the modern State as hollowed out and de-centred, most nation States are not necessarily in decline,<sup>153</sup> although many have been undergoing significant transformation. Also, despite external pressures for democratic reform, the urge to go through a process of constitutionalisation seems to be related to legitimacy. For example, one argument put forward is that all societies require legitimacy in order to survive. Citizens must have a reason to accept the social order within which they find themselves.<sup>154</sup> They must see the social order as legitimate.

For the most part, legitimacy in contemporary societies is not gained by the passive acceptance of power and authority as a natural given. The norms that underlie political power have to be worthy of obedience and acceptance. Jurgen Habermas argued that all societies must have legitimacy to continue and survive. The social order must be both normative and functional. According to Habermas, “Legitimacy can only mean that citizens by and large accept, on the basis of rational considerations, that norms underwriting the use of political power are worthy of being obeyed.”<sup>155</sup> In order for such a condition of acceptance to be realised, Habermas also argued that consensus on the validity of norms would have to be reached by way of open deliberations.

For the majority of a population to accept norms of domination in an age of information technology, the communications of the authoritative power need to be completely transformed.<sup>156</sup> For example, for norms to be perceived as valid, people must have access to consensus through public and rational discourse. If free and open

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<sup>152</sup> Kemmerer (n 28) 720.

<sup>153</sup> Niilo Jaaskinen, ‘Constitutions in the European Union – Some Questions of Conflict and Convergence’ (2011) 12 (1) ERA Forum 206.

<sup>154</sup> Todd Hedrick, ‘Constitutionalisation and Democratization: Habermas on Postnational Governance’ (2007) 33 (3) Social Theory and Practice 389.

<sup>155</sup> *ibid.*

<sup>156</sup> *ibid.*



public discourse is available, the assumption is that a consensus exists about the validity of those norms, and that they serve the general interests of all involved.<sup>157</sup>

By contrast, if public discourse is denied, censored or limited, dissatisfaction is likely to be the result. With enough suppression of this type of communication, legitimacy is often lost, and dissatisfaction among citizens can rise to the levels of the violent overthrow of the current power regime, as was seen in the recent events of the so-called ‘Arab Spring’.

### ***2.5.2 Constitutional Legitimacy – A Moral Concept***

For the most part, if something is lawful, then it is usually considered legitimate, although a law can exist that is legal, but this does not make it morally acceptable. A law can even be widely accepted, but this too does not mean the law is morally legitimate. For example, Fugitive Slave Laws were considered legitimate and legal in the United States in the 1800s, but no one would accept their moral legitimacy today. A regime or a decision which is deemed legal may be well supported, but may be illegitimate and unjustified under moral considerations.<sup>158</sup> A rule governed by law seems to be the most common thread in all constitutionalised nations. In the often prevalent normative perspective, however, Wojciech asserts that in order to be accepted as legitimate, those laws have to be administered correctly and methodically. Democracy must also create laws which adhere to specific fundamental principles, such as human dignity, equality and liberty.<sup>159</sup>

In other words, just because a rule is bound by laws, even a constitution, does not necessarily make it democratic in nature. This view of democracy is not that it is just procedural, but the democracy contains the ‘right’ values.<sup>160</sup> H.L.A. Hart eloquently states in his *Concept of the Law*, “however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.”<sup>161</sup> Consequently, from this normative perspective, democratic practices must perpetuate the right kind of moral value; practices that deviate from said substantive values are perceived as illegitimate and would thus

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<sup>157</sup> Hedrick (n 154) 388.

<sup>158</sup> Richard Fallon, ‘Legitimacy and the Constitution’ (2005) 118 (6) *Harvard Law Review* 1787.

<sup>159</sup> Sadurski Wojciech, ‘Law’s Legitimacy and ‘Democracy-Plus’ (2006) 26 (2) *Oxford Journal of Legal Studies* 377.

<sup>160</sup> *ibid* 378.

<sup>161</sup> Hart in Wojciech (n 159) 379.

undermine the legitimacy of the State that is deviating from practicing said values. This is especially true for any State that is participating in international agreements and/or treaties. Deviating from the rule of law established by such treaties would not only be seen as violating the international agreement and its moral standards, it would bear the weight of the international community to question the legitimacy of the sovereign rule.

### ***2.5.3 Normative Democracy***

#### ***2.5.3.1 Cosmopolitan Democracy***

For the most part, the most normative tradition related to international law and relations is known as cosmopolitanism, an idea first introduced by Immanuel Kant. Kant believed the most important task for human beings was to create a universal society where all people were embraced and all shared the same morality. Kant believed that our highest purpose is to develop human capacities to their utmost. The only way to attain these high capacities is through society that provides freedom to individuals. Kant wrote,

Nature demands that humankind should itself achieve this goal like all its other destined goals. Thus a society in which freedom under external laws is associated in the highest degree with irresistible power, i.e., a perfectly just civic constitution, is the highest problem Nature assigns to the human race.<sup>162</sup>

A perfectly just civic constitution would be a manifestation of cosmopolitan democracy. In recent years, scholars have revisited cosmopolitanism due to such events as the collapse of the Cold War and the economic and cultural processes brought on by globalisation. Most scholars agree, “international law today will need to have broader democratic and egalitarian concerns than did Kant himself.” Following Kant’s lead is John Rawls, who focuses on human rights and the rule of law in his *Law of the Peoples* and Jurgen Habermas, who has offered a proposal for global justice. Habermas claims that the need for a global rule of law necessitates an

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<sup>162</sup> Immanuel Kant, ‘Idea for a Universal History from a Cosmopolitan Point of View’ in *On History* (Lewis White Beck tr, The Bobbs-Merrill Co 1963) ch.

examination both of the ways in which democracies have been affected by globalisation and the possibility of creating global institutionalised democratic governance.<sup>163</sup> Habermas was concerned about the problems to democracy that could be caused by the forces of globalisation. Therefore, a more all-encompassing model of democracy would be required – cosmopolitan democracy. Cosmopolitan democracy is a set of procedures on a global scale that creates common economic and social policy for equal world citizens ("world domestic policy").<sup>164</sup> Habermas believed that in order to function and survive, societies must have legitimacy. Ultimately, citizens must have reasons to accept their social order as valid. Legitimacy is attained when citizens have given rational consideration to the norms established in the way political power will be used. In order to obey laws, the law has to be seen as worthy of acceptance. For rational consensus to occur democratic processes are required, as it is a process where consensus can occur. However, the process has to be based on certain conditions:

Namely, citizens must normally be prepared to deliberate in the public sphere on the basis of an orientation toward the common good (i.e., toward generalizable as opposed to private interests) and administrative capacities must be in place to transform the results of discourse in the public sphere into political power capable of effectively shaping society.<sup>165</sup>

When domestic laws are passed and imposed on citizens, certain questions arise, such as the justification of law, its legitimacy, and the obligation of citizens to comply with it.<sup>166</sup>

Based on the concerns of universal *erga omnes*, modern philosophers and legal scholars have been addressing the moral obligation of those in a position to act when it comes to issues that are global in nature, including world hunger, disease,

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<sup>163</sup> Hedrick (n 154) 387.

<sup>164</sup> *ibid* 388.

<sup>165</sup> *ibid* 390.

<sup>166</sup> Wojciech (n 159) 379.

distributive justice and environmental concerns.<sup>167</sup> The discourse has led to a growing embrace of the concept that all people, no matter their political affiliations, are part of a global community, a global community which has a moral obligation to the entire world's people. Cosmopolitanism is compatible with a system where the main political actors are still nation States, but with qualification. One qualification is what constitutes appropriate relations among national actors? For example, what criteria are used to recognise a political entity as legitimate? Also, what is required when States do not meet the legitimacy criteria? These are the problems and challenges of international legitimacy.<sup>168</sup>

Political cosmopolitanism also supports the idea that nation States should be replaced by global institutions, especially in terms of certain policy areas, like world trade and global climate concerns on world security. This raises the question of what conditions and criteria such global institutions will be expected to meet to achieve international legitimacy.<sup>169</sup>

Unsurprisingly, there are strong critics of a political cosmopolitanism that promotes a redesigned world governance system. One criticism is that it would be impossible to change the current world system to a global world order or an international federation of States. Such critics believe that such a vision poses too many difficulties and risks to make it worth pursuing.<sup>170</sup> Another criticism is that to have States somehow relinquish their sovereignty is a violation against the autonomy of States and is contrary to the principles of democratic self-determination of citizens. Additionally, the critics claim that it would not only be inappropriate but futile to try to subject States to normative limits to their use of power.<sup>171</sup>

Even supporters of cosmopolitanism admit the world is not quite ready for global constitutionalisation because global governance is still evolving. So, there is

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<sup>167</sup> Alyssa Bernstein, 'Political Cosmopolitanism' University of Ohio <[http://www.philosophy.ohiou.edu/PDF/EGJ\\_Political%20Cosmopolitanism\\_Vol-2.pdf](http://www.philosophy.ohiou.edu/PDF/EGJ_Political%20Cosmopolitanism_Vol-2.pdf)> accessed 15 May 2014.

<sup>168</sup> Pauline Kleingeld and Eric Brown, 'Cosmopolitanism' *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed, Fall 2013 Edition). <<http://plato.stanford.edu/archives/fall2013/entries/cosmopolitanism>> accessed 15 May 2014.

<sup>169</sup> Peter Fabienne, 'Political Legitimacy' *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed, Spring 2014 Edition) <<http://plato.stanford.edu/archives/spr2014/entries/legitimacy/>> accessed May 15 2014.

<sup>170</sup> Kleingeld and Brown (n 168) 31.

<sup>171</sup> *ibid.*

not full agreement yet as to goals and standards of justice to be set, which are subject to change. As of yet, then, “we do not claim to discover timeless necessary and sufficient conditions for legitimacy. Instead, we offer a principled proposal for how the legitimacy of these institutions ought to be assessed – for the time being.”<sup>172</sup>

### ***2.5.3.2 Legitimacy and Deliberative Democracy***

Citizens obey laws because they have accepted that the role of the State is to act for the social good. However, both Rawls and Habermas argue that in order for legitimacy and justice (social good) to actually be attained, public deliberation is also required. Rawls was more concerned about justice than legitimacy. For him, “Justice is achieved when people unanimously and voluntarily consent, in fair circumstances, to bind themselves to the application of certain principles of a political order, which are then bound in a constitution.”<sup>173</sup> In addition, Rawls argues that if justice is to be achieved, there needs to be a reasonable consensus on religious, philosophical and moral doctrines that will regulate society. Habermas asserts that, if the procedures used are legitimate, then consensus can be reached. Consequently, legitimacy can only be achieved if all those who are involved are given equal opportunity to engage in unlimited discussion on procedures.<sup>174</sup>

Later scholars who promoted deliberative democracy, following the lead of Rawls and Habermas, took into consideration more of the complexities of modern plural societies. Scholars like James Bohman, Dennis Thompson and Amy Guttmann, recognised that realistically, deliberative democracy is challenged by cultural pluralism and social inequalities where certain groups are excluded from public deliberation. For these “second generation” deliberative democrats, complete consensus was not realistic; however, decisions can still be seen as legitimate if they are made by a majority of participants, and agreements can be reached through compromise under deliberative conditions.<sup>175</sup> Ultimately, the way that the will of the people is expressed depends on the type of institutional mechanism chosen by the nation, and as early debates reveal, there are a variety of mechanisms to choose from. Most scholars would agree, however, that the will of the people is both deliberative

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<sup>172</sup> Buchanan and Keohane (n 140) 406.

<sup>173</sup> Stephen Elstub, ‘The Third Generation of Deliberative Democracy’ (2010) 8 (3) *Political Studies Review* 293.

<sup>174</sup> *ibid.*

<sup>175</sup> *ibid* 296.

and representative, where there are various options given, based on solid evidence and information with decisions representing the broad spectrum of stakeholders involved.<sup>176</sup> Bohman argues that in considering constitutionalism beyond the nation State, there are three required conditions to be present in order for the institutions to be accepted as legitimate. These are - formal, deliberative, and popular conditions. The purpose of a deliberative process is to create democratic reform so as to be accepted as legitimate.<sup>177</sup>

#### ***2.5.4. International Rule of Law and Cultural Relativism.***

The Universal Declaration of Human Rights is perceived by many as having set universal standards regarding the ideals of human rights for all people. However, this idea of universality has not gone without controversy and challenge. Views that human rights can be established as universal standards will beg the question on whether principles and concepts of human rights are always the same for all cultures. Yet, by their very nature, “universal” human rights instruments are based on the assumption that they reflect universally accepted norms of behaviour.

The Global Policy Forum (2015) reports that the debate related to human rights and Universalism vs. Cultural Relativism has been taking place in legal scholarship for decades, but it has become more intense with the development of contemporary international law. Universalism is the view that human rights are the same for all peoples and all cultures so should apply to every human being and all nations. Cultural Relativists, in contrast, argue that concepts of human rights are shaped by culture and so are culturally dependent. Consequently, from this perspective, no moral principles can be prescribed to all cultures.<sup>178</sup>

Twenty years after the Universal Declaration was created, the Arab States challenged it by creating the Cairo Declaration of Human Rights in Islam (CDHRI) in 2008, which was developed within the framework of the League of Arab States.<sup>179</sup>

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<sup>176</sup> James Fishkin, ‘Reviving Deliberative Democracy’ (nd), The Centre for Deliberative Democracy, Stanford University 182. <<http://cdd.stanford.edu/research/papers/2014/fishkin-reviving-deliberative-democracy.pdf>> accessed 15 April 2014.

<sup>177</sup> Bohman (n 150) 117.

<sup>178</sup> ‘Cultural Relativism vs. Universalism’ (2015) The Global Policy Forum <<https://www.globalpolicy.org/home/163-general/29441.html>> accessed 14 February 2015.

<sup>179</sup> Dalia Vitkauskaitė-Meurice, ‘The Arab Charter On Human Rights: The Naissance Of New Regional Human Rights System Or A Challenge To The Universality Of Human Rights?’ (2010) 1 (119) *Jurisprudencija/jurisprudence* 165.

These same States argued that the Arab Charter was necessary because concepts of human rights are merely products of Western imperialism. Because of this view, the Arab States say they are not bound by the Universal Declaration. Muslims believe that Islam has already set forth human rights' requirements, and Islam is more legitimate than policies created by men. So, the Arab Charter makes clear that the *Umma* (Islamic community) must uphold the dignity of all people as part of its sacred obligation. The CDHRI States that fundamental rights and freedom are integral to Islam and:

...no one shall have the right as a matter of principle to abolish them either in whole or in part or to violate or ignore them in as much as they are binding divine commands, which are contained in the Revealed Books of Allah and which were sent through the last of His Prophets to complete the preceding divine messages and that safeguarding those fundamental rights and freedoms is an act of worship whereas the neglect or violation thereof is an abominable sin, and that the safeguarding of those fundamental rights and freedom is an individual responsibility of every person and a collective responsibility of the entire Ummah.<sup>180</sup>

For some scholars, the wider acceptance of the Arab Charter on Human Rights signals "the reconciliation and compromise between the proponents of cultural relativism and universalism."<sup>181</sup>

Nevertheless, some scholars argue that this apparent dichotomy between Islam and the West regarding human rights is overly simplistic. While it is true that Western constructs of rights are not always accepted in Asian societies, the dichotomous view leads to the assumption that human rights somehow belongs to the West. This is nonsensical, especially in viewing the great spiritual legacy left by Asian societies in Hinduism, Buddhism, and Islam. For example, The *Quran*,

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<sup>180</sup> 'Cairo Declaration of Human Rights in Islam' The Organisation of Islamic Cooperation <<http://www.oic-oci.org/english/article/human.htm>> accessed 1 February 2015.

<sup>181</sup> Vikauskaite-Meurice (n 179) 166.

addresses equality, freedom of religion, and the right to property, as did other philosophical and legal sources throughout Asia.

Although these sources did not necessarily use the term, human rights, they were based on concepts that are considered fundamental to today's human rights principles, for example, justice and humanity.<sup>182</sup> In fact, the idea that universal human rights are a Western tradition ignores the historical conflict in Western principles between the standards of human rights law and the sovereignty of nations. This conflict was seen clearly in 1919 when the Japanese asked that a universal human rights clause be added to the League of Nations Covenant. Lord Robert Cecil, the British Delegate, argued against it saying, "It would mean encroaching upon the sovereignty of States members of the League... [opening] the door to serious controversy and to interference in the domestic affairs of States..."<sup>183</sup> The human-rights clause was rejected.

After World War II, however, with the world witnessing a State committing genocide against its own people, the sovereignty of nations was reduced, and outrage began to motivate nations of the world to accept that an international code of conduct or rule of law was necessary in order to maintain peace and stability. So, "In this context, little by little, a renewed natural-law doctrine began to gain currency: the idea that respect for human rights(along with the maintenance of peace) ought to constitute the point of no return for the new world community that would emerge."<sup>184</sup> The previous resistance to universal standards or laws that could be imposed on nations by an external order began to fade as Western notions of State sovereignty, although still strong, began to accept that occasionally, the sovereignty of a nation to do whatever it chooses is ultimately not conducive to world security. In addition, the strength of the ideal of State sovereignty is more of a Western concept than an Eastern or Asian one.<sup>185</sup>

Critics of universal standards argue that the universalistic nature of some human rights documents is a reflection of the attempt of the West to homogenise culture, which threatens cultural diversity. Again, this perception that to establish

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<sup>182</sup> Fernand De Varennes, 'The Fallacies in the "Universalism Versus Cultural Relativism Debate" in Human Rights Law' (2006) *Asia-Pacific Journal on Human Rights and the Law* 69.

<sup>183</sup> *ibid* 70.

<sup>184</sup> Antonio Cassese, *Human Rights in a Changing World* (Polity Press 1990) 29.

<sup>185</sup> De Varennes (n 182) 72.



universal human rights is an ‘us-against-them’ dichotomy is not realistic in the view of some. For example, Bielefeldt (2000) argues, that human rights are an issue of debate in both the West and Islam. However, “there is no such thing as a *Western* or an *Islamic* conception of human rights. Historical analysis shows that human rights have always been a political issue, not the natural result of any ‘organic’ development based on the genes of a particular culture.”<sup>186</sup> It is reasonable to admit that Islamic scholars may suspect Western nations of hegemony in their stance on human rights, a stance fed in recent years by Huntington, who claims that human rights and democracy belong to the West. He persuades and is convinced that universalising human rights will fail, and the only way non-Western nations can realise human rights is to adopt Western values.<sup>187</sup> Of course, non-Western scholars see these declarations as just more evidence of Western arrogance.

There is a way to end this divisive and artificial dichotomy. Dividing human rights into who owns them, the West or Islam, is antithetical to developing universal rights. In addition as Bielefeldt argues, “The language of human rights would thus simply be turned into a rhetorical weapon for intercultural competition...What is needed...is a critical defense of universal human rights in a way that gives room for different cultural and religious interpretations and, at the same time, avoids the pitfalls of cultural essentialism.”<sup>188</sup> Michael Polacek calls for flexibility in the application of human rights law without ignoring the need to set binding procedural requirements for States to provide such basic rights as due process and fair trials. So while universal laws are needed, there needs to be flexibility to accommodate competing principles and interests. Treaties which do not contain a wide range of reservations will become weakened without strong, collective consent.<sup>189</sup> In trying to accommodate this need for flexibility, the Vienna Convention on the Law of Treaties introduced the ability for nations to submit reservations in their acceptance of international human rights treaties.

There is a fine balance to be found in this hotly debated issue. Flexibility is good in that it allows most countries to embrace international Covenants. However,

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<sup>186</sup> Heiner Bielefeldt, “‘Western’ versus ‘Islamic’ Human Rights Conceptions? A critique of Cultural Essentialism in the Discussion on Human Rights’ (2000) 28 (1) *Political theory* 90.

<sup>187</sup> *ibid* 91.

<sup>188</sup> *ibid* 92.

<sup>189</sup> Michael Polacek, ‘Cultural Relativism and Universalism in International Human Rights Law’ (2012) 11 *International Human Rights Law* 10.

flexibility can also compromise the very purpose and nature of an international agreement that binds all parties to uphold human rights requirements. For example, if a country can too easily submit a reservation to an aspect of a treaty it does not want to follow, how legitimate is the agreement in protecting the human rights of all people?

### *2.5.5 International Constitutionalisation, Practical Solutions*

Apparently, discussions concerning international constitutionalism have a long way to go before any practical solutions can be developed for how such governance would function. For example, one critical aspect is that while many international lawyers speak of constitutionalisation, they speak in abstract terms and not many work out what this means in real life.<sup>190</sup> A lot of energy is spent arguing the normative case for a better and more just world, with demands for global justice coming to the fore, but legal scholars rarely transform their theories into concrete solutions.<sup>191</sup> Based on current discussions, it would be easy to assume that constitutionalisation already exists, but although a process of constitutionalisation is taking place, it is happening sporadically, so the discussion is framed in an area between normative and descriptive. On the one hand, legal scholars discuss the way international constitutionalisation should be taking place, and on the other, they also describe what is actually happening. At this point, constitutionalisation may be viewed as more of a heuristic device, a guide to the constitutionalisation of various institutions.

Some scholars have rather strong opposing views about the claims that international constitutionalisation must occur. For instance, one theory is that the current trend of international constitutionalisation is eroding Statehood.<sup>192</sup> Nor should it necessarily be seen as a positive trend since it challenges the already-established processes of domestic constitutionalisation.<sup>193</sup>

Additionally, challenges have been made regarding claims that the nation State has been neutered. This vision of the disempowered State seems somewhat

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<sup>190</sup> Klabbers, Peters and Ulfstein (n 93) 3.

<sup>191</sup> *ibid* 4.

<sup>192</sup> Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism?* (Oxford University Press 2010) xv.

<sup>193</sup> Thomas Kleinlein, 'On Holism, Pluralism, and Democracy: Approaches to Constitutionalism beyond the State' (2010) 21 (4) *European Journal of International Law* 1076.

ironic when on-going hegemony by major players such as the United States is observed. There is obvious controversy over the nature of State power in contemporary political science, although the discourse has perhaps been overshadowed by exaggerated claims of the decline of the State which have been made in many books and articles.<sup>194</sup> An important theme in these discussions was the loss of control of national economies and national boundaries, among other things. Scholars focused on international constitutionalism and the State's loss of power, even while many States were exerting their enormous influence, as Barrow describes, as the "principal agents of globalization as well as the guarantors of the political and material conditions necessary for global capital accumulation."<sup>195</sup> In other words, as the industrialised nations were globalising trade and developing the conditions, in their favour, for the accumulation of wealth among them, scholars argued about the declining power of the State.

Nevertheless, it is clear that States are being affected by international organisations, and that State leaders must still respond to pressures, both domestic and national, related to their legitimacy.<sup>196</sup> States are responding by restructuring and realigning their power relations. One view is that scholars are jumping to conclusions and have made the error of describing this transformation as a decline of the nation-State.<sup>197</sup>

As constitutional principles are increasingly being recognised at the international level, the development of a global law is clearly visible.<sup>198</sup> Whatever the case, because there is communication of law on a global scale, "the assumption of a global law system does not appear to be beyond reason."<sup>199</sup>

Yet the claim that a global law has emerged has been challenged. For example, even though there have been attempts to improve coordination between international governments, some critics argue that a formal process of

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<sup>194</sup> Clyde W. Barrow, 'The Return of the State: Globalization, State Theory and the New Imperialism' (2005) 27 (2) *New Political Science* 123.

<sup>195</sup> *ibid.*

<sup>196</sup> *ibid.* 124.

<sup>197</sup> *ibid.*

<sup>198</sup> Clemens Mattheis, 'The System Theory of Niklas Luhmann and the Constitutionalisation of the World Society' (2012) 4 (2) *Journal of International Law (Goettingen)* 639.

<sup>199</sup> *ibid.* 640.

constitutionalising international organisations is unlikely.<sup>200</sup> The State has not lost its power to the point where international organisations can unequivocally change the nature of the State. Claims of on-going or widely accepted efforts at international constitutionalisation are thus premature,<sup>201</sup> and according to Peters, “The constitutionalist reading of international law might raise dangerously high expectations.”<sup>202</sup> In fact it is argued that using the term ‘constitution’ at the international level is (or might be) inaccurate. Even the actual terms used in the debate taking place on constitutionalism are labelled by some as being misleading and in error. That is because the vocabulary being used makes it impossible to escape the underlying philosophical assumptions that are a part of that language.

The challenge to constitutionalism and its advocates were questioned as long ago as the late 1700s in the works of the Scottish philosopher David Hume, who argued that constitutionalism was often discussed with a utopian mentality, instead of being grounded in real life. To exemplify his argument, he pointed to the popular democratic ideal that government originates from consent.<sup>203</sup> Ideally, a pure democracy would derive from consent, according to constitutional philosophers of the time; however, there is no government in existence, then or now, that operates fully from consent alone: “The question for Hume is why speculative rationalism leads its proponents to political understandings that so patently ignore the limits of human experience.”<sup>204</sup>

Correspondingly, the validity of such constructs as international governance and constitutionalism are also being challenged in the modern discourse; “Social legitimacy is being artificially constructed through the use of constitutional language. Thus, the constitutionalist reconstruction might fraudulently create the illusion of legitimacy of global governance.”<sup>205</sup> According to Ann Peters, the problem with all of the constitutional language, is that it could give global governance a legitimacy not yet fully earned or realised. In the constitutionalism discourse an obvious incongruity is to be seen; nevertheless, this incongruity requires close attention in

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<sup>200</sup> Mattheis (n 198) 640.

<sup>201</sup> Ann Peters, ‘Merits of Global Constitutionalism’ (2009) 16 (2) *Indiana Journal of Global Legal Studies* 400.

<sup>202</sup> *ibid.*

<sup>203</sup> Manzer (n 147) 489.

<sup>204</sup> *ibid.*

<sup>205</sup> Peters (n 201) 401.

relation to international constitutionalism's potential and/or pitfalls. Regardless of whether international constitutionalisation is viewed as a supplement to the inadequacy of national activities, or as a way to enhance the global rule of law, such developments encourage motivation to reconsider the merits of constitutionalism.<sup>206</sup>

Constitutionalism is not new, and its impact as a model for the legitimisation of power has been felt at State level for over 200 years. Even those rulers who do not want to be subordinated by legal norms feel obliged to act or profess to do so within the constitutional framework.<sup>207</sup> Constitutionalism is obviously a powerful and normative worldview, and it seems likely that it will continue to emerge with similar power at the international level.

While it is a complex new world for international law, this should be regarded as an opportunity rather than a problem.<sup>208</sup> Judges must read each other's rulings, have respect for each other's judicial work, and try to preserve unity: "This is as good as it gets in an international legal order characterised by in-built overlaps of judicial voices which should, however, aim at harmony instead of cacophony."<sup>209</sup> Consequently, even though there is a danger that constitutionalism is likely to be misunderstood as a mechanism that offers immediate legitimacy, international lawyers are, for the most part, wise enough not to see constitutionalism and constitutionalisation as a ready-made answer.<sup>210</sup> Instead, it is a perspective which may help to illuminate pertinent questions of fairness, justice, and effectiveness.<sup>211</sup>

By being projected onto the world, the constitutionalisation of the global order is being enthusiastically conceptualised using normative ideals.<sup>212</sup> However, more questions are being asked than answered at this point. For example, some of the questions asked of constitutional scholars are:

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<sup>206</sup> Dobner and Loughlin (n192).

<sup>207</sup> Dieter Grimm, 'The achievement of constitutionalism and its prospects in a changed world' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 4.

<sup>208</sup> Bernhard Hofstötter, 'Can she excuse my wrongs?' (2003) 3 (3) *The European Court Of Justice and International Courts And Tribunals Croatian Yearbook of European Law & Policy* 391.

<sup>209</sup> *ibid.*

<sup>210</sup> Peters (n 201) 401.

<sup>211</sup> *ibid.*

<sup>212</sup> Ming-Sung Kuo, 'Review of Ruling the World? Constitutionalism, International Law, and Global Governance' in Jeffrey L. Dunoff and Joel Trachtman (eds), (2010) 20 (2) *Law and Politics Book Review* 73.

Does it simply suggest a global expansion of constitutional democracy as we know it? Does the new era of constitutionalism herald a paradigm shift in thinking constitutionalism? These are the central concerns not only to policy makers but also to political scientists and legal scholars in the talks of global constitutionalism.<sup>213</sup>

Further concerns related to the international constitutionalism discourse are said to be caused by the variety of hidden assumptions that underlie the debates.<sup>214</sup> For example, it is assumed that when ideas about constitutionalisation are applied to the international arena, this is a conceptual leap, or a transformation in legal thinking of such magnitude to match that of the development of modern constitutionalism itself.<sup>215</sup> If this assumption is accepted, then another assumption is made which is that the new challenges created by globalisation require a compelling response. Here again, however, much depends upon the choice made from the range of theoretical frameworks offered.<sup>216</sup>

Constitutionalism and constitutionalisation have their ‘dark side’, and scholars are warned to listen carefully to the rhetoric of constitutional discourse and its militaristic overtones, since people will fight, and even die, for their constitutional rights.

This cautionary tone extends to the new powers being bestowed on international courts. The limitations imposed on the political branches of government simultaneously seem to accompany “a huge dose of judicial self-empowerment and no small measure of sanctimonious moralizing”;<sup>217</sup> yet when it comes to human rights, even very different constitutional documents are quite similar. The constitutional ethos has a tone of moral superiority, not only regarding the creators of the constitution, but also towards those who interpret it.<sup>218</sup>

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<sup>213</sup> Kuo (n 212) 73.

<sup>214</sup> Anderson (n 27) 357.

<sup>215</sup> *ibid* 358.

<sup>216</sup> *ibid* 361.

<sup>217</sup> Weiler and Wind (n38) 17.

<sup>218</sup> *ibid*.

Obviously, there will be challenges with the process of constitutionalising international law. For example, how will translation work? How can domestic constitutional thinking be exercised within, or adapted to the international arena?<sup>219</sup> An international legal system will have a different structure and function from State systems, although it will still be subject to democratic standards and the protection of human rights; however, domestic models cannot simply be transplanted. The fundamental structural elements include the legal order that is collectively formed by the international community and which will provide the framework for the establishment of an international system of shared values.<sup>220</sup> Additionally, while formal rules will certainly be established, studies must also include details of how the system will work in practice: “It is important to examine the extent to which problems have arisen and the means already available, such as the doctrines of *res judicata*, *lis pendens*, and reliance on precedence between different courts and tribunals.”<sup>221</sup>

Nor should reform set unrealistic models or goals. An international legal system should not always supersede nation States, even when dealing with international issues. International jurisdiction may not always be the first choice, even when it seems apparent that an international response is required. Indeed, “States protect their sovereignty, sometimes with good reason. Thus, sovereignty should be respected in accordance with the principle of subsidiarity, in the sense that there should be good reasons for choosing international rather than national decision-making.”<sup>222</sup> Constitutionalisation is an attempt to subordinate the actions of governments to constitutional structures, and includes an international legal system. By the end of the process, there is likely to be a world constitution that could be compared to national constitutions, although, “International constitutionalism has to be regarded more as a pluralistic structure. But this structure does not need to be regarded as a fragmented element, but as a networking model or a complex form of ‘interface-management’ with common constitutional principles.”<sup>223</sup>

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<sup>219</sup> Ulfstein (n129) 1.

<sup>220</sup> De Wet (n113) 287.

<sup>221</sup> Ulfstein (n129) 2.

<sup>222</sup> *ibid.*

<sup>223</sup> Mattheis (n 198) 627.

Obviously, an international constitutional system would exist under the rule of law, so there would need to be formal standards assigned to ensure legitimate governance. In addition, although there will be rigidity supporting the rule of law, this has to be offset by values that promote the well-being of the political community.<sup>224</sup> A framework must be built that is associated with the on-going process of constitutionalisation, and is not restricted and preoccupied with envisioning and attaining a final good, representing a completed constitutional system.<sup>225</sup> The term ‘constitution’, when applied to supra-national structures, needs to have both formal and material elements that are differentiated. It must also emphasise the functions of the constitution, which involve,

the creation of institutions and the determination of values... since the transfer of State powers to the supranational organs has shifted the functions of a State constitution to the multinational level, there is a parallelism of the functions of the constitution of the Member States within the supranational order.<sup>226</sup>

There is uncertainty about the constraints that might be imposed by constitutional law reducing the effectiveness of an international legal system in response to such global issues as climate change or poverty. However, constitutionalisation is not a process whose main purpose is to limit international power, but rather a means to increase the effectiveness of international law by working towards a greater legitimacy of global legal processes and requirements.<sup>227</sup> At present, the context of the constitution is used to represent a system where various national governments come together to form a core value system that will be common to all, and set up as a decentralised legal structure. Such a system dictates the outer limits of the exercise of public power.<sup>228</sup>

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<sup>224</sup> Milewicz (n 25) 422.

<sup>225</sup> *ibid.*

<sup>226</sup> A. Wyrozumska, ‘The Process of Constitutionalisation of the EU and Related Issues’ (2011) 17 (1) *European Law Journal* 147.

<sup>227</sup> Ulfstein (n 129) 2.

<sup>228</sup> De Wet (n 113) 287.



International organisations and regulatory networks are obviously gaining more responsibility at the international level. The impact of their work is not just restricted to international concerns, since they also shape and/or influence domestic policies. In both ways they have carved out space which was hitherto the domain of a national constitution. In so doing, it can be argued – if one accepts the widespread belief that power, by way of a constitution, should be regulated, legitimised, and democratised – they should also be subject to the same constitutional criteria.

## 2. 6 Conclusion

The forces of constitutionalism and constitutionalisation are an attempt to address a changing global order. Through the forces of globalisation and information technologies, no nation lives in a void; no nation is an “island entire of itself.”<sup>229</sup> But if these governments remain oppressive, they risk losing their legitimacy. Additionally, there has been a significant increase in the growth of non-State or supra-State entities. What kind of influence will these entities have on the future of the nation State? Institutionalisation “carries with it authority and legitimacy”,<sup>230</sup> and as such may improve domestic institutions and enhance global stability and international relationships. Alternatively, they may be in conflict with domestic entities and undermine them. It is quite likely that both outcomes will be manifested in the coming years.

The role of international governments is fluid and transitional. It seems clear that we should accept that institutions are simultaneously causes and effects; that is, institutions are both the objects of State choice and consequential. States choose and design institutions. Once constructed, institutions will constrain and shape behaviour, even as they are constantly challenged and reformed by their member States.<sup>231</sup>

As citizens of the world begin to embrace the concept of constitutionalised international authority, hegemony and arrogance must not be allowed to overshadow the benefits that such protection could bring. Each nation State must be respected and

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<sup>229</sup> John Donne, ‘No Man is an Island’ <<http://www.poemhunter.com/poem/no-man-is-an-island/>> accessed 15 May 2013.

<sup>230</sup> Patrick H O’Neil , *Essentials of Comparative Politics* (WW Norton Company 2010) 296.

<sup>231</sup> Lisa Martin and Beth Simmons, ‘Theories and Empirical Studies of International Institutions’ (1998) 52 (4) *International Organization* 729 <<http://nrs.harvard.edu/urn-3:HUL.InstRepos:3382862>> accessed 2 February 2013.

valued as long as it does not violate the security or liberty of other nations. Yet there needs to be a legitimate authority that is strong enough to bring collective action against a nation that violates the rights of other States. However, one of the major issues of this current trend concerns the circumstances when that same international authority would have the right to take action against a State that is seen as a threat to others. And additionally, does that international authority have a right to intervene in the way a nation treats its own citizens? This is not a new concern, nor has international constitutionalisation offered an answer. Yet these issues seem to be at the very heart of current world issues and threats.

## Chapter Three: Constitutionalism and Legitimacy – An Islamic Perspective

### 3.1 Introduction

When evaluating contemporary Islamic governance and its relationship to legitimacy, a strong trend has been established whereby the people are no longer willing to accept governance from ruling parties that they believe have lost legitimacy. This response was most apparent in Egypt between 2011 and 2013 where by then, two administrations had fallen in less than two years, taken down for failing to fulfil widespread demands for more democracy.

By the middle of the twentieth century, discourse related to constitutionalism emphasised the consensus required, in that constitutions were primarily expressions of the internal social, political, and economic choices of a unique political community-a nation State. In other words, self-determination became a central concept in contemporary constitutional discourse. A key activity of political scientists was investigating the authenticity of the polity and whether the State itself was legitimate. Under the norms being established, the result could be governance that met legal requirements legitimising the use of power by a State, but not necessarily the moral requirements on which to build a civil society based on individual freedoms and rights. Consequently, it was recognised that not all constitutions are morally legitimate;<sup>232</sup> Just because a governmental body has developed a constitution does not mean that it is automatically legitimate. Rather, legitimate constitutions require certain universal characteristics. The characteristics of legitimacy included banning the arbitrary use of State power and setting limitations on the policy choices made by government, so both procedural and substantive characteristics are articulated in support of a higher law. Those universal characteristics have influenced a growing consensus related to international governance.<sup>233</sup>

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<sup>232</sup> Larry Cata Backer, 'Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering' (2009) 16 (1) *Indiana Journal of Global Legal Studies* 85.

<sup>233</sup> *ibid.*

In the last decade of the 20<sup>th</sup> century, a new constitutionalism, “global secular transnational constitutionalism”<sup>234</sup> grew to address the needs of supranational organisations and relationships. Krisch argues that this push towards international constitutionalism is due to the belief that it has the potential to create justice and order. Constitutionalism could establish authority by the use of clear legal norms, designed to protect the various actors and States. Without it, cooperation between nations would be weakened.<sup>235</sup>

A higher law, one that transcends individual States, is rooted in both natural and moral law. Backer describes how by the end of the twentieth century, “Constitutionalism...was tied to the construction of a collective—an international society of States – with the object of universalising standards of behaviour and of preserving the power relationships within and among States from threats.”<sup>236</sup> Late twentieth century constitutionalism represented an attempt to systematise, institutionalise, and implement as international higher law, a long-held view in Western legal and political circles of the basis for establishing a hierarchy of States by reference to their civilisation.<sup>237</sup> The objective is to both impose a deeper and substantive meaning of rule of law of constitutionalism on States and to find a mechanism for developing those substantive principles of domestic constitutionalism that might express transnational universal principles of rights and justice rather than merely those of majorities within a particular State. This, it was thought, would provide a meta-norm for limiting the power of States and avoiding arbitrary or immoral conduct by subjecting nations to international development and overview.<sup>238</sup>

Under this system all States participate in the construction of universal normative constitutional standards, but none control it entirely (though some have a greater authority in the process—a nod to power), and all are technically subject to its strictures as international law (or as a means of legitimating modern constitutional structures). The legitimacy of promoting global secular transnational constitutionalism has not gone unchallenged, however. The strongest opponents seem to be those who believe a Universalist religion should be the basis of normative

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<sup>234</sup> Backer (n 232) 86.

<sup>235</sup> Niko Krisch, ‘Beyond Constitutionalism – Pluralism’s Promise’ (2012) 25 (2) LJIL Symposium 1.

<sup>236</sup> Backer (n 232) 86.

<sup>237</sup> Tim Cadman, ‘Evaluating the Legitimacy and Quality of Global Governance’ (2014) 2 (1) International Journal of Social Quality 6.

<sup>238</sup> *ibid* 7.

constitution making.<sup>239</sup> In fact, the resurgence of religion in public life challenged the Nietzschean declaration that God is dead. Some feel that this resurgence is a response to the “otherwise hegemonic institutions of the market and the modern State.”<sup>240</sup> The article ‘Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering’, published in the *Indiana Journal of Global Legal Studies*, investigates the possibility that Islam could produce a set of characteristics that could be used to create a legitimate Islamic constitutionalism. Islam was chosen because it has the most developed theocratic transnational constitutionalism.<sup>241</sup>

### 3.2 The Development of Islamic Jurisprudence

Simply put, the Islamic State is a nation ruled by Islamic law. However simple this may seem, implementing an Islamic State has been met with challenges. This is because of the difficulty that arises when the nation State, in modern terms, holds all legal authority, which in Muslim societies, does not follow traditional methods of governance.<sup>242</sup> In contrast to the nation State holding the authority to develop legal rulings, classical Islamic law emerged outside the exclusive preserve of the State. The authority to make legal rulings was given to those esteemed individuals who had developed expertise in Islamic studies and their knowledge of the *Quran*. The authority of these jurists was outside of State authority and power, yet considered as legitimate, if not more so, than State rulings.<sup>243</sup> One of the most important aspects of the development of Islamic jurisprudence is that it defies codification. This is because of the inherent nature of Islamic law, which is seen as not only a set of rulings determined by religious scholar jurists, but as a continuous process<sup>244</sup> that does not become set and rigid, but is always subject to *ijma* (consensus of religious authority), *qiyas* (deductive analogy) and *ijtihad* (independent reasoning).<sup>245</sup>

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<sup>239</sup> Backer (n 232) 86.

<sup>240</sup> Robert W Hefner, ‘Public Islam and the Problem of Sociology of Religion’ (2001) 62 (4) Special Issue: Religion and Globalization at the Turn of the Millennium 491.

<sup>241</sup> Backer (n 232) 87.

<sup>242</sup> Sherman Jackson, *Islamic Law and the State: Studies in Islamic Law and Society* (Brill Academic Publishers 1996) xvii.

<sup>243</sup> *ibid.*

<sup>244</sup> *ibid.*

<sup>245</sup> Javaid Rehman and Aibek Ahmedov, ‘Sources of Islamic Law: Teaching Manual’ (2011) UK Centre for Legal Education 8.

An Islamic perspective of public law views the human being as an independent, under no obligation to follow someone else's rule, with some notable exceptions - rules determined by: 1) religious scholars (*ulama*), 2) messengers/prophets of God, and 3) political rulers (*a'imma* and *wulat*).<sup>246</sup> The obligation to obey *ulama* is due to the scholars' special knowledge and religious expertise; the obligation to obey political rulers is due to their legal relationship with citizens. Challenges to the obligation to obey political rulers can occur if the ruler has violated certain established principles. Consequently, the view of public law in Islam, "... consists of precisely those rules which attempt to answer the question of when commands of rulers are rightful, and therefore must be obeyed, and when they are wrongful, and can be, all things being equal, ignored."<sup>247</sup>

Early jurists often strongly disagreed, so rulings and opinions were categorised according to the nature of the ruling and the legal centre for which the jurists were aligned. For example, the works of Abu Yusuf, Shafii and Malik, but Malik in particular, are associated with the jurists of Medina. When a consensus took place on an issue from more than one of these legal centres, then confirmation was more binding and precedent set.<sup>248</sup> Reaching consensus was often rigorous and taxing, so an emphasis upon *ijtihad* was promoted, relying heavily on the techniques of analogy and deduction: "Arguments about the application and the interpretation of the *Shar'ia* and *Siyar* nevertheless materialised, and over a period of time, led to the creation of various schools of thought."<sup>249</sup> In the Sunni tradition, these schools are the: Maliki, Hanafi, Shafi'i and Hanbali schools of law. The *Shia* tradition uses the Jaffari school for the most part.<sup>250</sup>

### 3.3 Islamic and Western Jurisprudence

In the West, administration of justice is to design the judicial system so that individual rights and freedom are guaranteed. The rights of the individual are paramount.<sup>251</sup> However, in Islam, administration of justice it is to design a judicial

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<sup>246</sup> Mohammed Fadel, 'The Representational Ideal and the Sunni Conception of Public Law' (6 February 2014) University of Toronto 6.

<sup>247</sup> *ibid.*

<sup>248</sup> *ibid.*

<sup>249</sup> Rehman and Ahmedov (n 245) 4.

<sup>250</sup> *ibid.*

<sup>251</sup> Munir Ahmad Mughal, 'Comparative Study of Qualifications of a Judge under Islamic Jurisprudence and under the Western Jurisprudence' (2012) SSRN 5.

system to maintain a balance between social justice in social life and legal justice in the law courts. The rights of the society in general are paramount.<sup>252</sup> In either system, justice is either civil or criminal. Both systems impose punishment to attempt to eradicate and prevent crime, instill fear of being caught committing a crime, and to reform criminals. In both the West and Islam, the main purpose of the legal system is to administer/dispense justice and restore rights.<sup>253</sup>

In the West, the secondary duties of the Courts are to declare rights and determine facts; interpret and apply laws; to identify wrongful conduct by the State or its agencies, and to discharge any other duties that are assigned to the Courts. In Islam, the secondary duties are to resolve disputes; interpret and explain the laws; to settle family disputes and to perform administrative functions relating to the Courts.<sup>254</sup> In the West, protection of alleged criminals is provided; no such protection is provided in Islam.<sup>255</sup>

From an Islamic perspective, Islamic jurisprudence is more stable with a continuity of values<sup>256</sup> because the laws in the West are determined by humans and can be subject to change; the laws in Islam come from divine revelation and are not subject to change, although flexibility in application is allowed. The stability of Islamic jurisprudence, from an Islamic perspective is due to its source as compared to the Western system:

The values that must be upheld and defended by law and society in Islam are not always validated on rationalist grounds alone. Notwithstanding the fact that human reason always played an important role in the development of Shari'ah through the medium of *ijtihad*, the Shari'ah itself is primarily founded in divine revelation.<sup>257</sup>

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<sup>252</sup> Mughal (n 251) 5.

<sup>253</sup> *ibid* 6.

<sup>254</sup> *ibid*.

<sup>255</sup> *ibid* 7.

<sup>256</sup> M. H. Kamali, 'Principles of Islamic Jurisprudence' (1991) Islamic Texts Society 6.

<sup>257</sup> *ibid* 7.

Nevertheless, both systems of jurisprudence have power based on concepts of the supremacy of the Rule of Law. For Westerners, the first milestone was the Magna Carta; for Muslims it was the words of the Prophet, especially when he established the first Islamic State in Medina in 637 where he issued the Medina Constitution.<sup>258</sup> Mohammed is seen as much more than a Prophet by Muslims. He is seen as Head of State, as Military Commander and Messenger of God: “He was entrusted with a mandate from God to guide his people (ummah) in their life, so that he is not only an executive of God’s orders but also a legislator (al-shari’).”<sup>259</sup>

Although Western jurisprudence is not given divine origins in the same ways as Islamic jurisprudence, there is a sacredness in the roots of Western Rule of Law that is quite as powerful as religious faith in some ways. The creation of the Magna Carta in 1217 changed the Western world. From thereon, the important principle of the freedom of the individual from the tyranny of the State led to the constitutionalisation of many modern governments, especially the United States.<sup>260</sup> It is the Magna Carta, which is “widely recognized to be a pillar of liberty, major source of the modern concept of executive accountability, and foundation of the rule of law in the United States, the United Kingdom, and the Commonwealth countries.”<sup>261</sup> Perhaps the most revered aspects of the Magna Carta were found in Chapter 39 which declared:

No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.<sup>262</sup>

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<sup>258</sup> Masykuri Ibzilla, ‘Ways of Constitution Building in Muslim Countries’ in Birgit Krawietz (ed) *Justice as a Pervasive Principle in Islamic Law in Islam and The Rule of Law Between Shar’ia and Secularization* (Konrad-Adenauer-Stiftung 2008) 53.

<sup>259</sup> *ibid* 54.

<sup>260</sup> H Hazeltine, ‘The Influence of Magna Carta on American Constitutional Development’ *Columbia Law Review* (1917) 17(1) 3.

<sup>261</sup> Book Review (2015) Daniel Barstow MacGraw, Andrea Martinez, Roy E. Brownell, *The Magna Carta and the Rule of Law* (American Bar Association 2015) 1  
<[http://books.google.com/books/about/Magna\\_Carta\\_and\\_the\\_Rule\\_of\\_Law.html?id=mxjmoAEACA](http://books.google.com/books/about/Magna_Carta_and_the_Rule_of_Law.html?id=mxjmoAEACA)> accessed 10 February 2015.

<sup>262</sup> Bingham (n 4) 10.



At their core, both systems of jurisprudence follow the same basic principle, that guarantees are enshrined by the law, rather than the State.<sup>263</sup>

### 3.4 Islamic Schools of Law

The most liberal and flexible school of law is the Hanafi School. In the Hanafi tradition there is emphasis placed on *qiyas* (deductive analogy) as a method of forming legal judgments.<sup>264</sup> *Qiyas* was used so much so, that Hanifa's followers were called *Ahl-al-Rai* or 'People of Opinion' compared to *Ahl-al-Sunna* or 'People of the Tradition'. The Hanifa School is credited with creating a major portion of the principles of *Siyar*. The Hanafi School is predominant in Central and Western Asia, which includes Afghanistan to Turkey, Lower Egypt (Cairo and the Delta) and the Indian Sub-Continent.<sup>265</sup>

The Maliki School was established in Medina by Malik ibn Anas (d. 795/179). Maliki scholars view juristic preferences (*istihsan*) and public interest (*al-masalih al-mursala*) as the key sources for juridical decisions. The Al-Shafi'i School of Thought falls between the Maliki and Hanafi Madh'habs in that it uses methods of both Maliki and Hanafi, i.e., "less in the way of Qiyas (Analogy) and Raa'y (personal opinion). It excels in the technique of *Istin'baat* (deductive reasoning) for reaching a Fiqh verdict."<sup>266</sup> The Maliki School has followings in both North Africa and Upper Egypt.<sup>267</sup> The Shafi School was established by Muhammad ibn Idris al-Shafi (d. 820/204). Al-Shafi came from southwest Palestine (Gaza), and was a student of Malik in Medina. Al-Shafi travelled with Malik who was teaching and practicing law in Baghdad, and al-Shafi finally settled in Egypt. Al-Shafi preferred the prophetic *Hadith* over the other traditions in studying Islamic law.<sup>268</sup>

The Hanabali School was founded by Ahmad Hanbal (d. 855/241) who was working on the Quranic texts at the same time as Al-Shafi. Hanbal was much more

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<sup>263</sup> Birgit Krawietz, 'Justice as a Pervasive Principle in Islamic Law' in *Islam and The Rule of Law between Shar'ia and Secularization* (Konrad-Adenauer-Stiftung 2008) ch, 40.

<sup>264</sup> *ibid* 46.

<sup>265</sup> Rehman and Ahmedov (n 245) 46.

<sup>266</sup> 'Four Sunni Schools of Fiqh' Islamic Laws <<http://islamic-laws.com/articles/sunnischools.htm>> accessed 15 August 2014.

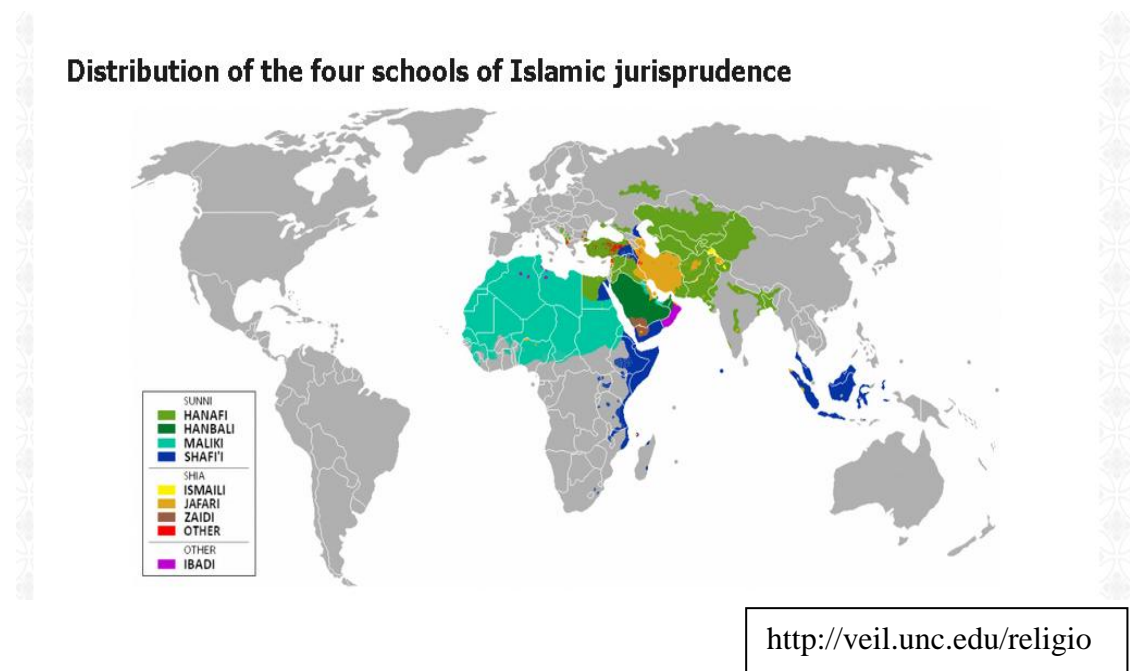
<sup>267</sup> *ibid*.

<sup>268</sup> *ibid*.

conservative, however.<sup>269</sup> He is regarded as a ‘traditionalist and theologian’, and his involvement with law was a technical by-product of his religious studies.<sup>270</sup> Consequently, his strong beliefs regarding the *Quran* and *Hadith* motivated him and his followers to adopt a rigid interpretation of the *Shar’ia*. He was independent and resisted theological approaches. This resulted in his imprisonment and “persecution by the ruling Caliph. While primarily a theologian, his teachings were largely based around religiously ordained *Hadith*, and only rarely articulated in strict legal jargon.”<sup>271</sup>

The *Shia* sect developed one major school of law - *Jaffari*, which is named after its founder, Jafar al-Sadiq, the sixth Imam.<sup>272</sup> While believing in the two principal sources, the *Shias* believe that law can only be translated by Imams, the religious leaders of prayer in the community, while *Sunni* law can be translated by Islamic scholars also, not just community religious leaders.

**Fig 1: Schools of Islamic Jurisprudence**



<sup>269</sup> Dr GF Haddad, ‘Imam Ahmad’ <[http://sunnah.org/publication/khulafa\\_rashideen/hanbal.htm](http://sunnah.org/publication/khulafa_rashideen/hanbal.htm)> accessed 15 August 2014.

<sup>270</sup> Rehman and Ahmedov (n 245) 47.

<sup>271</sup> *ibid.*

<sup>272</sup> *ibid.*

As the Muslim Empire reached its peak, locations of power had become fragmented and decentralised, leading to a further separation in the way the different schools of law evolved. By the mid 1400s, the Ottoman Turks had spread their empire with the capture of Constantinople (1453), and then spread across the Middle East and North Africa establishing a new Caliphate in 1517. By medieval times, the influence of Islam shaped the Ottoman dynasty of the Eastern Mediterranean, Asia Minor and South Eastern Europe; the dynasty also included the Mughal emporium of India and the Safavids dynasty of Iran.<sup>273</sup> Each of these Empires operated under different ideological approaches. For example, the Safavids followed a *Shia* faith and, as described by Rehman and Ahmedov, the Mughals of India, “adopted a more benign and assimilationist approach. Thus the developmental processes of Islam with varied political, economical and ideological influences also produced divergent viewpoints on legal approaches towards the *Shar’ia*.”<sup>274</sup> Ideological differences were not the only factors that caused variations. The political elite of these various societies were unwilling to accept any laws or rulings that did not support their personal agendas. Consequently, the development of Islamic law has a rich and diverse tradition that has left Islamic law open to further interpretation still being conducted today. The methods of interpretation which have developed over time have allowed jurists a good deal of flexibility and the ability to expand or critique further.

Whatever the school of law, Islamic jurists share an important quality, known as *wahy*, which means to bear witness to the authority of divine revelation as being above any man-made legislation no matter how rational. Unlike Western sources of law, where rationality, custom, precedent, morality and religion are the basic sources, religion and morality are the two dominant sources in Islamic law.<sup>275</sup> Defining law comes from God’s authority:

A defining law is a speech or communication from the Law Giver addressed to the Mukallaf which consists of a demand or an option. A demand may either be binding which leaves the

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<sup>273</sup> Rehman and Ahmedov (n 245) 48.

<sup>274</sup> *ibid.*

<sup>275</sup> Kamali (256) 4.

Mukallaf (human receiving the law) with no choice but to conform, or it may not be so binding.<sup>276</sup>

Depending on the circumstances, defining law becomes more or less compulsory. If a law is considered definitive, then a Muslim is obligated to follow such a law or be guilty of being a transgressor. The obligation might be imposed on individuals or the collective.<sup>277</sup>

The concept of a defining law being compulsory is not limited to Islamic jurisprudence, of course. It is the source of the defining law that is in question. In Islam, the Law Giver/Allah has determined definitive law. However, Western jurisprudence speaks of the Supremacy of Law where “no one is above the law”,<sup>278</sup> or as Dr. Thomas Fuller once said, “Be you never so high, the Law is above you.”<sup>279</sup> With the Magna Carta and the development of the Rule of Law, even the King of a land became subject to the law, which completely transformed the nature of Western government.

### **3.5 Islam and Democracy**

In a democracy, the power comes from below, from the consent of the governed rather than from a divine authority. In secularised societies, political rights are no longer based on religious beliefs, and the connection to spiritual authority is cut. However, this severance raised a great challenge to political authority because it was no longer sanctioned by religion. Past revolutions destroy traditional authority and new political orders develop.<sup>280</sup> But could they be sustained? Arendt identified the loss of religious sanctions as the greatest challenge to modern political authority.<sup>281</sup> Revolution destroys traditional authorities built on religious legitimacy and promises a totally new political order. Yet, what would guarantee that this new political order would endure? This guarantee is not one that new governance structures take lightly. Gunes and Tezcur claim that governments no doubt

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<sup>276</sup> Mughal (n 251) 90.

<sup>277</sup> *ibid* 91.

<sup>278</sup> Bingham (n 4) 4.

<sup>279</sup> *ibid*.

<sup>280</sup> Gunes Tezcur, ‘Judiciary, and Democracy in Islamic Societies’ (2007) 39 (4) *Polity* 479.

<sup>281</sup> *ibid*.

“desperately seek sacredness that is bestowed by transcendental norms and goals for purposes of political stability.”<sup>282</sup> Arendt argues that the act of constitution-making that sets the parameters of political life is the way to guarantee successful political stability, with America being a good example of how stability is created by a written constitution that is designed to resist change, but flexible enough to address the needs of the polity.<sup>283</sup> Indeed, the power and legitimacy of the democratic legislative bodies remains intact on the condition that the authority of the constitution and the Supreme Court remains sacrosanct and unchallenged.<sup>284</sup>

When considering the possibility of democracy in Muslim nations, most Westerners recognise that Muslims rely on their faith to establish the principles of social order.<sup>285</sup> But this is hard to accept in a country like the United States that is quite vehement in the need to separate church and State, with the failure to do so, seen as enabling intolerant rule. Islamic scholars claim Islam is inherently democratic. For example, several Islamic scholars claim that a separation of powers occurs naturally in Islamic governance by way of basic Islamic principles instead of by constitutional design. How would this natural separation occur if not by constitutional mandate? Islamic scholars point out that the natural separation manifests itself because rulers and religious scholars occupy separate realms of authority, each wielding a lot of power. The rulers and scholars check and balance each other and help to create a stable political environment.

The two groups of authorities create two separate methods of law-making, *siyasah*, which is ruler-made law and *fiqh*, which is scholar-made law. Neither system has absolute authority over the other, and each recognises the legitimate function and role of the other in the system. Throughout history and in modern decades, *fiqh* scholars vigorously maintain their freedom to perform *ijithad* in order to articulate *fiqh* doctrine without interference from external forces. *Fiqh* scholars, though, appreciate the need for order and security in the society, so they accept the importance of having a centralised government to maintain law. *Siyasah*, then, which literally means administration, creates a public good, so is considered a legitimate aspect of God’s law, *Shar’ia*. The *Quran* supports rulers who use *siyasah* to maintain

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<sup>282</sup> Tezcur (n 280) 481.

<sup>283</sup> *ibid* 48.

<sup>284</sup> *ibid*.

<sup>285</sup> Hefner (n 240) 493.

security, safety and justice for the people. *Siyasah* does not derive from divine texts in the way *fiqh* does; rulers create *siyasah* for governing needs.

### **3.5.1 *Siyasah and Public Good***

Most Western people misunderstand the nature of an Islamic State, believing that Islam requires religious leaders to rule, and only *fiqh* law is legitimate. However, *siyasah* rule is considered quite legitimate if it serves the public good. The requirement for religious rule has never been the case in Muslim history.<sup>286</sup> Muslim rulers created *siyasah* law, but not *fiqh*. *Siyasah* law, “emerged not from scholarly interpretation of scripture, but ruler determination of what was necessary for social order. And it was *siyasah* that was imposed uniformly upon the population. *Fiqh* was enforced through the filters of the several schools of law and litigant identity.”<sup>287</sup>

Rulers were aware, however, that they could not usurp the authority of the religious scholars without risking loss of legitimacy. The scholars are held in high esteem in Islamic nations, and if rulers took actions which were strongly opposed by the scholars, the rulers risked intense social resistance. Conversely, the *fiqh* scholars had no army and were themselves kept in check by rulers.

The State is not a religious institution, but an administration that ensures the security and well-being of Muslims and applies the Law of Islam, while also having to abide by the same law. The balance created by the classical Islamic system of governance is one of the reasons that the system has succeeded for so long.

In considering the compatibility of the principles of Islam with democracy, many scholars point out that when Abu Bakr was chosen as the first caliph, the choice had to be approved by the community. Bakr acknowledged he received his mandate from the people who asked him to implement, The *Quran* and *Sunna*. For some scholars like Rahman, this is a clear indication that the Islamic State elicits approval from the Islamic community, and this, therefore, is proof that the system is by nature democratic. Additionally, because Islam is egalitarian in nature, its governments must be based on popular will and some form of representation. Islamic scholar and historian Fazlur Rahman Malik, points out that in modern times, most

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<sup>286</sup> Rainer Grote and Tilmann Roeder (eds) *Constitutionalism in Islamic Countries* (Oxford University Press 2012) 69.

<sup>287</sup> *ibid.*

Muslim countries are struggling to modernise, and would be classified even today as developing countries. Rahman argued that in countries that are underdeveloped, a strong government is needed that is capable of centralised planning and control of economic development. There is no harm in having strong men guide the country, provided that in the process, there is a genuine commitment to the cultivation of democracy.<sup>288</sup>

Although Islamic scholars may argue otherwise, the making of a constitution in the Islamic world is mostly a European concept:

Although there are certain elements in the Islamic tradition which can be perceived as early expressions of an autochthonous approach to constitutionalism in Islam and have indeed been interpreted in this manner, they owe their prominence in contemporary debate more to recent attempts to reinterpret the Islamic tradition in light of the requirements of constitutionalism than to any rigid historical analysis.<sup>289</sup>

Additionally, it has been generally accepted that attempts at democracy in the Arab world have been met mostly with failure, with the outcome of democratisation in the Arab world described as “exceptionally bleak.”<sup>290</sup> These failures have led to unchecked authoritarianism in many Arab countries which is paving the way to a deep crisis in the fabric of Arab/Muslim societies. Indeed, a root cause of political and economic instability is the unchallenged wielding of State power. This coupled with the regime’s uncontrolled use of the rule of law has made the Arab world more vulnerable to the threat of political chaos.<sup>291</sup> Egyptian scholar, Miral Fahmy stated, “although I dreamed of democracy in my youth, I now see that our country is regressing politically.”<sup>292</sup>

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<sup>288</sup> F. Rahman, ‘A Recent Controversy over the Interpretation of ‘Shūrā’ (1981) 20 (4) *History of Religions* 294.

<sup>289</sup> Grote and Roeder (n 286) 3.

<sup>290</sup> Mark Tessler, ‘Islam and Democracy in the Middle East: The Impact of Religious Orientations on Attitudes toward Democracy in Four Arab Countries’ (2002) 34 (3) *Comparative Politics* 338.

<sup>291</sup> *ibid.*

<sup>292</sup> *ibid.*

Theoretically, Islamic democracy has great potential. The actual practice of Islamic democracy has not been encouraging, however. When rulers like Ja'far Numayri in Sudan and Zia al-Haqq in Pakistan initiated *Shar'ia* and an Islamic political system in the 1980s, there were less than positive consequences. For example, a military coup in Sudan resulted in the seizure of power by a group of military and civilian Islamists in 1989. The promise to create an Islamic democracy clearly failed in view of the regime's scandalous human rights record, in terms of its treatment of Muslim opposition groups and non-Muslim minorities.<sup>293</sup>

One of the ongoing concerns related to Muslim countries is their record related to human rights issues, which seems to be at odds with the basic values of Islam itself. Accordingly, in considering democracy in the Muslim world, one cannot separate religion from politics. Islam is a religion and a system of laws that relates to the society as well as to individual morality; "Islam plays a critical role in shaping political culture; no Middle Eastern Muslim country is able to escape completely from its overarching reach. Indeed, this intersection of culture and politics may be more pervasive than in other [non-Islamic] contexts."<sup>294</sup> Some scholars incorrectly argue that Islam, then, inevitably leads to totalitarianism.<sup>295</sup> However, any one of the governments that have lost legitimacy because of an abuse of power in recent years (Egypt, Syria) are not really following the true spirit of Islamic governance, but instead use coercion and fear to control its population rather than *Shura* or egalitarianism.

### **3.6 Islamic Constitutionalism**

Islamic constitutionalism, shaped by Western ideals, began to emerge in the late nineteenth and early twentieth centuries with the introduction and acceptance of Western constitutionalism in the Muslim world.<sup>296</sup> The emphasis on constitutionalism came in waves to the Muslim World, when it would undergo reformulation. The first phase of Islamic constitutionalism began with the modernist thinking of Muslim reformists in the late 1800s. In this first phase, Islam was a

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<sup>293</sup> John Esposito and John O. Voll, 'Islam's Democratic Essence' (1994) 1 (3) Middle East Quarterly 4.

<sup>294</sup> Tessler (n 290) 339.

<sup>295</sup> *ibid.*

<sup>296</sup> Sa'id Amir Arjomand, 'Islamic Constitutionalism' (2007) 10.1146 The Annual Review of Law and Social Science 116.



limitation imposed on government and legislation, not the basis of the constitution itself. In the second phase, Islam came to be considered as the basis of the constitution and the State. Arjomand describes the third and current phase of Islamic constitutionalism, in which there is a return to the idea of limited government – “this time as the rule of law according to a constitution that is not based on but is inclusive of the principles of Islam as the established religion.”<sup>297</sup> *Shar’ia* as the basis of an Islamic constitutional system has not been a constant.

Islamic law is viewed as a product of God’s revelation as expressed through scripture and traditions established by the Prophet, not human interpretation. Additionally, it follows, then that Islamic tradition is perceived as an “expression and source of God’s divinely revealed law.”<sup>298</sup> The law became seen as a perfect blueprint for human society. Because the law had already been perfected, by the tenth century, most Sunni jurists accepted that the guidelines for life had already been established, and *ijithad* was no longer necessary. Traditions became standardised and sanctified. The benefits were a stronger sense of unity, certainty and identity among the various local cultures and different religious practices. Sanctification has had its costs, however. For example, the dynamism, diversity and creativity that helped develop Islam were lost, along with human input into the formation of tradition and law. The result is that “later generations preserved and transmitted a more static, romanticized sense of Islamic history.”<sup>299</sup>

Consequently, many of the practices found in modern Islamic nations are viewed as sanctified under Islam, even those that may not be a reflection of Islam’s true intent. This recognition has caused many contemporary neotraditionalists to want to return to *ijithad* and reinterpret the fundamental sources of Islam to meet modern needs and conditions.<sup>300</sup>

In addition, many current Islamic scholars believe Islam set the stage for a democratic society, so there is no need to shape Islamic nations into a Western mould in order to become more democratic. No, what is required is a revival of early

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<sup>297</sup> Arjomand (n 296).

<sup>298</sup> John Esposito, *Islam: The Straight Path* (OUP 1998) 226.

<sup>299</sup> *ibid* 227.

<sup>300</sup> *ibid* 228.

Islamic practices that are inherently democratic, including *Shura* and the basic separation of law and power.

In contrast, conservatives, while advocating a return to Islam, argue that there is no need for *ijihad* because Islam is a system that has already been fully articulated, and it is still valid today and for all time. It is not the law that should be changed; past traditions just need to be reemphasised (*taqlid*), and society needs to conform to God's will.<sup>301</sup> In fact, many reforms made in the 1970s and 1980s were a restoration of traditional law. When real change did take place, it was gradual and in areas not covered by traditional law.<sup>302</sup> Neotraditionalists do not advocate a return to Islam without the right to reinterpret (*ijihad*) and rework them to meet current needs. They believe that modern Islamic societies adopted non-Islamic practices. Their purpose is to revitalise *umma* (community) through Islam's revealed sources. They are more flexible than conservative scholars and more likely to become political activists.

Islamic constitutionalism was first introduced in the writings of Islamic modernists, such as Khayr al-Din Pasha in Tunisia and Namik Kemal in Turkey. Constitutionalisation took place when these two modernists helped draft the Tunisian Constitution of 1861 and the Ottoman Constitution of 1876. Al-Din Pasha and Kemalin were viewed as reformers, and they argued that "representative, constitutional government captured the spirit of Islam".<sup>303</sup> In 1872, another reformist, Ahmad ibn Abi Diy, argued that Islamic history was constitutionalist in nature because *Shar'ia* imposed a limitation upon autocratic monarchy. He stated that monarchy limited by law (*k'anun*), "was indeed the normative form of government in Islam after the pristine caliphate."<sup>304</sup> In the early twentieth century those Muslim scholars who supported constitutionalism continued to assert that Islam is a natural basis for a constitutional system.

One pamphleteer asserted that constitutional government had been founded by the Prophet Mohammed and was first demanded from the rulers of Europe by the returning crusaders who discovered it to be the secret of Muslim success; a leading

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<sup>301</sup> Esposito (n 298) 228.

<sup>302</sup> *ibid* 229.

<sup>303</sup> Arjomand (n 296) 117.

<sup>304</sup> *ibid* 118.

journalist claimed it as the pristine form of government in Islam that had subsequently been forgotten by Muslims.<sup>305</sup>

The early Constitutionalism manifested itself in the Ottoman Fundamental Law in 1876. At that time a Council of ministers was formed, and the highest religious official of the empire, the Shaykh al-Islam, was the Supreme Council Head. The judiciary power consisted of the religious or *Shar'ia* and civil or State law systems. However, the Sultan dismantled the Fundamental Law in 1878. The next major push for constitutionalism came in 1906 with the Constitutional Revolution in Iran. Because of the revolution, the major issues of the place of Islam in a modern constitutional system became a focus of debate.

The drive for secularisation as influenced by Western constitutionalism, overrode a *Shar'ia*-based constitution during this time. Nevertheless, the idea of *Shar'ia* constitutionalism became more clearly defined and developed. As a result of these developments, Islamic constitutionalism identified *Shar'ia* as a legitimate limitation on government and legislation.<sup>306</sup>

The second phase of Islamic constitutionalism took place after the creation of Pakistan in 1947 and continues to the present; after India was divided, the citizens of the new nation of Pakistan wanted to set up a constitutional State. Even though Pakistan's founder favoured a secular State, fundamentalists, led by Mawlana Abulala Mawdudi wanted the new State to be based on Islam:

This ideological State was to be distinct from other postcolonial new States of the era because the struggle to liberate Muslim territories from foreign imperial rule had no basis in Islam. What Islam required was not a war of national liberation but the establishment of the sovereignty of Allah through *jihād*.<sup>307</sup>

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<sup>305</sup> Arjomand (n 296)148.

<sup>306</sup> *ibid* 118.

<sup>307</sup> *ibid* 119.

Mawdudi called his approach, “theo-democracy” and characterised it as “the very antithesis of secular Western democracy.”<sup>308</sup> It rejected national sovereignty or sovereignty of the people, and replaced it with “the sovereignty of God.”<sup>309</sup> In this type of system, the ruler had to not only be answerable to God but to the caliphs that represented the body of Islam.<sup>310</sup> In 1956, Pakistan became the first Islamic Republic in history. In 1985 President Muhammad Zia ul-Haq led the movement to create a restored Constitution. In that document, sovereignty was declared not just of God, but also the people of Pakistan and the State. Arjomand describes how at the time, no one challenged this elite interpretation, but instead, it was considered a “perfect compromise (because it satisfied everyone by declaring that sovereignty resided not only in God but also in the people of Pakistan and in the State of Pakistan) which seemed reasonable.”<sup>311</sup>

Within a few years, the sovereignty issue was challenged by Islamic fundamentalists. In fact, the re-declaration of God’s sovereign rule in governance is the cornerstone for the construction of an ideological constitution to be based on the *Quran* and the Islamic *Shar’ia*. This declaration triggered a movement of ideological constitution-creation, with *Shar’ia* at its core.<sup>312</sup> Although not quite the same as classical Islam which viewed the function of government as creating a secure and just order so people could live a life of faith, the new order saw government as an executive of *Shar’ia*.<sup>313</sup>

In 1955, Syria was the first Muslim State to constitutionalise *Shar’ia* as its main source of legislation. Syria started this trend. In 1962, the Kuwaiti Constitution, although modelled after the Ottoman Constitution of 1876, added *Shar’ia* as its main source of legislation in its Article 2: “The religion of the State is Islam, and the Islamic *Shar’ia* shall be a main source of legislation.”<sup>314</sup> In 1971, Egypt followed when it included in its Article 2: “Islam is the religion of the State and Arabic its official language. Principles of Islamic law (*Shar’ia*) are the principal source of

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<sup>308</sup> Metin Heper, ‘Islam and Democracy in Turkey: Toward a Reconciliation?’ (1997) 5 (1) Middle East Journal 35.

<sup>309</sup> Arjomand (n 296) 121.

<sup>310</sup> Heper (n 308) 35.

<sup>311</sup> Arjomand (n. 296) 122.

<sup>312</sup> *ibid* 123.

<sup>313</sup> *ibid*.

<sup>314</sup> Constitution of Kuwait, 11 November 1962 <[http://www.servat.unibe.ch/icl/ku00000\\_.html](http://www.servat.unibe.ch/icl/ku00000_.html)> accessed 15 April 2014.

legislation.”<sup>315</sup> Interestingly, Article 3 of the Egyptian Constitution states: “Sovereignty is for the people alone and they are the source of authority. The people shall exercise and protect this sovereignty, and safeguard national unity in the manner specified in the Constitution.”<sup>316</sup> As this type of constitutionalisation spread, by 2000, 24 Muslim nations had declared *Shar’ia* to be either the main source of legislation or a source of legislation. The new millennium witnessed 12 northern States in Nigeria declaring *Shar’ia* the State law.

The turning of *Shar’ia* from a source of legislation into a slogan was the consequence of the spread of politicised Islamic fundamentalism generally referred to as political Islam or Islamism. It was built on the myth of the Islamic State whose primary function is the execution of the *Shar’ia*—whatever the meaning of execution, with respect to a law without codes that Weber called a jurists’ law that includes rules for acts of worship, ritual, diet, and cleanliness.<sup>317</sup>

By the 1980s, a new trend was developing which Arjomand refers to as “postideological Islamic constitutionalism”.<sup>318</sup> Among these New Islamists was an embrace of political pluralism, and a multiparty system, a system of democracy, as being the form of government which was most fitting for Islamic society.<sup>319</sup> This was an abandonment of the idealised Islamic State where the State executed the laws of God. *Shar’ia* would be more of a reference point (*marja*) rather than the foundation of all legislation. By the 1990s, Muslim scholars like Fahmi Huwaydi discussed the compatibility of democracy and Islam.<sup>320</sup>

With the events of the new millennium intensifying the conflict between Islamic groups and Western nations, the idea of Islamic constitutionalism once again gained the attention of the Western public, who were attempting to understand the political dynamics of modern Islamic societies. The most common view that developed was the premise that Islamic society will inevitably clash with democratic

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<sup>315</sup> Constitution of the Arab Republic of Egypt 1971  
<<http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?CatID=208#.UxU0s-NdWS0>>  
accessed 15 April 2014.

<sup>316</sup> *ibid.*

<sup>317</sup> Arjomand (n 296) 123.

<sup>318</sup> *ibid.* 124.

<sup>319</sup> *ibid.*

<sup>320</sup> *ibid.* 125.

society.<sup>321</sup> The evidence used was to cite differences developed over centuries that would not change any time soon. Samuel Huntington argued these cultural differences are of greater significance than those of political ideologies and systems. Although such differences do not always lead to conflict and aggression, they have, as history shows, caused long-term disharmony and violence between different societies.<sup>322</sup> Add to Huntington's argument the premise derived from the democratic peace theory that democratic nations do not go to war with each other, the logical conclusion seems to be, therefore, that to reduce potential war, Islamic nations need to become democratic.<sup>323</sup> At the heart of political discourse on this issue is whether democracy is even possible in an Islamic State. Some scholars like Huntington declare that the only possible outcome of Islam and the West is a major clash. However:

more mutual respect between differing societies could be generated if Western culture recognised the potential of Islam to offer human dignity and justice in a nation based on Islamic principles. The government of Saudi Arabia has set the stage for an Islamic-based nation. In pursuit of this, it is slowly, but, surely undertaking reforms to realise more fully the true meaning of Islamic governance, where all citizens are treated equally. Saudi Arabia is accomplishing something that is of great importance to other Islamic nations. Its transformation holds out the possibility of having a tremendous constraining influence on elements of international terrorism, often emerging from groups that have been oppressed.<sup>324</sup>

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<sup>321</sup> Samuel Huntington, 'The Clash of Civilizations?' (1993) 72 (3) *Foreign Affairs* 1. He developed his thesis based on the idea that people from different civilisations have such different perspectives on issues of: relations between men and God; individuals and the group; citizen and State; family and State; as well as issues related to rights and responsibilities; liberty and authority; equality and hierarchy; and that there is therefore no common ground.

<sup>322</sup> *ibid.*

<sup>323</sup> Manus I. Midlarsky, 'Democracy and Islam: Implications for Civilizational Conflict and the Democratic Peace' (1998) 42 (3) *International Studies Quarterly* 486.

<sup>324</sup> Tim Niblock, *Saudi Arabia: Power, Legitimacy and Survival* (Routledge 2006) 5.

A central concern in these discussions emphasises the issue of the separation of powers and the rule of law. Traditionally, the separation of powers in a Muslim society came from the separation of the ruler's *siyasa* power and the authority of *fiqh* scholars. But this classic separation of power mostly disappeared during the era of colonialism which introduced the nation-State model of government, giving the State complete authority,<sup>325</sup> while simultaneously ignoring religious authority because the lack of separation between church and State is seen as being antithetical to democratic principles.

Islamic governance is viewed as undemocratic and unconstitutional in the minds of Western scholars, because they do not detect any separation of powers in that system. They believe that religious authority has no place in a democracy:

the separation of powers, combined with judicial protection of individual rights, forms the matrix of constitutionalism. Both of them are inseparable and indispensable for the functioning of a constitutional system that meets the standards of contemporary international law.<sup>326</sup>

Although some liberal concepts about constitutional monarchies were being promoted in parts of the Ottoman Empire in the late nineteenth century, it would be only with the departure of colonial powers that a new era of constitutionalism would even be possible in the Middle East. As independence was claimed and nationalism grew, Pan-Arabism spread, the establishment of Islam as the officially sanctioned religion of the State was developed, so a sense of national identity could be strengthened among mostly Muslim populations. Islam became a critical component in establishing political loyalties and in breaking out of the restrictions imposed by dynastic or tribal solidarity.<sup>327</sup>

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<sup>325</sup> Asifa Quraishi, 'The Separation of Powers in the Tradition of Muslim Governments' in Rainer Grote and Tilman Roeder (eds) *Constitutionalism in Islamic Countries* (Oxford University Press 2012) 63.

<sup>326</sup> Tilmann J. Roeder, 'The Separation of Powers in Muslim Countries, Historical and Comparative Perspectives' in Rainer Grote and Tilman Roeder (eds) *Constitutionalism in Islamic Countries* (Oxford University Press 2012) 321.

<sup>327</sup> *ibid* 7.

By the 1940s, with the failure of most Middle Eastern States to gain any cohesive national identity, Islamic constitutionalism began to take hold. As described previously, with the creation of the State of Pakistan in 1947, the fundamentalist movement there called for an Islamic Constitution rather than a secularised State. In such an Islamic State, the sovereignty of God would be recognised and not the sovereignty of the people.<sup>328</sup>

Pakistan was the first State to create a Resolution, the Objectives Resolution of 1949 that recognised Almighty God as the ultimate authority which would be delegated as a sacred trust from the limits placed on the State of Pakistan. The resolution committed the State to adhere to Islam and its principles of democracy, freedom, equality, tolerance and social justice. Pakistani citizens, both Muslim and non-Muslim would be able to live their lives with opportunities and protection of rights as set forth in the Holy *Quran* and the *Sunna*. Although this first Resolution is described as mostly symbolic, in 1956 Article 198 set forth stronger requirements that all laws must conform to the injunctions of Islam.<sup>329</sup> It was intended that a National Assembly would be formed that would monitor and review any and all laws to ensure they followed Islamic requirements.<sup>330</sup> At that time a National Assembly was formed, but within a year, the administration dismissed the Assembly. Maulvi Tamizuddin, President of the Assembly, challenged the dissolution, in the Sindh Chief Court, where the ruling resulted in his favour. However, the government appealed to a supreme court, where they won their appeal.<sup>331</sup>

A common question related to Islamic constitutionalism is whether it is the same as other democracies where the primary elements are those that protect the rights of individuals and groups and their ability to participate in the political process of a representative government. If it is different, are all citizens considered equal with the same freedoms of free speech and religion found in other democracies? Traditional Islam rejects democracy because Islam is perceived as a complete system which contains all of the rights, privileges, and protections that societies

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<sup>328</sup> Roeder (n 326) 8.

<sup>329</sup> *ibid.*

<sup>330</sup> *ibid.*

<sup>331</sup> 'National Assembly of Pakistan' 2012, para 8.



need,<sup>332</sup> while democracy is vulnerable to the frailties of a man-made system. This system of Islam is further supported by Men of Knowledge, the *ulama*, who are trusted to provide interpretation and proper application of divine sources as manifested in the *Hadith* and *Sunna* of Mohammed.<sup>333</sup> Consequently, since most Muslims see Islam as both a religion and a State, creating a written constitution was seen as unnecessary—the Holy *Quran* is the constitution.

Islam acknowledges that a ruling body is necessary to maintain social order, and chaos is avoided because Muslims are required to obey authority for the sake of public good. However, ultimate authority is only legitimate if the ruling body follows Islamic law. The natural outcome of this is that the faithful remain cooperative and loyal to government, on the basis that it operates according to the *Shar'ia* or the fundamental law of Islam.<sup>334</sup>

Not all Islamic States followed the same path. There is no one form of a Muslim nation: “The Muslim world is not ideologically monolithic. It presents a broad spectrum of perspectives ranging from the extremes of those who deny a connection between Islam and democracy to those who argue that Islam requires a democratic system.”<sup>335</sup> Consequently, while a nation might have a written constitution and laws might be developed, other nations required there to be a regulating body to ensure that those laws adhere to Islamic principles. Because of the diverse histories of the way that constitutional systems emerged in the Islamic world, there are different ways the separation of powers has been addressed.

Since the middle of the twentieth century, monarchies were no longer the dominant form of government. There are only three remaining absolute monarchies in the Islamic world: The Sultanate of Oman, the State of Qatar and the Kingdom of Saudi Arabia.<sup>336</sup> Even the absolute monarchies have introduced ‘quasi-constitutional’ documents.<sup>337</sup> Some countries, like Iran, see Islam as the constraining force on government, and when taken to the extreme as in Iran, this means that the clerical

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<sup>332</sup> Thomas Najjer, ‘Democracy under Islam: Rejection, Adoption or Containment?’ (2008) 6 (2) *Regent Journal of International Law* 419.

<sup>333</sup> *ibid.*

<sup>334</sup> Mughal (n 251) 33.

<sup>335</sup> Esposito and Voll (n 293) 1.

<sup>336</sup> Grote and Roeder (286) 337.

<sup>337</sup> *ibid* 336.

establishment must take the responsibility of State governance:<sup>338</sup> The concept has been challenged even in Iran, though. The Sunni see constitutionalism as relating more to the relationship between ruler and citizens; most “recent interpretations of Sunni constitutionalism, as expounded in the contemporary writings of the Egyptian Muslim Brotherhood, tend to stress the character of the constitution as a social pact between the ruler and the ruled.”<sup>339</sup>

In the traditional concept of social contract, as presented by Hobbes, Locke, and Rousseau, the critical notion is that of consent:<sup>340</sup> “Although contemporary social contract theorists still sometimes employ the language of consent, the core idea of contemporary social contract theory is *agreement*. Social contract views work from the intuitive idea of agreement.”<sup>341</sup> In the Islamic version, the ruled are expected to show allegiance to the rulers, and in return, the government performs critical functions, including maintaining stability, defending Islam and maintaining *Shar’ia*. If the ruler strays from *Shar’ia*, the citizens have the right of impeachment.<sup>342</sup> Importantly, this type of social contract also heralds the function of *Shar’ia* as placing limitations on constitutional government. This type of social contract also allows governments of various forms to develop, as long as they comply with Islamic principles in their law and policies. The basic principles required are *Shura* (consultation), *bayah* (pledge of allegiance), *ijma* (general consensus), public welfare (*maslahah*) and justice. A government that upholds these principles is able to repel (*fitnah*), which is chaos and turmoil.<sup>343</sup> These principles, according to Islamic scholars, are not unlike democratic government in that democracy is also based upon a set of key principles with the innate worth of citizens at its heart, as well as a government chosen by the people, the rule of law and

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<sup>338</sup> Grote and Roeder (286) 8.

<sup>339</sup> *ibid.*

<sup>340</sup> Fred D’Agostino, Gerald Gaus and John Thrasher, ‘Contemporary Approaches to the Social Contract’ *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed, Spring 2014 Edition), <<http://plato.stanford.edu/archives/spr2014/entries/contractarianism-contemporary/>> ;Samuel Freeman, *Justice and the Social Contract* (Oxford University Press 2007); Jürgen Habermas, *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society*, (Thomas McCarthy tr, Beacon Press 1985); John Rawls, ‘Justice as Fairness’ (1958) 67(2) *Philosophical Review* 164. Reprinted in *John Rawls, Collected Papers* (Samuel Freeman ed, Harvard University Press 1999).

<sup>341</sup> *ibid.*

<sup>342</sup> D’Agostino, Gaus and Thrasher (n 340) 9.

<sup>343</sup> Mohammed Hashim Kamali, ‘Constitutionalism in Islamic Countries, A Contemporary Perspective of Islamic Law’ in Rainer Grote and Tilman Roeder (eds) *Constitutionalism in Islamic Countries* (Oxford University Press 2012) 23.

equality for all. Like democracy, Islam contains a set of principles that require the same type of moral obligations, both legally and morally. The main difference is that in Islam, the people are not able to establish a legal order of their own accord. The *Shar'ia* is the foundation of the Islamic judicial system, and that cannot be undone by a group of people.

So while some scholars like Huntington and Kedouri, among others, argue that Islam and democracy are incompatible, many Muslim scholars challenge that view and point to Islamic interpretations that are expressions of support for democracy, including some by leading Islamist theorists.<sup>344</sup> Finally, they insist that openness, tolerance, and progressive innovation are well represented among traditions associated with the religion, and thus entirely compatible with Islam.<sup>345</sup> They argue that it is not Islam that has accounted for the failure of democracy in the Arab world, rather historical circumstances and economics are much more to blame.<sup>346</sup>

### ***3.6.1 The Islamic Social Contract -Umma (Community)***

The Western idea of social contract is a pact between the ruler and the ruled, whereby the ruled offer loyalty and obedience in return for the ruler providing what people need to live their lives with liberty, prosperity and freedom from being harmed by others.

In Islamic tradition, a social contract was formed when the Islamic community was founded by the Prophet in Medina (*hijra*). Interestingly, the forming of the Islamic community (*umma*) is considered so important to Muslims that the Islamic calendar starts, not at Mohammed's birth, but the year of the *hijra*. It was believed that community was as significant as any individual for the establishment of God's will on earth.<sup>347</sup> Many scholars, such as Kamali, see *umma* as the source of all political power.

The normative approach, adopted by Muslim jurists, maintains that the locus of all political authority is the community of believers who elect the caliph and obey

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<sup>344</sup>Tessler (n 290) 340.

<sup>345</sup> *ibid.*

<sup>346</sup> *ibid.*

<sup>347</sup> Esposito (n 298) 9.

him provided that the latter does not violate the *Shar'ia*. According to this approach neither the caliph, nor the people who elect him, possess unlimited sovereignty and the caliph exercises a limited authority that partakes in the nature of trust (*amanah*). Islam provides for a system of government accountable to the people. This accountability can be measured based on a well-defined set of criteria.<sup>348</sup>

The question is whether this rule stemmed from his divine office as Prophet or from deliberate choice of believers, who viewed him as best qualified.<sup>349</sup> Modern Islamic scholars choose the second view. So, the Islamic social contract is that God ordained the Prophet and when people commit themselves to Allah by following the teachings and authority of his Prophet, they will receive the benefits of security and prosperity in this life. After the death of the Prophet, the social contract was carried on. This second contract was formed by a process of selection of one of the believers by the others. This caliph assumed the function of the Prophet in administering existing law, but could not enforce new law.<sup>350</sup>

Both Islam and Western politics share the concept of a social contract/political pact (*'aqd siyāsi*) between the community and the ruler.<sup>351</sup> Islam, through Allah, guarantees human rights, and human rights are guaranteed by man in the West. In addition, the idea of consensus (*ijmā'*) in Islamic jurisprudence<sup>352</sup> is described by the Prophet's role in forming a social contract, which was to: express the message and convince people to believe it. Muslims hold differing views on the Prophet's role, although universally, all accept his actual rule. For instance, did his role go beyond proselytizing and incorporate political leadership? In other words, did his rule stem from his divine office as Prophet or did believers make a deliberate choice in choosing him to be the most qualified?<sup>353</sup>

Early Islamic systems were not democratic, however. Although *Shura* is embedded in Arab practice, and is basically democratic in nature, it was not

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<sup>348</sup> Mohammed Hashim Kamali, 'The Limits of Power in Islamic States' (1989) 28 (4) *Islamic Studies* 323.

<sup>349</sup> Shahrough Akhavi, 'Sunni Modernist Theories of Social Contract in Contemporary Egypt' (2003) 35 (1) *International Journal of Middle East Studies* 25.

<sup>350</sup> *ibid.*

<sup>351</sup> Arjomand (n 296) 125.

<sup>352</sup> The book *Islam and Democracy* (1993), written by Fahmi Huwaydi discusses the Islamic political pact at length and claims that because Islam contains democratic principles, it does not require a specific form of government, only that Islamic principles are followed.

<sup>353</sup> Akhavi (n 349) 24.

considered to be obligatory.<sup>354</sup> *Shura* did not constrain the powers of the caliph.<sup>355</sup> Additionally, the basic source of the separation of powers, the authority of the *ulama* (religious scholars) being relatively equal to State authority, was seriously eroded when the State took centre stage as the seat of power in Muslim States. With the emergence of modern law has come the growth of a new class of civil lawyers and judges, whilst the knowledge and skills of the *ulama* have become restricted to the family courts.<sup>356</sup>

Most modern *ulama* still believe they alone have the necessary religious training and so should be the primary authorities of law. Iranian society took this one step further and accepted the Ayatollah, a most respected *Alam*, as head of the government. Other religious leaders believe that national parliaments should rely on a Council or committee of *ulama* to advise them and the society on matters of law.<sup>357</sup>

Most Islamic nations today reject the single-party, autocratic State, and there is a new reading of Islam that is coming to dominate contemporary political discourse in the Muslim world. Of course, Islamic government is still obligated to implement *Shar'ia*, and *Shar'ia* encourages the participation of citizens, while the *Quran* upholds *Shura*. It is known that the Prophet himself used *Shura* as a regular part of his leadership. Kamali maintains that this makes *Shura* “a part of the normative precedent.”<sup>358</sup>

One of the pitfalls of Islamic governance is when there are no institutions created to prevent the tyranny of the religious majority. Additionally, only when judicial review that is sanctioned by a written constitution, and not subject to controls imposed by a military elite and which includes open access to citizens, can the protection of individual and minority rights be offered.<sup>359</sup> Many scholars today, including Samuel Huntington, argue that Islam and democracy are incompatible. At the same time, religion has almost disappeared from Western public political life and is seen more as a matter for personal life. Although it may seem that the reduction of religion in the public political realm was a universal trend, secularising politics was

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<sup>354</sup> Kamali (n 348) 29.

<sup>355</sup> *ibid.*

<sup>356</sup> Esposito (n 298) 232.

<sup>357</sup> *ibid* 233.

<sup>358</sup> Kamali (n 348) 29.

<sup>359</sup> Teczur (n 280) 480.

on the whole a modern European and Western Christianity development. The United States is one of the loudest proponents of the separation of Church and State. When Alexis De Tocqueville studied American democracy in 1831, he “understood that the American separation of church and State took government out of the business of coercing conformity, but it did not take religion out of public life. Religion remained one of the most important of institutions in American civil society.”<sup>360</sup> Tocqueville’s observations are still relevant today, more than a century after the publication of his treatise on American democracy.<sup>361</sup>

Most Muslims today rely on their religion to provide answers regarding jurisprudence and their personal lives. In order to accept the legitimacy of current governments, they expect that the principles of Islam will be the basis of governance. The need to secularise the government is not meaningful in an Islamic context. Why would humans think they could improve governance that is designed by Allah as expressed through his Messenger? This concept is mostly misunderstood by most Western scholars:

When we in the Western world, nurtured in the Western tradition, use the words "Islam" and "Islamic," we tend to make a natural error and assume that religion means the same for Muslims as it has meant in the Western world, even in medieval times; that is to say, a section or compartment of life reserved for certain matters.... That was not so in the Islamic world. It was never so in the past and the attempt in modern times to make it so may perhaps be seen, in the longer perspective of history, as an unnatural aberration....<sup>362</sup>

Nevertheless, scholars continue to speculate that without the separation of the sacred and profane, democracy cannot be attained in the Islamic world. This attitude continues even with the recognition of the major role religion plays in American politics.

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<sup>360</sup> Hefner (n 240) 493.

<sup>361</sup> *ibid.*

<sup>362</sup> *ibid* 497.

Caution needs to be taken when trying to describe an Islamic form of governance. There is no one Islamic model that defines how governance should be specifically structured. Some argue for a monolithic institution that has coercive power.<sup>363</sup> However, more moderate and conservative Islamist views argue against allowing a ruler to have too much power:<sup>364</sup> “By concentrating power in a ruler’s hands, such recipes only increase the likelihood that Islam’s high ideals will be subordinated to vulgar intrigues. Time and time again, we see unscrupulous despots wrap themselves in the mantle of Muslim piety.”<sup>365</sup> Not coincidentally, the Islam they promote is typically neofundamentalist, hostile to pluralism, justice, and civil decency<sup>366</sup> and therefore, against the basic principles of Islam which strive for justice and equality. A common theme in the 1980s and 1990s discourse related to Islam and Democracy was the failure of democracy in Islam, “The relationship between democracy and Islam has emerged to the forefront of international debate. Since the decline and fall of communism worldwide, both democracy and Islam, especially in its militant form, have experienced an international resurgence and a renewed vitality....”<sup>367</sup> The question being asked rather urgently is whether Islam poses a threat to Western values and democratic governance.<sup>368</sup> Samuel Huntington answered with a resounding yes! However, such claims are basically flawed because it is based on the false premise that there is a unified, consistent Islam that has emerged or “that there is one true, traditionally established, ‘Islamic’ answer to the question, and that this timeless ‘Islam’ rules social and political practice. There is no such answer and no such ‘Islam.’”<sup>369</sup>

The rise of Islamicism is not so surprising considering the failure of contemporary Islamic governance that gave rise to revolutionary actions like the Arab Spring. Revolutions occur when the current system is no longer satisfactory: “When order, identity, and resources collapse, believers flock back to their religion and seek in it not just a means of salvation in the afterlife, in its normal personal role,

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<sup>363</sup> Hefner (n 240) 498.

<sup>364</sup> *ibid.*

<sup>365</sup> *ibid.*

<sup>366</sup> *ibid* 499.

<sup>367</sup> Midlarsky (n 323) 485.

<sup>368</sup> *ibid.*

<sup>369</sup> *ibid.*

but also an answer to unsatisfactory conditions in the earthly life.”<sup>370</sup> Mustapha Kamal Pasha argues that modern illegitimate Islamic States and a growing disconnect between already fractured political Muslim communities, is providing an “opening to capture key institutions in civil society or to create alternative avenues of communal identity, participation, and civic action. Prospects for building a liberal democratic order hinge mainly on a resolution of the internal dialectic within these separate communities.”<sup>371</sup>

The Muslim Reformation of the twentieth century rejected religious bullying and encouraged a new understanding of the *Quran* gained with the perspective of modern realities. By doing this, many modern Muslim scholars believe they have found new meanings: “... the charge of this new reading is to recover and amplify Islam's democratic endowments, so as to provide the ethical resources for Muslims in a plural, mobile, and participatory world.”<sup>372</sup>

### ***3.6.2 Shura – Consultation and Deliberation in Islam***

In Arabic the root of the word *Shura* means to extract honey from the small hollow in the rock in which it is deposited by wild bees or to gather it from its hives and other places. In its more technical sense it is also defined as a collective endeavour for seeking an objective truth.<sup>373</sup> The term *Al-Shura* is a noun, meaning ‘consultation’, and in the verb form, *shaor*, it means to consult or to ask for advice.<sup>374</sup> Those who are involved in leadership, according to the *Quran*, have an obligation to involve others if the decisions to be made are related to common interests. The Islamic concept of *Shura* is where an accessible leader consults with learned and experienced citizens on matters of public concern.<sup>375</sup>

*Shura* has always been a critical instrument of government from an Islamic perspective. In fact, the lack of *Shura* has been used as a source of shame when

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<sup>370</sup> William Zartman, ‘Democracy and Islam: The Cultural Dialectic’ (1992) 581 *Annals of the American Academy of Political and Social Science* 185.

<sup>371</sup> Mustapha Kamal Pasha, ‘Predatory Globalization and Democracy in the Islamic World’ (May 2002) 581 *Annals of the American Academy of Political and Social Science* 121.

<sup>372</sup> Hefner (n 240) 499.

<sup>373</sup> Muhammed Nazeer K.Khel, ‘The conceptual and institutional development of shura in early Islam’ (1980) 19 (4) *Islamic Studies* 271.

<sup>374</sup> I.S. Al-Harbi, ‘Democracy in Islamic and International Law: A Case Study in Saudi Arabia’ (DPhil thesis, Brunel University London, 2010) 171.

<sup>375</sup> Majlis Al-Shura, Saudi Arabian Embassy, 2013 <[http://www.saudiembassy.net/about/country-information/government/Majlis\\_al\\_shura.aspx](http://www.saudiembassy.net/about/country-information/government/Majlis_al_shura.aspx)> accessed 1 April 2013.



critics accused despotic governments of being unjust. The ideal of *Shura* “was employed by groups that resisted power frequently using the concept of shura to embarrass or shame despotic rulers.”<sup>376</sup> Shortly after the death of the Prophet, *Shura* was seen as a symbol of legitimacy in politics. According to Islamic tradition since the time of the Prophet, then, the concept of *Shura* directly opposed autocratic rule and oppression.<sup>377</sup> Some of the controversy related to *Shura* was whether it was legally binding. Some Islamic jurists argued that *Shura* is binding, so the ruler has to follow any decisions arising from it. The majority of jurists concluded, however, that the decisions made by *Al-Shura* are advisory only, not binding. With this perspective, the balance of power between separate Islamic institutions, the executive and judiciary, is not the same as a separation of powers in a modern democracy; the balance of power is not between government institutions, but between the government as a whole and the non-governmental forces of scholarly academia. Neither of these held absolute power and each acknowledged the existence and the role of the other in the system.<sup>378</sup> Nevertheless, Islamic tradition does differentiate between laws created by Islamic scholars and by government officials.

### ***3.6.3 Islamic Separation of Powers: Fiqh and Siyasa***

It is commonly accepted that constitutionalism, along with the concept of the separation of powers, was not found in the Muslim world until the impact of European countries in the area after World War I. This assumption has been thrown into question. For example, there is evidence that in the earliest stages of the creation of an Islamic State, basic forms of the separation of powers were developed when the fundamental distinction between ruler-made law (*siyasa*) and scholar-crafted law (*fiqh*) manifested.<sup>379</sup>

Although the differentiation between *siyasa* and *fiqh* are considered a classic form of Islamic governance, this does not mean that Islamic societies evolved in consistent form. For example, Modern Islamic States adopted various ways in which national law is shaped by Islamic law. In some nations, Islam is recognised as the

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<sup>376</sup> Khaled Abou El Fadl, ‘The Centrality of Shariah to Government and Constitutionalism in Islam’ in Rainer Grote and Tilman Roeder(eds) *Constitutionalism in Islamic Countries*, (Oxford University Press 2012) 49.

<sup>377</sup> *ibid.*

<sup>378</sup> Quraishi (n 325) 63.

<sup>379</sup> Roeder (n 326) 323.

State religion but with limited effects, such as in Algeria, Jordan and Yemen.<sup>380</sup> The Algerian Constitution, for example, does not even mention Islamic law, but a few legal systems, such as in Saudi Arabia and Iran, are based primarily on religious law. Some nations, like Egypt and Pakistan, afford much more deference to Islamic law; however, while it is part of substantive law, it is not the dominant source of legislation, being applied mostly when dealing with personal issues.<sup>381</sup>

Besides the actual role Islamic law plays in different Islamic nations, there is a vast diversity in the way in which Islamic law is interpreted and applied in Muslim societies.<sup>382</sup> Consequently, in many Islamic States, religious law plays no role at all or a very minor one. Saudi Arabia, then, took a much different approach to Islamic Constitutionalism than many other Islamic States. Saudi Arabia rejected a Western style Constitution, and instead held the conviction that the constitution of an Islamic State is the Holy *Quran* itself and the *Sunna* of the Prophet. It was not until the second Gulf War that the Saudi rulers felt pressured to constrain its autocratic rule, and consequently, created the Basic Law of Governance, 1992.<sup>383</sup>

*Shar'ia* is God's law. There are two tangible sources of information about God's law—the *Quran* and the lived example of the Prophet Mohammed. In reality, though, the *Quran* and the life of Mohammed do not answer every legal question that comes forward, so Muslim scholars devote a good portion of their lives to interpreting the two sources to form new legal rules that are needed for application to new situations. These laws are called *fiqh* which means understanding:

The use of the term *fiqh* and not *Shar'iah* for these rules is significant and reflects a fundamental epistemological premise of Islamic jurisprudence. Muslim *fiqh* scholars undertook their work of interpreting divine texts with conscious awareness of their own human fallibility.<sup>384</sup>

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<sup>380</sup> Rudiger Wolfrum, 'Constitutionalism in Islamic Countries, A Survey from the Perspective of International Law' in Rainer Grote and Tilman Roeder (eds) *Constitutionalism in Islamic Countries* (Oxford University Press 2012) 77.

<sup>381</sup> *ibid.*

<sup>382</sup> *ibid* 79.

<sup>383</sup> Grote and Roeder (n 286) 9.

<sup>384</sup> Quraishi (n 325) 64.

This process of legal interpretation is a human activity, and conclusions cannot be claimed with complete certainty, only probabilities. The authority of *fiqh* came in part from the sincerity of the process of interpretation (*ijtihad*) of the scholars, not necessarily the correctness of the results. In other words, conclusions drawn by the scholars were considered legitimate if the legal reasoning came from sincere *ijtihad*. As more and more scholars engaged in *ijtihad*, “a healthy and unavoidable Islamic legal pluralism emerged, both in interpretative methodologies and specific bodies of doctrine.”<sup>385</sup> The resulting diversity evolved into several schools of law, each attaining equal legitimacy and authority for Muslims who want to live by *Shar’ia*. So, while Muslims believe there is only one law of God, *Shar’ia*, there are many different versions of *fiqh* that reveal the Law to humans. Still, while *Shar’ia* is not fallible because it is God’s law, *fiqh* certainly is, being the product of human interpretation.

*Ijtihad* is only able to be performed by *fiqh* scholars, without interference from rulers. However, it is recognised by *fiqh* scholars that in order to maintain order in the society, rules and regulations might be needed and only institutions that held legitimate power (caliph, sultan or king) over the people could develop such rules. These ruler-made laws are known as *siyasah*, which means administration. *Siyasah* is considered legitimate under *Shar’ia* because these laws are intended for the public good (*maslahah*). The rules that create order are so important for the service of the public good, that *fiqh* scholars believe *siyasah* must be respected and obeyed. *Maslahah*, the public good, is extremely important; it is thought this is likely why many classical *fiqh* scholars are generally deferential to rulers. Many contemporary Muslim advocates of democracy find the historic deference of the *fiqh* scholars to be frustrating, particularly their reluctance to challenge none but the most extreme *siyasah* laws.<sup>386</sup>

As a consequence of the two sources of law in an Islamic system - *fiqh* and *siyasah*, the division of power in an Islamic State is not a theocratic distribution of power. Those in physical power (king, sultan, caliph) are different from those who develop religious law and in most Muslim nations religious scholars do not hold

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<sup>385</sup> Quraishi (n 325) 64.

<sup>386</sup> *ibid* 65.

temporal power. Rulers appoint *fiqh* scholars as judges, but usually they respect *fiqh* diversity by appointing judges from the various schools of law.<sup>387</sup>

The realms of *fiqh* and *siyasah* form a check and balance system. *Fiqh* scholars garnered a significant amount of respect from the people, and rulers were conscious that to take action without the approval of the scholars could cause significant social opposition.<sup>388</sup> Consequently, the Islamic judiciary was separated from the executive even as early as the time of the third Caliph (AH 23 (643/644), and it had the power to strike down a Caliph's orders if they were in conflict with the *Shar'ia*. All were equally subject to law. Justice was based on an adversary system where the involved parties were heard and evidence examined. All decisions were recorded so they could be reviewed in a system that had a hierarchy of courts and appeals came from a lower court to a higher court with an ultimate appeal to the Caliph.<sup>389</sup>

Additionally, *fiqh* scholars would not be able to overly undermine the authority of the government because they did not command an army.<sup>390</sup> Noah Feldman claims that this balance ensured the success of the traditional Islamic system of governance for so long.<sup>391</sup> Some Islamic historians like Feldman, the author of *The Fall and Rise of the Islamic State* argue that it was the loss of this classic separation of powers between *fiqh* and *siyasah* that led to the downfall of the Ottoman Empire.<sup>392</sup> As the *fiqh* scholars lost their role and authority as lawmakers, this left a void in an effective way to balance the power of the rulers and gained the Sultan additional powers.<sup>393</sup> *Shar'ia* itself is a balance against State power:

The Islamic State is distinguishable from the Western nation-State by the fact that sovereignty in the latter admits no formal restraints. The nation-State claims to possess unrestricted power to legislate. Since the Islamic State is not vested with unlimited sovereignty, it lacks the authority to enact law that subjugates the citizen to the exercise of arbitrary power, or a law

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<sup>387</sup> Quraishi (n 325) 65.

<sup>388</sup> Roeder (326) 323.

<sup>389</sup> Mughal (n 251) 33.

<sup>390</sup> Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton University Press 2008) 6.

<sup>391</sup> *ibid* 7.

<sup>392</sup> *ibid* 68.

<sup>393</sup> *ibid* 69.

that may be repugnant to the Shar'iah. Likewise since the Shar'iah exists independently of the will of the State, the citizen of the Islamic State is enabled thereby to judge the legality and propriety of government by a set of well-established principles enunciated in the Qur'an and Sunna.<sup>394</sup>

Additionally, it has been more common than not for *ulama* not to accept the legitimacy of those in a position of rule. In fact, there has been a traditional tension between rulers, *ulama* and Islamic jurists because of the independence of *Shar'ia* scholars and leaders. This anti-government position was possible precisely because of the independence of *Shar'ia* which has acted as a protective code for the rights of people that even the most ruthless ruler could not cross.<sup>395</sup> Moreover, *usul al-fiqh*, the process of developing evidence to authenticate Islamic law does not require governmental approval, but is an independent process carried out by Islamic scholars and jurists.<sup>396</sup>

The classic division of *fiqh-siyasah* is a separation of powers that has the potential to inform modern Islamic constitutionalism—some scholars call it the “*Sha'ria* check.”<sup>397</sup> This *Shar'ia* check has manifested itself in some Muslim-majority countries when a branch of government is given the authority to perform a *Shar'ia* check on the laws of the country. Such a branch would be given the authority to strike down any legislation that is not consistent with *Shar'ia*.<sup>398</sup>

The classic *Shar'ia* style of the separation of powers is not the same as the modern concept of the division of powers. The modern version is a separation of State powers from each other, while the classic *Shar'ia* style is a balance of power between State and non-State institutions. Colonialism ended this traditional separation of powers in the Islamic State because colonialism injected the nation-State model of government where the State holds all the authority. *Fiqh* scholars are still in operation, but they do not have an alliance with the State which is balanced

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<sup>394</sup> Kamali (n 348) 16.

<sup>395</sup> *ibid* 15.

<sup>396</sup> *ibid* 16.

<sup>397</sup> *ibid* 17.

<sup>398</sup> *ibid*.

and interdependent.<sup>399</sup> Unfortunately, even Muslims are unclear about the difference between *fiqh* and *Shar'ia*, so there is a possibility that a popular majority could legislate their own version of *fiqh* laws<sup>400</sup> claiming they are *Shar'ia* and mandated by Islam and therefore not requiring public debate. The role of the *fiqh* scholar in Muslim societies, who offered a credible non-governmental check on State power, lost recognition.<sup>401</sup> According to Islamic scholar Asifa Quaraishi, without the power of the *fiqh*, the *Shar'ia* authority given to government, risks the establishment of an Islamic theocracy:

Ironically, this phenomenon is new in Muslim history, created by the effort to recognise a role for Shariah within modern constitutional norms. But it is decidedly different from the classical separation of *fiqh* and *siyasah* powers, and it risks rejection by global constitutional norms which tend to presume no public role for religious law. The challenge for Islamic constitutionalism in the modern era will be to find effective solutions to this problem, exploring creative divisions of legal and political authority that will resonate with both the democratic and Islamic affinities of Muslims today. Variations on the classical *fiqh-siyasah* separation of powers may be a useful direction of inquiry.<sup>402</sup>

### **3.7 Is Democracy in Islam A False Promise?**

Firstly, there is no one type of Islamic State. Several variations have been implemented over time and geographic space. Consequently, there is widespread diversity in contemporary Islamic governance. For example: Saudi Arabia is governed by a conservative monarchy; Iran is a clergy-run State; Sudan and Pakistan's Islamic governance are militarily imposed, and; there is the recently failed Muslim Brotherhood's attempt at creating an Islamic State in Egypt. One issue binds them all together. In the last decade or two, all of these States have faced the

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<sup>399</sup> Quaraishi (n 325) 71.

<sup>400</sup> *ibid.*

<sup>401</sup> *ibid.*

<sup>402</sup> *ibid* 73.

challenges of reform, and the major theme continues to be the relationship between Islam and politics and the governance of the State. <sup>403</sup>

Secondly, and unsurprisingly, given the diversity among contemporary Muslim scholars, the range of the debate on Islam and its compatibility with democracy ranges from those who argue that there is no link between Islam and democracy to those who claim that Islam is in need of a democratic government.<sup>404</sup> These diverse voices include ultraconservatives and extremists who argue that Islam has its own mechanisms to create a just society and assert that democratic conventions are not necessary. Others argue that democracy can only be realised if there is a separation between church and State, with religion being a matter of the private domain.

It is possible to categorise these diverse range of views into three distinct groups in Islamic thought that have polarised the progress of reform in the Muslim world. The first group is labelled as the rejectionists who reject completely any type of Western democratic activities in Islamic governance. The second, known as the secularists, would like to see a Western, secularised governance. The third group, reformists, believes that through a process of reform, democracy can be achieved using traditional Islamic concepts, which include such features, as:

- *shura* (consultation between the ruler and ruled)
- *ijma* (community consensus)
- *maslaha* (public interest) and;
- *ijtihad* (using human reason to reinterpret the Quran to meet the changing needs of society).

Parray states that, “these mechanisms can be used to support parliamentary forms of government with systems of checks and balances among the executive, legislative and judiciary branches.”<sup>405</sup>

But what is the individual’s role and responsibility in relation to citizenship within the belief system defined within Islam? According to a genuine conviction

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<sup>403</sup>Tauseef Ahmad Parray, ‘Islamic Democracy or Democracy in Islam: Some Key Operational Democratic Concepts and Notions’ (2012) 2 (2) World Journal of Islamic History and Civilization 67.

<sup>404</sup> *ibid* 68.

<sup>405</sup> *ibid* 69.

and belief, Islam teaches that God alone is the One who is All-knowing, All-powerful and must be obeyed unconditionally.<sup>406</sup> Human beings are seen as having relative knowledge and no absolute power. They are all seen as being equal and enjoy the dignity granted to them by God since their creation. Each is accountable in this life and in the life to come for his or her deeds.<sup>407</sup> That all people are granted this freedom and liberty through their belief in God is a given in Islam.

Every matter, even the faith itself, should rely on one's conviction about what is right and what is wrong without any coercion or intimidation. As the *Quran* says, "No coercion is [allowed] in matters of faith."<sup>408</sup> Based on these beliefs, no human being can decide, arbitrarily and independently, a matter that concerns others as opposed to himself or herself alone, nor indeed claim, if he or she has done so, immunity from accountability. The *Quran* therefore enshrines the need for *Shura* – the engagement of an individual with others to reach a decision on a matter that concerns them all,<sup>409</sup> subsequent to and a condition of Islamic faith in God. It represents a positive response to His message. It is noteworthy, that such a personal responsibility within Islam comes next to the commitment in making prayers to Him: "... and those, who respond to [the call of] their Lord, and keep up the prayers, and whose rule in a matter [of common concern] comes out of consultation among themselves..."<sup>410</sup> The initiative of involving others in making a decision of common interest has to come from those who are responsible for leadership and making such decisions. That said, those people being consulted have an equal responsibility to offer, in return, their *nasihah* (advice) to the leadership in a way which is suitable, since giving advice is an obligation of every individual towards leaders and the public. It is "*a'imat al-Muslimin wa 'ammatihim*"<sup>411</sup> (joining the doing of what is right and good and forbidding the doing of what is wrong and evil), according to a tradition of the Prophet reported by Muslims – that is the responsibility of the State authorities as well as the people.<sup>412</sup>

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<sup>406</sup> Fathi Osman, 'Islam in a modern State. Democracy and the Concept of Shura' (2001) Centre for Muslim-Christian Understanding, History and International Affairs 8.

<sup>407</sup> *ibid.*

<sup>408</sup> *ibid* 10.

<sup>409</sup> *ibid* 11.

<sup>410</sup> *ibid.*

<sup>411</sup> *ibid*12.

<sup>412</sup> *ibid*13.



### 3.8 Conclusion

Muslim scholars are being encouraged to become engaged in the consideration of democracy in the Muslim World. This scholarly activity is urgent because of current political trends, which include, on the one hand, a declaration that the Cold War and Communism have ended, and that Western liberalism has brought the “end of history.”<sup>413</sup> On the other hand, there is widespread concern about the resurgence of religion and the rise internationally of fundamentalism and disquiet about a future marked by a “clash of civilizations.”<sup>414</sup> It is a sobering time for intellectuals, particularly those representing the Muslim *umma*, for they need to address themselves to the issues that are being debated in the academic world as well as in its corridors of power, and to try to rethink the strategy of Islam and the Muslim *umma* based on these challenges.

However, Muslims are not the only ones that are being called upon to revisit and address the meaning of Islam and its relation to modern democracy. Karen Armstrong, who wrote the foreword to Esposito’s book, argues that democratic reform in the Muslim world is not just an urgent regional issue but a global one. She writes that this book helps us to recognise that the future of Islam does not just depend on whether or not a few reformers achieve success, but that the US and Europe are major players in the process. She argues, that if short-sighted Western policies are not reviewed and amended, they will continue to affect the region in a negative way. This will in turn weaken the will for reform and strengthen the resolve of extremists.<sup>415</sup> Consequently, she hopes that readers of the book will gain a more balanced and nuanced view of the Muslim World.<sup>416</sup>

As stated earlier in this chapter, Islam manifests itself in different forms of governance in today’s Muslim nations. Yet, such differences should be of no surprise, considering that democracy too, is a multifaceted philosophy. Muslims possess a moral and ideological identity and a culture and history which differs from

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<sup>413</sup> Ahmad Khurshid, ‘Islam and Democracy: Some Conceptual and Contemporary Dimensions’ (2000) 90 (1/2) *Muslim World* 1.

<sup>414</sup> *ibid.*

<sup>415</sup> Karen Armstrong, Foreword, *The Future of Islam* (Oxford University Press 2013) ix.

<sup>416</sup> *ibid.*

that of the West. It is therefore, unacceptable and flawed to assert that Western style democracy is suitable and indeed ideal for all nations.<sup>417</sup>

Insisting on the adoption of a Western model of democracy, is not only Eurocentric, but raises the historical spectre, yet again, of political colonialism. No wonder then, that many Muslims perceive the insistence, at the very least, is a short-sighted and/or insultingly uninformed view of some Western scholars who appear to flatly reject the principles of Islam and its ability to promote a just society based on liberty and freedom.

An Islamic political order is based on the concept of *Tawhid* (one God) and seeks its flowering in the form of popular vicegerency (*Khilafa*) operating through a mechanism of *Shura*; this is supported by the principles of equality of humankind, rule of law, protection of human rights (including those of minorities), accountability of rulers, transparency of political processes and an overriding concern for justice in all its dimensions: legal, political, socio-economic and international.<sup>418</sup> One of the key concepts of Islam is that it has established a system of life based on following the true path of God. This true path includes the way society is governed.

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<sup>417</sup> Khurshid (n 413)1.

<sup>418</sup> *ibid* 2.

## Chapter Four: *Shura*: Deliberative Democracy, An Islamic Perspective

*And consult them in affairs (of moment) then,  
when thou hast taken a decision,  
put thy trust in God.<sup>419</sup>*

### 4.1 Introduction

Democracy is a set of ideals to create a just society, as well as a form of government. It is meant to preserve the dignity of the citizen and freedom from any type of oppression, along with the ability of citizens to participate in government. However, direct democracy is not practical in nations that have large populations, so democratic countries use representative democracy, where elected representatives make political decisions based on the interests of those they represent. To make the most informed and wisest decisions, deliberation is required. Democracy is meant to provide a vehicle for the will of the people to manifest itself in governance. Ideally, the will of the people is both deliberative and representative. Deliberation provides a variety of viewpoints and interests and representation should be broad enough to cover the interests of a majority of citizen groups. In Islam, the practice of *Shura* amounts to deliberation, and when those involved in *Shura* represent various parts of society, then two of the most basic requirements of democracy can be met—the will of the people through representation.<sup>420</sup>

### 4.2 The Nature of *Al-Shura*

The introduction of the *Majlis Al-Shura* law states:

... in compliance with the words of God, “Consult them on the affair,” and His other words, “Their affairs are carried out in consultation among themselves,” and following the Sunna of His Messenger (PBUH) who consulted his companions, and after taking cognizance of the previous *Shura* (Consultative) Council of 1347H.... and following the Sunna of His Messenger (PBUH)

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<sup>419</sup> Holy *Quran*, Chapter 3, Verse 159.

<sup>420</sup> James Fishkin, ‘Reviving Deliberative Democracy’ (nd) The Centre for Deliberative Democracy, Stanford University 181 <<http://cdd.stanford.edu/research/papers/2014/fishkin-reviving-deliberative-democracy.pdf>> accessed 15 April 2014.

who consulted his Companions and urged the Nation to engage in consultation, Majlis Ash-Shura shall be established to exercise all tasks entrusted to it according to this Law and the Basic Law of Governance while adhering to the Book of God and the Sunna of the Messenger (PBUH), maintaining brotherly ties and cooperating in kindness and piety.<sup>421</sup>

*Al-Shura* is meant to be conducted with freedom where people are free to speak their mind and express their opinion without any hesitation or pressure. There are many examples in Islamic history from the life of the Prophet Mohammed that models his desire to have his companions freely express their opinions. For example, at the battle of Uhud, the Prophet wanted to defend the city from inside, but his companions did not agree, so he followed them. The tradition of freely speaking was carried on in the spirit of the prophet. 'Umar, the second Khalifah is reported to have addressed the meeting of *Al-Shura* by saying,

I have called you for nothing but this that you may share with me the burden of the trust that has been reposed in me of managing your affairs. I am but one of you, and today you are the people that bear witness to truth. Whoever of you wishes to differ with me is free to do so, and whoever wishes to agree is free to do that. I will not compel you to follow my desires.<sup>422</sup>

It is this spirit of respect and collaboration that represents the tradition of *Shura* in Islam and is why it is highly valued as a part of the collective identity of Muslims. Westerners pride themselves on individual liberties and individual identity; however, collectivity is more valued in Islam as a concept that brings unity, harmony and peace among human beings. Ultimately, a goal of Islam is that all humans should be united in peaceful cooperation so that all can live in peace and happiness. The idea of collective decision-making in government is a natural offshoot of the way

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<sup>421</sup> Majlis Ash Shura Law, Royal Embassy of Saudi Arabia, <[http://www.saudiembassy.net/about/country-information/laws/Majlis\\_Ash\\_Shura\\_Law.aspx](http://www.saudiembassy.net/about/country-information/laws/Majlis_Ash_Shura_Law.aspx)> accessed 15 June 2014.

<sup>422</sup> Muhammad Shafiq, 'The Role and Place of Shura in the Islamic Polity' (1984)23 (4) Islamic Studies, 435.

Islamic society should work in general. Is this democracy? Not exactly, but it has a similar spirit which is to protect the good and dignity of human beings in their society.

Most Muslim scholars would argue that *Shura* is actually a superior form of democracy in action than any Western-style representative decision-making. The principle of *Shura* is considered to be a Muslim duty and it is believed that when it is used correctly, as it was in the time of the Prophet and his four successors, that it has all the benefits of liberal democracies. However, the difference is that it does not possess the same weaknesses and therefore carries less risk.<sup>423</sup>

To participate as a member of the *Shura* Council is highly respected. The tradition is that men or women who serve as *Shura* members are highly talented and educated and held in high esteem within their respective professions. Such a body of well-respected men served the Prophet and gave him their opinion on matters referred to them. This was the *Shura* or consultative body. *Shura* was developed as a fundamental practice in governance in Islam from before the time of the Prophet. His first four successors are known by history to have practiced *Shura* as well. A consultative Council was to be established by each leader of government so the leader could consult with this Council in order to administer the affairs of State with their consent.<sup>424</sup> *Shura* is considered sacred due to its revered nature. The Prophet declared that Muslims need to practice mutual counsel in their affairs. He is reported to have said: "If your leaders are virtuous, your rich men generous and your affairs are settled through mutual consultation the surface of earth is better for you than its bottom."<sup>425</sup>

#### ***4.2.1 Shura before Islam***

*Shura* is pre-Islamic in that it is a part of ancient Arabian culture and tribal government. In fact, it is a continuation of the tribal institution called *nadi* (Council of Elders), which was later perfected by the moral principles set forth in the *Quran*.<sup>426</sup> Tribal leaders were elected by consensus (*Shura*), based on wisdom,

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<sup>423</sup> Uriya Shavit, 'Is Shura a Muslim Form of Democracy? Roots and Systemization of a Polemic' (2010) 46 (3) Middle Eastern Studies 351.

<sup>424</sup> Amir Hasan Siddiqi, *Studies in Islamic History* (Jamiyatul Falah Publications 1967) 94.

<sup>425</sup> Khel (n 373) 272.

<sup>426</sup> *ibid.*

leadership, generosity, and skill in battle. Once elected, if the situation changed or if they were felt not to be up to the challenge, a new leader could be chosen, also by consensus. There was no automatic right to be the leader and no hereditary right to assume leadership from one's father, uncle or brother, although close relatives of a former leader were often chosen. Every man in the tribe had the right to lead and even when chosen by the application of *Al-Shura*, he led as the steward of tribal resources, the "first among equals." Such a leader was required to use *Al-Shura* in major decision-making by consulting tribal elders.<sup>427</sup>

When a patriarchal kingship was established in Mecca by Qusayy around 500CE, supreme authority was given to a relatively small number of privileged people based on social status. These were most commonly the heads of the various clans of the tribe of Quraysh and of their allies, who together formed the *nadi*. This Council regulated all the religious, political, economic and social affairs of the community in Mecca. The Council of Elders was not an elected body, but was accepted as reflecting the will of the tribe because of its legitimacy within the tribal structure. It was an executive more than a legislative Council.<sup>428</sup>

#### ***4.2.2 Islamic Influence on Shura***

Later, under the influence of Islam and *Shura*, the members of the Council were no longer selected because of ancestry or their social status within the tribe but on the basis of their religious affiliation. The *nadi* was replaced by *Shura*, the authority of which came from the consensus of the Muslim *ummah* (community). Through this transformation of tribal communalism into Islamic individualism and collectivism, the conditions for a new kind of popular participation were created.<sup>429</sup>

The sanctity of *Shura* cannot be overemphasised, because it is believed that Allah asked the Prophet Mohammed to use *Shura* in matters of government. Thus, the directive to use *Shura* comes directly from God. Additionally, it is believed that God asked Mohammed to use *Shura* to set a precedent for the way in which government should be managed in the future.<sup>430</sup> When decisions had to be made, and

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<sup>427</sup> Khel (n 373) 272.

<sup>428</sup> *ibid.*

<sup>429</sup> *ibid.*

<sup>430</sup> M. A. Al-Muhanna, 'The Saudi Majlis Ash Shura. Functions and International Role:1993-2003' (DPhil thesis, University of Durham 2005) 47.

if there was no clear and specific guidance to be found in the *Quran*, then the Prophet is reported to have explained that Muslims should resolve any issues through mutual counsel, but on condition that the men were pious and held sound opinions.<sup>431</sup> Tradition also maintains that when the Prophet was asked about the meaning of some of the terms in the Quranic verse III: 159, he was reported to have said: “Consulting men of sound opinion and resolving the matter in light of the same.”<sup>432</sup>

Even though the concept of consultation comes from a much older Arab tradition, it is considered inherently Islamic because the process was used and recommended by the Prophet. There are two *Shuras* in the *Quran* which discuss *al-Shura: Al-Imran* and *Al-Shura*. There are also books which attempt to explain the *Hadiths* regarding *Al-Shura* and books which explain *Al-Shura* as used in Islamic law. Thus, *Shura* has a long heritage and is a broad and profound concept within Islam. Obviously *Shura* has not been fully implemented in accordance with Islamic law in and by modern Islamic governments.<sup>433</sup> There are various reasons for this, including tribal legacy and power structures. While a majority of Muslims may not be pushing for more *Shura*, in the opinion of most Muslim jurists, *Shura* is part of *aza'im al-ahkam* (the commandments), which are obligatory for the ruling authority and the Muslim people.<sup>434</sup>

The concept of *Al-Shura* is mentioned specifically in the *Quran* in two places; one being the chapter on *Al-Shura* described above, as found in Surat/chapter 42, Ayat/verse 38. The second mention of *Shura* in the *Quran* is when Allah ordered Mohammed to practice *Shura* during his lifetime:

It is part of the Mercy of Allah that thou dost deal gently with them. Wert thou severe or harsh-hearted, they would have broken away from about thee: so pass over [their faults] and ask for [Allah's] forgiveness for them; and consult them in affairs [of moment]. Then, when thou hast taken a decision put thy trust in Allah. For Allah loves those who put their trust [in him].<sup>435</sup>

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<sup>431</sup> Al-Muhanna (n 430) 47.

<sup>432</sup> Khel (n 373) 273.

<sup>433</sup> Al-Muhanna (n 430) 80.

<sup>434</sup> A. Shafaat, 'A More Detailed Look at the Quranic Principle of Shura' (Winter 1980) Islamic Perspectives <<http://www.islamicperspectives.com/Shura.htm>> accessed 15 November 2013.

<sup>435</sup> Holy *Quran*, surat al Imran, verse 159.

This particular passage is written in the imperative tense, which is used in Arabic to discuss obligations, further reinforcing the idea that *Shura* is obligatory.<sup>436</sup> Additionally, the fact that these statements are attributed directly to revelations of the Prophet Mohammed gives them extra weight.<sup>437</sup>

Subsequently, the Prophet went on to construct a set of practices regarding *Shura*, which he and the four Caliphs who immediately followed him, used frequently in their dealings with the community. This is reflected in the many *Hadiths* where the Prophet was consulted regarding the concerns of daily living, and where he consulted with his advisers on the decisions which had to be taken for the good of the community. For example, one of the companions, Abu Huraira, is quoted as saying: "I have not seen any person doing more *Shura* than [Mohammed]."<sup>438</sup> Additionally, it appears that in addition to the companions, the Prophet counselled many others about the value of *Shura*. It might be argued that with Allah to guide him, Mohammed did not need the opinion of his companions. In reality, however, he both wanted and needed their counsel, especially concerning the day-to-day matters of the community.<sup>439</sup>

The *Quran* and the *Sunna* both show the need for multiple perspectives when dealing with worldly issues.<sup>440</sup> One requirement of Islam is that all must work for the interest of the community. This can only happen if leaders take the opinions of their subjects into consideration when making decisions, which in turn makes them more likely to serve the public interest.<sup>441</sup> Umar describes *Shura* as follows: "The opinion of one man is like the cloth woven of one thread; the opinion of two like the cloth made of twisted thread and the opinion of three (or more) like a piece of cloth woven of several threads together that can hardly be torn into pieces."<sup>442</sup>

The *Quran* suggests that all members of a community should participate in *Shura*. However, as the numbers of Muslims increased, the practice of *Shura* underwent some necessary changes and became more indirect. The companions of

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<sup>436</sup> Al-Harbi (n 374) 172.

<sup>437</sup> *ibid.*

<sup>438</sup> Jama Al Tirmithi, Hadith No 4/213.

<sup>439</sup> Al Harbi (n 374) 175.

<sup>440</sup> *ibid* 174.

<sup>441</sup> Khel (n 373) 279.

<sup>442</sup> *ibid.*



the Caliph would first consult with the *ummah* (Muslim community). After gathering the input of the people, the companions would act as the representatives of the members of the community whom they had met, and decisions would then be made based on the outcome of those consultations.<sup>443</sup>

Through the practice of *Shura*, a collective product is generated that comes from joint thinking, experience, diligence, scholarship, knowledge, expertise and continuous research and study.<sup>444</sup> *Shura* applications and results should conform to the Islamic faith and *Shar'ia*.

*Shura* requires serious and effective participation in making any decision. When the Prophet received the divine revelation to rely on *Shura* in making decisions concerning common matters for which no specific revelation had arrived, this knowledge alone might have been expected to reveal the necessity of *Shura* in a Muslim society. Ibn 'Atiyya stated his opinion by commenting:

*Shura* is one of the basics of Islamic law (*Shar'ia*), and a mandatory rule; and any [who is entrusted with a public authority] who does not take the counsel of those who have knowledge and are conscious of God, should be dismissed from his [or her public] position, and there is no argument about that.<sup>445</sup>

On confronting his enemies from Quraysh, who had challenged him by setting up their camp near Medina, the Prophet consulted his companions on the matter. On the basis of their opinions, he decided to meet his enemies in the battle of Badr; this occurred in the year 1 AH/622 CE. Later, the Prophet also consulted his companions about whether to go out of Medina to meet the attacking army or to stay in the city and defend it when they attacked; he followed the opinion of the majority and met them in the battle of Uhud in 3 AH/624 CE. When a coalition of tribes launched an attack against Medina in the year 5 AH/626 CE, the Prophet's suggestion to give one of the attacking tribes some of the city's produce to persuade

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<sup>443</sup> Shafaat (n 434).

<sup>444</sup> S. Humaid, *The Shura Council in the Kingdom of Saudi Arabia*. 3.

<sup>445</sup> Osman (n 406) 10.

them to withdraw, was met with disapproval by some of his companions. He accepted their views. Later, in the year 23 AH/644 CE, when the Caliph ‘Umar was stabbed to death by an assassin, a committee had been appointed to discuss, among themselves and with the people, who would succeed him; their decision had to be that of the majority.<sup>446</sup>

Caliph Omer Ibn Al-Khattab is reported to have said: “No one can become caliph without *Shura*.”<sup>447</sup> This implies that there should be a consensus among Muslim scholars as to the importance of *Shura* in Islamic Law; however, there are those who, while conceding its importance, believe nevertheless that *Shura* should be practised in a flexible manner. For example, there is apparently no established way of choosing those to be included in a *Shura* Council, or any agreed number of participants. It is believed that all practices and procedures for this important system should be flexible, to meet the needs of the people at a specific time and place.<sup>448</sup> Most jurists see the practice of *Shura* as a sacred responsibility, and true believers would necessarily incorporate *Shura* into Islamic governance. In this way *Shura* with its strong moral roots, would become a form of worship, a religious ritual, by means of which a *Shura* Council member, a Muslim individual, and the society as a whole would strive to please God.<sup>449</sup> However, recognising the religious importance of *Shura* in society does not settle the questions about *Shura* or its practice.

The *Quran* praises Muslims who use *Shura* in their daily affairs. As a consequence of faith in God, participation with others is required in decisions that concern them, in part because in Islam all are equal and no one should be placed above others. The necessity for consultation comes directly from the *Quran*, in which an entire chapter is devoted to it: “and those, who respond to [the call of] their Lord, and keep up the prayers, and whose rule in a matter [of common concern] comes out of consultation among themselves...”<sup>450</sup> Thus, *Al-Shura* is a principle in Islamic Law to ensure majority rule, not autocratic rule.<sup>451</sup> Although considered a principle of Islamic Law, this has not necessarily led to the use of *Shura* by modern Islamic leaders, and in fact Saudi Arabia did not re-implement the practice until relatively

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<sup>446</sup> I. Al-Asqalani, *Fatah al-Bari* ( Al-Salafeah Press 1984) Hadith No. 1779.

<sup>447</sup> *ibid.*

<sup>448</sup> ‘Al-Shura’ Kingdom of Saudi Arabia < <http://www.saudiembassy.net/>> accessed July 2014.

<sup>449</sup> Humaid (n 444) 3.

<sup>450</sup> *Quran*: Surat Ash-Shura 42: 38.

<sup>451</sup> Shafiq (n 422) 426.

modern times. However, Islam is a pioneer in introducing the widely-cherished concept of consultation in conducting everyday affairs, although the applications of this concept are not specified in detail. The *Quran* speaks of "... those who... conduct their affairs by mutual consultation..." [Q, 42: 38]. Consultation is considered one of the important pillars of the Islamic way of life. To ignore it is an express violation of the law prescribed by Allah.<sup>452</sup>

*Shura* begins within the family when decisions are made, and is extended to national and international levels of governance. Injustice occurs when people's needs are ignored. When large numbers of people are involved, then trusted representatives should be part of the decision-making process. If consultation is not used when decisions are being made there will be an impact upon others. Islam teaches that such people have been deprived by the selfishness of those who have seized their rights. When the interests of many are at stake, consultation becomes a grave responsibility. A conscientious individual, who does not wish to be held accountable by his Creator, would not dare to carry such a burden by himself, but instead would painstakingly employ the means of consultation for reaching a broader-based decision that would be in everybody's best interests. Thus, if there was an error of judgement, no one individual would be held responsible.<sup>453</sup> Islam also teaches that those who are affected by collective decisions have the right to be fully informed of all matters under consideration.

### **4.3 The Significance of *Shura* in Modern Islamic States**

Currently, Western descriptions of Islamic societies show an evaluation of Islam based on looking at current political realities rather than at the religion itself, which in fact is largely misunderstood in the West. Islam provides a vision of a just society, and also presents general principles for a way of life for the individual, the family, the society, the State, and world relations in order to secure balance and justice in life on earth.<sup>454</sup> It offers the basic moral and organisational rules for relationships between people within the family and society, and between rulers and

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<sup>452</sup> M R Khan, 'Shura and the Islamic Vision of Democracy' (2002)

<<http://www.usislam.org/debate/ShuraDemocracy.htm> > accessed 1 June 2013.

<sup>453</sup> *ibid.*

<sup>454</sup> Osman (n 406) 9.

those ruled.<sup>455</sup> Islam does not provide detailed programmes, since human circumstances go through a process of continuous development and specific details will need to be changed over time. Instead, Islam offers messages of guidance. Indeed, Muslims consider that living in a community of believers in God will result in freedom and equality for all human beings.<sup>456</sup>

According to Islamic history, *Shura* played a very significant role in shaping the way the religion developed into an established system of living. It is documented that the main task of *Shura* after the death of the Prophet was to help frame laws when no direct revelations were available upon which to base a specific law. When considering how a law should be designed the Caliphate would consult with esteemed peers. Laws would only be adopted after consultation with members of the *Shura* had taken place.<sup>457</sup> For example, records show that when Abu Bakr needed to make a decision, he followed the traditions of the Prophet. New ordinances would only be issued once consensus had been reached.

Since *Shura* is a basic standard of Islam, it exemplifies, at least in part, the most basic principle of democracy by requiring consent and representation of the citizens in an Islamic nation, and too, accountability and transparency from Islamic leaders. Just as human freedom and equality are fundamental in any democracy, Islam considers ‘human dignity’ to be the foundation for the right way of life. For example, the *Quran* says: “We have indeed conferred dignity on the children of Adam, and carried them on land and sea, and provided for them sustenance out of the good things of life, and favoured them far above most of Our creation.”<sup>458</sup>

There are four primary principles in any Islamic socio-political organisation – namely *Shura*, justice, equality and human dignity.<sup>459</sup> The need for human dignity covers all aspects of life, including its moral, intellectual and physical aspects. Every human being has the right to live a dignified life through fair conditions of work and decent social welfare for those who cannot work either temporarily or on a permanent basis. Freedom of choice and to move freely is another primary aspect of

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<sup>455</sup> Osman (n 406) 9.

<sup>456</sup> *ibid.*

<sup>457</sup> Khel (n 425) 478.

<sup>458</sup> *Quran*, 17:70.

<sup>459</sup> S.Sulaiman, ‘The Shura principle in Islam’ para 10 (Al-Wehar, 1999)<<http://www.alhewar.com/SadekShura.htm> 1999> accessed 17 December 2013.

human dignity. Any limitations imposed on these two facets run counter to such beliefs and are therefore considered immoral.<sup>460</sup>

As one of the four cardinal principles of Islam, *Shura* reflects basic Islamic values, which are established on three precepts. One, that all people in a society are equal in human and civil rights. Two, public issues are best decided by the majority view. Three, the other cardinal principles of justice, equality and human dignity constitute the moral core of Islam and are best realised in public life through *Shura* governance.<sup>461</sup>

Islam teaches that God alone is the One who is all-knowing, all-powerful, and who, according to a genuine conviction and belief, must be obeyed unconditionally. Islam also teaches that human beings have relative knowledge and no absolute power. Being equal, each person is thus accountable for their choices and actions. Every decision should be based on what is right and what is wrong. In other words, as Osman states, no single individual can decide arbitrarily and independently a matter that concerns others and not himself or herself alone: “The Quran makes “*shura*” or participation with others in making a decision that concerns them, subsequent to and a consequence of the faith in God.”<sup>462</sup>

*Shura* is presented in the *Quran* as a principle, not a system. This was meant to allow successive generations of Muslims to continue to strive for a more perfect form of *Shura*.<sup>463</sup> However, an important distinction needs to be made between *Shura* and democracy. They are similar in that both require citizen participation in governance and decision-making. Whilst democracy recognises and endorses the ultimate sovereignty of the people, *Shura* sanctifies the ultimate sovereignty of God. Accordingly, democracy can suffer from the limitations of human reason, whereas *Shura*, it is argued, does not suffer from any inadequacies if constitutional, legal, economic and social matters are underpinned by *Shari'a*.<sup>464</sup>

Muslims believe that humans cannot perfect the laws that are prescribed by God through his prophets. However, a government that follows God’s laws is one

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<sup>460</sup> Osman (n 406)10.

<sup>461</sup> Sulaiman (n 459) para 12.

<sup>462</sup> Osman (n 406) 10.

<sup>463</sup> Sulaiman (n 459) para 12.

<sup>464</sup> A Moussalli, ‘Hasan al-Turabi’s Islamist Discourse on Democracy and “Shura”’ (1994) 30 (1) Middle Eastern Studies 53.

that is just and moral. Mickenburg suggests that democracy in Islam is absent because of “patriarchal orders, and [...] geopolitical and regional factors”, not because of any incompatibility with religious principles.<sup>465</sup> In other words, the patriarchal social structure has facilitated a less open and participative culture than was ever intended by Islam.

#### **4.4 The Role of *Majlis Al-Shura* in Islamic Polity**

*Shura* is consultation. *Majlis* (a place of sitting) *Al-Shura* is the institution or Council formed when members are officially part of a permanent *Shura* body. First and foremost, the purpose of *Majlis Al-Shura* is to make new laws in areas where there is no clear command or law found in the *Quran* and *Sunna*. *Majlis Al-Shura* is not a product of historical developments. It is accepted by many Muslims as a commandment from Allah as seen in the verse, “*Those who hearken to their Lord and establish regular prayer; who (conduct) their affairs by mutual consultation*”.<sup>466</sup> It is one of the most important tenets of the religion only second to *Al-Salat*, which is to worship Allah, as in the practice of collective worship. Collective worship teaches Muslims how to organise themselves and such organisation is considered to be essential for the well-being and peace of Muslim communities. The obligatory *Al-Salat* for all, five times throughout the day, reinforces this sense of organisation and order. The *masjid* (mosque) has functions beyond the place of prayer; communal consultation takes place to discuss community affairs.<sup>467</sup>

It is believed that *Al-Salat* and *Al-Shura* are given equal standing from Allah. Collectivity is of key importance to Islam. In collective worship, for example, all people are equal without discrimination based on who is rich or poor, black or white, Arab or non-Arab. From the collective worshipers, the group would elect the one most pious to become the imam. In earlier times it is not surprising that *Al-Shura* took place in the mosque, the same place of collective worship.

Decisions made through *Al-Shura* are not considered infallible of course. They are prone to human error. However, collective wisdom is highly valued. Shafiq

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<sup>465</sup> M Minkenberg, ‘Democracy and Religion: Theoretical and Empirical Observations on the Relationship between Christianity, Islam and Liberal Democracy’ (2007) 33 (6) *Journal of Ethnic & Migration Studies* 889.

<sup>466</sup> Holy *Quran*, Chapter 42, Verse 38.

<sup>467</sup> Shafiq (n 422) 419.

claims that *Al-Shura* is considered a necessity because it brings understanding, cooperation and unity in the lives of the people. It compels its members to think seriously without any reservation about their own problems. A community which once becomes aware of its problems will surely find its way to peace and prosperity. Al-Qasimi has summarised the importance of *Al-Shura*; he states that the Prophet was ordered to use *Al-Shura* in conducting his affairs, not because he needed to do so, but because he was guided by divine intervention. *Al-Shura* was used to allow an opportunity for all to express opinion and to deal with issues in a fair and correct way.<sup>468</sup> In addition, the precedent set by the Prophet of consulting with the most talented and esteemed of men is recognised as having been instrumental in Islam's legal and political development.<sup>469</sup>

#### **4.5 Shura and Contemporary Issues**

Just as *Shura* has been a heated topic of debate among modern Islamic scholars, the relationship between Islam and democracy has become a matter of public scrutiny. There are basically two visions related to the debate: (i) those who deny any connection between Islam and democracy; and (ii) those who argue that Islamic tradition contains a number of concepts, ideals, institutions and values which are essentially democratic in nature. These include such concepts as: *Shura*, *Ijtihad*, *Bay'a*, *Khilafa*, *Ijma'*, *Maslaha* and *Ahl al-hall wa al-'aqd*. These, especially the first three, provide a practicable foundation of democracy in Islam.<sup>470</sup>

However, Samuel Huntington argued that democracy does not exist in Islam, and because of that, Muslim and Western societies will always clash.<sup>471</sup> This is clearly not what most Muslim scholars believe. In fact, the former chairman of the current *Shura* Council in Saudi Arabia, Dr Salih bin Abdullah bin Humaid, compares *Shura* principles to democratic ones. He reports that in *Shura* public rights and public freedoms are transformed into religious and social obligations which are connected to *Shar'ia*, with the intention of finding a balance between an individual's interests and the interests of society generally. In contrast democracy leans towards individual rights and freedoms over society's interests. In addition, he states, the rights and

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<sup>468</sup> Shafiq (n 422) 421.

<sup>469</sup> Khel (n 425) 276.

<sup>470</sup> Parray (n 403) 68.

<sup>471</sup> Minkenberg (n 465) 902.

freedoms of both the individual and society are restricted by *Shar'ia*. Conversely, in democracy they become limited only when they violate the rights and freedoms of others or violate the law.<sup>472</sup> Huntington's thesis is very divisive, and not really accurate. It is just another example of dichotomous thinking that does not resolve conflict but adds to it:

In a world in which we often succumb to the dichotomy between "us" and "them", we are challenged to transcend (though not deny) our differences, affirm our common humanity, and realize that "we", whether we like it or not, are interconnected and co-dependent, the co-creators of our societies and our world.

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#### ***4.5.1 Shura – Obligatory or Optional?***

A majority of Muslim scholars and jurists believe that *Shura* is obligatory.<sup>474</sup> They support this position through reference to the two texts mentioned previously. If Allah put *Shura* in a statement that included the obligatory prayers and charity, then *Shura* must be obligatory also. The Prophet Mohammed openly practised *Shura* with his companions, and this frequent practice was the topic of a discussion with Ali Ibn Abu Talib, the Prophet's cousin and son-in-law, who ruled the Caliphate from 656 to 661.<sup>475</sup> When Ali asked the Prophet what he should do if he encountered a situation that was not directly covered within Islamic Law, the Prophet replied: "Counsel people and do not make your absolute decision."<sup>476</sup> This practice is believed to be the reason why the companions used *Shura* to decide on Mohammed's successor as Caliph (Head of State) after his death. To depend on the opinion of the majority in decision-making is the only reasonable and acceptable procedure to follow, as there is less risk of error than there would be if it was the sole responsibility of an individual. With an assembly, the freedom to express views

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<sup>472</sup> Humaid (n 444) 3.

<sup>473</sup> Esposito (n 298) 5.

<sup>474</sup> Al-Harbi (n 374) 173.

<sup>475</sup> *ibid* 174.

<sup>476</sup> A. Al-Haythami, *Mojama Al-Zoaid and Manba Al-Foaid* (Dar The Arabic Book Press, 1982) 1/178.



collectively, to share different perspectives and explore opposing positions is critical for the purpose and efficiency of *Shura*.<sup>477</sup>

The argument that *Shura* is obligatory is not limited to past debate. Modern Islamic scholars like M. Riaz Khan argue that *Shura* is a moral demand taught by Islam, and that to depart from *Shura* would be immoral. Consultation is an inherent principle in Islamic society, and the rule applies to all collective situations whatever the size: the family, the tribe, or the whole country.<sup>478</sup> Additionally, Islam requires that the leaders of government should be chosen with the consent of the people, based on their judgment of the integrity of the individuals.<sup>479</sup> *Shura* is connected to *salat al-jamaah*, which is collective prayer. *Salat al-jamaah* is preferred over individual prayer because it teaches Muslims how to organise and cooperate with each other. Thus *salat al-jamaah* is considered the essence of Islam and key to the process of *Shura*, because it promotes brotherhood, understanding, and mutual cooperation.<sup>480</sup> History recounts that when Umar, the second Caliph, wanted to have a meeting of *Shura al-naas* (general assembly), he would call for *salat al-jamaah*, collective worship.

The former Chairman of the current *Shura* Council in Saudi Arabia believes that *Shura* is a critical element in any Islamic political system or for that matter in any social structure. He argues that any Muslim State that seeks to attain security and political stability for its citizens “should base its government and political system on *Shura* [...] a deeply rooted concept in the Muslim society and [...] a distinctive quality of the Islamic political system.”<sup>481</sup>

Not all Islamic scholars, however, agree that *Shura* is compulsory. Supporters of this position refer to the Islamic scholar Al-Shafai, who mentions that the use of *Shura* by a judge is not required.<sup>482</sup> Others support this position by arguing that the Prophet requested that his companions follow *Shura* as a general principle, not as an obligation in all situations.<sup>483</sup> These scholars argue that there is no formal guidance

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<sup>477</sup> Osman (n 406)11.

<sup>478</sup> Al-Muhanna (n 430) 83.

<sup>479</sup> M. Khan, ‘Shura and The Islamic Vision of Democracy’ (2002)

<<http://www.usislam.org/debate/ShuraDemocracy.htm>> accessed 1 April 2013.

<sup>480</sup> Shafiq (n 422) 420.

<sup>481</sup> Humaid (n 444) 3.

<sup>482</sup> Parry (n 403) 78.

<sup>483</sup> *ibid.*

about the way *Shura* is applied in society as the Prophet wanted the principle to be flexible, depending on circumstance. They point out that even the Prophet did not practice *Shura* in all situations, as for example, in cases of disputes between Muslims and non-Muslims.<sup>484</sup> They argue that since *Shura* was not practised consistently, then it must in fact be optional, or depend on the nature of the situation. They contend that in Islamic Law nothing is considered obligatory unless proven with clear evidence. In short, they believe that since such evidence is lacking on the question of *Shura*, it must therefore, be optional.<sup>485</sup>

The exact interpretation of how *Shura* should be applied in modern Islamic societies has been the subject of debate for the last several decades. One of the basic questions is whether the public is to be involved in the election of *Shura* members. If not, can the *Shura* truly represent them? In a famous debate in the 1960s, Mawdudi maintained that the head of State should be chosen by the people, who then entrusted the leader to make the appropriate decisions and to appoint a group of advisers who would help him make those decisions. This is one form of *Shura* according to Mawdudi.<sup>486</sup> Though broadly in agreement, Mutawalli questioned this view, pointing out that the *Quran* said nothing about the need for all citizens to be involved in consultation, but that only specially selected people should be included in the process. In other words, general elections were not required, but specially-designated people should be part of the consultative process. The *Quran* states, “Let there be of you a community, who call people to goodness.”<sup>487</sup> This verse has been interpreted as “Let there be a group of you”. Mutawalli contended that there did not need to be a majority as a criterion for truth; identifying what is true often required the most righteous among people.<sup>488</sup>

The debate over *Shura* between Mawdudi and Mutawalli was concerned less about whether *Shura* required participation by all, and more about what the nature of *Shura* would be. For example, Mawdudi believed *Shura* was required in all things legislative, while Mutawalli argued that it was only necessary in military affairs and

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<sup>484</sup> Al-Harbi (n 374) 174.

<sup>485</sup> *ibid.*

<sup>486</sup> F. Rahman, ‘A Recent Controversy over the Interpretation of ‘Shūrā’, (1981) 20 (4) History of Religions 294.

<sup>487</sup> *Quran* 3:104.

<sup>488</sup> Rahman (n 486) 292.

therefore not even relevant in modern times.<sup>489</sup> Both Mawdudi and Mutawalli did, however, agree that *Shura* representatives needed special qualifications so that the best possible advice could be given to the head of State, in order to ensure the best decisions would be made following this type of consultation.

This attitude of only allowing the most skilled to be involved in making political decisions is the basic argument against direct franchise in an Islamic society. However, even those against direct franchise would still argue that *Shura* needs to be representative of all citizen groups. The more populist stance is that *Shura* is not meant for the elites of the society; there must be representation of all citizens, and there should be no distinction between the status of Muslims. Those who believe that *Shura* is obligatory in an Islamic society point out that people who argue that *Shura* is discretionary are often the powers that do not find *Shura* to be conducive to their interests.<sup>490</sup> Nevertheless, the social contract between the ruler and the ruled is a strict one in an Islamic State.

According to historical precedents in Islam, there was a genuine (not a fictitious) binding contract between the ruler and the ruled. This mutual pledge, which was called *bay'a*, held the ruler responsible for assuring the supremacy of God's law (*Shar'ia*) and justice, securing human dignity, serving the public interest, and fulfilling all the duties of the position. The people were held responsible for supporting the ruler, for obeying his decisions that complied with God's law, and for fulfilling their obligations.<sup>491</sup> The early Caliphs were chosen primarily from a small group who had been given authority through *bay'a*. The chosen Caliphs would then address the public to gain their acceptance through the public *bay'a*. As noted, *bay'a* is a mutual pledge from the ruler that he will follow Islamic Law and satisfy the public, and from the people to support the ruler and advise him.<sup>492</sup> *Bay'a* is therefore seen as a sacred responsibility and is likely to account for the willingness of most Muslims to support their rulers.

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<sup>489</sup> Rahman (n 486) 292.

<sup>490</sup> Sulaiman (n 459).

<sup>491</sup> Osman (n 406) 12.

<sup>492</sup> *ibid*10.

Another group of scholars believes that *Shura* is optional, but a highly desirable combination of the two positions on *Shura* discussed above.<sup>493</sup> Its adherents suggest that as each situation and ruler is different, the requirement for *Shura* can vary. If the ruler lacks the wisdom and experience to make a decision, then it is recommended that he use *Shura*. If this is not the case, *Shura* becomes optional. It is for the ruler to decide. This position is supported by al-Hasan al-Basri (642-728) and al-Thahakh. One reading of Ibn-Abbas states; “and consult them in *some* affairs,” emphasising the word “some” and indicating that *Shura* is optional.<sup>494</sup>

Other scholars would take great exception to the idea that *Shura* is optional.<sup>495</sup> Some have gone so far as to suggest that classical doctrine was inaccurate because it led to the belief that *Shura* was merely a ruler asking subordinates for advice. However, the *Quran* asks for mutual advice, which means mutual discussions among people of equal standing. He also argues that if *Shura* and its democratic voice are not made available, then a ruling body is "wittingly or unwittingly guilty of rendering Islam null and void."<sup>496</sup>

Overall, it is believed that in most cases *Shura* is an obligation under Islamic Law, and it is generally regarded as an underlying principle; Islam stipulates *rida al-awam*, meaning ‘popular consent’. *Rida al-awam* is considered a prerequisite for a political authority to be accepted as legitimate, while *ijtihad jama’i* or ‘collective deliberation’ is requisite for the proper administration of public affairs. In addition, Islam requires *mas’uliyya jama’iyya*, which is ‘collective responsibility’, for maintaining the public good of society.<sup>497</sup>

#### **4.5.2 *Shura and Legitimacy***

A central issue in modern governance is legitimacy. In fact, legitimacy or lack of legitimacy may be the urgent political issue for international legal

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<sup>493</sup> Al-Muhanna (n 430) 80.

<sup>494</sup> Abu Fares, *Qazoat Al-Hudaebea* (Dar Al-Furqan Press 1984) 132.

<sup>495</sup> See Fazlur Rahman, ‘The Principle of Shura and the Role of the Ummah in Islam’ in Mumtaz Ahmad (ed) *State, Politics, and Islam* (American Trust Publications, 1986) 95; Muhammad Hamidullah, *Introduction to Islam* (International Islamic Federation of Student Organizations 1970) 116-17; Ayatullah Baqir al-Sadr, in M. A. Ansari (tr) *Introduction to Islamic Political System* (Accra: Islamic Seminary/ World Shia Muslim Organization, 1982) 78, who all argue vehemently that Islam requires *Shura*.

<sup>496</sup> Esposito and Voll (n 293) 5.

<sup>497</sup> Sulaiman (n 459).

scholarship.<sup>498</sup> Illegitimacy in government is “the single most important impoverishing and destabilising element in our global neighbourhood.”<sup>499</sup>

A traditional source of legitimacy is established when people participate in deliberative democracy. To establish legitimacy, deliberative democracy promotes that the public deliberation between citizens is the basis for legitimate political decision-making and self-government. Deliberative democracy includes four principles, the first, being the common good. Second, public reason (the legitimacy of deliberative outcomes is derived not simply from the will of the majority, but instead from the results of collectively reasoned reflection by political equals engaged in a shared project of identifying laws and public policies that respect the interests, preferences, and values of all citizens).<sup>500</sup> Third, preference transformation (which means that those involved in deliberation are willing to listen to other views and perhaps even change their opinions) and finally, egalitarianism.

*Shura* represents legitimacy for an Islamic society because it is a system immersed in deliberation, which is its primary purpose, and it is based on a value system that is deeply rooted in the Islamic system. Because *Shura* is part of Islam, it cannot be changed according to the whimsical wishes and attitudes of any one person. Therefore, *Shura* controls the affairs of the Muslim nation, whereas democracy stems from a relative moral value system that is subject to the wishes, tendencies and attitudes of the majority in a parliament, and to circumstances that change over time.<sup>501</sup>

In response to the claim that Islam and democracy are incompatible, Humaid states that democracy is not contradictory to *Shura*, but neither is it identical. Each has its own principles, basis and rules. The vast field of scholarly diligence given to Muslims during the application of *Shura* enables practitioners to benefit from any innovations that may arise in the applications of democracy.<sup>502</sup>

*Shura* has a role in several areas of Islamic society. It has an important role in the election of the people’s representatives in the parliamentary body – or bodies –

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<sup>498</sup> Obiora Chinedu Okafor, ‘The Concept of Legitimate Governance in the Contemporary International Legal System’ (1997) 4 (1) *The Netherlands International Law Review* 33.

<sup>499</sup> *ibid.*

<sup>500</sup> Worley (n 35) 443.

<sup>501</sup> Humaid (n 444) 6.

<sup>502</sup> *ibid.*

and the practice of legislation therein. This role is intended to guard the public interest and place a check on executive power, and it facilitates consideration of the people's concerns. If the practice of "one person, one vote" does not secure a fair representation for all groups, then the structure of *Shura* has to be changed; for example, assigning to each of these groups a certain number of seats in proportion to their size.<sup>503</sup> In addition, a limited number of seats must be made available to represent any minority groups in the society. It is also necessary to implement ways of reaching the best possible representation of the people and their diverse structure and interests.<sup>504</sup>

*Shura* is therefore needed when discussions and hearings are held, and when decisions are arrived at by the representative body and its committees, along with executive bodies or other organisations or individuals in relation to any public concern. In certain matters of special importance, a significant practice of *Shura* may occur if a public referendum is deemed to be appropriate; this may be decided by the legislature or by a requisite number of voters through a designated procedure.<sup>505</sup>

*Shura* obviously has a role in the executive branch and its departments when discussions and decision-making occurs. It should also be practised in the elections of leaders and boards of the unions of workers; professionals and students; in the discussions and decision-making of these elected bodies; and in any wider conferences they might arrange. Furthermore, technical and professional *Shura* ought to be conducted in schools, hospitals, factories, companies or any other business. In the courts, *Shura* is followed when more than one judge makes a ruling over a case, or when the jury system is used.<sup>506</sup>

#### **4.6 Building upon *Shura***

In its technical sense, *Shura* may be defined as a collective endeavour for seeking an objective truth. Affiliations through *Shura* are created, not based on kinship or status, but on the principles of religious practice and faith and equality among peers. Any Council of elders created to practice *Shura* was egalitarian in nature, which is a principle of deliberative democracy. Everyone had equal status,

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<sup>503</sup> Humaid (n 444) 7.

<sup>504</sup> Osman (n 406) 12.

<sup>505</sup> *ibid.*

<sup>506</sup> *ibid* 13.

just by membership. The elders made up the Council because these were considered to be the wisest men, and wisdom is a virtue that is a requirement for participation in a *Shura* Council. By its very nature, many describe it as the most democratic institution in an Islamic society. For the last 30 years, Arab/Muslim scholars have published a large amount of literature related to the debate on democracy in the Muslim world. Not surprisingly, considering the diversity within Islam, there are various schools that offer different approaches regarding Islam and democracy.

The Muslim Brothers movement integrates some aspects of democracy and discard others. They argue that the principle of *Shura* is a Muslim duty and that when it is rightly applied, as was the case at the time of the Prophet and his four righteous successors, it has the same qualities as liberal democracies – but none of their flaws. In the opinion of the Muslim Brothers, implementing *Shura* relieves Muslim societies from despotism and weakness. Ultimately, the Muslim Brothers believed that returning to the true spirit of Islam would rescue Muslim nations from their current distorted status. “If Muslims only returned to its true nature, that of equality, fraternity and consultation, tyranny will have no place among them.”<sup>507</sup>

However, a Muslim nation should not blindly copy Western democracy. For example, personal freedoms should never be considered if they contradict the teachings of Islam. Jihadi-salafis reject that *Shura* and democracy share anything in common. They argue that any comparison and use of Western terms or concepts runs the risk of “shattering” the identity of Muslims, and reading things into the text that are not there is illegal: “Democracy and *Shura* are described as being as far apart as heaven and earth. Democracy is described as a tyranny of human beings; *Shura* is described as a God-ordained regime that, when applied guarantees the best of fortunes for individuals and societies.”<sup>508</sup> Western democracy is seen as lesser than Islam in guaranteeing a just society. Any process that transfers sovereignty from Allah to people is deemed immoral and improper. Muhammed Qutb argued injecting non-Islamic terms into Islam while trying to defend Islam is a sign of defeat. So, Muslims are cautioned not to incorporate the ideas of democracy into their discourse.

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<sup>507</sup> Shavit (n 423) 351.

<sup>508</sup> *ibid* 355.

Any resemblance is just imaginary: Islam can only accept a regime that is lead by Allah's law and which is based on the process of *Shura*.<sup>509</sup>

Liberals consider *Shura* to be a cornerstone of Islamic democracy, whilst governments recognise *Shura* as a process which legitimises the existing political order. The term *Shura* is also being used in the contemporary debate in Arab societies on the desired system of government by scholars and activists whose main concern is the introduction of Western-type democracy in Arab countries. These scholars are suspicious of synthesis and compromises between Muslim and Western terminologies, noting that these have resulted in the past in abandonment of pluralistic politics altogether. Their aim is rather simple: that Arab society goes through the same political transformations as Latin American, East European and other societies have experienced since the mid-1970s. While this goal has found more resonance in intellectual circles since the mid-1980s, and even more so since the collapse of communism in Europe in 1989, it still enjoys little advocacy in most Arab societies, where Islamism has become more firmly entrenched and where suspicions are common as to the real intentions behind calls to return to the liberal democratic model – a model which failed Arabs in the past.<sup>510</sup>

It is in relation to these suspicions that some liberals call upon *Shura*. Ironically, liberals are in agreement with jihadi-salafis in their narrow, literal interpretation of *Shura* as a form of consultation rather than a comprehensive system of government resembling Western democracy.<sup>511</sup>

One recurring issue is the structure of the *Shura* body. Should it be comprised of experts, or of anyone elected through universal suffrages, and once it exists, what should be the mechanism of its operations? Al-Turabi, for example, distinguishes in one of his works between four types of *Shura*: a) universal *Shura*, which is also the highest and strongest one, such as that used in referendums and general elections. This type of *Shura* constitutes *ijma'* – a consensus within the nation, which is legally binding so long as it does not contradict the *Quran* and the *Sunna*; b) *Shura* based on the people's representatives in government; c) *Shura* based on experts; and d) *Shura*

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<sup>509</sup> Shavit (n 423) 357.

<sup>510</sup> *ibid* 355.

<sup>511</sup> Raed Abdulaziz Alhargan, 'Saudi Arabia: Civil Rights and Local Actors' (2012) 19 (1) Middle East Policy 1:2.



based on opinion polls. Al-Turabi seems to describe here the decision-making mechanism of Western democracies, without committing himself to technicalities such as the frequency of elections or the balance of power between legislators and the head of State. But elsewhere he states that the principle of *Shura* is governed in accordance to knowledge, because he who possesses more knowledge, sees things more clearly. Thus, he leaves the door open to both a theocratic and a republican form of government.

In the twentieth century, many Islamic scholars began to equate *Shura* with democracy. These scholars argue that being democratic, Islam calls for the people's leaders to be elected, non-elected leadership is illegitimate.<sup>512</sup> Al-Qaradawi notes that in the Muslim system, as is the case in the Western one, the nation elects its ruler, and the ruler cannot be imposed on the nation. The concept of *Shura* is that of a system whose leaders are chosen, monitored and expelled if they fail in their duty to the people. *Shura* is not a right for individuals to practise, but rather a system which is a Muslim requirement.

The literal meanings of *Shura* and democracy are similar; however, their connotations are not. They both involve public participation in political affairs; democracy, though, honours the ultimate sovereignty of the people; *Shura* honours the ultimate sovereignty of God, and through the *Quran*, a textual authority is recognised. Islam requires that the way the *Quran* is interpreted be kept flexible to adapt to changing social needs, so a consultative body like the *Shura* is singularly important in ensuring that *fiqh* law meets the needs of modern people. Democracy has the shortcoming of relying on human reason for its authority, while *Shura* is able to avoid such a pitfall by addressing constitutional, legal, social and economic matters as underpinned by *Shar'ia*.<sup>513</sup>

If *Shura* does not rely on *Shar'ia*, it could resemble liberal democracy in which the enjoyment of political rights is mostly figurative and essentially controlled by economic structures. For human theories are not complete, but sectional. For example, capitalist economy theory concentrates wealth in few hands, others, like communism, disperses personal wealth; in both, real authority is held by the few;

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<sup>512</sup> Stephanie Lacroix 'Between Islamists and Liberals: Saudi Arabia's New "Islam Liberal" Reformists' (2004) 58 (3) *The Middle East Journal* 346.

<sup>513</sup> Mousalli (n 464) 55.

“This dialectical problem results from the dependence of human theories on circumstantial tendencies and prevents the development of perfect political equality, unity and freedom.”<sup>514</sup>

#### **4.7 *Shura*- A Resurgence**

The last three decades have witnessed a resurgence of the debate on democracy within Muslim scholarship. Any attempt to try to narrowly classify how Muslim scholars interpret democracy in Islam would be misleading because there are diverse views within Islamic scholarship on the shape and characteristics of *Shura* and how it should be applied. Nevertheless, whilst different approaches are held, all recognise the need for *Shura* in one form or another. Of course, Muslim scholars are not the only ones investigating the compatibility of Islam and democracy; the congruency of the two, or lack thereof, has received much attention from the West.

The importance of *Shura* and democracy was first addressed by the reformist movement in Islam led by Jamal al-Din al-Afghani (1838-1897) and later by Muhammad ‘Abduh (1849-1905). Al-Afghani and his students introduced the idea that the principle of *Shura* rejects tyranny. Abduh promoted the idea that implementing *Shura* is an Islamic obligation rather than an imitation of western practices. Although Islamic law did not clarify how *Shura* should be implemented, Abduh appeared to be satisfied with the limited consultative roles reserved for the assemblies of his time.<sup>515</sup> Later, one of Abduh’s students, Abd al-Rahman al-Kawakibi (1855-1902), asserted that Islam should be seen as being synonymous with democratic government; consequently, if Muslims truly lived the foundations of their faith – equality, fraternity and consultation – tyrannical rule would not exist within Islamic States.<sup>516</sup>

The reformist movement helped to free Islam to be open to democratic reforms. However, it did not free the societies to embrace religion as the primary origin of legitimate democracy. That said, the overall rationale underpinning the movement was the synthesis of divergent ideas, namely, “embracing the West so that

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<sup>514</sup> Mousalli (n 464) 57.

<sup>515</sup> Shavit (n 423) 351.

<sup>516</sup> *ibid.*

it can be repudiated; instituting rationalism in Islam, so that scriptures remain a comprehensive framework of life.”<sup>517</sup>

#### **4.8 *Shura* and Deliberative Democracy**

In the past decades, up until the mid 1990s, most consultation taken by the monarchs occurred behind closed doors. If agreement was not achieved, then policies generally were not implemented because the necessary consensus had not been reached. The matter would be left pending until the problem could be considered further. The consequence to a State which does not follow such practice is likely to be instability and unrest.

*Shura* may also be seen as an effective model for Islamic monarchies as they differ from other forms of absolute rule. Other types of monarchy do not embrace consultation to this extent, if at all. Luciani asks a very important question - as *Shura* has not resulted in democratic governance, why is it seen as preferable in many Islamic societies over more traditional forms of democracy? His answer reveals the motivation underpinning the nature of Islamic society.

The first motivation has to do with the role of religion in politics. Because Islam aims at being a political order as well as a personal faith, a clean separation of religion and State is almost impossible. Consequently, there must be a place for religion somewhere in State institutions. Thus, either a) you have direct government of the clerics; or b) you assign ultimate power of control to the clerics (the Iranian situation being somewhere in between); or, finally c) you have a “secular” ruler whose job is to balance various opinions, including religious opinion (the Saudi situation). Indeed a “secular” ruler will never accept being as such, and will try in all ways possible to acquire religious legitimation, even if his power was originally acquired by conquest or use of force; the ruler will certainly not define himself as “secular” in the sense of not being a believer! Having credible religious legitimation is an essential element of strength for any incumbent ruler, and in this sense a factor facilitating the practice of consultation and consensualism.<sup>518</sup>

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<sup>517</sup> Shavit (n 423) 351.

<sup>518</sup> Giacomo Luciani, ‘Democracy vs. *Shura* in the age of the Internet’ in Khalaf & Luciani (eds) *Constitutional Reform and Political Participation in the Gulf* (Gulf Research Center) 283.

Luciani's assessment clearly describes the current and historical nature of the Saudi regime in searching for a balance between its secular hold on power and the need to satisfy the religious components of Saudi society. By maintaining the sanctioning of its power by its religious base, the Al-Saud family has maintained its position and authority. Luciani argues the necessity of this and how it is related to *Shura*:

Indeed, if one plotted the various Arab political systems on a diagram, with one axis showing the degree of religious legitimacy claimed by the ruler, and the other the extent to which consultation takes place (assuming that both variables could be measured); we would then find a positive correlation, in the sense that those rulers who have no claim to religious legitimacy also are less prone to engaging in consultation. The cases of Iraq, Syria or Libya illustrate this point very clearly.<sup>519</sup>

#### **4.9 Conclusion**

Samuel Huntington, in his famous "Clash of Civilizations" theory (1993/1996) argued that there was no room for democracy in an Islamic society and that in fact the problem was not Islamic fundamentalism, but Islam itself.<sup>520</sup> In challenging Huntington, Minkenberg pointed out that the "democratic deficit" in Islamic countries could not be accounted for by the apparently problematic relationship between Church and State or the fact that secularism was lacking in these societies. Rather, the main reason was to be found in the patriarchal structures of such societies, and in the servitude and oppression of women.<sup>521</sup> While scholars, like John Esposito, claim democracy can easily be found in Muslim societies, including through the practice of *Shura*,<sup>522</sup> others angrily challenge such an assertion. Those who are strongly critical of scholars like Esposito accuse them of twisting definitions to make them fit into the structure of Islamic government. Thus, as Bukay notes, terms like democracy become relative – or else, as is the case with Esposito

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<sup>519</sup> Luciani (n 518) 283

<sup>520</sup> Minkenberg (n 465) 900.

<sup>521</sup> *ibid* 902.

<sup>522</sup> D. Bukay, 'Can there be an Islamic democracy?' (2007) 14 (2) Middle East Quarterly 72.

and his fellow scholars, distort the truth of what life is like in Muslim countries to reinforce their ideas.<sup>523</sup>

Such interpretations of Islamic society are deeply flawed. However, such sweeping generalisations are fairly representative of a Western response to Islam. A clearer understanding of Islamic principles is therefore desirable. This should focus on correcting such widespread misrepresentations which circulate in the Western world, especially those related to Saudi Arabia. Because the Kingdom is the home of two of the most holy sites in Islam, it attracts millions of visitors annually. Consequently, Saudi Arabia will always have a special position in the Islamic world. This means, of course, that developments within Saudi Arabia are bound to play a crucial role in influencing the way that the Islamic world relates to the wider world, and in particular how radical Islamist forces are controlled or accommodated within the global system.<sup>524</sup> If the international community fails to understand how an Islamic society like Saudi Arabia functions in practice, fear and distrust between cultures seem likely to continue and will only serve to exacerbate the likelihood of a future 'clash.'<sup>525</sup>

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<sup>523</sup> Bukay (n 522) 72.

<sup>524</sup> Niblock (n 324) 5.

<sup>525</sup> *ibid* 6.

## **Chapter Five: Contemporary Politics in the Arabian Gulf - Power, Legitimacy and the Need for Reform**

### **5.1 Introduction**

Modern governments in the Arabian Gulf are being pressured to become more democratic or lose the support of their citizenry. In response, some of the leading Saudi political leaders are promoting a change to the constitutional monarchy.<sup>526</sup> Their primary concerns, however, appear to be for more security rather than a personal desire to see their country become more democratic.<sup>527</sup> Some scholars argue that the only way the current ruling party can maintain legitimacy will be to initiate structural reform and nurture the development of a democratic framework to underpin the legitimacy of the State.<sup>528</sup>

In Saudi Arabia, the authority may be “majestic,” yet even the King’s authority has to meet the moral scrutiny of the people in order to be accepted as legitimate. The State’s moral authority has been challenged since the 1970s. The need for reform has been recognised by the Saudi ruling body since then.<sup>529</sup> A statement related to political reforms made over the last few decades is posted on the website of the Law of the Board of Grievances, presented by the Saudi Embassy which states, “The revitalization of Saudi Arabia's political system reflects the nation's adaptability to modern development without compromising its religious and cultural values.”<sup>530</sup> One could understand this to mean that in order to maintain religious and cultural values political change will be small, gradual and incremental and will not destabilise the status quo.

### **5.2 Pressures for Reform come to the Arabian Gulf**

The 1990s saw major political changes that affected the Arabian Gulf region. For example, there were important changes in the political climate in the region after the 1991 Gulf War, the collapse of communism in the Soviet Union and Eastern

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<sup>526</sup> Niblock (n 324) 110. Tim Niblock, reports that “Prince Nayif, in particular, has played down political reform, insisting that the central objective is to defeat the terrorist threat now facing the Kingdom.”

<sup>527</sup> *ibid* 111.

<sup>528</sup> *ibid* 175.

<sup>529</sup> *ibid*.

<sup>530</sup> *ibid* 176.

Europe, and the rise of Islamist opposition movements throughout the Middle East and North Africa. The governments recognised that reforms would likely be required.

An example is the Sultan of Oman who decided it was necessary to liberalise the country's political system. But the Sultan wanted to introduce reform gradually to avoid alienating his traditional power base.<sup>531</sup> So, he created the Omani Consultative Council (OCC), which was Oman's response to *Majlis Al-Shura*. The OCC was based on the State Consultative Council (SCC) created ten years previously. The State Council, however, was mostly an advisory Council, much like the *Shura* Council of Saudi Arabia today. Nevertheless, the State Council of Oman was a critical step away from absolute tribal rule. The Council's functions were advisory, but it still represented Omani citizens, and it became a modern model for other Gulf States.<sup>532</sup> The State Council was very welcomed and seen as an important symbol of reform in Oman; however, its implementation did not really change the manner of governance in the country.

The Sultan and some members of the ruling party close to him worried that the traditional system of rule was not in the long-term interest of Oman. So, the Sultan then decided to reform the SCC, give it more power and authority, involve it in a wider range of activities, and involve ordinary citizens so it would have a more significant role in the political, economic and social development of the country.<sup>533</sup> The result was the Omani Consultative Council. Although the members of the OCC were to be elected, this is not exactly what took place. Each member was chosen by the Deputy Prime Minister for Legal Affairs from a list of three candidates that had been voted for in caucuses held in the *wilayat* (administrative system), in which hundreds of leading citizens participated. Of the three names for each position, the Deputy Prime Minister chose one and submitted the list to the Sultan for final approval.

In 1994, the OCC underwent further reform. The number of members was expanded from 59 to 79, and a chairman was appointed. Each district would elect

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<sup>531</sup> Abdullah Juma Al-Haj, 'The Politics of Participation in the Gulf Cooperation Council States: The Omani Consultative Council' (1996) 50 (4) Middle East Journal 559.

<sup>532</sup> *ibid* 560.

<sup>533</sup> *ibid* 561.

representatives to be appointed to the Council. Those areas with less than 30,000 people elected two representatives and those with more than 30,000 elected four representatives to serve.<sup>534</sup> The elections added more representation and political participation of the people. The Sultan believed these reforms would help to rally support from the different tribal sectors of the country and help gain support in his efforts to modernise the country. Al-Haj notes that not only did the Sultan want to secure support from the tribal groups, but from the newly educated young people, the leading families and merchants of the country:

The OCC brought together these diverse segments of the population, giving them greater recognition and providing them with new financial resources in order to secure their support for the regime. Also, the Sultan wished to give the leading tribal and merchant families and the emerging educated elite an input in his new socio-economic policies, to ensure that they were implemented.<sup>535</sup> Even with all of these reforms, however, the OCC has no real significant legislative powers. These powers are still under the control of the Council of Ministers who create and implement legislation in the country. The role of the OCC is still advisory only.

When it is time to elect members to the OCC, each district votes for its appropriated number of representatives, from 2-4. Selected candidates are allowed to publish pamphlets and to place billboards, banners and posters announcing their candidacy in the streets and public places, although these adverts have to stay within the person's district. The maximum number of billboards for each candidate is 20. Candidates can also publish advertisements in the local press and on TV, and for the first time in 2011, to hold public meetings, in farms, halls or electoral tents. Many female candidates used the Oman Women's Association local halls for the purpose. Instant texting and other instant access mediums, along with the Internet were used to campaign. For the most part, however, candidates use personal networks for their campaign activities.

Unfortunately for the Sultan, Oman's reforms did not guarantee there would be no unrest in the sultanate. Apparently, this is because the country is being ravaged by the same forces that are plaguing other areas in the Middle East:

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<sup>534</sup> Al-Haj (n 531) 562.

<sup>535</sup> *ibid* 363.



It's about a youthful, worldly, more connected population who basically want a voice -- publicly accountable ministers, free and independent press, even separation of State powers. It's also about an economy in which during 2009, nearly 75 percent of private sector jobs drew monthly wages of OMR 200 or less (USD \$520), and in which non-nationals in the active workforce outnumbered nationals by more than two-to-one.<sup>536</sup>

External pressures have made a major impact on the undemocratic countries of the Arabian Gulf. In response, both Qatar and Oman developed elected consultative Councils with women having the right to vote. Kuwait and Bahrain have both created parliaments, and there is economic liberalisation in the United Arab Emirates. At the end of last year, Sheikh Mohammad al Maktoom, Crown Prince of Dubai, suggested that Arab leaders needed to introduce reform to avoid challenges to their power.<sup>537</sup> Some of the reforms already undertaken have been described as mere “tokens” of democracy, meant to appease international criticism. For example, in a review of the role of the OCC in Oman, unlike the promotion by the government that refers to the OCC as parliamentary, the OCC is not a parliament. A parliament must have the power to legislate and the ability to monitor the executive authority. Also the membership must be based on free and universal election. However, in Oman, selection of Council members is made by the government and ultimately determined by the Sultan. Such a system of selection challenges the validity of the electoral process. Oman also differs from other parliamentary systems in that the competition of political parties for seats in parliament does not apply.<sup>538</sup> External pressures for democratic reforms have been imposed on the countries of the Arabian Gulf, including Saudi Arabia, for decades, since the Reagan Administration in the US when Western normative standards were demanded in order to determine whether the nations were trade worthy-friend or foe. However, the implementation of blanket reforms in the Arabian Gulf would have failed:

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<sup>536</sup> Raid Zuhaira Al-Jumali, 'Oman, kind of not quiet' (7 November 2011) Foreign Press 1 <[http://mideastafrica.foreignpolicy.com/posts/2011/11/07/kind\\_of\\_not\\_quiet](http://mideastafrica.foreignpolicy.com/posts/2011/11/07/kind_of_not_quiet)> accessed 1 January 2013.

<sup>537</sup> Mai Yamani, 'Democratic Facade' (2005) 61 (2) The World Today 14.

<sup>538</sup> Al-Haj (n 531) 570.

... far from being a uniform, undifferentiated region, [it] is one of considerable complexity, strewn with booby traps for the unwary outside policymaker. If there is Ariadne's thread leading through the labyrinth, it is the determination of these various countries to decide for themselves what is in their best interest, to set their own national goals, and to cooperate among themselves only when they perceive it in their interest to do so. Any program to impose external leadership must be undertaken with extreme caution.<sup>539</sup>

Just implementing elections for executive leadership, for example, would likely not have the desired results. That is because the societies and their political relations are embedded in the traditional relations between the rulers and ruled and voting systems or elections are not likely to lead to more political participation or a balance of power and access.<sup>540</sup>

### **5.3 The Current Saudi State and Legitimate Rule**

In Saudi Arabia, legitimacy is bound together with an ideology that is coloured by a religious perspective which seeks to set out how society should be shaped and organised.<sup>541</sup> The monarchy has always presented itself as a protector of Islam. The Basic Law of Governance emphasises this role in Articles 6, 7 and 8, of the Basic Law of Governance when it declares:

Article 6:

In support of the Book of God and the Sunna of His Messenger (PBUH), citizens shall give the pledge of allegiance (bay'a) to the King, professing loyalty in times of hardship and ease.

Article 7:

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<sup>539</sup> Anoushiravan Ehteshami, 'Reform from Above: The Politics of Participation in the Oil Monarchies' (2003) 79 (1) *International Affairs* (Royal Institute of International Affairs 1944) 53.

<sup>540</sup> *ibid* 55.

<sup>541</sup> Niblock (n324) 10.

Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunna of the Prophet (PBUH), which are the ultimate sources of reference for this Law and the other laws of the State.

Article 8:

Governance in the Kingdom of Saudi Arabia is based on justice, shura (consultation) and equality according to Islamic *Shar'ia*.<sup>542</sup>

Additionally, the State has traditional legitimacy, in that the monarchy has been responsible hitherto for bringing the country together. Therefore, the monarchy lays claim to its right and the responsibility for the creation of a modern State of Saudi Arabia. This they would argue is what the royal family, historically, is entitled to do and thus on this basis they legitimise and retain the rulership of the country.<sup>543</sup> The government also stresses its achievements in developing and modernising the nation and in its ability to meet the needs of its population. Another form of legitimacy maintained by the monarchy is its circles of cooperation and bases of support from key groups. The family itself is vast. With 7,000 princes, the political role of the family could be compared to a political party.

A critical constituent group of the regime is the *ulama*, the religious leaders. Considering that the regime's legitimacy is due in part to its commitment to Islam, the relationship between the regime and the *ulama* is critical. The line between the two often becomes blurred as the *ulama* depend on State financing for most of their activities. The tribal constituency is also pivotal (and always has been), to ensure cooperation between tribes in order that stability is maintained across the region. As Niblock argues (2006), over time, tribal leaders embraced the role of being guarantors of the people's passivity to the regime's rule and, too, acted as representatives of the people during dialogue with the King.<sup>544</sup> Tribal loyalty continues to be a powerful force in the country. However, in order to maintain the complicated relations and sources of cooperation required in Saudi Arabia, they all

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<sup>542</sup> Articles 6, 7 & 8, The Basic Law of Governance 1992, The Royal Embassy of Saudi Arabia, <[http://www.saudiembassy.net/about/country-information/laws/The\\_Basic\\_Law\\_Of\\_Governance.aspx](http://www.saudiembassy.net/about/country-information/laws/The_Basic_Law_Of_Governance.aspx)> accessed July 2014.

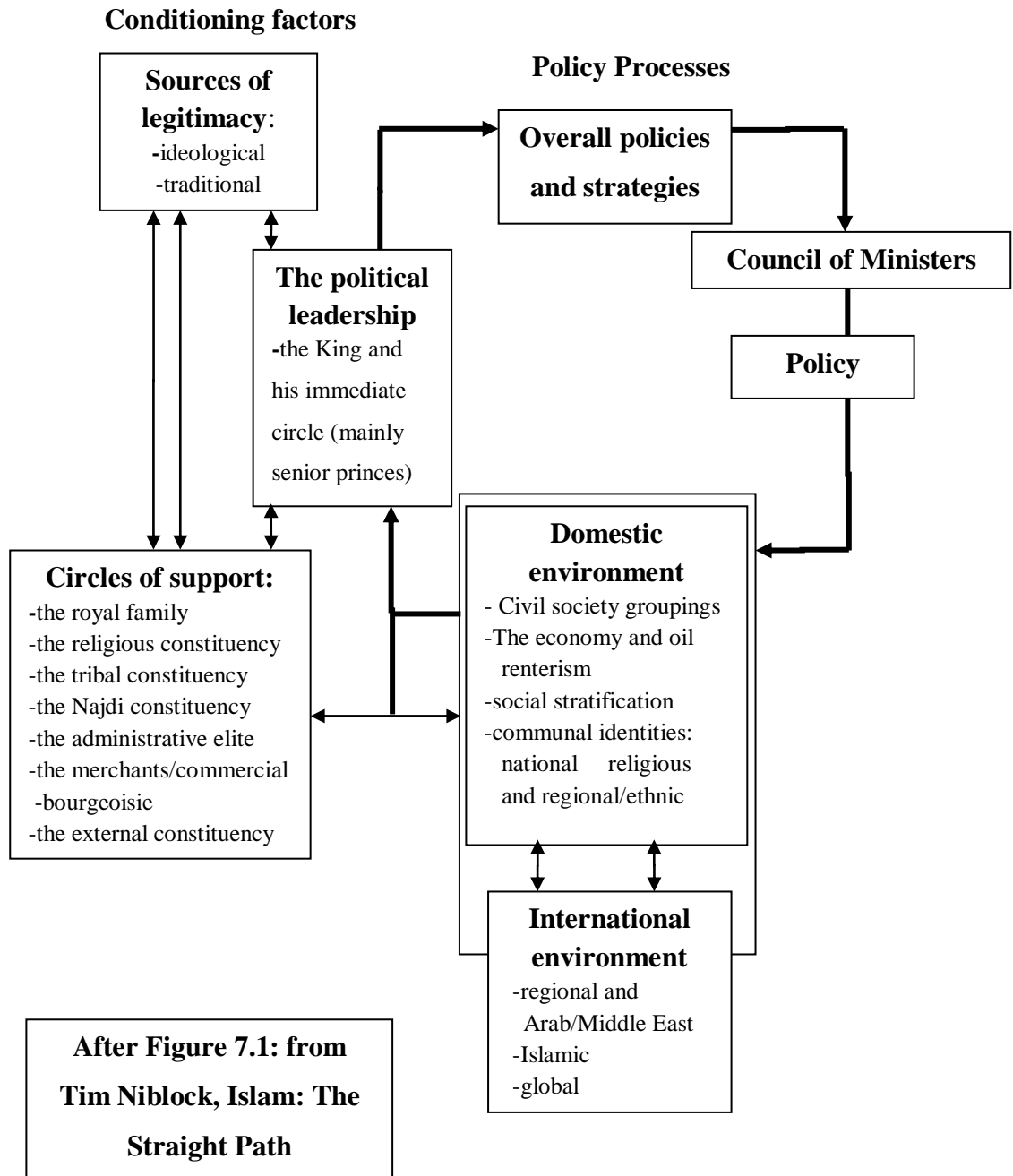
<sup>543</sup> Niblock (n 324) 11.

<sup>544</sup> *ibid* 15.

must share the government's belief in the legitimacy of its rule.<sup>545</sup> Ultimately, "The House of Saud has relied on Islam to unite and rule its tribal society, to legitimate its authority and institutions, and to assert its leadership in the Islamic world."<sup>546</sup>

Figure 2 illustrates the dynamics and relationships inherent in the current Saudi Arabian political system.<sup>547</sup>

**Fig. 2: Saudi Arabian political system**



<sup>545</sup> Niblock (n 324) 8.

<sup>546</sup> Esposito (n 298) 191.

<sup>547</sup> Niblock (n 324) Fig. 1, 11.

In order to maintain legitimacy, the regime within Saudi Arabia will have to convince the various stakeholders depicted here that the existing political institutions are the most appropriate for its society. Considering the relatively stable nature of Saudi society, the government should be able to avoid the use of force and coercion to maintain its rule and the status quo, if it nurtures widespread belief in its legitimacy.<sup>548</sup>

Yet, whilst the Saudi government derives its legitimacy from several key sources, does it possess democratic/structural legitimacy? In a democratic, constitutional framework, it is apparent that legitimacy depends on the will of the majority of its citizens. On this basis alone, the case for Saudi Arabia in its claim of democratic legitimacy is very weak. In response to this view, the regime argues that by maintaining a coherent system of law and governance, it possesses a greater legitimacy than that which is founded on the *Quran*. In addition, it is asserted, the *majlis* (informal Councils) of the King and of senior members of the royal family represent the traditional role of interlocutor between the people and the ruler, in as much as any citizen may present their case to them as if they were talking directly to the King.<sup>549</sup> Although these informal meetings are important for citizens, they are not a vehicle for their active participation or input into major policy issues. The transition to a more democratic form of government is one of the Saudi regime's stated long-term goals, the implementation of which will need time and careful consideration.<sup>550</sup>

Legitimacy in Islam comes foremost from the Supreme law of *Shar'ia*, and secondly, the requirement that society is governed in accordance to the will of the people. Kurshid states that whosoever is in authority "must enjoy the confidence and support of the Muslims, the Umma, the real repositories of Khilafa."<sup>551</sup> The legitimacy of the Saudi regime has not gone uncontested in the last four decades, and in particular, came under intense scrutiny in the late 1970s. During the reign of King Faisal, from 1962 to 1979, the country was able to use its new, huge revenues from oil to maintain stability through modernisation and by taking steps to reduce the levels of income inequality across the State. However, regional events have had a

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<sup>548</sup> Niblock (n 324) 10.

<sup>549</sup> *ibid* 13.

<sup>550</sup> *ibid*.

<sup>551</sup> Khurshid (n 413) 3.

major impact. When the Shah of Iran was overthrown in 1979, one of the first actions the new Iranian regime initiated was a political attack on the Saudi claim to Islamic leadership.<sup>552</sup> The Saudi Kingdom was declared to be corrupt, outdated and compromised by its relationship with the US. Unfortunately for the Kingdom, during the same time period, the volatility of oil prices had a major impact on the economic well-being of the country. Stability was maintained by a top-down approach. First, religious authorities were given more power to satisfy sections of the population, and the government used “welfare policies” to keep most of the population acquiescent. However, no real political reforms were introduced. Therefore, people benefitted from the government’s generosity, but had no role in shaping their communities.<sup>553</sup>

#### **5.4 Saudi Arabia Responds**

Although there were calls for reform in Saudi Arabia during the 1980s and 1990s, they were generally quietly quelled.<sup>554</sup> Reforms were described as not being relevant to the needs of the Saudi people or dismissed as being untimely or too radical. However, the last decade has witnessed a new spirit of reform in the GCC monarchies.<sup>555</sup> Some of the events that have caused the Arabian Gulf States to examine the need for reform are: the invasion of Kuwait and the first Gulf War; September 11, 2001 terrorist attacks; the second Gulf War; the war in Afghanistan; and most recently the revolutions associated with the Arab Spring. After the attacks of 9/11, relations between Saudi and the US were shaken when it was discovered that fifteen of the hijackers were Saudi citizens.<sup>556</sup> The monarchies often refer to the need for reform in terms of what Anoushiravan Ehteshami describes as “new realities.”<sup>557</sup>

Incremental change is more suitable to the people of Saudi Arabia, but this does not mean Saudis will not become restless if there are no real reforms made. As one Saudi journalist states, “We live in a society that has its own peculiarities, and we should move down the path of reform at a speed appropriate to the ability of

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<sup>552</sup> Niblock (n 324) 49.

<sup>553</sup> *ibid* 71.

<sup>554</sup> Ehteshami (n 539) 53.

<sup>555</sup> *ibid* 54.

<sup>556</sup> Iris Wurm, ‘In Doubt for the Monarchy Autocratic Modernization in Saudi-Arabia’ (2008) Peace Research Institute Frankfurt (PRIF)10.

<sup>557</sup> Ehteshami (n 539) 54.

society to accept change.”<sup>558</sup> Because the nature of government and political leadership in Muslim monarchies within the Arab Peninsula rests on family-based fiefdoms, which have held ruling power long before each of their lands evolved into independent States, any discussion on the shape of political reform in any of their States is inexorably tied, ultimately, to what the ruling families see as good governance and too, to the extent they are prepared to allow the process of change to alter the balance of power. Thus, hitherto, the status quo has been maintained by careful changes in the running of the State.

Widening participation across the Arab Peninsula through more active implementation of *Shura* practices has opened up the individual States to a range of international measures defining good governance. These include: “transparency, accountability, absence of corruption and nepotism, and rational and fair policy-making, along with efficiency and responsiveness in the public sector, the presence of an independent judiciary which operates (and is seen to operate) without prejudice, privacy laws and freedom of information.”<sup>559</sup>

While Saudi Arabia responded to external pressures, internal political pressures began to increase. For example, in May 2003, terrorist attacks were launched within the Kingdom. Al-Qaeda targeted Saudi Arabia between 2003 and 2005. A total of 221 people lost their lives.<sup>560</sup> At the same time, several citizen petitions were filed demanding an increase in political participation by Saudi citizens. In January 2003, the King received a petition for open elections to the Consultative Council and a request for more civil rights. More petitions followed. The final petition openly demanded a changeover from an absolute to a constitutional monarchy.<sup>561</sup>

The pressures within the Kingdom were exacerbated by other issues too: high unemployment and a labour market that had to absorb 130,000 young men, when only 30,000 - 40,000 graduates were able to find jobs. Unrest grew. Additionally, both King Abdullah and his Crown Prince Sultan were over 80 years old and the

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<sup>558</sup> Saoud Kabelli, ‘Saudi Arabia Faces More Immediate Threats Than Arab Spring’ *Al-Monitor* <<http://www.al-monitor.com/pulse/security/2014/01/arab-spring-threat-saudi-arabia.html>> accessed 30 January 2014.

<sup>559</sup> Kabelli (n 558).

<sup>560</sup> Wurm (n 556) 7.

<sup>561</sup> *ibid.*

ruling family was in disagreement about how to make the necessary generational changes. The Saudi powers find themselves facing internal and external criticism, which has raised concern regarding the security of their rule. This has alerted them to recognition of the need for action.<sup>562</sup>

King Abdullah initiated a process of reform, while still in the position of Crown Prince. He established the Forum for National Dialogue, a panel for discussion of various proposals for change. To date, six meetings have been held. Discussion topics have included extremism, the rights and responsibilities of women, education, youth and perceptions of foreigners.<sup>563</sup>

Thus, the regime in Saudi has taken small steps toward reform, although it is generally agreed that those steps have not weakened its power. Nevertheless, the people have been encouraged because under the Saud family regime, they had never experienced any fundamental change regarding their rights since 1932. And, whilst the reforms were intended to implement little change and maintain, by and large, the status quo, the steps taken have tried to satisfy demands from within the country.<sup>564</sup> Therefore, whilst the reforms are considered minimal, they do show that Saudi Arabia is capable of change, which has brought hope to the population.

One of the first steps taken in response to internal demands was the creation of the constitutional document, 'Basic Law' in 1992. However, most scholars agree that the most important step was the formation of the Consultative Council (The *Al-Shura* Council), which was established as a debating assembly consisting of sixty members, albeit they were appointed by the King. The Council was empowered to study all government regulations and international treaties before they became royal assent. The Council could also question cabinet members. It could not, however, initiate debates, without first obtaining permission from the King, who at the same time held the power to dissolve or reorganise the Council at any time.<sup>565</sup>

Members of the *Al-Shura* Council were chosen from the country's most important groups of constituents, both conservative and liberal, including religious

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<sup>562</sup> Wurm (n 556) 8.

<sup>563</sup> *ibid.*

<sup>564</sup> *ibid.*

<sup>565</sup> Andrzej Kapiszewski, 'Elections and Parliamentary Activity in the GCC States: Broadening Political Participation in the Gulf Monarchies' in Abdulhadi Khalaf & Giacomo Luciano (eds) *Constitutional Reform and Political Participation in the Gulf* (Gulf Research Center 2006) 90.



bodies, government, law and business. Most could be described as experts in their field. Establishing the Council was seen as significant, which explains its growth from sixty to ninety members in 1997, to one-hundred and twenty in May 2001 and to one-hundred and fifty in April 2005. Its influence, whilst not necessarily grounded in law, has been a function of its members' prominence and diversity. It also reflects the tradition of governance in Saudi Arabia, which concerns itself with avoiding conflict by maintaining harmony through consultation and consensus.<sup>566</sup> The Council is rarely divided over issues. Although the *Al-Shura* Council has been applauded by Saudi citizens, it has not satisfied those who demand more democratic reform. This is because the views of the Council can be seen as recommendations only. The King and the Government are not bound to implement them. That said, ministers normally accept the recommendations or agree a compromise action with the Council.<sup>567</sup> With the on-going threat of extremism, intense debate has continued, with the conclusion that the closed nature of the Saudi political system, largely imposed by the need to appease the religious establishment, is the main cause.<sup>568</sup>

Of note in the process of change is a petition called *A Vision for the Present and the Future of the Nation*, which was signed by one-hundred and four academics in 2003 and supported by businessmen, religious scholars and professionals from various regions who represented different religious and political orientations. Among the various issues raised in the petition were calls to provide the Consultative Council with legislative and control powers; to make it an elected body; for an independent judiciary; to allow freedom of expression and; the establishment of civil society institutions.<sup>569</sup>

Most petitions, including the aforementioned, are very respectful in tone and content. For example, a recent publication to the King from Dr. Khalid Al-Nowaiser, openly praises the King for what he has done so far. He argues, however, that recent events are making the need for further reforms particularly urgent. Al-Nowaiser calls for reform of the *Al-Shura* Council. While he describes the formation of the Council as being a step forward, under the current structure and role, it is not up to the huge

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<sup>566</sup> Kapiszewski (n565) 91.

<sup>567</sup> *ibid.*

<sup>568</sup> *ibid.* 92.

<sup>569</sup> Khalid Al-Nowaiser, 'Meeting New Challenges' (5 March 2011) *Arab News* < [http://www.al-bab.com/arab/docs/saudi/saudi\\_reform\\_documents\\_2011.htm](http://www.al-bab.com/arab/docs/saudi/saudi_reform_documents_2011.htm) > accessed 1 June 2013.

challenges faced by the country. He advocates the need for an effective Council to take part in decision making. Such a Council, if composed properly, would not be a threat to the regime, but would help to address the heavy responsibilities faced by the State, which no government can be expected to cope with without support.<sup>570</sup>

Al-Nowaiser also talks of the need for a social contract in Saudi Arabia, where rights and obligations of the government and citizens are clearly identified. He does not believe this can happen without a formalised constitution. Additionally, he says, the constitution should be derived from the *Quran*.<sup>571</sup>

Since 2003, several petitions have asked for more limits to the power of the ruling family, along with more participation by citizens in decision-making. A response to the petitions was the development of the National Dialogue sessions. The issue of elections came up in the second debate of December, 2003. The results of the dialogue were presented to the Crown Prince, now King Abdullah, and the recommendations included holding elections for the State Consultative Council and local consultative Councils; encouragement for the establishment of trade unions, voluntary associations and other civil society institutions; and the separation of legislative and executive branches.<sup>572</sup>

Although the rest of the world may see recent activities in Saudi Arabia related to democratic reform as painfully slow and inadequate, Abd al-Aziz al-Qasim argues,

It is hard to overestimate the importance of this step in a society where non-interference in politics is considered the condition of good citizenship. [The local] elections in themselves may not have much substance, but the decision to hold them breaks a barrier and establishes the principle that society can participate in making policy.<sup>573</sup>

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<sup>570</sup> Al-Nowaiser (n 569).

<sup>571</sup> *ibid.*

<sup>572</sup> Kapiszewski (n 565) 93.

<sup>573</sup> *ibid.* 94.

Change is taking place, albeit slowly, but the pace and nature of that change requires careful consideration of the various stakeholders. If pushed too far, for example, religious conservative groups could easily destabilise the country.

This alone, is one of the reasons modern Muslim scholars encourage democratic reform based on Islamic principles, identifying *Shura* and *Ijma* as the foundation for Islamic democracy.<sup>574</sup> *Ijma* is consensus regarding a question of law. Add consensus to *Shura* – mutual consultation and decision-making between ruler and ruled – and the basis can be seen for a powerful foundation for the creation of a deliberative democracy within the Islamic nation. In order to develop joint deliberation on issues, *Shura* also requires a specific dilemma to be addressed by collating and sharing different points of view to reach resolution. This process is regarded as a source of democratic ethics in Islam and for some it is seen as another way of describing democracy in Islam: a foundation for democratic government.<sup>575</sup> Obviously, the Arabian Gulf countries had a long way to go to meet the conditions of good governance.

## 5.5 The Arab Spring

Before the events in 2011 that became known as the “Arab Spring,” many Western political analysts had been swayed by Samuel Huntington’s declaration that Muslims would never embrace democracy. Samuel Huntington wrote in his book *Clash of Civilizations*, that the “general failure of liberal democracy to take hold in Muslim societies is a continuing and repeated phenomenon [...] This failure has its source at least in part in the inhospitable nature of the Islamic culture and society to Western liberal concepts.”<sup>576</sup> Huntington’s premise that Islam and democracy were incompatible was very convincing. If one made reference to the catalogue of repressive “Muslim” dictatorships in the Middle East, then history even, appeared to support his argument and proved to the West, that Huntington was right.

Yet, the inevitable clash-of-civilizations premise appeared to unravel and be undermined by the upheaval caused by the Arab Spring. Millions of Muslims risked their lives to demand more democracy in their societies. The spirit of the Arab

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<sup>574</sup> Parry (n 403) 73.

<sup>575</sup> *ibid* 2.

<sup>576</sup> Fatima Al-Samak, ‘The Arab Spring: Muslims Embracing Democracy’ (18 July 2011) *Encompassing Crescent* 1.

uprisings are captured in the following quote from a new publication, *Encompassing Crescent*, that was created in response to the popular call for change:

If 2011 is demonstrative of anything, then it is that we the people demand accountability, transparency and a leadership that listens and is responsive to the calls of humanity. There are, however, some States that appear to hear these calls from below and those that transcend geographical boundaries.<sup>577</sup>

Some important questions have arisen due to the major events of the Arab Spring. For one, what did the Arab Spring look like from the Arab world itself? Marwan Bashara, the senior political analyst with *Al-Jazeera*, discussed the Arab Spring by claiming that each Arab country and its people reacted according to its own circumstances and the nature of the regime and its relationship with citizens. While all the Arab countries do share a common history and culture, each nation had a different response specific to that society. Bashara described the revolutionary wave as breathtaking, but also “too good to be true.”<sup>578</sup> Revolutions for democracy would need to be able to make radical changes to be successful; this would entail ridding the old regime of its supporters and holding back its unbridled power.<sup>579</sup> And after the initial revolution, a counter revolution would likely take place where the old forces compete. The revolutions do open the way for change and fill the people’s aspirations, but it takes time to develop democracy says Bashara. He also says we are not witnessing the new forms of a counter, counter-revolution. Bashara does remain optimistic, however. He says, “The promise of the Arab revolution was - and remains - a break with repressive authoritarian and totalitarian regimes to pave the way towards an era of freedom, dignity and prosperity.”<sup>580</sup>

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<sup>577</sup> Jerzy Buzek, ‘Introduction: A New Vision for a Changing World’ ( May 2011) 1 *Encompassing Crescent* 1.

<sup>578</sup> Marwan Bishara, ‘Year Four: The Seasons Turn on the Arab Spring’ (17 December 2013) *Al-Jazeera* 1 <<http://www.aljazeera.com/indepth/opinion/2013/12/year-four-seasons-turn-arab-spring-2013121762345793639.html>> 16 February 2015.

<sup>579</sup> *ibid.*

<sup>580</sup> *ibid* 1.

Another important question to ask in light of the Arab Spring is what would or should a Muslim democracy look like? This is a central question to the continuing debate over the compatibility of Islam with democracy.

### ***5.5.1 The Arab Spring and Saudi Arabia***

With waves of unrest flowing across the Middle East, the reality of the region has surely been changed, and Saudi rulers have not ignored potential threats to the Kingdom coming from dissatisfied, disaffected people. But Saudi citizens will be more affected by internal conditions rather than influenced by radical protests in other countries. For example, the very high unemployment rate of young people in the Kingdom is seen as a bigger threat than any external political movement. Nevertheless, several steps were taken by the Saudi government to maintain a calm exterior. For example, in March, 2011, a day of demonstrations was planned called “A Day of Rage.” Learning of the upcoming protest, thousands of police were dispatched to the country’s Eastern region, where the demonstration was expected to take place.<sup>581</sup> In addition, the government announced its plan to spend \$35 billion to help the country’s middle income and low income families. It is this combination of resources distributed to the population, along with a ruling family that has been embedded in the region for centuries, which helps to maintain the government’s legitimacy:

Given the size of oil revenues, they [Al-Saud family] have enormous economic means at their disposal to co-opt the population and to put in place economic development policies that can provide jobs for a young and restless population. Finally, large numbers of Saudis cannot imagine the country remaining unified without them in power and, moreover, have too much to lose if the regime is overthrown.<sup>582</sup>

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<sup>581</sup> Toby Jones, ‘Seeking Reform, Not Regime Change’ (14 March 2011) *The New York Times* <<http://www.nytimes.com/roomfordebate/2011/03/14/how-stable-is-saudi-arabia/seeking-reform-not-regime-change>> accessed 14 March 2011.

<sup>582</sup> Bernard Haykel, ‘What Makes the Kingdom Different?’ (14 March 2011) *The New York Times* <<http://www.nytimes.com/roomfordebate/2011/03/14/how-stable-is-saudi-arabia/what-makes-the-kingdom-different>> accessed 14 March 2011.

Still, the events of the Arab Spring were profound, leaving imprints along the way, including demands for reform in almost every corner of the Middle East; “The region has also seen unprecedented and growing freedom of expression and demands for greater public participation, where democratic discourse has gained a legitimacy that is hard to revoke.”<sup>583</sup> Saudi has been able to quell radical calls for reform primarily because the contract between the Gulf rulers and their citizens retains its validity. This helps to maintain political stability, which is the desire of the population in general, and is essential for initiating positive and beneficial change.<sup>584</sup> Nevertheless, Saudi Arabia’s subjects do desire substantive political reform. Calls for the creation of a constitutional monarchy, an end to corruption, and more political rights have been expressed for many years. Even though most Saudis respect King Abdullah and his leadership, a large number see the political system as rigid, unresponsive and corrupt, focused mainly on serving the interests of the ruling elite. There are plenty of diverse people who want to see change, but they do not want to see an end to the regime itself. What they want is more political accommodation, giving them more say in governance and more say over the wealth generated by oil. The fact that a popular uprising has not taken place in Saudi Arabia is not an indication of the lack of will from the population to do so, but rather, a sign of the level of control the central authorities hold over the public.<sup>585</sup>

## 5.6 Conclusion

In Saudi Arabia, the foundation of a true separation of power exists already through the principle of *Shura* as manifested in its *Al-Shura* Council. The *Al-Shura* Council is highly revered in Saudi because it represents the most well-respected members of society coming together to consider whether contemporary law in Saudi follows *Shar’ia*. However, the Council does not follow the classical separation, where the *fiqh* scholars were independent from the ruler’s influence and sway. As long as the members of the *Al-Shura* are appointed by the King, there is no true role for non-governmental voices that articulate *Shar’ia*. In the past, the rulings of *fiqh* scholars were accepted so long as that scholar or scholars had built a worthy

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<sup>583</sup> Saoud Kabelli, ‘Saudi Arabia faces more Immediate Threats than Arab Spring.’ *Al-Monitor* <<http://www.al-monitor.com/pulse/security/2014/01/arab-spring-threat-saudi-arabia.html#>> accessed 30 January 2014.

<sup>584</sup> *ibid.*

<sup>585</sup> Jones (n 581) 1.

reputation as someone wise in their interpretation of the sources of *Shar'ia*. So, their credibility came in part from public perception.

To develop true credibility in the tradition of *fiqh*, public participation in the election of members to the *Al-Shura* Council based on the body of work developed by a person, is required. Saudi Arabia does not need to incorporate Western constitutionalism to achieve its own constitutionalisation. It needs only to adhere to its own classic tradition of the separation of *fiqh* and *siyasa* to create a more democratic national governance system. The Saudi State would not only create a more democratic system of governance, it would be a model for a viable Islamic constitutionalism, not as a re-creation of an old order but as a solution to contemporary challenges.

The discourse on constitutionalism today only recognises law that comes from the State, but there are other sources. The separation of powers was a response to the State that tried to control the beliefs of its citizens. The Western solution was a separation of State and Church. The separation of law-making power into *fiqh* and *siyasa* was the Muslim solution. Both were astute and appropriate solutions, well matched to the nature of their citizens.<sup>586</sup> Additionally, a government cannot achieve its goals if it lacks consensus and involvement of the people in support of its policies and decisions.<sup>587</sup> It is unnecessary for the future of Muslim societies to break away from their heritage. It is quite feasible that Islamic nations can exist in a world of constitutionalism and offer equal freedoms and protections to its citizens: The concern that modernisation would lead to increasing westernisation and secularisation of Islamic society has been challenged by recent Muslim history. Social, economic and political development does not require secularisation of a society as a starting point.<sup>588</sup> In fact the most significant debates related to the Muslim world are not over the superiority of a secularised State as compared to an Islamic State in terms of democracy, rather they are about the constitutionalisation of existing States.<sup>589</sup>

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<sup>586</sup> Quarishi (n 325) 73.

<sup>587</sup> Kamali (n 348) 16.

<sup>588</sup> Esposito (n 298) v.

<sup>589</sup> Kamali, 'Legal maxims and other genres of literature in Islamic jurisprudence' (n 323) 27.

Because of the strength of religion in the Muslim society, a government which would help to make the *Shar'ia* a real force in society would be best suited to contemporary Muslim nations. Modern Muslims, like most people, seek a balance between continuity and change in their lives, and a more democratic system built on Islamic tradition would be a good choice to achieve the balance required. A key to any constitutionalism today is that it finds inspiration and a way to address diversity in order to find solutions while maintaining support from the people. In my opinion, if Western leaders had a more clear understanding of the potential of Islam to promote democracy, they would have the ability to help Muslim nations reach constitutional goals of mutual interest to all citizens, Western and Muslim. However, the conventional Western interpretations, of religion, and in particular of Islam, leave little room for the recognition of the actual, complex development of such Islamic countries. Defining Islam and modernity as two more or less incompatible phenomena fails to recognise the potential of developing modern democratic Islamic societies with their cultural elements and particularities.<sup>590</sup>

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<sup>590</sup> Kamali, 'Civil society and Islam: a sociological perspective' (2001) 42 (3) *European Journal of Sociology* 459.



## Chapter Six: Contemporary Governance and Law in Saudi Arabia

### 6.1 Introduction

Saudi Arabia is governed by both Islamic and secular institutions that have undergone reform in the last 30 years. Although a relatively new country, Saudi Arabia is part of a region that is much influenced by its ancient history and traditions. So, even modern-day governance follows ancient traditions based on regional history. Nevertheless, Saudi Arabia, in recent decades, has developed a legal and administrative system that is designed to meet the demands of modern affairs.

#### *6.1.1 Brief History of the Modern State*

The present-day Kingdom of Saudi Arabia was officially proclaimed by King Abdulaziz in 1931, following a process of unification by the Al Saud clan from the early 1900s. However, whilst the history of the region extends for thousands of years, the existence of the modern Kingdom of Saudi Arabia only goes back some two hundred and sixty years, to 1744, when Muhammad bin Saud, founder of the first Saudi State, and Shaikh Muhammad Ibn Abd al-Wahhab, a well-respected religious authority, pledged to establish Islam and to apply the Islamic *Shar'ia* in this new entity. This principle was strongly reaffirmed in the Basic Law of Governance that was adopted in Saudi Arabia in 1992.<sup>591</sup>

Saudi Arabia today, is made up of 13 provinces, each with a governor and deputy governor, who act as local authorities. Each province also has its own Council, which advises the governor and deals with the development of the province. Over the years, and since the modern Kingdom was created, the monarchy has worked hard to establish a modern Islamic State. It has used a blend of pragmatism, and adherence to sacred values and beliefs, in order to maintain legitimacy in the hearts and minds of Saudi citizens.

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<sup>591</sup> Ayoub and Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia' (2004) 19 (1/4) Arab Law Quarterly 5.

## 6.2 Institutions of Authority in Contemporary Saudi Arabia

Chapters 1, 2 and 6 of the Basic Law of Governance (1992) outline the structure of the Saudi State: Saudi Arabia is a monarchy based on Islam. The head of the government is the King, who is also the Commander-in-Chief of the armed forces. The Crown Prince acts as an assistant to the King, and is second in line to the throne. Governance occurs through the King and with the help of the Council of Ministers, also called the Cabinet. There are 22 government ministries in the Cabinet. Each ministry specialises in a different area of government, such as foreign affairs, education and finance.<sup>592</sup>

The Council of Ministers, or Cabinet, is an official body presided over by the King (who is also the Prime Minister). It includes the Prime Minister and his Deputies, active ministers, ministers of State appointed by royal edict as Cabinet members, and consultants to the King who are appointed by royal command as members of the Cabinet. The law pertaining to the Cabinet does not specify the number of members of the Cabinet, which allows new ministries to be added as needed.<sup>593</sup>

## 6.3 Executive Authority

According to the system of law in Saudi Arabia, the King has ultimate authority over the executive branch.<sup>594</sup> The King also implements the policies of the nation under the umbrella of Islam. In addition, the King is responsible for the implementation of *Shar'ia*, as well as Saudi Arabia's laws, regulations and policies, along with the system of government and the general policies of the State. If circumstances indicate a situation of emergency, the King is given extraordinary powers, allowing him to take whatever actions are necessary and implement them in order to deal with the crisis.<sup>595</sup> Additionally, as head of the Council of Ministers, ministries and governmental agencies, the King directs general State policy,

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<sup>592</sup> The Basic Law of Governance 1992 (n 542) Chapters 1, 2 & 6 accessed 15 August 2013.

<sup>593</sup> Saleh Al-Saddan, 'Stages of issuing law in the Kingdom of Saudi Arabia, Office of the Al-Shura Council' (2009) 15.

<sup>594</sup> The Basic Law of Governance (n 542) Article 44.

<sup>595</sup> *ibid*, Article 62.

administers advice and guidance and thereby strives to maintain harmony and unity within the Council of Ministers.<sup>596</sup>

The Council of Ministers is the primary legislative authority in Saudi Arabia, and the Council of Ministers is led by the Council's Prime Minister. As the Prime Minister of the Council is the King, there is no real separation of powers between the King and the Council, even though promises for more separation of powers have been made for the last few decades.<sup>597</sup>

Article 56 of the Basic Law of Governance specifies:

The King is the Prime Minister. Members of the Council of Ministers shall assist him in the performance of his mission according to the provisions of this Law and other laws. The Council of Ministers Law shall specify the powers of the Council in respect of internal and external affairs, organization of governmental departments and their coordination. In addition, the Law shall specify the qualifications and the powers of the ministers, ministerial accountability procedures and all matters pertaining to the ministers. The Law of the Council of Ministers and the areas of their authority may be amended according to this Law.<sup>598</sup>

The King clearly has immense responsibilities, but he does share some of that authority with other agencies. According to Article 44 of the Basic Law of Governance, the Authorities of the State consist of the Judicial Authority, the Executive Authority and the Regulatory Authority; this Law dictates that these Authorities should cooperate with each other, in the performance of their duties. The King holds absolute power over these Authorities.<sup>599</sup>

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<sup>596</sup> The Basic Law of Governance (n 542) Article 56.

<sup>597</sup> Bassam Abdullah Albassam, 'Political Reform in Saudi Arabia: Luxury or Necessity?' (2011) 6 (93) Middle East Studies 76.

<sup>598</sup> The Basic Law of Governance (n542) Article 56 accessed 18 August 2013.

<sup>599</sup> *ibid* Article 44.

The citizens of Saudi Arabia have accepted the powers assigned to their King as long as he rules under the umbrella of *Shar'ia*, as Article 45 of the Basic Law of Governance States: "... the King undertakes the legitimate policy of the nation in accordance with the rules of Islam." He, therefore, oversees the application of Islamic law and the State's laws, as well as the public policy of the State, and must also defend and protect the State. Thus, there can be no doubt that the King's most important responsibility is to oversee the application of the rules and obligations of Islamic law in order that the nation and its citizens will both achieve security and a state of wellbeing.<sup>600</sup>

#### 6.4 Legislative Authority

Governance occurs through the regulatory (legislative) authority of the Council of Ministers and also the *Shura* Council. The King is the head and the reference of all regulatory and legislative authority. The Council of Ministers and the *Shura* Council provide the mechanisms for the issuing of laws. In developing law, there are two stages – proposal and discussion – which are of particular importance before a law is issued. As the head of the regulatory authority, the King has the task of endorsing all laws prior to their publication. Ultimately, if a proposed law is not ratified by the King, that law is rendered invalid.<sup>601</sup> Legislative authority has the power to approve international treaties, agreements, regulations and concessions. In Islamic *Shar'ia*, only God can legislate; so the word "legislation", a secular term, is not used in the Saudi State. The legislative authority is shared by the King, the Council of Ministers, and the *Al-Shura* Council, with the King as the ultimate authority.<sup>602</sup>

Legislative/Regulatory authority is derived from Article 67 of the Basic Law of Governance, which states that the body known as the Regulatory Authority "... shall be concerned with the making of laws and regulations which will safeguard all interests, and remove evil from the State's affairs, according to Shar'ia." The powers that accrue to this body must be exercised according to the provisions of the Law of

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<sup>600</sup> Ragheb El-Sergany, 'Shura in Islam' (27 November 2010) 14 On Islam  
<<http://www.onislam.net/english/Shar'iah/Shar'iah-and-humanity/Shar'iah-and-life/449889-shura-in-islam-concept-and-importance.html?Life=> > accessed 1 August 2013.

<sup>601</sup> Al-Saddan (n 593) 13.

<sup>602</sup> Abdullah F Ansary, 'A brief overview of the Saudi Arabian Legal System' (July 2008) Globalex,  
<[http://www.nyulawglobal.org/globalex/saudi\\_arabia.htm#\\_Toc200894561](http://www.nyulawglobal.org/globalex/saudi_arabia.htm#_Toc200894561)> accessed 1 September 2013.

Governance, and the Law of the Council of Ministers. This is undertaken through the legislative body called the Consultative Council (*Majlis Al-Shura*). In that regard, Article 67 of the Basic Law also states, “The regulatory authority lays down regulations and motions to meet the interests of the State or removes what is bad in its affairs, in accordance with the Islamic *Shar’ia*. This authority exercises its functions in accordance with this law and the laws pertaining to the Council of Ministers and the Consultative Council”.<sup>603</sup> The Consultative (*Shura*) Council consists of 150 members (as amended from 60, to 90, then back to 150 members) who are appointed by the King for four-year terms, which can be renewed. It proposes new laws and also reviews and/or amends existing ones.<sup>604</sup>

## 6. 5 Statutory Law

Besides the Islamic *Shar’ia* law, there are many statutory laws that have been passed in relation to criminal, administrative, and commercial areas in the affairs of the Kingdom. As the ruler of the Islamic State, the King has discretion over policies of public interest, *al-Siyasah*. All State regulations developed by the King are considered legal and legitimate as long as they are not contrary in any manner to *Shar’ia*. *Siyasah* is developed when there is no clear, definitive text in Islamic law that is related to a particular circumstance or issue.

Saudi Arabia’s judicial system is based on Islamic law (*Shar’ia*). The King acts as the final Court of Appeal. *Shar’ia* courts are found throughout the Kingdom. *Shar’ia* is the main source of the judicial, as well as the general system of government.<sup>605</sup> The foundations of *Shar’ia* are declared in Article 23 of the Law of Basic Rule: “The State shall protect and apply the *Shar’ia* of the Islamic faith [which] orders the doing of good and beneficial things and prohibits the doing of the forbidden; it will perform the duty of preaching for [belief in] God.”<sup>606</sup>

Since the formation of the first Saudi State in the mid-18th century (which eventually developed into the modern Kingdom of Saudi Arabia) *Shar’ia* has been

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<sup>603</sup> The Basic Law of Governance (n 542) Article 67, accessed 18 August 2013.

<sup>604</sup> ‘About Saudi Arabia’ (2006) Saudi Arabian Embassy <  
<http://www.saudiembassy.net/about/country-information/government/> para 3 > accessed 15 August 2013.

<sup>605</sup> *ibid.*

<sup>606</sup> ‘Saudi Arabia: The New Constitution: The Kingdom of Saudi Arabia’ (1993) 8 (3) Arab Law Quarterly 262.

the foundation on which the country's basic system of government is built. *Shar'ia* identifies the nature of the State and its goals and responsibilities, as well as the relationship between the government and its citizens.<sup>607</sup>

The willingness of millions of Muslims to merge their faith and the State's governance is an inherent part of Islam itself. As one commentator notes, when millions of Muslims begin their prayers, they ask to be guided in "the straight way – the way of those upon whom Thou has bestowed Thy blessings."<sup>608</sup> All Muslims pray to the Creator on behalf of all others who believe, and they ask God to show all Muslims the right way, both spiritually and in practical ways. Thus, "The realization that questions of society and politics are closely connected with spiritual problems and cannot, therefore, be dissociated from what we conceive of as 'religion' is as old as Islam itself."<sup>609</sup>

Correspondingly, when Muslim nations gained their independence from the power and influence of the colonialists, they needed to choose the most appropriate type of governance to ensure the best interests of their own people. Since Islam prescribes ethical, social and practical aspects of behaviour, most Muslim nations chose to create Islamic States, rather than to embrace Western ideals.<sup>610</sup> Creating an Islamic State requires the application of the tenets of the religion to the life of the nation. Saudi Arabia exemplifies this choice. Nevertheless, because he recognised that his young country would have to adapt to changing times if it was to thrive and prosper into the future, King Abdulaziz built the foundations for a constitutional regime, and therefore, as recorded by the Saudi Arabian Embassy in 2006, he established "a modern government where once tribal rulers had reigned."<sup>611</sup> In 1953, King Saud established Saudi Arabia's Council of Ministers and during the 1950s and 1960s, 20 government ministries were created. Working with the King, the Council of Ministers then formed the executive and legislative branches of the government.

The King also re-established the traditional *Majlis* – the holding of weekly meetings open to the general public so that concerns and issues can be raised and

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<sup>607</sup> 'Saudi Arabia: The New Constitution: The Kingdom of Saudi Arabia' (n 606).

<sup>608</sup> Muhammad Asad, *The Principles of State and Government in Islam* (University of California Press 1961) new edition 1980, made available online by Islamic Book Trust Malaysia <<http://muhammad-asad.com/Principles-State-Government-Islam.pdf>> accessed 15 August 2013.

<sup>609</sup> *ibid* v.

<sup>610</sup> *ibid* 1.

<sup>611</sup> 'About Saudi Arabia' (n 604).

brought to local, regional and national attention. These activities were meant to formalise the long-held Islamic traditions of popular consultation that had always been practised by Saudi rulers. The consultative nature of the governance can be seen in Article 8 of the Basic Law of Governance, which states, “The [system of] rule in the Kingdom of Saudi Arabia is based on fairness (justice consultancy), consultation, and quality, in conformity with the precepts of the Islamic *Shar’ia*.”<sup>612</sup> Muslim leaders believed that an Islamic State would require much more than general principles concerning the need for a just State. They believed a precise body of law would be necessary, one which would direct human life. This need was fulfilled by Islam through a divine law called *Shar’ia*. This law “has been provided in the ordinances of the *Quran* and supplemented (or, rather, detailed and exemplified) by the Prophet Muhammad in the body of teachings we describe as his *Sunna*, or way of life.”<sup>613</sup>

Saudi Arabia remains one of the few countries in the world in which *Shar’ia* law continues to exert dominance over the legal system. The importance of *Shar’ia* for governance in Saudi Arabia can be seen in its position as the first general principle of the Basic Law of Governance as follows:

Article 1. Basis of the State: The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam and its constitution is the Book of Almighty God, the Holy Qur’an, and the Sunna (Traditions) of his Prophet... Its language is Arabic and its capital, is the city of Riyadh.<sup>614</sup>

As a result, the Constitution of Saudi Arabia is regarded as a *Sunna* of the Prophet Mohammed, which means that it is considered a sacred normative directive which must be adhered to in the governing of society on the basis of the Prophet’s teachings.<sup>615</sup>

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<sup>612</sup> Al-Jarbou and Ayoub (n 591) 3.

<sup>613</sup> Asad (n 608) v.

<sup>614</sup> ‘Saudi Arabia: The New Constitution: The Kingdom of Saudi Arabia’ (n 606) 258.

<sup>615</sup> Al-Jarbou and Ayoub (n 591) 9.

Thus *Shar'ia*, the general word for 'law' in Arabic, is a term that can be translated as "the path in which God wishes men to walk". This, in essence, encapsulates the moral and practical injunctions of God's commandments as embodied in the *Quran* and the *Hadith* (traditions of the Prophet), as well as other legal rules derived from sources that are complementary to the two principal sources. Furthermore, because it is all-encompassing, the *Shar'ia* is essentially the merging of religious and social duties, matters of ritual and devotion, and legal and moral obligations. And since *Shar'ia* is divinely inspired, it is therefore, "immutable by man."<sup>616</sup>

## **6.6 Sources of Islamic Law**

The four sources of Islamic law are the *Quran*, the *Sunna*, *qiyas* (analogy), and *ijma* (consensus).

### **6.6.1 Primary Sources**

The primary source is the *Quran*, the revealed word of God, which is much more than a code of law. Out of 600 verses in the *Quran*, there are only around 80 verses that specifically address legal issues. Although, in general, most of its verses are ethical in nature, Hanson states that, "The ultimate sanction for the infringement of Quranic provisions is the blessing or wrath of God."<sup>617</sup> The other primary sources of Islamic law are the *Sunna and Hadith*. These are the traditional laws that are based on the actual words and acts of the Prophet Mohammed. The *Sunna* and *Hadith* are very similar, but *Sunna* refers to the way the Prophet lived his life, and *Hadith* is the narrative/reports as told of his life.

### **6.6.2 Secondary Sources of Law and the Evolution of a Dual System**

#### **6.6.2.1 Fiqh Law**

Clearly, not all aspects of Islamic law could be specifically addressed in the *Quran*. Legal rulings that could be applied to individual cases were derived from the work done by the *fuqaha* (jurists) of the past, whose decisions were based on deductive reasoning using their own expert knowledge of the *Quran*, as well as the

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<sup>616</sup> Maren Hanson, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2 (3) Arab Law Quarterly 275.

<sup>617</sup> *ibid* 273.



use of *qiyas* (deduction through analogy). These *fiqh* (decisions) set legal precedents for future rulings,<sup>618</sup> and the decisions became legal maxims. *Fiqh* was developed by the religious-legal scholars, *ulama*, who are independent of the State. These are the laws of conscience which apply to religion, family, contracts, property, and tort, and they relate to individuals. In theory, *fiqh* has a rule for every type of human activity, but mostly this is true only at the level of much generalised norms.

Legal maxims deriving from *fiqh* can be described as theoretical abstractions, usually in the form of short epithetical statements that, often in just a few words, are expressive of the goals and objectives of *Shar'ia*. These maxims consist mainly of statements about principles that are derived from detailed reading of the rules of *fiqh* on various themes. Generally, the *fiqh* have been developed by individual jurists in relation to particular themes and issues over the course of history, and in this sense they differ from the rules of modern statutory law, which are concise and devoid of detail. The detailed expositions of *fiqh* in turn enabled the jurists, at a later stage of development, to reduce them into abstract statements of principles. In many ways, legal maxims represent the culmination of an expanding progress that could not have been expected to occur during the formative stages of the development of *fiqh*.

The actual wording of the maxims is occasionally taken from the *Quran* or *Hadith*, but, more often they were the work of leading jurists, and have subsequently been refined by other writers throughout the ages: "It has often been a matter of currency and usage that the wording of certain maxims has been taken to greater refinement and perfection."<sup>619</sup> However, because many of these rulings were based on quite different circumstances from those to be found in modern situations, the modernists would like to see greater flexibility in the process of decision-making.

Another secondary source of law is a judge's *ijtihad* (i.e., deriving a rule as interpreted direct from divine law without relying on the views of other scholars).<sup>620</sup> In reaching decisions about cases that fall outside the stipulations provided by *Shar'ia*, Islamic jurisprudential tools are applied, such as *qiyas* (analogy) to the traditional sources.

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<sup>618</sup> Asad (n 608) 11.

<sup>619</sup> Kamali (n 590) 80.

<sup>620</sup> 'Ijtihad', Wordnet, Princeton University < <http://wordnetweb.princeton.edu/perl/webwn?s=ijtihad> > accessed 1 September 2013.

In reviewing the facets of law in Saudi Arabia, it is useful to understand how *fiqh* became one part of a dual system. As the legal system evolved, two major sub-systems emerged, each with its own form of authority. The first system that developed was *fiqh*. Saudi legal decisions derive from the body of work developed by *fiqh*.

A judge in Saudi Arabia is not only guided by *fiqh* doctrine; he uses his own understanding of the texts from the *Quran* and *Sunna*. A judge is required to be a scholar of Islamic legal texts, so his judgment derives from these texts directly. Saudi judges are expected to be guided by morality and a concern with the current moral state of the parties as with their previous acts or with legal outcomes. Judicial decisions arrived at by Saudi judges are considered valid and cannot be overruled. Saudi judges also apply *ijtihad*<sup>621</sup> in reaching decisions about cases that fall outside the stipulations provided by *Shar'ia*. In such cases, they apply Islamic jurisprudential tools such as *qiyas* to the sacred sources.<sup>622</sup>

*Hukm shar'i* (legal rulings) often relied on *dalil* (proofs or an indication of evidence). Islamic jurists who could show four principal *dalil* based on sources of the *Shar'ia*, namely the *Quran*, *Sunna*, consensus and analogy, were considered definitive.<sup>623</sup> When there is no direct *dalil* linked to the *Quran* or *Sunna* themselves, this is where *ijma* and *qiyas* are called upon—consensus and deductive analogy, among other things.<sup>624</sup> This type of *ijtihad* requires particular expertise utilising the full spectrum of religious sciences. The minimum requirement is that the *mujtahid* (early Islamic jurist) know all the proof texts that are relevant to solving the question before him, and that there is no unequivocal divine communication (*khitab*) governing the case.<sup>625</sup> Fadel states that, “Valid *ijtihad* consists in following the best available evidence, whether that evidence is revelatory or empirical, as the context requires.”<sup>626</sup>

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<sup>621</sup> ‘Ijtihad’, Wordnet (n 620).

<sup>622</sup> Frank Vogel, ‘The public and private in Saudi Arabia’ (2003) 70 (3) Social Research 75.

<sup>623</sup> Kamali (n 590)19.

<sup>624</sup> Dr. Munir Ahmad Mughal, ‘Islamic Jurisprudence’ <<http://ssrn.com/abstract=1903980>> accessed 15 April 2014.

<sup>625</sup> Mohammed Fadel, ‘On the Validity of Ijtihad’ 1

<[http://www.sunnah.org/fiqh/usul/on\\_the\\_validity\\_of\\_ijtihad.htm](http://www.sunnah.org/fiqh/usul/on_the_validity_of_ijtihad.htm)> accessed 20 April 2014.

<sup>626</sup> *ibid* 2.

In relation to human behaviour and objectives of law, there are defining laws and declaratory laws. Defining (*taklifi*) laws are the laws that define or indicate the extent of man's freedom of action and restraints imposed. In other words they identify an individual's rights and obligations to society.<sup>627</sup> Islamic law, *Shar'ia*, in general, is defining and meant to address the principles that guide behaviour of the individual and his or her own behaviour toward himself or herself, family, neighbours community nation and Muslim polity, the *ummah*. *Shar'ia* also governs the interactions of groups and communities and their organisations. Indeed, "*Shar'ia* establishes the criteria by which all social actions are classified, categorised and administered within the overall governance of the State."<sup>628</sup> Declaratory (*wad'i*) laws are the laws that are interpretive in defining law. Through declaratory law, for example, laws of contracts, marriage and inheritance developed.<sup>629</sup>

One of the most important challenges of developing Islamic law based on the *Quran* is the fact that it is not a legal text. Countless jurists have devoted their lives to identifying the verses in the *Quran* that advise on legal proceedings. Not everyone agrees upon, which verses are considered legal *āyāt*. M.H. Kamali in his text *The Principles of Islamic Jurisprudence* (2005) identifies 350 legal *āyāt* in the *Quran*. Most of these were a response to social and legal issues of the time, such as infanticide, usury, gambling and unlimited polygamy. The Prophet created reforms to change practices that were considered unjust. Other verses presented the penalties to be issued if someone violated the reforms.

The *Quran* is not considered a revolutionary document, but in general, confirmed existing customs and institutions of Arab society and only demanded change where it was thought to be necessary to overcome injustice.<sup>630</sup> Approximately 140 *āyāt* in the *Quran* are related to issues of faith. For example, there is *salāh*, legal alms (*zakāh*), *siyām* (fasting), the pilgrimage of *hajj*, *jihad*, charities and the taking of oaths and penances (*kaffarat*).<sup>631</sup> Another 70 *āyāt* are related to marriage, divorce, and the waiting period of *'iddah*, revocation (*raj'ah*), dower, maintenance and

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<sup>627</sup> Mughal (n 624) 87.

<sup>628</sup> Shaykh Muhammad Hisham Kabbani, 'Understanding Islamic Law' The Islamic Supreme Council of America, para. 4 <<http://islamicsupremecouncil.org/understanding-islam/legal-rulings/52-understanding-islamic-law.html>> accessed 1 June 2013.

<sup>629</sup> Mughal (n 624) 87.

<sup>630</sup> Kamali, *Principles of Islamic Jurisprudence* (3<sup>rd</sup> edn Islamic Texts Society 2005) 26.

<sup>631</sup> *ibid* 27.

bequest. About the same number of *āyāt* cover rules related to civil and commercial transactions – sale, lease, loan and mortgage. Approximately, 30 *āyāt* cover crimes, including murder, highway robbery, adultery and false accusation (*qadhif*). Another 30 *āyāt*, address justice, equality, evidence, consultation, and the rights and obligations of citizens. Unsurprisingly, jurists do not agree on the number of *āyāt*.<sup>632</sup>

The study of the *Quran* to create a system of law was so intense that a specific method or approach began to be applied. *Usul-fiqh*, the methodology of law or the science of the sources, developed as a scientific method to study *āyāt*: “*Usul al Fiqh* has been defined as the aggregate, considered per se, of legal proofs and evidence that, when studied properly, will lead either to certain knowledge of a *Shar’ia* ruling or to at least a reasonable assumption concerning the same; the manner by which such proofs are adduced, and the status of the adducer.”<sup>633</sup> The *Quran* and *Sunna* do not provide a systematic approach, but rather provide indications from which *Shar’ia* can be deduced.<sup>634</sup> *Shar’ia* is law that was declared during the lifetime of the Prophet and is found in the *Quran* and prophetic traditions. *Fiqh* is what has been gained from the efforts of scholars after the prophet's death.<sup>635</sup> *Usul al-fiqh* refers to methods used to derive law including analogy (*qiyas*), juristic preference (*istihsan*), presumption of continuity (*istishab*) and the rules of interpretation and deduction. These methods are meant to aid in the correct understanding of the sources and *ijtihad*.<sup>636</sup> *Usul al-fiqh* is meant to help the jurists to obtain an adequate knowledge of the sources of *Shar’ia* and of the methods of juristic deduction and inference. *Usul al-fiqh* also regulates the application of *qiyas*, *istihsan*, *istishab*, *istislah*, etc., the knowledge helps the jurist to distinguish which specific method of deduction is the most appropriate tool to obtain the *hukm shar’i* (legal ruling) of a particular problem.<sup>637</sup> *Hukm shar’i* is further divided into prescriptive or descriptive rulings.<sup>638</sup>

<sup>632</sup> Rehman and Ahmedov (n 245) 8.

<sup>633</sup> Fakhr al Din al Razi in Dr. Taha Jabir al 'Alwani (ed) *Al Mahsul Fi 'Ilm Usul al Fiqh* (Imam ibn Sa'ud Islamic University, 1st edn, 1399/1979, part I) 94.

<sup>634</sup> Kamali (n 630) 12.

<sup>635</sup> Hasan Al-Ridai, ‘The Literal and Figurative Definition of Jurisprudence’ 1 <[www.al-Islam.org](http://www.al-Islam.org)> accessed 1 June 2013.

<sup>636</sup> Kamali (n 630) 12.

<sup>637</sup> *ibid* 14.

<sup>638</sup> Jackson (n 242) 116.

Complicating matters even further is the fact that the *Quran* emerged over a 23-year time period. During that time, there were changes made, and *naskh* occurred. *Naskh*, or the abrogation of a ruling, did take place when the Prophet recognised a need to change a ruling because the community changed. There is debate about the number of *naskh* among Islamic jurists: “The ‘ulami’ are unanimous on the occurrence of *naskh* in the Sunna. It is however, with regard to the occurrence of *naskh* in the *Quran* on which there is some disagreement, both in principle and on the number of instances in which *naskh* is said to have occurred.”<sup>639</sup> They go on to say that it is this type of controversy and conflicting opinions that caused the importance of *ijtihad* to increase.

#### 6.6.2.2 *Siyasa*

Another Islamic principle meant to hold rulers accountable for their actions is *siyasa*: the laws of rule and governance in an Islamic society. Specifically, *siyasa* is Muslim law as expressed in regulatory decisions or policy of government.<sup>640</sup> The *siyasa* does not relate to individuals, but originates from the heads of State and is applied to the nation and all citizens, or more specifically to the rules of the public sphere. Under *siyasa*, “a ruler is free to take any legal action as long as it meets two conditions: first, it serves the public good – the general or public interest (*maslaha ‘amma*); and second, it does not in any way offend any fundamental principle or rule of the *Shar’ia*.”<sup>641</sup>

Jurist, Abu Hamid Muhammed Al-ghazali defined *maslaha* in the 5<sup>th</sup>/11<sup>th</sup> century and his interpretation has been maintained in Islamic law. Al-ghazali declared that a law or policy is legitimate and correct if it promotes benefits of good for all people or prevents harm to people (*maslaha*). The notion of *maslaha*, along with legal reasoning of the jurists was “aimed at curbing the unchecked use of human reasoning in the area of religious law and at making the law-finding process less arbitrary and more objective.”<sup>642</sup>

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<sup>639</sup> Rehman and Ahmedov (n 245) 41.

<sup>640</sup> Vogel (n 622) 75.

<sup>641</sup> *ibid* 752.

<sup>642</sup> Felicitas Opwis, ‘Maṣlaḥa in Contemporary Islamic Legal Theory’ (2005)12(2) *Islamic Law and Society* 182.

Some scholars argue that Islamic legal prescriptions were intentionally kept vague so that laws would not become too rigid in the face of changing times. To support this view they quote the *Quran* (v. 5:48): “To every one of you, We have appointed a right way and an open road. If God had willed, He would have made you one nation; but that He may try you in what has come to you.”<sup>643</sup> Thus, according to this view, the divine lawgiver purposely left legal decisions in a state of open-endedness, so that the eventualities that arise in life and that were not dealt with directly by the *Quran* or *Sunna* could still be addressed; “... the real *Shar’iah* is extremely concise and, therefore, easily understandable; and because it is so small in volume, it cannot – nor [...] was it ever intended to – provide detailed legislation for every contingency of life”.<sup>644</sup> Instead the Prophet intended that additional laws and regulations would be determined through reasoning and would be based on circumstances, as long as they followed the spirit of Islam.<sup>645</sup>

Even so, many who want legal reform in Saudi Arabia see the practice of *Shar’ia* as a challenge to modernisation.<sup>646</sup> For example, although there have been proposals to codify *Shar’ia* law, rather than leaving decision-making to the discretion of individual *Shar’ia* judges, there has been considerable resistance to the idea of reforming the legal system. This is not altogether surprising – after all, how, in practice, can a divinely-inspired body of law be improved upon?<sup>647</sup> In addition, the importance of tradition cannot be underestimated in Saudi society. For example, one of five of the most important legal maxims developed over time is, “custom is the basis of judgment.”<sup>648</sup> This Saudi dilemma provides “a keen opportunity to examine the tensions that arise when law and governance become complicated by reference to religion, history, and competing paradigms of legitimacy and authority in governance and the rule of law.”<sup>649</sup>

## 6.7 Dual Judiciary

Currently the Saudi Arabian judiciary is a dual system made up of:

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<sup>643</sup> The *Quran*, Verse 5:48.

<sup>644</sup> Asad (n608) 14.

<sup>645</sup> *ibid.*

<sup>646</sup> Z A Al-Sudairy, ‘The Constitutional Appeal of Shar’ia in a Modernizing Saudi State’ (2010) 2 (1) Middle East Law & Governance 2.

<sup>647</sup> *ibid.*

<sup>648</sup> Kamali (n 590) 83.

<sup>649</sup> Al-Sudairy (n 646) 3.

### 6.7.1 *Shar'ia Courts*

On 1 October 2007, King Abdullah issued a Royal Decree for the purpose of reorganising the Judicial System under a new Law of the Judiciary. The change established a High Court, which took over the role of the Supreme Judiciary Council as the highest judicial authority in the Kingdom. New Courts of Appeal are to be established in the various regions in the Kingdom. In addition, First-Degree Courts are to be established in different regions according to the needs of the system, and their authority comes from specialised Criminal, Commercial, Labour, Personal Status, and General Courts. Some of these courts would also mediate disputes that had previously been addressed by special administrative committees.<sup>650</sup>

The Royal Decree of 2007 will establish a new High Court (Supreme Court).<sup>651</sup> The courts of appeal that exist now will be replaced with new courts of appeal in the various provinces, and they will address labour, criminal, commercial and other specialised areas of the law. As a part of the judiciary reorganisation, a new Board of Grievances Law has been created, which has also yet to be put into effect. The new Board of Grievances will have a narrower jurisdiction to determine matters involving the government.

Thus, whilst under the new Judiciary Law of 2007, the Supreme Judiciary Council will no longer function as the highest court, it will continue to oversee administrative aspects of the judiciary.<sup>652</sup> There will now be a Supreme Judicial Board/Council made up of a president and ten members: the Chief of the High Court, four full-time members of the rank of Chief of the Appellate Court appointed by the King, the Deputy Minister of Justice, the Chief of the Bureau of Investigation and Prosecution. Three of the members will possess the qualifications required by the Appellate Judge, appointed by the King. All Supreme Judicial Council members will hold tenure for four years, which is renewable.

In accordance with article 5 of the Statutes of the Judiciary, the *Shar'ia* courts consist of:

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<sup>650</sup> Ansary (n 602) 5, accessed 15 August 2014.

<sup>651</sup> Richard Clark, Chapter 44, 'Saudi Arabia' (2012) *The Dispute Resolution Review* 664 <<http://www.nortonrosefulbright.com/files/us/images/publications/20120401SaudiArabia.pdf>> accessed 20 October 2014.

<sup>652</sup> Ansary (n 602) 5.

- (a) The Supreme Judicial Board;
- (b) The Court of Cassation;
- (c) The general courts;
- (d) The courts of summary justice.

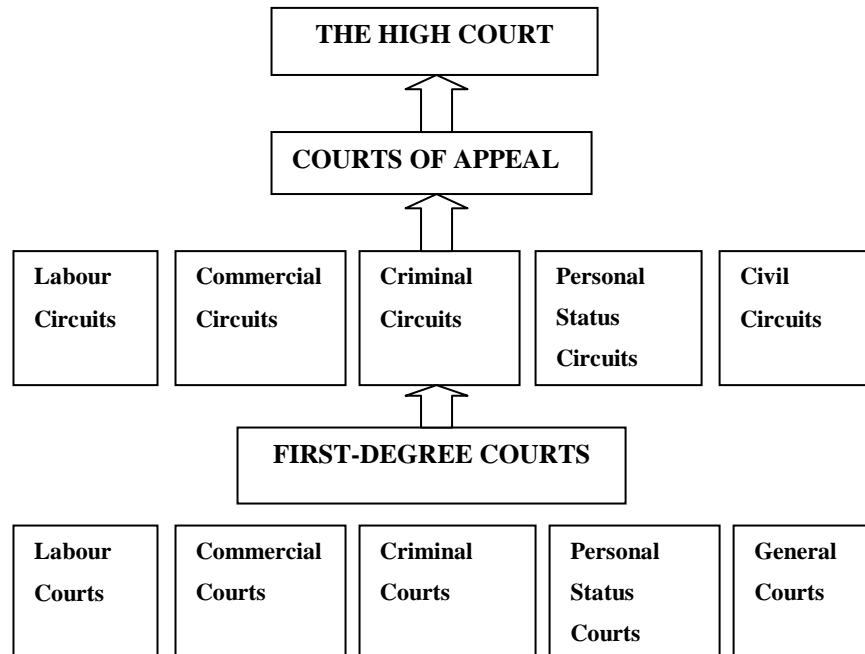
The new structure of the *Shar'ia* courts is set out, overleaf in Figure 3:<sup>653</sup>

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<sup>653</sup> Ansary (n 602) 4.



**Fig 3 Structure of *Shar'ia* Courts**



No matter what their place in the hierarchy or their purpose might be, it is important to remember, that all courts in Saudi Arabia fall under *Shar'ia* law, and the two main sources upon which it relies are the *Quran* and *Sunna*.<sup>654</sup>

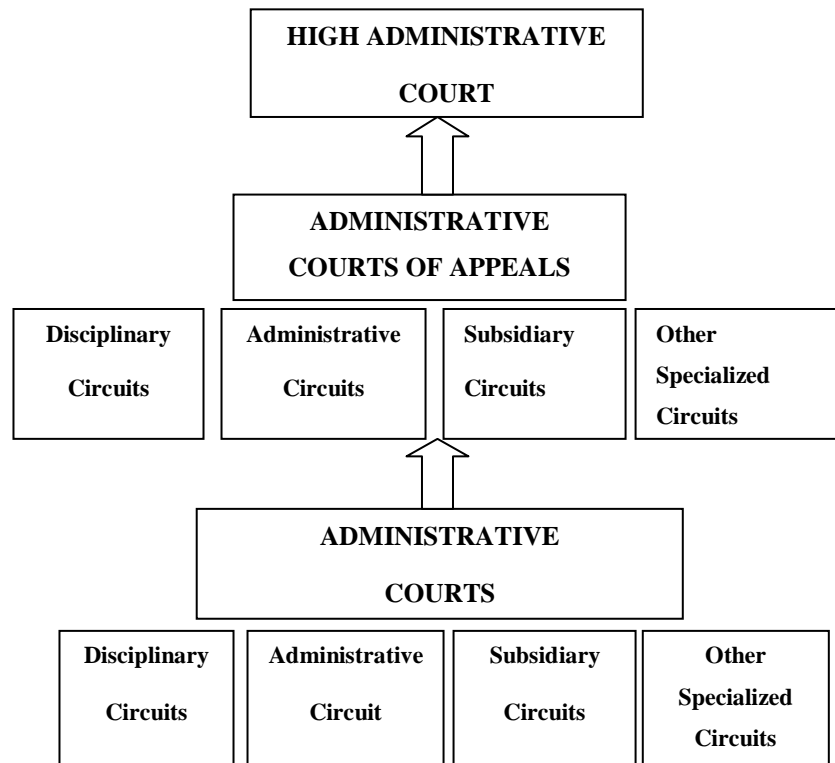
### **6.7.2 Board of Grievances**

The Board of Grievances (*Diwan Al-Mazalem*) is an independent judiciary. In addition to the previous judicial bodies, there are several Administrative Committees that have jurisdiction to hear certain specified cases. The new Board of Grievances will be structured in the following way: (See Figure 4, overleaf)<sup>655</sup>

<sup>654</sup> Ansary (n 602) 5.

<sup>655</sup> *ibid* 3.

**Fig 4: Board of Grievances** <sup>656</sup>



Article Three of the Law of the Board of Grievance identifies that its President will be appointed by the King, and that he is directly responsible to the King. The President can only be terminated by Royal Order. The Vice Presidents are also appointed by the King.<sup>657</sup>

### ***6. 7.3 The Independence of the Judiciary***

According to Part One of the Law of the Judiciary (1975), the judges of the various courts are guaranteed their independence:

Article 1: Judges are independent and, in the administration of justice, they shall be subject to no authority other than the provisions of Shar’iah and laws in force. No one may interfere with the Judiciary.

<sup>656</sup> Ansary (n 602) 35.

<sup>657</sup> Article 3, The Law of the Board of Grievances, Royal Decree No. M/51, 17 Rajab 1402, 10 May 1982 <[http://www.saudiembassy.net/about/country-information/laws/Board\\_of\\_grievances\\_law.aspx](http://www.saudiembassy.net/about/country-information/laws/Board_of_grievances_law.aspx)>accessed 10 May 2014.

In addition, judges cannot be arbitrarily removed from office, nor can they be transferred to another position except by consent.<sup>658</sup>

The independence of the judiciary is considered central to Islamic governance; “An independent judiciary is absolutely essential for the administration of justice and government under the rule of law. Historical practice in this area is inconsistent and, on the whole, uninspiring in that often in Islamic history the atmosphere was not congenial for the judges to work fully independently.”<sup>659</sup> Birgit Krawietz elaborates that there is no one body of Islamic law. During its history, Islamic law has been laid down in monographs based on specifics, which do not strictly distinguish between the various areas of the law. There are literally thousands of variations and versions of legal writings produced by individual scholars, but not only have they not been collected in a comprehensive canon, no hierarchy of authorities has been formed, at least not in Sunni Islam. Specific versions were only developed to be applied under the influence of Europeans, when Islamic law began to be partly codified.<sup>660</sup>

## 6.8 Jurisdiction

According to the Statutes and the Basic Law of Governance, *Shar'ia* Courts have general jurisdiction to decide all civil and criminal disputes. They usually decide only cases and controversies that are related to personal status or family affairs, civil disputes, and some criminal cases. The reason why the *Shar'ia* Courts do not hear all legal matters is based on historical factors. For instance, when King Abdulaziz exerted his influence over Western Saudi Arabia, the region had been using Ottoman-oriented laws and the King did not wish to change that. However, the *ulama* viewed the Ottoman laws as man-made and they were duly rejected by the *Shar'ia* courts. The attitude of the *ulama* and of the *Shar'ia* courts towards enacted laws and regulations prevented the *Shar'ia* courts from deciding many important disputes.

The *ulama* were also strongly opposed to the idea of codifying the rules of *Shar'ia* and insisted that Islamic *Shar'ia* had to be applied according to what was

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<sup>658</sup> Part One, Law of the Judiciary, 1975 [http://www.saudiembassy.net/about/country-information/laws/Law\\_of\\_the\\_Judiciary.aspx](http://www.saudiembassy.net/about/country-information/laws/Law_of_the_Judiciary.aspx) > accessed 10 May 2014.

<sup>659</sup> Kamali (n 590) 361.

<sup>660</sup> Krawietz (n 263) 40.

stated in the *Quran* and the *Sunna* through the explanations in the books of jurisprudence, especially those from the medieval period. Meanwhile, however, they rejected government imposed laws and regulations.<sup>661</sup> It has been observed that such resistance to changing the legal system is part of the strong influence of the traditionalist movement in Saudi Arabia's history, and that, because it secures religious principles, the movement's credibility in Saudi society is very high. This traditionalist movement is mainly represented by the *ulama* in *Shar'ia* universities by: *Shar'ia* Court judges; the Board of the Senior *Ulama* which gives *fatwas* in all daily affairs, including worship and legal transactions; the Higher Council of Justice; and finally by independent *ulama* who are not within the structure of the government.<sup>662</sup>

The books of jurisprudence that were written by *ulama* scholars are held in high regard, just as the scholarly *ulamas* themselves are highly esteemed. Traditionalists would rather rely on the wisdom encapsulated in the views of these highly regarded *ulama* scholars than risk change. Codifying *Shar'ia* would cause a gap in the ability of jurists to rely on the true source of legal power, i.e., the *Quran* and the *Sunna*, and it was felt that codifying the rules of *Shar'ia* would deter judges from turning to its main sources; indeed "God says in the Holy Qur'an: 'O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you. If you differ in anything among yourselves, refer it to Allah and his Messenger if you do believe in Allah.'"<sup>663</sup>

Article 8 of the Law of the Board of Grievances outlines the jurisdiction of that body:

One: The Board of Grievances shall have jurisdiction to decide the following:

Cases related to –

- the rights provided for in the Civil Service and Pension Laws for government employees and hired hands;

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<sup>661</sup> Al-Jarbou, 'The role of traditionalists and modernists on the development of the Saudi legal system' (2007) 21 (3) Arab Law Quarterly 193.

<sup>662</sup> *ibid.*

<sup>663</sup> *ibid* 195.

- Cases of objection filed by parties concerned against administrative decisions;
- Cases of compensation filed by parties concerned against the government and independent public corporate entities resulting from their actions.
- Cases filed by parties concerned regarding contract-related disputes where the government or an independent public corporate entity is a party thereto;
- Disciplinary cases filed by the Bureau of Control and Investigation;
- Penal cases filed against suspects who have committed crimes of forgery as provided for by law;
- Cases within the jurisdiction of the Board in accordance with special legal provisions;
- Requests of foreign courts to carry out precautionary seizure on properties or funds inside the Kingdom.

Two: With consideration to the rules of jurisdiction set forth by law, the Council of Ministers may, at its discretion, refer any matters and cases to the Board of Grievances for hearing.<sup>664</sup>

Article 9 of the Law of the Board of Grievances also declares:

The Board of Grievances may not hear requests related to sovereign actions, nor objections filed by individuals against judgments or decisions issued by courts or legal panels which fall within their jurisdiction.<sup>665</sup>

It should be noted that Saudi Arabia is not just influenced by traditionalism; there is also a modernist movement. There is always tension between the two. Interestingly, members of the *Shura* Council are often influenced by the modernist

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<sup>664</sup> Article 8, The Law of the Board of Grievances (10 May 1982), Royal Decree No. M/51, 17 Rajab 1402 < [http://www.saudiembassy.net/about/country-information/laws/Board\\_of\\_grievances\\_law.aspx](http://www.saudiembassy.net/about/country-information/laws/Board_of_grievances_law.aspx)> accessed 2 May 2014.

<sup>665</sup> *ibid* Article 9.

movement. The modernisation movement is promoted mainly by members of the educated elite, technocrats, and such legal professionals as lawyers and law professors; most of these intellectuals have studied in the West and their ideas and approaches to the development of their country, including its legal system have been influenced by Western countries. The Council of Ministers and more recently the *Shura* Council (Consultative Council) are the main governmental institutions that have been making an effort to modernise.<sup>666</sup>

The modernists would prefer the codification of *Shari'a* law since they consider that there is too much inconsistency in the way *Shari'a* is applied in various cases. They point out discrepancies, especially with *Tazir* crimes which are minor crimes that are not mentioned in the *Quran*.<sup>667</sup> The tension between the modernists who would like to see legal reform and the traditionalists, accurately reflects the same kind of tensions that are seen in Saudi society in general. In order for stability to be maintained some scholars argue for a more harmonious balance between these two powerful influences and the demands of both: the traditional adherence to religious principles and the call for growth to ensure survival in a complex commercial world.<sup>668</sup> It is felt that taking other legal systems as examples on which to model Saudi Arabia's legal system should not be the starting point. Instead, the country should rely first on the resources of existing law and secondly, on the jurisprudential heritage of the Saudi legal system in order to create equilibrium between new developments that exist in the world and its own Islamic heritage. Making use of approaches from other legal systems may lead to conflict between the rules of *Shar'ia* and those which have been 'imported.' If the resources of the *Shar'ia* do not have provision for governing certain issues, it would be better to turn to the jurisprudential heritage before resorting to other legal systems to seek ways of developing the Saudi legal system.<sup>669</sup>

## 6.9 Case Law

*Shar'ia* law does not acknowledge case law because the foundation and interpretation of the law are the rulings made by the scholar-jurists, the *fuqaha*.

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<sup>666</sup> Al-Jarbou (n 661).

<sup>667</sup> *ibid* 199.

<sup>668</sup> *ibid* 200.

<sup>669</sup> *ibid*.

Through their works to interpret law, *Shar'ia* law is provided. Case law, then, is not required to be used as precedent. The *fuqaha* develop the authoritative works and judges use them to apply the law to specific cases. The authority to make decisions derives from recognised texts not previous rulings. As a result, it is scholars and not judges who frame the law.<sup>670</sup> A characteristic of a *Shar'ia* legal system, subsequently, is inconsistency in legal rulings, especially because of the variety of schools of law upon which legal decisions are made by individual judges. A trend has been recognised, however, where some consistency has developed. When an individual judge makes a ruling that is considered preferable, it becomes a dominant rule in its related school of law, and other rulings will follow suit. Examination of legal literature reveals this consolidating trend.<sup>671</sup>

## **6. 10 State Authority and Hierarchy of Powers**

A legislative hierarchy exists in Saudi Arabia. Most sovereign is the Constitution, which is considered a manifestation of the *Quran* and *Sunna*; next is the Basic Law of Governance, the Law of the Allegiance Commission, the Law of the Council of Ministers, the Law of the *Shura* Council, and the Law of Provinces. The next in line are the regular laws, followed by the regulations. A lower court or law can never override higher laws.<sup>672</sup>

In Saudi Arabia, the Basic Law of Governance sets forth the elements of regulatory authority. It has the jurisdiction to create laws and regulations. One of the Law's primary purposes is to eliminate corruption in the affairs of the State, in accordance with the rules of Islamic law. This regulatory authority is vested in the two bodies – the Council of Ministers and the *Shura* Council. Nevertheless, the King is the head of the State and the reference to all the powers within it, in accordance with Article 44 of the Basic Law, which reads: “The State's authorities consist of: the judicial authorities, the executive authorities and the regulatory authority. These authorities cooperate in the performance of its functions, according to this law and other laws, and the king is a reference to these authorities.”<sup>673</sup> Ultimately the King is the head of the regulatory (legislative) authority, and makes the final decision in the

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<sup>670</sup> Noel James Coulson, ‘Muslim Custom and Case-Law’ (1959) 6 (1/2) *Die Welt des Islams*, New Series 20.

<sup>671</sup> *ibid.*

<sup>672</sup> Al-Saddan (n 593) 7.

<sup>673</sup> *ibid.*

event of disagreement between the Council of Ministers and the *Shura* Council. As set forth in the Basic Law of Governance, “The King is the ultimate arbiter for these Authorities.”<sup>674</sup>

## 6. 11 Human Rights and International Law in Saudi Arabia

In 1992, for the first time in the history of Saudi Arabia, the Government acknowledged human rights as a legal issue.<sup>675</sup> The new Basic Law of civil and political rights addressed human rights in its Article 26, which reads briefly: “The State shall protect human rights in accordance with the *Shar’ia*.” The article does not specify what those human rights are. However, later in the text of the Basic Law it does state that it will guarantee the rights of citizens and their families in the case of emergency, illness, disability and old age, but does not elaborate.

Article 28 promises the Government will facilitate job opportunities for everyone, and create laws to protect employees from employer abuse. Article 30 promises public education for every citizen, and article 31 guarantees universal health care for all Saudi citizens. Article 39 protects the right to privacy as provided for by law.<sup>676</sup> One clarification made very clear in the Basic Law, related to the international human rights standard. This requires that when an international human rights treaty has been ratified through royal decree, the implementation of the Basic Law must conform to those treaties. Perhaps this is why there has been hesitation on the part of the Saudi Government to ratify all human rights treaties, especially those seen as contrary to *Shar’ia* law.

Besides protection of human rights appearing in the Basic Law, the Law of Criminal Procedures, based on *Shar’ia* law does contain several provisions to ensure citizens are protected from human rights violations. For example, Articles 2 declares that –

No person shall be arrested, searched, detained, or imprisoned except in cases specified by the law. Detention or imprisonment shall be carried out only in the places designated for such purposes and shall be for the period prescribed by the competent authority. A person under arrest shall not be subjected to any

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<sup>674</sup> The Basic Law of Governance Article (n 542) Article 44.

<sup>675</sup> Human Rights Watch, ‘Empty Reforms. Saudi Arabia’s New Basic Laws’ (May 1992) 2.

<sup>676</sup> Dana Zartner, *Courts, Codes and Customs* (Oxford University Press 2014) 159.



bodily or moral harm. Similarly, he shall not be subjected to any torture or degrading treatment.<sup>677</sup>

Besides language to guarantee rights of the accused, the new court procedures introduced another safeguard to ensure people's rights are protected. The new law established one or more Courts of Appeals in each of Saudi Arabia's provinces. Each court will function through specialised circuits comprised of three-judge panels, except for the Criminal Circuit, which reviews judgments involving certain major crimes, including those which bear the death sentence. It will include five judge panels. Courts of Appeals have the following circuits: Labour Circuits, Commercial Circuits, Criminal Circuits, Personal Status Circuits, and Civil Circuits. It will also be possible to establish specialised Appeals Circuits in the counties of each province where a Court of Appeals is established. Each circuit will be composed of a president appointed by the Chief of the Appellate Court and judges holding the rank of Appellate Judge. The Courts of Appeals will hear and rule upon decisions from lower courts. After hearing the litigants' arguments in accordance with the Law of Procedure before *Shar'ia* Courts and the Law of Criminal Procedure, the judges will present their verdict.<sup>678</sup>

The Book, *Empty Reforms: Saudi Arabia's New Basic Laws* (May, 1992) criticises Article 26 because the *Shar'ia* is not codified. So, its interpretation is left to the government appointed Council of Senior Scholars, which is a reference to the *Al-Shura* Council. However, the Human Rights Watch Organisation does not see it as a separate decision-making authority set apart from the King. The authors of this book, published by Human Rights Watch, argue that the Council, for the most part, defers to the King's interpretation of the *Shar'ia*, including those that relate to human rights.<sup>679</sup> The authors from the Human Rights Watch claim that the small attention given to protect human rights under the new Basic Law is even more alarming because Saudi Arabia has been unwilling to sign most international human rights agreements (See Appendix I).

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<sup>677</sup> The Basic Law of Governance Article (n 542) Article 2.

<sup>678</sup> Ansary (n 602) 3.

<sup>679</sup> *ibid.*

Saudi Arabia is one of the few countries that did not vote for the Universal Declaration of Human Rights presented by the United Nations General Assembly. Saudi's reasoning is that some of the language of the Declaration violated precepts of Islam, such as the call for freedom of religion. Saudi officials claimed also that human rights protections under Islamic law are superior to the Declaration. These are the two primary reasons given for Saudi's refusal to sign later human rights documents, including the International Covenant on Civil and Political Rights. The New Basic Law of 1992 was an important step in codifying Saudi's legal system, but, according to Human Rights Watch "they fall short of internationally recognized standards in their treatment of civil and political rights." Nevertheless, the United States and other countries have applauded King Fahd ibn Abdel-Aziz for the new laws as "important steps toward participatory government and recognition of citizens' rights."<sup>680</sup>

***6. 11.1 Reservations on International Human Rights: The Vienna Convention on the Law of Treaties***

The recognition and acceptance of international human rights law is difficult in Saudi Arabia. When recognition or acceptance does occur, it is often limited by reservations and understandings to the treaty provisions. In six out of nine international human rights treaties, Saudi Arabia has reservations in six of them, and all refer to Islamic law.<sup>681</sup>

Saudi Arabia has used the option to qualify the ratification by publishing reservations regarding those treaties. Under international law, as specified in the Vienna Convention on the Law of Treaties (1969), individual States can post reservations on specific parts of a treaty based on the State's concern that the treaty may be in conflict with State-held policies or values. For example, Saudi Arabia posted the following reservations in relation to The Convention on the Elimination of All Forms of Discrimination against Women (1979), which Saudi Arabia ratified in 2000:

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<sup>680</sup> Human Rights Watch (n 675) 1.

<sup>681</sup> Zartner (n 676) 160.

1. In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.
2. The Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention.<sup>682</sup>

Saudi Arabia did not want to be bound by such terms as found in Article 9 because it requires that the State grant women equal rights with men to acquire, change or retain their nationality, in the event of marriage to a non-native Saudi. They also do not want to be bound by the requirement that women be granted equal rights with men with respect to the nationality of their children.<sup>683</sup>

Saudi Arabia also posted a reservation when it ratified the United Nations Convention on the Rights of the Child in 1996. It published the following general reservation, “[The Government of Saudi Arabia enters] reservations with respect to all such articles as are in conflict with the provisions of Islamic law.”<sup>684</sup> The main concern with this reservation is that, although Saudi Arabia, assures the Committee of Review on this Convention that it guarantees all of the rights of children under its *Shar’ia* law, there are two problems with children’s rights issues in Saudi Arabia. First, the country has been known to execute people under the age of 18 years, which is a violation of the Convention, and second, there is discrimination against non-marital children.

Some may argue that a nation who ratifies a treaty is obligated to follow all of the requirements of the treaty. According to the Vienna Convention of the Law of Treaties (1969), however, a country who files a reservation to a treaty before ratifying it is exempt in accordance with its reservations. The United Nations defines a reservation as a unilateral statement made by a State or an international organisation when signing, ratifying, accepting, approving or acceding to a treaty. The system of reservations was designed to ensure all nations would be more

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<sup>682</sup> ‘Article 9, ‘Convention on the Elimination of All Forms of Discrimination against Women’ United Nations Treaty Collection, Treaty Series (1979) 1249:13

<<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article9>> accessed 15 April 2014.

<sup>683</sup> ‘Convention on the Elimination of All Forms of Discrimination against Women’ (n 682).

<sup>684</sup> Convention on the Rights of the Child, (20 November 1989) 1577 United Nations Treaty Series 3.

encouraged to participate in international treaties because of the flexibility a reservation can exert, “especially if a requirement in a treaty seems contrary to a nation’s system of beliefs.”<sup>685</sup> The system of reservations allows States to implement a treaty in a way that is consistent with their domestic laws. The reservation, therefore, subordinates the treaty law to domestic law. Article 20 of the Vienna Convention outlines how reservations function.

For example, (1) A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides. If a treaty appears to require that all participants apply all aspects of a treaty in its entirety, then in that case, all parties are required to accept the reservations made by an individual State. Also, if a treaty is a constituent instrument of an international organization, and unless it otherwise provides, a reservation requires the acceptance of that organization.<sup>686</sup>

Saudi Arabia has declared reservations related to the four following Conventions: The International Convention on the Elimination of All Forms of Racial Discrimination (1997), The Convention on the Elimination of All Forms of Discrimination against Women (2000), The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1997), and (4) The Convention on the Rights of the Child (1996). As long as the other nations accept the reservations, then the State declaring the reservations can defer to their particular requirements. However, other States do not always accept a reservation. For example, when the United Arab Emirates published reservations to the Convention to Eliminate All Forms of Discrimination Against Women, Austria objected to those reservations saying that the specific reservations made by the UAE would inevitably

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<sup>685</sup> The Guide to Practice on Reservations to Treaties, provisionally adopted by the Commission. International Law Commission 2011 36.

<sup>686</sup> *ibid.*

result in women being targets of discrimination which violates the purpose of the Convention.<sup>687</sup>

Once a reservation has been submitted, countries who object to its substance have 12 months to publish an objection.<sup>688</sup> There are certain conditions under which reservation making is not allowed, including: (a) If the reservation process has been prohibited by the treaty; (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or when the reservation is incompatible with the object and purpose of the treaty.<sup>689</sup>

In the case of Saudi Arabia, the Government defers to *Shar'ia* law if there is ever a question related to the laws of the treaty and how they should be implemented. Saudi Arabia is using the same principles in Sweden as its response to ratifying an international treaty: "... it adheres to the principle that international treaties do not automatically, on ratification, become part of Swedish law. To become directly applicable, international treaties must either be transformed or incorporated into Swedish law."<sup>690</sup> The Vienna Convention does stress, however, that a State which has ratified a treaty should take steps to ensure its domestic law is compatible with treaty law. The United Nations Committee on Economic, Social and Cultural Rights explains that a State does not have to make a Covenant directly applicable to its legal system; however, the Committee emphasises that the State takes steps to achieve the rights through adopting legislation to make it so. However, merely because the Covenant is not incorporated does not mean a person cannot invoke the content of the Covenant in a particular case, and it does not prevent anyone from raising the question whether a law or a provision in law is in conformity with the Covenant.<sup>691</sup>

Saudis view Islamic texts as binding. This should be borne in mind when considering Saudi Arabia and international law, because it is important to note that, international conventions are not. Nevertheless, it is not surprising that the Saudi Government still feels external pressures on what critics sees as its ongoing

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<sup>687</sup> Dawn Osakue, 'Reservation to treaties: A Summary' (2010) academia.edu 5.

<[http://www.academia.edu/1129892/Reservation\\_to\\_Treaties](http://www.academia.edu/1129892/Reservation_to_Treaties)> accessed on 30 January 2015.

<sup>688</sup> Treaty Handbook, Office of Legal Affairs, United Nations (2012) 12.

<sup>689</sup> *ibid.*

<sup>690</sup> Implementation Of The International Covenant On Economic, Social And Cultural Rights, Committee On Economic, Social And Cultural Rights Forty-first Session Geneva, 3-21 November 2008, 6.

<sup>691</sup> *ibid.*

violations of civil rights. For example, although Saudi Arabia declared that its *Shar'ia* law takes precedence over the rights of women as outlined in the Convention on The Elimination of all Forms of Discrimination against Women (1979), one critic argued that the reservation should be viewed as a political one and not as a religious one. Even though most Muslims view *Shar'ia* law as timeless and immutable, in reality, there is little consistency in the law, and in fact, it has changed over time: “Evolving political contingencies, not Islamic beliefs, turn out to be the determinative factors.”<sup>692</sup>

Those supporting Saudi Arabia’s reservations related to the Convention on the Elimination of all Forms of Discrimination against Women argue that there are differences in Western and Islamic underlying assumptions about what it means to be human. For example, Islamic jurists emphasise “honour” (*ird*) and affiliation with a patrilineage (*nasab*) as aspects of the basic needs of all human beings.<sup>693</sup> Reformist jurists in the early 20<sup>th</sup> century worked to protect these needs in the form of *huquq* (rights). *Huquq* has led to rulings banning extra-marital sex and the like. The difference in ideas between the West and Islam about what it means to be human has therefore, led to a different emphasis on which human rights are considered fundamental to promote and protect.<sup>694</sup>

For several decades, legal scholars have debated the notion that human rights are universal and applicable to all cultures. The debate has continued even more so in relation to international law and human rights. Universalism suggests that human rights apply to all humans, with cultural differences being irrelevant, while relativism argues that human rights are culturally dependent. Consequently, it would be inappropriate to assume all moral principles apply to all cultures. Some would argue then, that such human rights principles as those seen in the Universal Declaration of Human Rights of 1948 are distinctly Western. The origins of the Declaration can easily be identified as having come from political landmarks like the Magna Carta of the United Kingdom (1215), the French Revolution (1789) and the American Bill of Rights (1791). As a consequence, such Western ideals are a form of cultural

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<sup>692</sup> Elizabeth Ann Mayer, ‘Evolving political contingencies, not Islamic beliefs, turn out to be the determinative factors’ 1 < <http://www.univie.ac.at/recht-religion/kultur-religion/isl/a%20e%20mayer%20en.pdf> > accessed on 1 August 2014.

<sup>693</sup> Aria Nakissa, ‘Book Review: Islam and Human Rights Tradition and Politics’ (2013) 8 (1) *Societies Without Borders* 175.

<sup>694</sup> *ibid.*

imperialism.<sup>695</sup> Cultural relativism developed from evolutionism, which held that human societies evolved from primitive/savage to modern. Unsurprisingly, Western civilisation ranked highest on the scale because standards are based on Western values: “Cultural relativism was introduced in part to combat these racist, Eurocentric notions of progress.”<sup>696</sup>

Likewise, Muslim scholars have criticised the hegemonic assumptions about the universality of human rights in general. Western ideas about human nature are assumed to form the basis of a universality of human rights. This position is a barrier to understanding how human rights are perceived in Muslim and other non-Western societies.<sup>697</sup>

The most recent attention given to human rights in relation to actions taken by the Saudi Government is its treatment of journalists and activists who are calling for human rights reforms. According to a report from Human Rights Watch (August 11, 2014), Saudi Arabia had increased the number of arrests, trials, and convictions of dissidents who had acted peacefully. It has also used force to disperse peaceful demonstrations by citizens. Authorities continued to violate the rights of Saudi women and girls and foreign workers. In addition, authorities subjected thousands of people to unfair trials and arbitrary detention. Courts convicted human rights defenders and others for peaceful expression or assembly demanding political and human rights reforms.<sup>698</sup>

This statement was more than likely prompted by the arrest of Waleed Abu Al-Khair, a human rights lawyer, who founded the Monitor of Human Rights Organisation in Saudi Arabia. The charges against him include: “preparing, storing and transmitting information that undermines public order” and violating Saudi Arabia’s cyber-crime law.”<sup>699</sup>

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<sup>695</sup> ‘Cultural Relativism vs. Universalism’ Global Policy Forum 1

<<https://www.globalpolicy.org/home/163-general/29441.html>> accessed 10 February 2015.

<sup>696</sup> Allison D Rentlen, ‘Relativism and the Search for Human Rights’ (1988) 90 (1) American Anthropologist 56.

<sup>697</sup> *ibid.*

<sup>698</sup> Human Rights Watch, ‘Human Rights in Saudi Arabia’ (August 2014) 1

<<http://www.hrw.org/middle-eastn-africa/saudi-arabia>> accessed 10 September 2014.

<sup>699</sup> Reporters Without Borders, ‘Jailed And On Trial For Reporting Human Rights Violations’

<<http://en.rsf.org/saudi-arabia-jailed-and-on-trial-for-reporting-20-06-2014,46489.html>> accessed 20 June 2014.

Needless to say, such circumstances in Saudi Arabia leave it wide open to strong criticisms of its true stance on human rights. One of the most notable critical scholars of Saudi's human rights record is Ann Elizabeth Mayer, whose book *Islam and Human Rights* was recently released in its 5<sup>th</sup> edition.<sup>700</sup> Mayer's purpose in writing the book is to expose the ways in which Saudi's human rights laws deviate from international human rights laws. Mayer makes no apology in her lack of a neutral approach on the subject. She declares from the outset that her beliefs concur with "... the normative character of human rights principles set forth in international law and in their universality."<sup>701</sup> However, as a Western scholar, Mayer lacks knowledge of a clear understanding of the history and context of Islamic human rights laws and traditions. She uses no original texts based on Arabic, but mostly reference texts written in English or French. She is very polemic in her discourse. She seems to ignore the trend of more tolerance to cultural differences related to human rights. Nakissa delivers a strong criticism of Mayer's work, arguing that scholars have become more sensitive to the distinctly different forms of cultural practices found from one society to another. This is especially true in recent work on human rights. Mayer's position reveals that she takes a universalistic perspective of human rights. However, this viewpoint is a barrier to understanding how human rights are perceived in non-Western and specifically Muslim societies.<sup>702</sup>

Regardless of scholarly debate, it is clear that not allowing freedom of expression violates the United Nations Declaration of Human Rights, which is the foundation for the later treaties; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights. As stated by the United Nations, the two Covenants included most of the articles of the original UNDHR, "making them effectively binding on States that have ratified them. They set forth everyday rights such as the right to life, equality before the law, freedom of expression, the rights to work, social security and education."<sup>703</sup>

Some scholars argue that circumstances like the limits related to human rights for women and freedom of expression in Saudi Arabia are precisely why there needs

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<sup>700</sup> Ann Elizabeth Mayer, *Islam and Human Rights Tradition and Politics* (Westview Press 2013).

<sup>701</sup> Nakissa (n 693)174.

<sup>702</sup> *ibid* 176.

<sup>703</sup> The Foundation of International Human Rights Law, The United Nations  
<[http://www.un.org/en/documents/udhr/hr\\_law.shtml](http://www.un.org/en/documents/udhr/hr_law.shtml)>accessed 15 April, 2014.



to be international standards and mandates related to human rights because cultural differences are used to justify the denial of human rights to some groups. Saudi Arabia argues that it has developed its own protections of the rights for women based on tradition, faith and custom. Regardless of whether Saudi Arabia agrees with international mandates of human rights, the Al-Saud government is under continuing pressure to reform rights for women, rights for children, rights for immigrants, and rights for the freedom to express opinions. For example, in its 2008 Annual Review, the Committee on the Discrimination Against Women made a recommendation to the government of Saudi Arabia, even though the Vienna Convention intended that States have the ability to declare reservations to international treaties. The recommendation was as follows: “The Committee urges the State party to consider the withdrawal of its general reservation to the Convention, particularly in light of the fact that the delegation assured that there is no contradiction in substance between the Convention and Islamic *Shar’ia*.”<sup>704</sup> The Committee also suggested, after reviewing Saudi Arabia’s Report on Human Rights as required by the Treaty that it “encourages the State party to amend its legislation to confirm that international treaties have precedence over domestic laws. The Committee calls upon the State party to enact a comprehensive gender equality law and intensify its efforts to raise awareness about the Convention among the general public.”<sup>705</sup> The Committee expressed a concern, that while it acknowledged Articles 8<sup>706</sup> and 26<sup>707</sup> of the Basic Law (1992) do guarantee the principle of equality:

neither the Constitution nor other legislation embodies the principle of equality between women and men. It expresses concern that neither contains a definition of discrimination against women, in accordance with article 1 of the Convention, covering both direct and indirect discrimination and extending

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<sup>704</sup>Concluding comments of the Committee on the Elimination of Discrimination against Women (8 April 2008) CEDAW/C/SAU/CO/2, 2.

<sup>705</sup> *ibid* 3.

<sup>706</sup> Article 8 of the Basic Law states: Article 8: Governance in the Kingdom of Saudi Arabia is based on justice, *Shura* (consultation) and equality according to Islamic *Shar’ia*.

<sup>707</sup> Article 26 of the Basic Law states, ‘Article 26: The State shall protect human rights in accordance with the *Shar’ia*’.

State responsibility to prohibit acts of discrimination of both public and private actors.<sup>708</sup>

The Committee specifically emphasised its concern about discrimination against women in Saudi Arabia related to *mehrem* (male guardianship over women). Even though *mehrem* is not a law, it is widely practiced. *Mehrem* is viewed as being a severe limitation on women's rights, especially in relation to legal capacity and such things as personal status regarding, marriage, divorce, child custody, inheritance, property ownership and decision-making in the family, and the choice of residency, education and employment.<sup>709</sup> The Committee argues that the practice of *mehrem* reinforces the country's patriarchal ideology, with stereotypes and the persistence of deep-rooted cultural norms, customs and traditions that discriminate against women and constitute serious obstacles to their enjoyment of their human rights. Other practices prevalent in Saudi Arabia, such as the de facto ban of women from driving, which is a limitation of their freedom of movement, also contribute to the maintenance of such stereotypes. The Committee is concerned about the limited efforts by the State party to directly address such discriminatory cultural practices and stereotypes.<sup>710</sup>

Ultimately, because Saudi Arabia continues to resist international human rights standards and conventions because it does not want to defer to legal standards, it believes should be subordinate to *Shar'ia*, the legitimacy of the Government comes under scrutiny by the global community. In response, Islamic scholars have been even more assertive in the justification they argue is provided by the Vienna Convention for the intention of flexibility: "that a flexible, international treaty law based approach to human rights treaties is more effective in the propagation of human rights norms in diverse cultural-legal environments as noted in this case study of the reservations to human rights treaties made by Islamic States."<sup>711</sup>

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<sup>708</sup> Concluding comments of the Committee on the Elimination of Discrimination against Women (n 708) 3.

<sup>709</sup> *ibid* 4.

<sup>710</sup> *ibid*.

<sup>711</sup> A.A. Sawad, 'Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations' (DPhil thesis, University of Otago) < <http://hdl.handle.net/10523/1692>>, 2011> accessed 1 June 2014.

However, with the growing importance of international law, conventions and treaties related to human rights, Saudi Arabia will undoubtedly be placed under growing pressure by the global community to implement democratic reforms to improve its record on human rights issues.

## 6. 12 Conclusion

Besides human rights issues, as reviewed above, another limitation on democracy in Saudi Arabia is the issue over the separation of powers. In reviewing the various institutions of governance in Saudi Arabia, it becomes clear that there is very little separation of powers between them. Although many of the functions of government have been delegated to various institutions, the King is the “ultimate arbiter” who has the power to Issue Royal Decrees that strip or infuse power according to his discretion. This lack of separation of powers is also partly due to the fact that the King and Prime Minister are positions held by the same person, and that the King’s decrees are sovereign above all others. He alone has the power as to whether or not to ratify laws that are proposed by the *Shura* Council.

Nevertheless, separating or allocating these functions or powers into distinct or separate authorities is not a mandatory part of the Islamic political system. Rather, an Islamic political system is based on the centralised authority of the head of State, where the head of the State is responsible for all State functions including the judiciary. The King, as head of State, can take on all State functions himself, or appoint judges even though he has the right to act as a judge himself.<sup>712</sup> The *Shura* is the element of Saudi society that is intended to be a balance to the whims of a ruler, and to make sure that Islamic governance follows the right path. The citizens of Saudi Arabia are comfortable with their monarchy because the adherence to *Shar’ia* is its most important legitimising factor, and the *Shura* Council is a manifestation of *Shar’ia* in the form of a legislative body. For example, the *Shura* Council has the right to summon a Minister or any government official for inquiry.<sup>713</sup> The right to act on behalf of the *Shura* is held on the authority of the Prime Minister. In Saudi Arabia, the King is also the Prime Minister, as well as being the head of the Council of Ministers.

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<sup>712</sup> Ayoub and Al-Jarbou (n 591)15.

<sup>713</sup> *ibid.*

The *Quran* does not directly address the separation of powers in the State. Each Islamic State chooses the way it will practise governance. In the case of Saudi Arabia, the citizens have entrusted the King with this power. The main requirement of his ability to use his immense power is that he follows the right path of *Shar'ia*. If the monarchy were to stray too far from *Shar'ia*, then his power would no longer be seen as legitimate. To maintain legitimacy, the *Shura* Council must be formed in a way that maintains a complete spirit of consultancy, and where its decisions could actually provide a true balance of power to the monarchy. At this time, however, with members of the *Shura* being appointed (and therefore, equally able to be removed) by the King, the legitimacy of the system of governance in Saudi Arabia, in relation to the way its power is structured, remains very much open to question.

## **Chapter Seven: The Evolution of *Majlis Al-Shura* (*Al-Shura* Council) in Saudi Arabia**

### **7.1 Introduction**

Since the horrific events in New York on 11 September 2001, the relationship between Islam and democracy has come under intense scrutiny from Western scholars. A pervasive and entrenched attitude exists in the minds of most Western people. Islamic societies are perceived as being oppressive and authoritarian. An example of this view can be found in the following espoused argument. Tibi argues that despite claims that moderate or liberal Muslims are more open to democratic principles, in reality the political ideology of Islamism is closed to the core values of democracy, specifically pluralism and power sharing.<sup>714</sup> Islamism, at the core of Islamic societies, is presented as radical jihadist Islam. According to Tibi's line of thinking, any Muslim who pursues the principle that an Islamic State should be a *Shar'ia*-based Islamic order<sup>715</sup> is completely closed to democratic concepts. Therefore, it supposedly follows, that anyone who desires a *Shari'a*-based society is the adversary of others who seek a more democratic society.<sup>716</sup>

Saudi Arabia has an important part to play in international politics, and its role in the international arena is of vital importance for global peace and security.<sup>717</sup> One of its most important developments in modelling democratic reform has been the building of *Majlis Al-Shura* (the *Al-Shura* Council) into its current status.

### **7.2 Development of *Majlis Al-Shura* in Saudi Arabia**

In Saudi Arabia, the consultative process developed unevenly. The first Council was created in 1924 and was named the National Consultative Council. Sheik Abdul Gadir Al-Shebi was the first chairman, and the Council itself consisted of twelve members. At that time, when the State structure was incomplete, the Council was asked to draft the basic administrative laws for the country. In its early

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<sup>714</sup> B. Tibi, 'Islamism and Democracy: On the Compatibility of Institutional Islamism and the Political Culture of Democracy' (2009) 10 (2) *Totalitarian Movements & Political Religions* (special issue on Islamism) 135.

<sup>715</sup> *ibid.*

<sup>716</sup> *ibid.* 136.

<sup>717</sup> *ibid.*

stages there was no law to specify the functions of the Council, and in its initial form, it lasted for approximately six months.<sup>718</sup> The structure of the Council became more formalised in 1925. It had a vice president and a secretary, and six articles of instructions were developed for the Council membership. The instructions included the qualifications for membership, and specified the way voting would take place. In the same year, seven more articles were developed to address jurisdictional matters.<sup>719</sup> For example, jurisdiction included regulating all matters in courts, municipalities, endowments, education, security, and commerce, in addition to forming permanent committees to solve problems related to social traditions that did not contradict *Shar'ia*.<sup>720</sup> The Council was to be made up of 12 elected members to represent all 12 of Saudi Arabia's districts.<sup>721</sup>

In 1927, the function and jurisdiction of the *Shura* Council became part of Basic Law. For that reason, 1927 is often the date given for the formal creation of *Shura* in Saudi Arabia.<sup>722</sup> In 1928, amendments were made to the original law, with the number of articles increasing from 15 to 24. The new law required the Council to meet daily, instead of once a week. Half of the Council's members were to be elected, with the other half appointed by the King, and all the members were to be selected from people who were scholars or experts in religion or commerce. In 1928, 14 new articles were added to the Basic Law relating to *Shura*. For example, one article required that there would be two vice presidents of the Council, one elected and one appointed by the King.<sup>723</sup> The Basic Law of the *Shura* remained unchanged until 1953, when many of the responsibilities of the *Shura* Council were transferred to the Council of Ministers.

After the first *Shura* Council had been dismantled, it was decades before another was developed. Even so, *Shura* has been incorporated into the Saudi government in one form or another since the beginning. At the time of the initial Council, the State structure was incomplete and it was charged with drafting the

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<sup>718</sup> Humaid (n 444) 8.

<sup>719</sup> *ibid.*

<sup>720</sup> *ibid.* 11.

<sup>721</sup> 'Majlis Al-Shura' Kingdom of Saudi Arabia

<<http://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/Historical+BG/>> accessed 1 April 2013.

<sup>722</sup> *ibid.*

<sup>723</sup> *ibid.*

basic administrative laws.<sup>724</sup> From that time onwards, a *Shura* Council was part of many governments, with its duties, functions and title varying according to the needs of the country and the monarch at the time.<sup>725</sup>

Although both King Faisal (1964-75) and King Khalid ibn 'Abd al-'Aziz al-Sa'ud (1975-82) promised to establish a *Majlis*, it was not until September 1992 that King Fahd developed the next formal Council and named Shaikh Muhammad ibn Jubayr, a conservative *'alim* (religious scholar), as the chairman of Saudi Arabia's first *Majlis al-Shura*.<sup>726</sup>

In the early 1990s a crucial decision was made in Saudi Arabia when a consensus could not be reached, namely, when the regime invited the American military into the country. Saudi still feels the negative backlash of this decision. The process of consultation has become more and more public with further developments being made to ensure communications and dialogue with the *Al-Shura* Council are increasingly transparent. The Council represents an institutional process of consultation and is now a part of the State system of governance. However, not all consultation takes place within the Council. Old practices remain and a substantial amount of informal consultation continues to occur. This may change over time as the institution of the Council becomes more familiar to those in government as an entity to consult; is recognised by the people and the regime as being an effective representative of the people's interests; and is embedded within the engine of State governing practices. Nevertheless, trust of the people in the process of *Shura* within the Council is likely to grow. Whereas Council debates were initially held away from the eyes of the public, they now receive a good deal of media attention and are also live streamed and debated over the Internet.<sup>727</sup>

The *Majlis* is becoming more important, and to stop something it has approved will require its opponents to spend a lot of political capital. In fact, the opponents of a given measure are more likely to concentrate on preventing the *Majlis* from

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<sup>724</sup> 'Shura in the Kingdom of Saudi Arabia' (2013) Kingdom of Saudi Arabia website <<http://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/Historical+BG/>> accessed 1 April 2014.

<sup>725</sup> *Majlis Al-Shura* <[http://www.saudiembassy.net/about/country-information/laws/Majlis\\_Ash\\_Shura\\_Law.aspx](http://www.saudiembassy.net/about/country-information/laws/Majlis_Ash_Shura_Law.aspx)> accessed 15 June 2014.

<sup>726</sup> Humaid (n 444)11.

<sup>727</sup> Shavit (n 423) 277.

taking it up and deliberating on it. The *Majlis* is also a way to accommodate the growing importance of the “experts” and business community, which find this forum quite congenial to their respective agendas and approaches.<sup>728</sup>

The structure created in 1992 for the *Shura* Council is still in use today. The changes that were made in 1992 were intended to be more closely aligned with modern political developments in the Kingdom, as some of the qualitative changes suggested. The new law contained 30 articles to provide greater comprehensiveness and clarity in the functioning of the *Shura*. After members have been appointed, the Council remains intact for four years without change rather than two, which had been the case initially. Originally two vice-presidents had been appointed for the Council, whereas currently there is one vice president and one deputy. The current law also changed the minimum accepted age for membership of the Council to 30 years of age rather than 25 years.<sup>729</sup>

### **7.3 *Shura* Council Law (1992)**

Article Eight of Chapter Two of the Basic Law of Government, 1992, stated, “Government in the Kingdom of Saudi Arabia is based on justice, *Shura* (consultation) and equality.” Article 68 of Chapter Six specified, “The *Shura* Council shall be established. Its Law shall specify the details of its formation, powers and selection of members. The King may dissolve and reconstitute the *Shura* Council.”<sup>730</sup> On March 5, 1992, *Shura* Council Law was published. At that time 60 members were to be appointed to the Council, which was later amended to 150 members. Article 15 of the *Shura* Council Law outlines its functions:

The *Shura* Council shall express its opinion on State's general policies referred by Prime Minister. The *Shura* Council shall specifically have the right to discuss the general plan for economic and social development and give views; revise laws and regulations, international treaties and agreements,

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<sup>728</sup> Luciani (n 518) 279.

<sup>729</sup> *ibid* 12.

<sup>730</sup> The Basic Law of Governance (n 546) Article 8, accessed 15 June 2014.



concessions, and provide whatever suggestions it deems appropriate; Analyze laws; Discuss government agencies annual reports and attaching new proposals when it deems appropriate.<sup>731</sup>

Article 17 of Council law provides that *Shura* Council resolutions shall be submitted to the King who then will determine which be referred to Cabinet; if both the *Shura* Council and Cabinet agree, the resolutions are issued after the King's approval. On the other hand, if views of both Councils vary, the issue shall be returned back to *Shura* Council to decide whatever it deems appropriate, and send the new resolution to the King who takes the final decisions.<sup>732</sup>

Article 18 provides that all laws, international treaties and agreements, and concessions shall be issued and amended by royal decrees after being reviewed by the *Shura* Council.<sup>733</sup>

Obviously, although the *Shura* Council has the right to review all resolutions and other legal instruments, the King has ultimate authority under all circumstances, with the ability to embrace or reject any referrals, resolutions or recommendations provided by the *Shura* Council.

Article 19 of *Majlis Al-Shura* Law provides that minutes for each session recording all aspects of the session, including the venue and date of the session, the time it started, the name of its chairman, the number of members present, the names of those absent and the reasons for their absence, along with a summary of the discussions, the results of voting, the texts of the resolutions, as well as anything else the Chairman wishes to record.<sup>734</sup>

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<sup>731</sup> 'Article 15, Majlis Ash Shura Law' <[http://www.saudiembassy.net/about/country-information/laws/Majlis\\_Ash\\_Shura\\_Law.aspx](http://www.saudiembassy.net/about/country-information/laws/Majlis_Ash_Shura_Law.aspx)> accessed 15 June 2014.

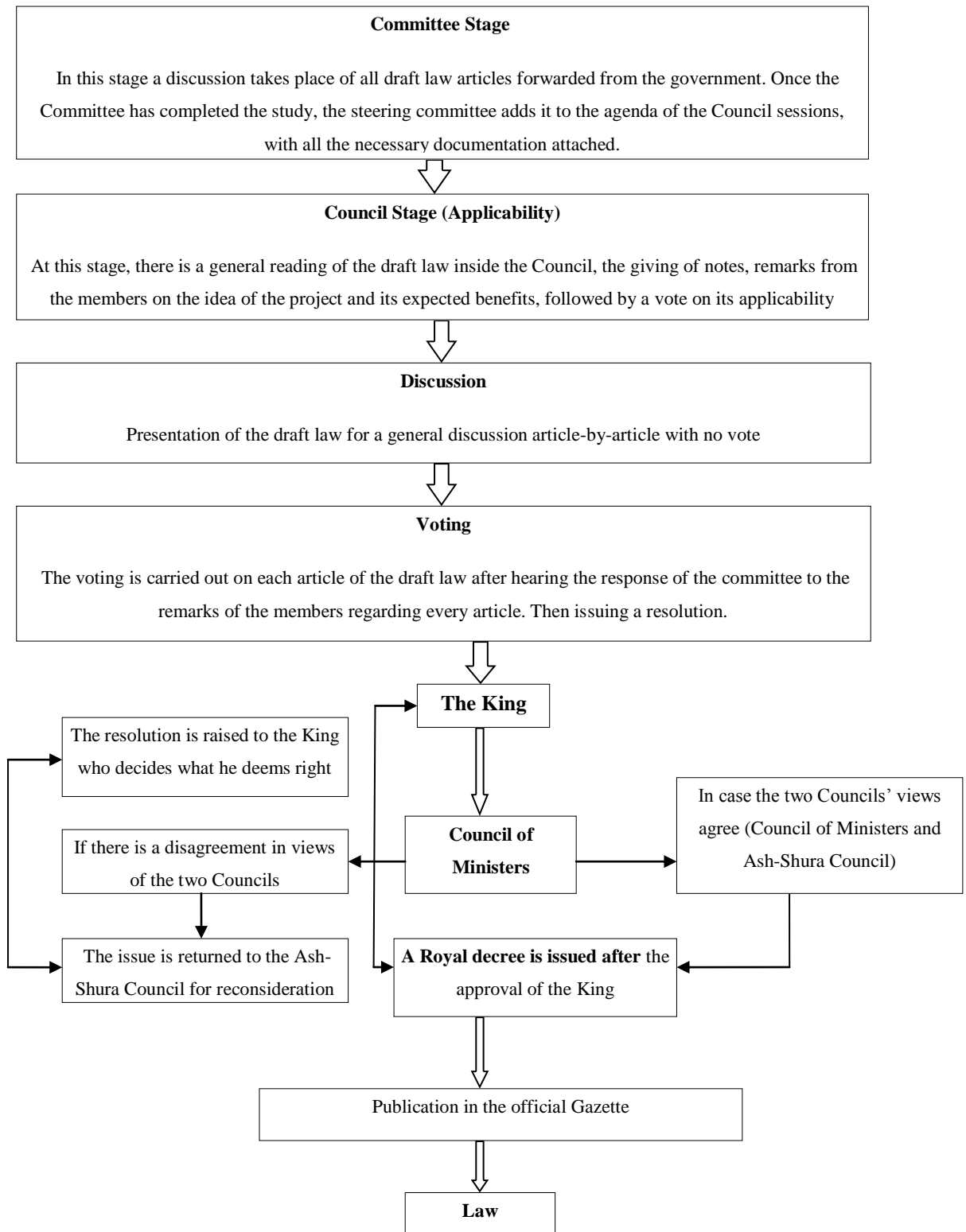
<sup>732</sup> *ibid* Article 17.

<sup>733</sup> *ibid* Article 18.

<sup>734</sup> *ibid* Article 19.

The consultative process is triggered when a particular matter is submitted to the *Majlis*, and the chairman begins the consultative process by assigning the matter to one of the specialised committees of the *Majlis*. The chairman acts as the moderator of deliberations, and when consensus is reached, he reports the advisory opinions of the *Majlis* to the King. The way the *Shura* Council is structured causes major delays in the process of even its advisory role. Figure 5, overleaf, shows the hierarchical process involving matters put forth to the Council.

**Fig 5: The Stages of making legislation in the *Majlis* from the beginning through to the issuance of law by the King**



**Source:** after figure 5.1 within The Majlis Ash-Shura in the Kingdom of Saudia Arabia (published by the Majilis, July 2004).

Beyond these specific criteria of age, citizenship and good character, there are also personal characteristics that influence who will be appointed to the *Shura* Council. Typical members will come from four major categories: the *ulama* (Islamic scholars and clergymen), *ahl al-'ilm* (people of learning), *ahl al-ra'y* (shapers of opinion) and *ahl al-khibra* (experts). Although these groups are well represented in the *Majlis*, R. Hrair Dekmejian argues that a careful analysis of members “shows a carefully crafted strategy of inclusion aimed at strengthening the political foundations of Saudi legitimacy.”<sup>735</sup> Table 1, overleaf, highlights the type of membership in the 1997 *Shura* Council.

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<sup>735</sup> R. Hrair Dekmejian, ‘Saudi Arabia’s Consultative Council’ (1998) 52 (2) Middle East Journal 205.

**TABLE 1**  
*Occupational Backgrounds of the Members of the 1997 Majilis  
al-Shura*

Occupation	Number	Percentage
Academic (secular fields)	23}	
Academic (religious fields)	7}	36.7%
Academic/Journalist	3}	
Bureaucrat	19}	
Bureaucrat/Academic	7}	
Bureaucrat/Businessman	7}	
Bureaucrat/Judge	3}	43.3%
Bureaucrat/Journalist	1}	
Bureaucrat/Lawyer	1}	
Bureaucrat/Religious	1}	
Police	4	4.4%
Diplomat	4	4.4%
Military	3	3.3%
Businessman	3}	
Businessman/Lawyer	3}	7.8%
Businessman/Journalist	1}	
	90	99.9%

*Source: Aggregation of data from Al-Yamama, 12 July 1997; 'Ukaz, 8 July 1997; 'Ukaz al-Ushbu'iyah, 7 July 1997; Al-Majalla, 19 July 1997; Al-Quds al-'Arabi, 8 July 1997; Al-Riyad, 7 and 8 July 1997; Al-Jazira, 7 July 1997; and Al-Shara al-Awsat, 15 July 1997.*

According to Dekmejian, about 20 percent of *Majlis* members are from religious universities, mostly specialists in Islamic studies, while the rest are from the non-religious universities with diverse secular specialisations. The religious membership includes several high ranking *ulama* and other specialists in Islamic studies, while among the secular academics are some of the Kingdom's top scientists and scholars, who have published in Western academic journals. The country's security concerns, both internal and external are reflected in the appointments of the retired police and military generals to the Council. There are some diplomats appointed which may show that the Council will play a more important role in foreign policy, and by including several important business men, the private sector is represented:

Among the journalists, bureaucrats and academics are also well-known men of letters, poets, writers, television producers, and the editors of two major newspapers, *Al-Yamama* and *'Ukaz*. The inclusion of these members of the Saudi literati class brings distinction to the *Majlis*. A breakdown of the bureaucrat component reveals the inclusion of several key ministerial and professional constituencies, such as petroleum, urban affairs, information, health, water resources, the National Guard, and the religious establishment.<sup>736</sup>

In 1997, when the King appointed 30 new members to the *Al-Shura* Council, it was met with surprise from both within the country's borders and from the international community. The appointments were seen to represent an important step in the development of the Saudi political system for two interconnected reasons. First, it was a declaration of the King's intention to institutionalise the consultative process he was responsible for creating in August 1993. The second reason was that the King extended the consultative process in Saudi Arabia substantially, by increasing the Council's membership from 60 to 90.<sup>737</sup>

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<sup>736</sup> Dekmejian (n 735) 206.

<sup>737</sup> *ibid.*

The *Shura* Council in Saudi Arabia is perceived as a manifestation of Islamic social and legal principles that can be derived from Articles 1 and 2 of the Law of the *Shura* Council which states:

Article 1: And His words ‘Those who answer the call of their Lord [...] and offer their prayer perfectly, and who (conduct) their affairs by mutual consultation, and who spend of what we have bestowed on them .... and following His Messenger [...] in consulting his Companions and urging the Nation to engage in consultation, The Shura Council shall be established to exercise the tasks entrusted to it, according to this Law and the Basic Law of Governance, while adhering to the Book of Allah and the Sunna of his Messenger [...], maintaining brotherly ties and cooperating unto righteousness and piety.’<sup>738</sup>

Article 2: The Shura Council shall hold fast to the bond of God and adhere to the sources of Islamic legislation. All Members of the Council shall serve the public interest, and shall preserve the unity of the community, the entity of the State and the interests of the Nation.<sup>739</sup>

*Shura* refers to the act of consultation; i.e., it seeks the opinions of knowledgeable people, the nation, or the nation’s representatives, about various issues, which is why Muslims took *Shura* as one of the principles and bases of governance, and why mature Muslims elect those whom they consider worthy of power and governance.<sup>740</sup> Muslim society believes that *Shura* is a necessary system, and a necessary imposition on the leadership. *Shura* is also considered an important manifestation of a just and civilised society. Some regard it as one of the most important elements contributed by Muslims to creation and consolidation in the Muslim community. Others have been influenced by *Shura*, especially in Europe since the thirteenth Gregorian century. Thus, *Shura* represented a kind of expression

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<sup>738</sup> Article 1, Law of the Shura Council, Royal Order No. (A/91), March 5, 1992, *Umm Al Qura Gazette*, 1.

<sup>739</sup> *ibid* Article 2.

<sup>740</sup> El-Sergany (n 600).

of the divine will on the basis of what the Prophet said: “My nation shall not agree upon an error.” El-Sergany explains that this is why a ruler in an Islamic society is not entitled to give himself the right to express divine will, because in the absence of indisputable evidence from the *Quran*, legislation belongs to the Muslim community.<sup>741</sup>

Although *Shura* refers to shared decision-making, it is not the same as secular democracy. Democracy requires that the rule of people should be assumed by people; that people develop their own constitution and laws; and that judicial authority is used among people through the application of secular laws. To attain authority, people are elected who regulate authorities. *Shura*, however, has a different perception.

*Shura* in Islam is based on the fact that ‘rule’ is Allah’s rules revealed to the Messenger of Allah, and that adherence to that rule is the basis of faith. Scholars are people of power and decision and are placed at the top of the people of *Shura*. Given Allah’s rules, scholars have nothing to do in their consultations but to work diligently to prove the text, understand it accurately, and draw systematic plans for its application. In fact, the democratic system can be easily circumvented, by certain powers so that this or that party could impose its view on the nation. The Islamic *Shura*, however, leaves domination for Allah only and prioritises Allah’s rules over any other provision and legislation. This leads to the emergence of men living in the company of Allah and fearing Him honestly.<sup>742</sup>

Originally the *Majlis* was divided into eight committees that specialised in different areas of social life, such as Islamic affairs or health and education, culture and media, etc.<sup>743</sup> To address growing needs the number of committees was expanded to 11 in 2004 and now has 13 committees to address social and economic issues. Once the committees have had time to investigate and deliberate on a particular matter, they present an advisory opinion which the Chairman then delivers to the King. During deliberations, people who have expertise related to the matter are often asked to report to the Committee so they can be as well-informed as

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<sup>741</sup> El-Sergany (n 600).

<sup>742</sup> *ibid.*

<sup>743</sup> Dekmejian (n 735) 207.



possible.<sup>744</sup> The Council often receives petitions from Saudi citizens asking the Council to review specific issues, and the Council reviews the petitions and will refer them to other bodies if they feel a matter is better served in a different venue,<sup>745</sup> such as a specific ministry. The Committee is in place for one year, and each member of the *Shura* Council belongs to at least one committee.<sup>746</sup>

In order to address the petitions developed by Saudi citizens, the *Shura* has established its relationship with citizens through a special committee that was created to receive and study the petitions and proposals of citizens and consider their ideas and views. The committee becomes the liaison between the Council and the citizens by studying the petitions; when required, the Chairman of the Council will decide which specialised committee in the *Shura* is most appropriate to consider the petition's subject.<sup>747</sup>

Members of the *Shura* Council are held in high regard as they represent people who are well-educated and at the top of their professions. The value of higher education in Saudi Arabia can be seen here, in that over 60 percent of *Al-Shura* members hold doctoral degrees.<sup>748</sup> The members are in fact referred to as the “cream of men.” Furthermore, the representational role of the *Majlis* is very significant because it is the only Saudi institution that brings together the various segments of Saudi society: social and political interests, tribes, ideological factions, sects, and regions. In this sense, representation promotes a sense of community solidarity and identity with the Saudi nation, although some social sectors, such as women, remain under-represented, or excluded from the *Majlis* altogether.<sup>749</sup> In recent years, this matter has been addressed, with the appointment of several women to the *Shura* Council.

In general therefore, the *Shura* Council supports the Council of Ministers in the decision-making process by presenting its views in the form of resolutions. However, as a result of the establishment of the Council of Ministers in 1953, the power of the *Majlis* began to decline since the newly-founded Council of Ministers

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<sup>744</sup> Dekmejian (n 735) 208.

<sup>745</sup> *ibid.*

<sup>746</sup> Al-Muhanna (n 430) 114.

<sup>747</sup> *ibid* 115.

<sup>748</sup> *ibid* 40.

<sup>749</sup> Dekmejian (n 735) 214.

took over most of its jurisdiction and embodied both the legislative and executive authorities. As reported by Al-Muhanna (2005), “the Majlis was still legally alive, but inactive until 1992 when King Fahd bin Abdalaziz re-modelled it, introducing modernizations and improvements to make it fit with the progressive development occurring in all areas of the Kingdom and to enhance its efficiency and vitality.”<sup>750</sup> Today, when the King refers resolutions to the Council of Ministers, the *Shura* Council reviews such resolutions. If the two Councils agree, a resolution is issued after the King’s approval. If the views of the Councils vary, the matter returns to the *Shura* Council to decide whatever it considers appropriate; its new resolution is then sent to the King who has the final decision.<sup>751</sup>

According to Article 15 of the Law of the *Shura* Council, the *Shura* Council has the following authorities:

The *Shura* Council shall express its opinion on the general policies of the State referred to it by the President of the Council of Ministers. The Council shall specifically have the right to exercise the following:

- a. Discuss the general plan for economic and social development and provide an opinion on it.
- b. Review laws and regulations, international treaties and conventions and concessions, and provide whatever suggestions it deems appropriate.
- c. Interpret laws.
- d. Discuss annual reports submitted by ministries and other governmental agencies, and provide whatever suggestions it deems appropriate.<sup>752</sup>

The jurisdictions of the general panel, along with the Council’s Chairman, Vice President, and Secretary General were clarified. Another internal regulation was also issued explaining the rights and duties of the members of the Council, the rules

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<sup>750</sup> Al-Muhanna (n 430) 40.

<sup>751</sup> Humaid (n 444) 4.

<sup>752</sup> Law of the Shura Council (n 738) Article 15.

governing the Council's financial and personnel affairs, and the rules and procedures for the investigation and trial of members of *Majlis al-Shura*. None of these issues had appeared in the previous law.<sup>753</sup> In addition, the Council was relocated from Mecca to Riyadh.

In August 1993, the King appointed 60 new members. The *Majlis* was developed in the aftermath of the 1991 Gulf War, which was a critical time in modern Saudi history since the war had exacted not only massive costs, but had also had a psychological impact on Saudi Arabia's sense of stability. All of these factors, along with the decline of oil revenues created serious challenges for the Saudi State. This situation was further compounded by the unprecedented rise of an Islamist movement that sought to play a decisive role in both domestic and foreign affairs. The establishment of the *Majlis* was in fact part of the regime's response to the demands of its Islamist and nationalist critics for reforms in the aftermath of the war.<sup>754</sup>

The new Council was also developed according to the law of the new Constitution. The Basic Law of Governance of 1992 required in its eighth Article that the Government in the Kingdom of Saudi Arabia should be based on Equity, *Shura*, and Equality, in conformity with Islamic legislation. Moreover, Article 68 of the same law stated that: "The Shura Council shall be established. Its Law shall set forth its formation, the exercising of its powers and the selection of its members. The King may dissolve and reconstitute the Shura Council".<sup>755</sup>

King Fahd believed *Shura* was necessary to maintain the relationship between the ruler and the people; with the principle of mutual consultation based on the *Quran*, *Sunna* (custom) and *Shari'a* (Islamic law) that means *Shura* is sanctioned by Islam and aligned with the practices of the Prophet himself. King Fahd's royal decree declared that the main purpose of the *Majlis* was to provide *nasiha* (advice) to the King in four areas: the Kingdom's laws; the general plan for economic and social development; the annual reports submitted by ministries and other State agencies; and international laws, treaties and agreements.<sup>756</sup> The King authorised the Council

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<sup>753</sup> Humaid (n 444) 12.

<sup>754</sup> Dekmejian (n 735) 215.

<sup>755</sup> Law of the Shura Council (n 738) Article 68.

<sup>756</sup> Dekmejian (n 735) 215.

to contribute to the development of the Kingdom and its growth, always keeping in mind the interests of all Saudi citizens (*al-maslaha al-'amma*).<sup>757</sup>

In 1997, the King formalised the *Majlis Al-Shura* and expanded the membership from 60 to 90; eventually, the membership would be enlarged to 150.<sup>758</sup> This move surprised both the citizens of Saudi Arabia and the international community. The appointment of an expanded Council was welcomed as an important milestone in the continuing development of the Saudi political system for at least two major reasons. First, it represented the King's apparent determination to institutionalise the consultative process which he had initiated in August 1993, and secondly, the decision to increase the Council's membership from 60 to 90 was seen as representing a major broadening of the consultative process in the Kingdom.<sup>759</sup> The current Council has limited authority. The members are appointed by the King for four years. They study the drafts of all laws that have been referred by the government. The members will read, research, take expert testimony, and discuss the proposed law until they are satisfied that they understand how this particular law will be of benefit to the nation. They must offer their own views and recommend possible amendments. They may also choose to recommend that a particular draft is not suited to the country's needs, or submit a draft of new proposed legislation or recommended amendments to an existing law. After study and deliberation within the Council, its Chairman has then to refer the final decision to the King.<sup>760</sup>

The *Shura* Council also has the right to express its opinion on the general policies of the State and to discuss the General Plan for Development. This Plan is a national project, consisting of social, educational and economic objectives that are positioned on a developmental schedule. It also includes the policies, programmes and methods that will be required to accomplish these objectives.<sup>761</sup> The *Shura* Council discusses the various programmes and recommends additions/changes as it sees fit. It also has to discuss the annual reports forwarded by the ministries and other

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<sup>757</sup> Dekmejian (n 735) 215.

<sup>758</sup> Humaid (n 444) 12.

<sup>759</sup> Dekmejian (n 735) 216.

<sup>760</sup> *ibid.*

<sup>761</sup> 'Shura in the Kingdom of Saudi Arabia' (n 724).

government bodies. The Council members have the right to summon any government official and to request clarification.<sup>762</sup>

The criterion for selection of members relies heavily on scholars, experts and specialists. Scholars are expected to have scientific qualifications in various subjects and specialisations. Without exception, all members must represent the general interests of the nation in their actions. For the King, choosing these members is a time-consuming and important task, which requires clear and detailed information, and a number of different selection techniques and criteria have been used over the years. As each member represents the religion and the entire country, any kind of partisanship is unacceptable. There should be no pressure from members, interest groups, or partners for special needs or attention, and all members should be able to enrich discussions with a broad range of knowledge and clear, but neutral understanding.<sup>763</sup>

Saudi Arabia's Prime Minister is the head of not only the *Shura* Council, but of the Council of Ministers as well. Of course, the King is the Prime Minister, and the Crown Prince is Deputy Prime Minister. The Council of Ministers is the true legislative body in Saudi Arabia, being responsible for drafting and overseeing the implementation of the internal, external, financial, economic, education and defence policies, and general affairs of the State. The Council meets weekly and is presided over by the King or one of his deputies.

It is the Council of Ministers that are in charge of *siyasaḥ*, or ruler made law while the *Shura* advises on whether the laws created are aligned with Islamic principles. The laws created by the Council of Ministers are legitimatised by the notion of *maslahah*, in service of the public good and what is considered necessary for social order. *Siyasaḥ* (law-making) "best resembles the work that happens in legislatures today."<sup>764</sup> In the past *maslahah* was determined by the specific ruler, however, it can now be decided democratically by the majority.<sup>765</sup> Because of this, *siyasaḥ* could easily become part of a secular legislative process and still be acceptable within the boundaries of an Islamic society;

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<sup>762</sup> Dekmejian (n 735) 217.

<sup>763</sup> *ibid.*

<sup>764</sup> Grote and Roder (n 286) 69.

<sup>765</sup> *ibid.*

The implications of this reconceptualization are many. First, if laws made by democratic legislatures are recognized as modern versions of ruler-made *siyasah*, then a whole range of important social order legislation could gain credibility as the *siyasah* arm of a *Shar'iah*-based legal system.<sup>766</sup>

Upon recognising that in making *siyasah* law is consistent with Islam, this shift in perception could inspire Muslims to develop a new respect for secular legislation.<sup>767</sup> Secular legislation could include addressing a wide range of things (because it is *maslahah*), including civil rights, health care, poverty and education. It certainly could bridge the current gap between Islamic law and international rights norms. Now that traditional forms of governance, that included the separation of powers through the duality of *fiqh* and *siyasah*, have been replaced with the nation-State model, where the State holds all of the authority, *fiqh* scholars do not have the same power and influence in the society. Even the esteemed *Shura* Council does not have true legislative power.

Indeed, because the members are appointed by the King, he maintains control of the persona of the *Shura* Council. Investigation by R. Hrair Dekmejian, has led him to claim that upon further analysis of the *Shura* Council, the makeup of the membership shows a continuing selectivity by the King to solidify public support for the Council. Two Shiite members were appointed to represent the Shiite minority in Saudi Arabia, in spite of criticism, and 30 women have also been appointed. According to Dekmejian, several Salafi activists, many of whom had previously been imprisoned for their opposition to the government, were appointed. These activists include Zayd 'Abd al-Muhsin al-Husayn, Mani' al-Juhani and Ahmad al-Tuwayjiri, who were jailed in 1993 for leading an activist Salafi group at King Sa'ud University. Dekmejian asserts that "King Fahd's decision to bring these Salafi critics into the *Majlis* represents an unprecedented act of co-optation of former opponents, reflecting an unusual degree of political flexibility and accommodation."<sup>768</sup>

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<sup>766</sup> Grote and Roder (n 286) 69.

<sup>767</sup> Dekmejian (n 735) 70.

<sup>768</sup> *ibid.*

Although forming the *Shura* Council fulfilled earlier promises of democratic reforms in Saudi Arabia, and there has been obvious commitment to broadening the scope of the Council, the *Shura* Council is still not a true source of real political participation for Saudi citizens, even though the appointments are meant to try to be representative of the broad spectrum of Saudi interests. People do feel relieved that their needs and interests are more effectively addressed by the Council and its various committees; however, the importance of political participation and the element of self-determination that is essential to democracy remains unrealised. Additionally, no true separation of power exists if the King has final determination in all decisions. It is true that the King will likely want consensus among influential key players regarding major decisions; nevertheless a true check on the King's power is still elusive.

Saudi Arabia's *Shura* has obviously passed through several stages since its use as a process of consultation among the early Arab tribes and by the Prophet Mohammad in early Islam.<sup>769</sup> Fortunately, since it is not described as having specific rules as to who may consult, or how many consultants are advisable, it can be modified to suit the times and the situation as needed.<sup>770</sup> If we believe that *Shura* is mandatory (which seems to be the majority opinion), then the choice of the late King Abdul-Aziz to use *Shura* as a foundation for his government in 1924 was obviously correct, even though this practice had been limited or even left unused by previous rulers of the area. Current rulers in Saudi now believe that implementing *Shura* is a requirement for filling the divine order by applying *Shar'ia* as is prescribed in the *Quran* and *Sunna*.

If we accept that *Shura* is divinely inspired and required of an Islamic government, the only options to be considered are how best to design the process and use it to provide the most effective and efficient consultation for the government. Who should provide this consultation and what method of choice should be used to provide the most fair-minded and balanced outcome for all concerned?

Over the last few years, the nature of the *Majlis Al-Shura* has been addressed to ensure it is truly representative of Saudi Arabian society. Dekmejian remarks upon

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<sup>769</sup> 'Shura in the Kingdom of Saudi Arabia' (n 724) accessed 1 June 2014.

<sup>770</sup> Humaid (n 444) 12.

one important change made in the modern Council regarding the age of its members: “In a patriarchal society that reveres seniority such as Saudi Arabia, the relative youth of the new Majlis' aggregate membership is both surprising and politically salient.”<sup>771</sup> Towards the end of the 1990s, the average age of the members was 52 years, with the youngest being 34 years old and the oldest 69. Members in their 60s represented only 17 percent of the Council, 30 percent were in their 30s and 40s and 53 percent were in their 50s. This reflected a clear decision by King Fahd to bring youthful dynamism into the consultative process. The inclusion of a large youthful cohort might also have been in recognition of the increasing proportion of youth in the Kingdom's population.<sup>772</sup> A Council made up of individuals mostly in their 50s was very different from other elite political organisations in Saudi Arabia where the average age was over 60.<sup>773</sup>

Another important feature of the Council that distinguishes it from some of the other Saudi political organisations is that the members do not necessarily have to have close ties to the Al-Saud family. It is true that tribalism is still an obvious feature of Saudi society; however, it is not a major factor in the *Shura*, none of whose members are, in fact, tribal leaders, even though the members do come from a variety of tribal backgrounds, including the 'Anaza, Mutayr, 'Utaiba, Shammar, Ghamid, Harb, Zahran and Dawasir tribes. Thus tribal politics do not play an important role in the functioning of the *Majlis*.<sup>774</sup>

One of the most important changes ever to have occurred is the appointment of 30 women to the *Shura* Council. A new royal decree delivered in January 2013 declared that 20 percent of the Council would be made up of women.<sup>775</sup> When the Saudi news presenter Fouz Auwadh al-Khmali was interviewed about this development she stated, “This is the beginning of a new era for Saudi women. It's about time women had a say – we are 50 percent of Saudi society, you know.”<sup>776</sup> These Council appointments are just the beginning of some important changes for

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<sup>771</sup> Dekmejian (n 735) 217.

<sup>772</sup> *ibid* 218.

<sup>773</sup> *ibid*.

<sup>774</sup> *ibid*.

<sup>775</sup> S. Hamdan, ‘Women appointed to Saudi Council for first time’ (16 January 2013) *The New York Times*.

<sup>776</sup> ‘In Saudi Arabia women's voices are starting to be heard’ (27 March 2013) Time.com, <<http://world.time.com/2013/03/27/in-saudi-arabia-womens-voices-are-starting-to-be-heard/>>accessed 1 April 2014.



women that are taking place in Saudi Arabia. In 2015, women will finally be given the right to vote in the Provincial Councils.<sup>777</sup> There are also steps being made to dismantle the country's guardianship system that requires women to have permission from a male guardian for many activities. These changes are considered major achievements by King Abdullah, who had been working for reform for women for the last eight years.

#### **7.4 Conclusion: Working Toward Mutual Understanding**

Ideological misunderstandings are often mutual. A Western public is not the only group that is suspicious of ideologies that are not its own. Many Muslims become disturbed at the demand for more democracy in their governance because they associate the term with secular authority which they believe is imperfect. This negative association is unfortunate and does not fit with the basic democratic principles of an ideal Islamic State. In the same way that Islam, for most Westerners, is immediately associated with being anti-democratic and oppressive, Muslims often have an automatic response to the term 'democracy', which they see as laden with all the hallmarks of Western imperialism. This is unfortunate, because it is the suppression of democracy that often leads to militancy and radicalised groups. When assembly and expression are blocked, this will lead to explosive tendencies surfacing in society. Violence occurs when it has been impossible for people to have a voice or to participate in their own governance.<sup>778</sup> Therefore, Muslims should not develop hypothetical and unrealistic fears about a democratic process to implement *Shura* in a contemporary Islamic State. Nor should non-Muslims have unsubstantiated fears about Islam, since Islam is an ideological and moral safeguard for justice and equal human rights and because the Islamic faith deepens the commitment of Muslims to human dignity for all mankind. Human rights that had been secured by democracy would be not threatened by Islam or Muslims, but would be observed more as a matter of faith.<sup>779</sup>

Obviously, there is much more common ground between principles of Islamic governance and democratic principles than most people, even international political

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<sup>777</sup> Abdullah, His Majesty King of Saudi Arabia, Annual State of the Nation Presentation to the Majlis Al Shura, 2011.

<sup>778</sup> Dekmejian (n 735) 219.

<sup>779</sup> *ibid.*

scholars, seem to recognise. If greater understanding could be developed between the groups who hold these two very important belief systems, it could help to alleviate some of the tensions between them. In various ways, the bias between the two groups is based on ideological stereotypes and misunderstandings. Muslims fear Western democracy, seeing it as a rejection of God's intention for how a society should function, and most Westerners see Islam as rejecting personal choice and liberty. Instead, both philosophies promote the dignity of the human being and the need for a government to reflect the will of the people, and not to serve its own selfish interests. The basic goal of *Shari'a* is to create a just society, in which human rights are protected. This goal is the same as that of democracy. The distance between them is really not so great that the two philosophies concerned cannot find mutual respect for each other.

## Chapter Eight: Achieving Further Constitutional Reform in Saudi Arabia;

### A More Democratic *Shura* Council

#### 8.1 Introduction

Islam teaches Muslims to obey authority, and so if a regime is challenged, it is usually because that regime is in egregious violation of its obligation to its polity under Islamic values and principles. The *Quran* states: “O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result.”<sup>780</sup>

In the spirit of democracy, the classic separation of powers in an Islamic State is not between different government institutions, but between government and the non-government force of religious academia. In Saudi Arabia, the authority of *fiqh* law was given over to the *Al-Shura* Council, whose members represent scholars and experts on both *fiqh* and *siyasa* law. In its contemporary function, however, the *Al-Shura* Council does not represent a true separation of powers because the members are appointed by the King rather than elected by the people. If Saudi Arabia is serious about its claims of undergoing democratic reform, then it needs to adhere to the basic necessities of constitutionalism—the separation of powers combined with the protection of individual rights, which Quraishi claims “form the matrix of constitutionalism.”<sup>781</sup> In order for a system to meet the current standards of international human rights law, the separation of powers and the protection of individual rights are indispensable. A system that does not have the mechanisms for a judiciary that is independent would not be in a position to serve the rule of law.<sup>782</sup>

In order to be accepted as a legitimate ruler, the ruler of an Islamic nation must have the acceptance of the religious authorities, who will only approve a leader who is bound by *Shar'ia*, religious law. Just claiming that a ruler is subject to the law is not enough. The ruler would no longer be accepted if he strayed from the law in

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<sup>780</sup> 39 The Holy *Quran*, Surat Al-Nisa, verse: 59.

<sup>781</sup> Quraishi (n 325) 63.

<sup>782</sup> *ibid* 65.

any way. So, in an Islamic nation, no secular ruler has unlimited power, at least not in the spirit of Islam. Noah Feldman notes that to motivate rulers to follow law required incentives:

And as it happened, the system of government gave him a big one, in the form of a balance of power with the scholars. The ruler might be able to use pressure once in a while to get the results he wanted in particular cases.... the ruler could pervert the course of justice only at the high cost of being seen to violate God's law — thereby undermining the very basis of his rule.<sup>783</sup>

## 8.2 Saudi Arabia's Reform Movement – Post-Arab Spring

One of the major justifications for constitutionalisation is the concern for how power is distributed in a country. The power is manifested in the way government activities are distributed among agencies and how conflicts of interests are resolved between them. In other words, the rules of the game and the way the game plays out to produce an orderly conduct of the business of government depends on the structures of power. In this regard many constitutions in the developing world and particularly in the Middle East are found lacking.<sup>784</sup> For the most part, institutions are not arranged to maximise checks and balances on power, so that personal interests are subordinated to public interests.

Another important justification for constitutionalisation is the importance of public participation in the quest for self-determination. The ideals of constitutionalism also support a dynamic political process rather than a fixed system of distributing power and rights: "...the functional view thus emphasizes social reality, i.e., the practice of constitutionalism as something to be achieved and

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<sup>783</sup> Noah Feldman, 'Why *Shar'iah*?' *The New York Times*, 16 March 2008  
<[http://www.nytimes.com/2008/03/16/magazine/16Shar'iah-t.html?ei=5070&em=&en=5c1b8de536ce606f&ex=1205812800&pagewanted=all&\\_r=0](http://www.nytimes.com/2008/03/16/magazine/16Shar'iah-t.html?ei=5070&em=&en=5c1b8de536ce606f&ex=1205812800&pagewanted=all&_r=0)>accessed 15 April 2015.

<sup>784</sup> Grote and Roeder (n 286) 498.

commonly learned, not something that can be merely announced by an elite in final documentary form."<sup>785</sup>

Constitutional reforms have been promised in Saudi Arabia since the 1960s, and fulfilment of those promises has been slow to come to fruition. In 1962, for example, right after the unrest and Nasirist movement in Yemen, Crown Prince Faysal promised a constitution that would allow the creation of regional and national assemblies. No assemblies were actually developed at the time. When King Faysal was assassinated in 1975, there was again a mention that the assemblies might be created. Then when the Grand Mosque of Mecca was seized in November 1979, Crown Prince Fahd announced that a basic law of governance, which would include provision for a consultative assembly, would be drafted. Again, no such developments occurred. In trying to gather popular support in the war against Iraq, however, the House of Saud once again promised it would re-establish the *Majlis*. Still, King Fahd's November 1990 announcement of a consultative assembly was quite vague when he mentioned that it would be established "soon, God willing."<sup>786</sup> The *Majlis al-Shura* was established in 1992, but was considered at best a small step in part because members would be appointed by the King. There is no proposal at this time to introduce elections or to permit political parties.

Nevertheless, the importance of the development of the *Shura* Council goes beyond its political aspects. It serves other functions as well. For one, being appointed to the *Shura* Council is an important honour given to a citizen, which is based on *thiqa malakiya* (royal trust). With the appointment comes the prestige and respect that their selection gives to the members and their families. The appointment indicates a commendation for service to the country. It also has an important symbolic function, at both the domestic level and the international level. In emphasising the qualifications of its members, the Saudis can show their country is governed by "*safwat al-rijal*" (the cream of men) to serve in their Council.<sup>787</sup> The members are a showcase of men with doctorates and expert qualifications. In fact, even though members are appointed to the Council, it is also seen as a venue for

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<sup>785</sup> Grote and Roeder (n 286) 508.

<sup>786</sup> Charles Butterworth and William Zartman (eds) *Between the State and Islam* (Cambridge University Press 2001) 97.

<sup>787</sup> Dekmejian (n 735) 205.

liberal professionals to express their views and an acceptance for more pluralism in the society.<sup>788</sup>

The Council also serves a representational function, which is very valuable, since it is the only Saudi organisation that brings together the various groups of stakeholders in the country, representing various social and political interests, tribes, ideologies, sects, and regions. This function helps to promote unity, community, solidarity and identity, even though some segments are underrepresented, such as *Shia* and women. Finally, the Council has a cooptative function. Not only have the appointments brought together the cream of men, it has unified various factions that could otherwise cause conflict. This type of cooperation between factions is unprecedented in Saudi political history, and a very wise move on the part of the King who seeks to maintain widespread support and legitimacy among his people, not necessarily an easy task.

In recent years, a greater urgency for reform has developed in Muslim nations. There has been a corresponding new trend among religious scholars: a shift in interest towards democratic reforms in Saudi Arabia and other Islamic societies. For example, the well-known and influential religious scholar Sheikh Salman al-Awdah recently claimed that although democracy may not be ideal, it is the least harmful system of governance; it offers flexibility and adaptability to meet local needs.<sup>789</sup> Support for democracy is relatively revolutionary coming from a religious authority such as al-Awdah, especially keeping in mind that many religious leaders hold the view that “democracy” is a foreign concept imposed by Westernisers and secular reformers upon Muslim societies. They argue against any type of Western democracy and its principle of popular sovereignty as an unacceptable rejection of the sovereignty of God. Therefore, when Sheikh Al-Awdah sends a message of support for democracy, it is a significant event.

Al-Awdah was active in petitioning the Saudi government in the 1990s calling for the creation of the *Shura* Council. Now, he is embracing a more democratic form of government and asking that the Saudi government reform itself further. Because of his activism in the 1990s, Al-Awdah was imprisoned by the

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<sup>788</sup> Dekmejian (n 735) 197.

<sup>789</sup> Aaron Zelin, ‘Democracy Al-Salafi Style’ (2012) Foreign Policy <[http://www.foreignpolicy.com/articles/2012/07/19/democracy\\_salafi\\_style](http://www.foreignpolicy.com/articles/2012/07/19/democracy_salafi_style)> accessed 15 April 2013.

Saudi regime, which caused a lot of criticism and backlash against the government. The Sheikh was released in 1999, and while still active, he is more subtle in his criticisms of the Al-Saud clan.<sup>790</sup>

Like Sheikh Al-Awdah, several other Islamic scholars have shown approval of democracy in Muslim nations. In their discussions, the scholars often combine historically important concepts from within the Islamic tradition together with the concepts of democracy in order to fit the needs of people in the modern world. In 1992, Rashid Ghanoushi stated in the London newspaper, *The London Observer*:

If by democracy is meant the liberal model of government prevailing in the West, a system under which the people freely choose their representatives and leaders, in which there is an alternation of power, as well as all freedoms and human rights for the public, then Muslims will find nothing in their religion to oppose democracy, and it is not in their interests to do so.<sup>791</sup>

These Muslim spokespeople are not promoting that Islamic nations copy Western forms of democracy, but develop new forms that include religious norms that are appropriate for their Islamic societies. Most Muslims believe secular societies are devoid of spirituality and Islam can provide a framework to combine democracy and religious governance.

Unsurprisingly, a secular government does not seem acceptable in an Islamic nation because of *tawhid*, which means oneness with God. *Tawhid* is central to the idea that you cannot compartmentalise life; faith and spirituality are found in all aspects of life, especially in one as important as the governance of people. That is one reason the *Al-Shura* Council plays such an important role in the Saudi society. For many it is a confirmation that Islam serves its people well in many ways—socioeconomically, politically, and spiritually.

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<sup>790</sup> Zelin (n 789).

<sup>791</sup> Rashid Ghanoushi in Colin Bower, 'Whose Democracy is it Anyway?' *The Guardian Magazine* <<http://mg.co.za/article/2007-04-05-whose-democracy-is-it-anyway>> accessed 1 September 2014.

### 8.3 The *Al-Shura* Council, Potential for Balance

Reform in Saudi society proceeds slowly because of the differing ideologies of the various stakeholders. However, because it is an institution that has developed from Islamic tradition, the *Shura* Council is held in high esteem by most members of Saudi society - both elite and non-elite. The *Shura* Council represents an egalitarian solution to the balance of power, Muslim style. However, in order to have a balancing role, the *Shura* Council needs equal weight in decision-making as compared to the Council of Ministers, the country's cabinet. Currently, the Council of Ministers has the final authority regarding decisions related to financial, executive and administrative matters. The resolutions are only binding as agreed upon by a majority vote. If there is a tie, the prime minister casts the tie-breaking vote. Its authority is defined in the Basic Law of Governance and the Council of Ministers is advised by the *Majlis Al-Shura* (Consultative Council).<sup>792</sup> Therefore, the *Al-Shura* Council only has advisory influence over the Cabinet. As long as the Cabinet dominates the *Al-Shura*, *Al-Shura* is not as effective in its check on the executive or as a balance of power. Ultimately, at this time, the nature of the *Majlis* depends on "whether the king wishes to make it a useful mechanism, particularly in its legislative and mediational roles, as well as on the ability of the *Majlis* leadership to expand the scope of the organization's influence and responsibilities within the political system."<sup>793</sup>

The reforms needed depend on a delicate alliance of custom, faith, legitimacy and relevancy. It would be advantageous to undertake an investigative study to determine which regulatory and legislative powers would enhance the *Al-Shura* Council's authority to provide a more balanced system of governance. It seems appropriate that the *Shura* Council address some of the more humanitarian issues of society, such as civil rights and education. It already addresses these issues in its various committees, but it needs to be given the authority to act on these issues independently. The Council needs to be allowed to legislate policies it deems appropriate without seeking guidance and consent from the King.

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<sup>792</sup> Council of Ministers System, Royal Embassy of Saudi Arabia, <[http://www.saudiembassy.net/about/country-information/government/Council\\_of\\_ministers\\_system.aspx](http://www.saudiembassy.net/about/country-information/government/Council_of_ministers_system.aspx)> accessed 1 April 2013.

<sup>793</sup> Dekmejian (n 735) 217.



Political participation in the country is also a major concern. Therefore, government implementation of a method of electing members to the *Al-Shura* Council would be a welcome move. The country could adapt a system similar to that of Oman. The work of the *Shura* Council also needs to become more visible. Currently, most *Al-Shura* Council affairs are quite secretive; the implementation of greater transparency to the Council's undertakings would be beneficial.

To legitimise the Muslim nation according to Islamic principles, *Shura* should exist as a political institution that is a manifestation of the basic spirit of Islamic society. Collective deliberation and joint responsibility are considered prerequisites to proper administration: "In the first place, Islam stipulates "*rida al awam*", that is, popular consent, as a prerequisite to the establishment of legitimate political authority, and *ijtihad jama'i*, that is, collective deliberation, as a requisite to the proper administration of public affairs."<sup>794</sup> Sulaiman argues that both *Shura* and democracy derive from the same consideration that collective deliberation is more valuable to the public good than individual preference, and that all people are equal in rights and responsibility.<sup>795</sup> Additionally, it is commonly accepted that majority judgments are more likely to be comprehensive and sound than individual decision-making:

both thereby commit to the rule of the people through application of the law rather than the rule of individuals or a family through autocratic decree. Both affirm that a more comprehensive fulfillment of the principles and values by which humanity prospers cannot be achieved in a non-democratic, non-*Shura* environment.<sup>796</sup>

Although many Muslim scholars call for more democracy in Arab/Islamic States, they concur that Islam has already provided the tools to develop a democratic society. Such a claim was made more than fifty years ago by Mawlana Azad (1888 - 1958) a theologian, scholar and reformer in India who is described as regarding,

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<sup>794</sup> Sulaiman (n 459).

<sup>795</sup> *ibid.*

<sup>796</sup> *ibid* 2.

the Islamic system of government established by Prophet Muhammad (pbuh) as the real picture of democratic system of government and calls it “Islamic democracy” for which the holy Qur’an uses the term ‘*Shura*.’ Islam is synonymous, he maintains, with the “spirit of democracy and equality”, and it cannot consider any government which is not parliamentary and constitutional as in accordance with God’s will.<sup>797</sup>

S. Yusuf al Qaradawi, a renowned modern scholar argues: “The tools and guarantees created by democracy are as close as can ever be to the realization of political principles brought to this earth by Islam to put a leash on the ambitions and whims of rulers. These principles are: *Shura* [consultation], good advice...”<sup>798</sup>

Although the compatibility of Islam and democracy has been a heated debate of increasing intensity among modern Muslim scholars for the last decade, there seems to be agreement that a key to democratic reform in Muslim societies is to increase the participation of the people in government.<sup>799</sup> However, the form that participation should adopt is not entirely clear, although many would argue participation needs to be harmonised with Islamic principles to create a democratic system of government.

#### **8.4 Reform Begets Reform**

Once the small reforms made in recent years are seen to work, most expect there will be more, such as, elections for regional Councils, and eventually for the *Al-Shura* Council. In 2012, Prince Sultan bin Abdel Aziz, the Minister of Defence informed the Council of the leadership views. It agrees with the demands for the Council to be given further powers. The *Shura* members have welcomed these overtures, and would like to see a model introduced which is similar to Kuwait’s parliamentary framework. The members want to see the role of prime minister to be

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<sup>797</sup> Tauseef Ahmad Parray, ‘Islam-Democracy Discourse in 1900s: Approaching the Views of 20th century Indian Scholar, Mawlana Abul Kalam Azad (d.1958)’ (March 25 2013) *Encompassing Crescent* 1.

<sup>798</sup> Parray ‘Islamic Democracy or Democracy in Islam: Some Key Operational Democratic Concepts and Notions’ (n 403) 77.

<sup>799</sup> *ibid.*

separate from that of the King, as well as an elected assembly which would be responsible for passing a budget and which would have the power to grant or withdraw confidence from ministers.<sup>800</sup>

However, ruling members of the Saudi family disagree over the causes of tensions in the country and on how to confront them. Nevertheless, there is concern within the regime that too much liberal reform is also a threat. They are not alone in holding this concern as many Islamists consider elections to be anti-Islam.<sup>801</sup>

Not everyone believes that enhancing *Shura* will guarantee more democracy in an Islamic State such as Saudi Arabia. For example, Giacomo Luciani argues that *Shura* is a concept that depends on how it is actually practiced. It can exist in a method where actual consultation is minimal at best, and if approval from the people is lost by not conforming to the “correct” conclusion, a leader and/or a regime could suffer political repercussions and an increasing challenge to the status quo.<sup>802</sup> Consequently, the process of *Shura* in a country where the ruler holds absolute power, demands that consultation is practised whenever an important decision is faced and a policy will not be enacted unless key stakeholders are in agreement. This is by and large the most common political reality within a majority of the Arabian Gulf States today.<sup>803</sup>

At the present time, no reasonable person would describe the country of Saudi Arabia as being democratic, in spite of its promotion of *Shura*. However, the regime has been able to maintain legitimacy because it has been able to integrate religion with politics through its religious alliances. Additionally, reform has been enacted because of the deep fear that dissent by the people can destroy the State. So, Saudi has implemented reform, albeit cautiously and incrementally. Now is the time, however, for the Kingdom to take a more meaningful step by allowing members of the *Al-Shura* Council to be elected by the public, as opposed to being appointed by the King. This will not guarantee a democratic society, but it is a step in the right direction towards more balance of power in Saudi Arabia, as the Council is not dependent on the King for its body politic. Additionally, elections can help bring

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<sup>800</sup> Kapiszewski (n 565) 95.

<sup>801</sup> *ibid* 96.

<sup>802</sup> Luciani (n 518) 276.

<sup>803</sup> *ibid*.

more transparency to the system of governance, as those being elected will be held more accountable to their constituents. Considering the *Al-Shura* Council is a revered Islamic institution, it seems to be the best place to implement democratic reform. Firstly, as its role is already approved and accepted, a new form of political participation is not required. Moreover, the Council can be portrayed as an Islamic way towards democracy and thus erode the strength and appeal of any political argument from those who would accuse Saudi of caving in to Western models of governance.

That the Council is currently up to 150 members is a continuing demonstration of the commitment to strengthen the status and importance of the *Shura* Council.

## 8.5 Conclusion

Islamic leaders have long held onto the tradition of people's ability for self-determination through their right of consultation, guaranteed in Islam. The Ayatollah Baqir al-Sadr, who was executed by Saddam Hussein in 1980, said in his work, *Islamic Political System*, that the people are entitled to use the practice of consultation in addressing their affairs. This view was reaffirmed by Iran's President Khatami in a recent interview. He stressed that citizens have a fundamental role in not only bringing a government to power, but also in monitoring it and possibly replacing it without stress and difficulty.<sup>804</sup>

Currently, the *Al-Shura* Council's function in Saudi society is a key to the country's ability to constitutionalise and implement more democracy into its system. More democracy has been promised to Saudi citizens since the 1960s. Slowly but surely, reform has taken place, which has manifested most importantly in the form of its *Majlis Al-Shura*, its consultative Council, an institution that has become the pride of the country. Nevertheless, the *Al-Shura* Council falls just shy of being a true harbinger of democracy. Providing the Council with more legislative authority and allowing members to be elected by Saudi citizens would bring the country closer to an ideal of a society governed within the framework of both democratic principles and spirituality in Islam.

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<sup>804</sup> John L Esposito and John O Voll, 'Islam and Democracy' (2001) 22 (6) *Humanities* 2.

Over the last two decades, Saudi Arabia has made small, incremental political and social changes to meet the growing demands for reform in the Kingdom. The country has faced both external and internal pressures to institute more democracy. For the most part, however, trying to introduce radical change would undermine the government's legitimacy with its own citizens, no matter how welcoming a move towards a Western version of democracy might be viewed in the rest of the world. And considering that a democratic government is supposed to represent the wishes of its citizens, anything more than gradual change would be inappropriate for Saudi Arabia. Renewing its commitment to Islamic forms of governance and embracing the true spirit of those principles is the best way for the country to progress. In this way, its citizens can reap the benefits of fuller participation in the political process and the needs of most stakeholders within Saudi Arabia are more likely to be met.

In reviewing the literature and recognising the characteristics of this unique country, the most appropriate process of constitutionalisation that would maintain stability and legitimacy in Saudi Arabia, whilst providing sufficient citizen participation in governance, would be to restructure the *Al-Shura* Council. Members should be elected by the public and not appointed by the King, and the Council itself should act as a balance of power between the other sources of authority within the Saudi State.

## Chapter Nine: Recommendations and Conclusion

Saudi Arabia, like other nations in the Middle East, is confronting political, economic, social, and diplomatic challenges shaped by a new millennium. Additionally, information technologies, globalisation and the inability for the governments to control information and social networking has allowed outside influences to make an impact on the region's various societies. Since the 1980s, with the increase in international trade, there has been a drive to politicise international commerce as seen when the Reagan administration tried to impose normative democratic principles on America's "friends" and trading partners.<sup>805</sup> When applying such standards on the Middle East, most people do not realise how non-uniform the different countries are, so the complexity of the region is often greatly underestimated. However, "If there is Ariadne's thread leading through the labyrinth, it is the determination of these various countries to decide for themselves what is in their best interest, to set their own national goals and to cooperate among themselves only when they perceive it in their interest to do so."<sup>806</sup>

When under pressure, each nation will respond to demands from citizens in its own way. The way the reforms are developed and implemented will be shaped by the country's history, culture and circumstances. Nevertheless, if constitutionalism is truly a force for change in the Middle East, as is claimed by many, certain fundamentals are required to drive that change in order for the governments to maintain legitimacy.

Constitutionalism requires, at the very least, that government is legally limited in its powers. A government's continuing legitimacy will depend on whether or not it is observing these limitations. Constitutionalisation, then, imposes legal restraints on government, which results in a balance between the power of the State and the power of the people. In a country like Saudi Arabia, where citizen participation is extremely limited, in order to institute some semblance of democratic reform, the process of representative deliberation needs to be visible to Saudi citizens. Democratic legitimacy requires at the very least that those who deliberate be

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<sup>805</sup> Etheshami (n 539) 53.

<sup>806</sup> *ibid.*

held accountable.<sup>807</sup> The transparency of deliberation in policy-making is critical for maintaining legitimacy in government. This is because laws or policies that are enacted without the support of citizens are often seen as unjustified; “The coercive powers of the State would be exercised against citizens on grounds they [the citizens] do not find reasonable or that they cannot as free and equal citizens endorse.”<sup>808</sup>

It is reasonable, then, that when policies and laws are made through a deliberative process by representatives who are acting on behalf of the people, the process itself is seen as legitimate, so the outcomes are also accepted as legitimate. Political legitimacy is obtained when people recognise and accept the validity of the rules of the political system and the decisions of rulers. In a representative system, if the process of how policies and laws are developed is seen as legitimate, then policy-makers will be in a position to act decisively on behalf of citizens without having to seek approval or using force for every decision.<sup>809</sup>

Since the 1990s, Saudi Arabia has been promising its citizens that it will implement democratic reforms. Slowly but surely, it has been working to keep its promise. The promise was first manifested in the creation of the Basic Law of Governance in March, 1992. This was a first attempt to respond to the demand for more democratic governance in the country; while the Basic Law did offer some important changes, general citizen participation was still non-existent. Consequently, there have been continuing demands for more citizen participation in the political process, and recently, attention has been turned to the *Al-Shura* Council. The *Al-Shura* Council is the Islamic main governing authority that ensures policies and laws follow the principles of Islam. The *Shura* framework, however, only provides general, universal principles; the details of how they are applied are left open to interpretation by the various nations affected. This allows a great degree of flexibility, which makes *Shura* a progressive political system that can respond to the nation’s interests during any era. Allowing the *Shura* to be open and unspecified is considered an advantage because it can be adapted to the needs of the citizens at the

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<sup>807</sup> Bohman (n 150) 107.

<sup>808</sup> *ibid.*

<sup>809</sup> Jorge Aaragon, ‘Political Legitimacy and Democracy’ *Encyclopedia of Campaigns, Elections and Electoral Behavior* (nd) 2, <[http://www.luc.edu/media/lucedu/dccirp/pdfs/articlesforresourc/Article\\_-\\_Aragon\\_Trelles,\\_Jorge\\_2.pdf](http://www.luc.edu/media/lucedu/dccirp/pdfs/articlesforresourc/Article_-_Aragon_Trelles,_Jorge_2.pdf)> accessed 2 May 2014.

time. Currently, the needs of the citizens in Saudi Arabia are to participate in political decision-making.

The role of the *Al-Shura* Council has profound significance in Arab culture and history. The *Shura* method of public consultation is associated with the ancient Arab tradition of the open *Majlis* or ‘Council.’ *Shura* guarantees that governance under Islam is guided by the consultation of others. In addition, by enlarging the role of the *Al-Shura* Council as a vehicle for citizen representation, Saudi Arabia is using basic Islamic precepts which are perceived as being more legitimate in forming governance in the country rather than one that appears to be mimicking Western democracy. Some constitutional and legal scholars agree that legitimate democracy comes in many forms and there is therefore, no need for Muslims to simply follow non-Muslims models.<sup>810</sup> Indeed, secular systems are seen as illegitimate for most Muslims. This is because from the Islamic worldview, a separation of religion from politics can result in governance that lacks spirituality and moral guidance. Most Muslims would agree that a secularised government, then, often leads to abuse of power; the Baath Arab Socialist regime of Saddam Hussein in Iraq is a good example of this fear coming to fruition. In the past 30 years, there has been a good deal of literature published on the relationship between *Shura* and democracy. While there are different perspectives as to *Shura*’s role in bringing Western-style democracy to Islam, there is common ground created between governments and intellectuals who consider *Shura* to be a process that legitimises the existing political structure.<sup>811</sup>

The Saudi Arabian government has no intention of becoming a democracy, of course, but it has made promises to use more democratic practices. Using forms of governance that are sanctioned under Islam is the most reasonable choice for the country. Contrary to those who declare Islam and democracy are incompatible, the role of the *Al-Shura* Council could become an exemplary model of deliberative democracy at work in a modern society. The Saudi government has already made conciliatory gestures of good faith to add more democratic reforms by increasing the *Al-Shura* Council’s numbers to be more representative of the diversity in the country. Appointing both *Shia* members and women is a radical change for the Council, but one met with enthusiasm by most citizens. Still, although the reforms are an

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<sup>810</sup> Esposito and O Voll (n 804) 2.

<sup>811</sup> Shavit (n 423) 351.



important step in the right direction, most observers argue they have done little to change the patriarchal, clan-based structure of the governance system.<sup>812</sup> This has raised concern about how much longer the Saudi population can be persuaded to accept and support a government which allows them so little participation.<sup>813</sup> However, although Saudi citizens make demands for reform, Saudi society has always been resistant to dramatic change; a more incremental approach would be more appropriate. Prince Talal has stated, “The majority in Saudi Arabia... prefer gradual steps towards a democratic life. If the citizens can express an opinion and take part in decisions in one way or another that is what is important... the structure of the Saudi system is different than other countries. There are customs here, and customs are stronger than laws.”<sup>814</sup>

## **9.1 Recommendations for Constitutionalising the *Al-Shura* Council**

### ***9.1.1 Electing Council Members***

At this time, citizens are not calling for a separation of authority between the *Al-Shura* Council and the King, but rather participation by being able to elect who becomes a member of *Al-Shura*. Indeed, the citizens of Saudi Arabia respect their leaders with deep devotion for the most part. This does not keep them from desiring more self-determination. The election of members to the Council will help to guarantee that the broad interests of all citizens are addressed more evenly because the people will choose who they believe will best represent their needs.

Considering the purpose and intent of the Council is for its members to participate in deliberative consultation, the Council has the potential to meet one of the most important functions of a democracy – deliberative participation in decision-making. Direct participation is not required as long as the *Al-Shura* Council members have been selected in a legitimate process. The members also need to be seen as serving the interests of the people rather than the King. As long as the King appoints the members, the legitimacy of the Council is in question, and will most likely be seen as an extension of the King’s will rather than an independent agency. One of the

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<sup>812</sup> Pekka Hakala, ‘Cautious Reforms in Saudi Arabia’, Policy Department, European Parliament 1 < [http://www.europarl.europa.eu/RegData/etudes/briefing\\_note/join/2013/491504/EXPO-AFET\\_SP\(2013\)491504\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491504/EXPO-AFET_SP(2013)491504_EN.pdf)> accessed 28 May 2013.

<sup>813</sup> *ibid.*

<sup>814</sup> Ehteshami (n 539) 70.

arguments against elections was made by Prince Sultan, who said he worried that elections could result in the appointment of unfit members to the Council. Currently the majority of Council members hold doctoral degrees.<sup>815</sup> A way to overcome this concern is to have each district nominate candidates who have to meet minimal requirements, such as specific levels of education, experience and expertise in certain areas. Currently, Article 3 of the *Al-Shura* Council states that members of the Council are chosen from “amongst scholars and men of knowledge, expertise and specialization. Their rights, duties and all other affairs shall be defined by Royal Decree.”<sup>816</sup> There is no reason why the same stipulations cannot be applied in the election of candidates. In this way, the people can choose by election from among some of the finest members of Saudi society.

### ***9.1.2 Transparency***

The minutes of the Council Meetings should be made available to the Saudi public for its review. Keeping in mind the requirements of legitimacy where deliberative legitimacy is usually measured by the quality of deliberation; does it for example provide an opportunity for free open debate and do the results of such deliberation match the expectations of an independent standard?<sup>817</sup> Publishing the minutes of meetings would make the deliberative process open to the public and the quality of the deliberation would be open to evaluation; this would provide more accountability to governance and decision-making, so Saudi citizens can judge for themselves if their interests are being fully served.

### ***9.1.3 Increasing the Legislative Power of the Al-Shura Council***

Currently, the *Al-Shura* Council is mainly an advisory body, presenting its opinion on policies of the State referred by the Prime Minister. They discuss the monarchy’s plan for economic and social development, study and interpret laws and regulations, and then make suggestions it feels are necessary. While the *Al-Shura* Council does have important influence as an advisory Council, it does not have the authority to pass legislation independently. It can initiate legislation, but the King

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<sup>815</sup> Anthony Cordesman and Nawaf E. Obaid, *National Security in Saudi Arabia: Threats, Responses and Challenges* (Praeger Security International 2005) 362.

<sup>816</sup> Majlis Ash-Shura Law, Saudi Arabian Embassy <[http://www.saudiembassy.net/about/country-information/laws/Majlis\\_Ash\\_Shura\\_Law.aspx](http://www.saudiembassy.net/about/country-information/laws/Majlis_Ash_Shura_Law.aspx)> accessed 15 June 2014.

<sup>817</sup> Manzer (n 147) 40.

will have the final say in the event that the majority cannot agree on an issue. As outlined in Article 31 of *Majlis Al-Shura* law:

Council resolutions shall be adopted by majority as set forth in Article 16 of the Law of the Shura Council. In case a majority vote is not attained, the topic shall be rescheduled for voting in the following session. In the event the topic does not win the necessary majority in this session, the Issue shall be brought before the King along with any relevant study as well as the results of the voting in both sessions.<sup>818</sup>

The *Al-Shura* Council also acts as an advisory body to the Council of Ministers. The Council of Ministers has the final authority to make decisions about laws and for financial, executive and administrative policies. Its resolutions are non-binding unless agreed upon by a majority vote. In case of a tie, the prime minister has the deciding vote. Like the *Al-Shura* Council, the Council of Ministers is appointed by the King, so the Ministers are seen as an extension of the King's will. The Council of Ministers has more power than the *Al-Shura* Council. This is because the *Al-Shura* Council is more representative of Saudi citizens than the Council of Ministers. Allowing the *Al-Shura* Council more legislative authority would establish more of a balance of power between regime rule and the will of the people. The Council of Ministers is more of an administrative body, working for the efficient and just functioning of the government, while the *Al-Shura* Council is a representative body, working to serve the needs of the people it represents. Granting the *Al-Shura* Council more authority would not be challenged. The Council is already highly regarded by the community, and it is therefore, likely that its decisions would be accepted as appropriate and legitimate.

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<sup>818</sup> Article 31, Majlis Ash Shura Law, The Royal Embassy of Saudi Arabia, <[http://www.saudiembassy.net/about/country-information/laws/Majlis\\_Ash\\_Shura\\_Law.aspx](http://www.saudiembassy.net/about/country-information/laws/Majlis_Ash_Shura_Law.aspx)> (Accessed 15 June 2014).

## 9.2 Conclusion

These three measures would be effective in beginning the process of constitutionalising Saudi Arabian governance. Because the *Al-Shura* Council is highly revered, and not associated with Western institutions, it is much more likely that the Saudi stakeholders will welcome the reforms rather than condemn them. Currently, the Council is seen as an important forum for introducing future reforms, so it is by far the best vehicle for introducing more democracy in the Kingdom. Change needs to be gradual in Saudi society, as dissention is more likely to occur when tightly-held customs, traditions and sacred values are being threatened. However, Saudi citizens do want more political participation in government. The redesigning of the *Al-Shura* Council into a true representative consultative Council would satisfy some of the rising demands for a more open and responsive government. Once these changes are made, it is quite likely that other changes will follow, including voting rights for more sectors of society.

The purpose of this research project has been to examine the factors which have led to the need for Saudi Arabia to reform its *Al-Shura* Council law. It has analysed the external environment that is being impacted by the forces of global constitutionalism and has considered the need for governments to act legitimately in order to be accepted as legitimate or face failure. This has led to an exploration of issues of legitimacy and the need for reform in the Arabian Gulf in general. Normative processes have been creating pressure for change in the international arena, and Saudi Arabia is not exempt from these influences. The research has set the stage for evaluating Islam's compatibility with democracy by introducing the ideas of deliberative democracy and *erga omnes*. In addition, it has emphasised the growing importance of human rights and their central role in the urgency related to constitutionalisation at the international level. The study has outlined the structure of governance that is currently in place in Saudi Arabia and elaborates concepts of constitutionalism, albeit from an Islamic perspective. The research has taken an in-depth look at the practice of *Shura*: its history and significance in Islam, the absence of a formalised pattern in its application and its evolution in Saudi Arabia. Finally this study sets forth the argument being developed on why Saudi should reform its *Al-Shura* Council law.

If no new reforms are implemented in the near future, it is likely that the long-held legitimacy of the regime could be called into question. Currently, the regime still has a lot of influence and most citizens do not want a change in monarchy family rule. They seek a less oppressive, more responsive, more democratic government. The three measures suggested here to reform the government would be a good balance between radical reform and reform which is too slow in its progress. With more participation, transparency, and legislative authority, the *Al-Shura* Council can act as a true deliberative organisation. Its role would be to represent the needs of Saudi citizens, where the Council and the Saudi government would be working for the common good: the only truly legitimate role the government should hold.

## APPENDIX I

### RATIFICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES WITHIN THE SAUDI KINGDOM

<b>INTERNATIONAL BILL OF HUMAN RIGHTS</b>
<i>None of the below rights have been signed</i>
International Covenant on Economic, Social and Cultural Rights
International Covenant on Civil and Political Rights
Optional Protocol to the International Covenant on Civil and Political Rights
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty
<b>PREVENTION OF DISCRIMINATION ON THE BASIS OF RACE, RELIGION, OR BELIEF; AND PROTECTION OF MINORITIES</b>
<i>None of the below rights have been signed</i>
International Convention on the Elimination of All Forms of Racial Discrimination
<b>WOMEN'S HUMAN RIGHTS</b>
Convention on the Elimination of All Forms of Discrimination against Women: <i>Ratified: 07 Oct 2000</i>
Optional Protocol to the Convention on the Elimination of Discrimination against Women: <i>Not signed</i>
United Nations Convention against Transnational Organised Crime: <i>Signed: 12 Dec 2000</i>
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime Preamble, supplementing the United Nations Convention against Transnational Organised Crime: <i>Signed: 10 Dec 2002</i>
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime: <i>Signed: 10 Dec 2002</i>
<b>SLAVERY AND SLAVERY-LIKE PRACTICES</b>
Slavery Convention: <i>Not signed</i>
Protocol amending the Slavery Convention: <i>Not signed</i>
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery: <i>Accession: 5 Jul 1973</i>
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others: <i>Not signed</i>

<b>PROTECTION FROM TORTURE, ILL-TREATMENT AND DISAPPEARANCE</b>
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: <i>Not signed</i>
Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: <i>Not signed</i>
Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: <i>Not signed</i>
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: <i>Accession: 23 Sep 1997</i>
<b>RIGHTS OF THE CHILD</b>
Convention on the Rights of the Child: <i>Accession: 25 Feb 1996</i>
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts: <i>Not signed</i>
Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour: <i>Ratification: 8 Oct 2001</i>
<b>FREEDOM OF ASSOCIATION</b>
<i>None of the below rights have been signed</i>
Freedom of Association and Protection of the Right to Organise Convention
Right to Organise and Collective Bargaining Convention
<b>EMPLOYMENT AND FORCED LABOUR</b>
Convention concerning Forced or Compulsory Labour: <i>Ratification: 15 Jun 1978</i>
Equal Remuneration Convention: <i>Ratification: 15 Jun 1978</i>
Abolition of Forced Labour Convention: <i>Ratification: 15 Jun 1978</i>
Discrimination (Employment and Occupation) Convention: <i>Ratification: 15 Jun 1978</i>
Employment Policy Convention: <i>Not signed</i>
Convention concerning Occupational Safety and Health and the Working Environment: <i>Not signed</i>
Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: <i>Not signed</i>
<b>EDUCATION</b>
Convention against Discrimination in Education: <i>Ratified</i>
<b>REFUGEES AND ASYLUM</b>
<i>None of the below rights have been signed</i>
Convention relating to the Status of Refugees
Protocol Relating to the Status of Refugees

<b>NATIONALITY, STATELESSNESS, AND THE RIGHTS OF ALIENS</b>
<i>None of the below rights have been signed</i>
Convention on the Reduction of Statelessness
Convention relating to the Status of Stateless Persons
<b>WAR CRIMES AND CRIMES AGAINST HUMANITY, GENOCIDE, AND TERRORISM</b>
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity: <i>Not signed</i>
Convention on the Prevention and Punishment of the Crime of Genocide: <i>Ratification: 13 Jul 1950</i>
Rome Statute of the International Criminal Court: <i>Not signed</i>
<b>LAW OF ARMED CONFLICT</b>
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: <i>Ratification and Accession on: 18 May 1963</i>
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea: <i>Ratification and Accession on: 18 May 1963</i>
Geneva Convention relative to the Treatment of Prisoners of War: <i>Ratification and Accession on: 18 May 1963</i>
Geneva Convention relative to the Protection of Civilian Persons in Time of War: <i>Ratification and Accession on: 18 May 1963</i>
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I): <i>Ratification and Accession on: 21 Aug 1987</i>
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims on Non-International Armed Conflicts (Protocol II): <i>Ratification and Accession on: 28 Nov 2001</i>
<b>TERRORISM AND HUMAN RIGHTS</b>
International Convention Against the Taking of Hostages: <i>Accession: 8 Jan 1991</i>
International Convention for the Suppression of Terrorist Bombing: <i>Not signed</i>
International Convention for the Suppression of the Financing of Terrorism: <i>Signed: 29 Nov 2001</i>
International Convention for the Suppression of Unlawful Seizure of Aircraft: <i>Ratification and Accession on: 14 Jun 1974</i>
International Convention on the Prevention and Punishment of Crimes Against International Protected Persons: <i>Not signed</i>



<b>U.N. ACTIVITIES AND EMPLOYEES</b> <i>None of the below rights have been signed</i>
Convention on the Privileges and Immunities of the United Nations
Convention on the Safety of United Nations and Associated Personnel
<b>REGIONAL CONVENTIONS</b> <i>None of the below rights have been signed</i>
[European] Convention for the Protection of Human Rights and Fundamental Freedoms
Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms
Protocol No.2 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
Protocol No.3 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
Protocol No.4 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
Protocol No.5 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
Protocol No.6 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
Protocol No.7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
Protocol No. 8 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
Protocol No. 9 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
Protocol No. 10 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
Protocol No. 11 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
Protocol No. 12 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
Protocol No. 2 to the European Convention for the Prevention of Torture and inhuman or Degrading Treatment of Punishment

**AFRICAN REGIONAL CONVENTIONS**

*No ratification information available.*

African [Banjul] Charter on Human and Peoples' Rights

Convention Governing the Specific Aspects of Refugee Problems in Africa

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

African Charter on the Rights and Welfare of the Child

## APPENDIX II

### INTERNATIONAL HUMAN RIGHTS

		<i>Date</i>	<i>Monitoring Body</i>
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination	21 Dec 1965	CERD
ICCPR	International Covenant on Civil and Political Rights	16 Dec 1966	CCPR
ICESCR	International Covenant on Economic, Social and Cultural Rights	16 Dec 1966	CESCR
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women	18 Dec 1979	CEDAW
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	10 Dec 1984	CAT
CRC	Convention on the Rights of the Child	20 Nov 1989	CRC
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	18 Dec 1990	CMW
CPED	International Convention for the Protection of All Persons from Enforced Disappearance	20 Dec 2006	CED
CRPD	Convention on the Rights of Persons with Disabilities	13 Dec 2006	CRPD

		<i>Date</i>	<i>Monitoring Body</i>
ICESCR - OP	Optional Protocol to the Covenant on Economic, Social and Cultural Rights	10 Dec 2008	CESCR
ICCPR- OP1	Optional Protocol to the International Covenant on Civil and Political Rights	16 Dec 1966	CCPR
ICCPR- OP2	Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	15 Dec 1989	CCPR
OP- CEDAW	Optional Protocol to the Convention on the Elimination of Discrimination against Women	10 Dec 1999	CEDAW
OP- CRC- AC	Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	25 May 2000	CRC
OP- CRC-SC	Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	25 May 2000	CRC
OP-CAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	18 Dec 2002	SPT
OP- CRPD	Optional Protocol to the Convention on the Rights of Persons with Disabilities	12 Dec 2006	CRPD

## Bibliography

### Books

Abiad N, *Shar'ia, Muslim States and International Human Rights Treaty Obligations* (British Institute of International and Comparative Law 2008 xv)

Al-Asaaf NM (tr), *The Shura Council in the Kingdom of Saudi Arabia* (The Information Department of the Shura Council 2004)

Al-Asqalani I, *Fatah al-Bari, Hadith No 1779* (Al-Salafeah Press 1984)

Al-Dakhil K, *2003: Saudi Arabia's Year of Reform* (Carnegie Endowment for International Peace 2004)

Al Din al Razi F, in Dr Taha Jabir al 'Alwani (ed), *Al Mahsul Fi 'Ilm Usul al Fiqh*, (1<sup>st</sup> edn, 1399/1979, part I, Imam ibn Sa'ud Islamic University 1979)

Al-Haythami A, *Mojama Al-Zoaid and Manba Al-Foaid* (Dar Arabic Book Press 1982)

Al-Jasas A, *Ahkam Al-Qur'an* (Dar Arabic Book Press 1984)

Al-Najjar M, ed. *Al-Shafai, Al Aom* (Dar Al-Marefa Press 1961)

Al Qamdi A, '*Fekh Al Shura*' (Dar Taebah Press 2001)

Al-Qurtby M, *Al-Jama Le-Ahkam- Al Qur'an* (Dar Egypt Books 1967)

Al-Razy F, *Al-Tafsir Al-Khabir* (Dar Al-Bean Press 1985)

Armstrong K, Foreword *The Future of Islam* (Oxford University Press 2013)

Asad M, *The Principles of State and Government in Islam* (University of California Press 1980)

Baqir al-Sadr A, *Introduction to Islamic Political System*, trans. M. A. Ansari (Islamic Seminary/ World Shia Muslim Organization 1982)

Bazelli S and Andrews P, '*Law and Rights in Global Perspectives on Constitutionalism and Governance*' (Heinlein Online, 36 Queen's L.J. 332, 2010/2011) 331

-- *The Twilight of Constitutionalism* (Oxford University Press 2012)

-- *Islam, The Straight Path* (3<sup>rd</sup> edn, Oxford University Press 1998)

Best S, *Introduction to Politics and Society* (Sage Publications 2002)

Bingham T, *The Rule of Law* (Penguin Group 2010)

Birks P, (ed) *Privacy and Loyalty* (Clarendon Press Oxford 1997)

Butterworth C and W Zartman (eds) *Between the State and Islam* (Cambridge University Press 2001)

Cassese A, *Human Rights in a Changing World* (Polity Press 1990)

Cordesman AH and N Obaid, *National Security in Saudi Arabia: Threats, Responses, and Challenges* (Praeger International 2005)

Dobner P and Loughlin M (eds) *The Twilight of Constitutionalism?* (Oxford University Press 2010)

Donne J, 'No Man is an Island' <<http://www.poemhunter.com/poem/no-man-is-an-island/>>

Ernst B H, *The Uniting of Europe* (Stanford University Press 1958)

Esposito J, *Islam: The Straight Path* (Oxford University Press 1998)

-- *The Future of Islam* (Oxford University Press 2013)

-- (ed) *The Oxford History of Islam* (Oxford University Press, USA, 2000).

Fabienne P, 'Political Legitimacy' *The Stanford Encyclopedia of Philosophy* (2014)

Edward N. Zalta (ed)

<<http://plato.stanford.edu/archives/spr2014/entries/legitimacy/>> 2014> accessed 15 April 2013

Fares AM, *Qazooat Al-Hudaebea* (Dar Al-Furqan Press 1984)

Feldman N, *The Fall and Rise of the Islamic State* (Princeton University Press 2008)

Flory M and R Mantran, *Les régimes politiques des pays arabes* (Presses Universitaires de France 1968)

Franck T M *The Power of Legitimacy Among Nations* (Oxford University Press 1990)

Grimm D, 'The achievement of constitutionalism and its prospects in a changed world' in P Dobner and M Loughlin (eds) *The Twilight of Constitutionalism?* (Oxford University Press 2010)

Grote R, *Constitutionalism in Islamic Countries* (Oxford University Press 2012)

Hamidullah M, *Introduction to Islam* (Kitab Bhavan 1992)

Hasenclever A, P Meyer and V Rittberger, *Theories of International Regimes* (5<sup>th</sup> edn Cambridge University Press Cambridge 2002)

Herb M, *All in the Family: Absolutism, Revolution and Democracy in the Middle Eastern Monarchies* (State University of New York Press 1999)

Hourani A, *A History of the Arab Peoples* (Warner Books 1991)

Humaid S, *The Shura Council in the Kingdom of Saudi Arabia*

Human Rights Watch, *Empty Reforms. Saudi Arabia's New Basic Laws* (Human Rights Watch, May 1992)

Ibdilla M, 'Ways of Constitution Building in Muslim Countries' in Birgit Krawietz (ed) *Justice as a Pervasive Principle in Islamic Law in Islam and The Rule of Law Between Shar'ia and Secularization* (Konrad-Adenauer-Stiftung 2008) 53.

Ibn-Ateah A, *Al-Muharrar Al Oajez* (Al-Doha Press 1982)

Ibn Majah M, *Sunan Ibn Majah* (Hadith No. 2740-2741 Eisa Al Halabi Press Cairo)

Jackson S, *Islamic Law and the State: Studies in Islamic Law and Society* (Brill Academic Publishers 1996)

*Jama Al Tirmithi*, Hadith No 4/213

Joerges C and P Ernst-Ulrich, *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing 2006)

Kamali MH, *Principles of Islamic Jurisprudence* ( 3<sup>rd</sup> edn Islamic Texts Society 2005)

-- 'Constitutionalism in Islamic Countries, A Contemporary Perspective of Islamic Law' in Rainer Grote and Tilman Roeder (eds) *Constitutionalism in Islamic Countries* (Oxford University Press 2012)

-- 'Elections and Parliamentary Activity in the GCC States: Broadening Political Participation in the Gulf Monarchies' in Khalaf and Luciano (eds) *Constitutional Reform and Political Participation in the Gulf* (Gulf Research Center 2006)

Kant I, 'Idea for a Universal History from a Cosmopolitan Point of View' in *On History* (Lewis White Beck tr, The Bobbs-Merrill Co 1963) ch.

Kapiszewski, 'Elections and Parliamentary Activity in the GCC States: Broadening Political Participation in the Gulf Monarchies' in Abdilhadi Khalaf & Giacomo Luciano (eds) *Constitutional Reform and Political Participation in the Gulf* (Gulf Research Center 2006)

Keohane R, *After Hegemony* (Princeton University Press 1984)

-- *Cooperation and International Regimes* (Princeton University Press 1984)

Khalaf A and L Giacomo, (eds) *Constitutional Reform and Political Participation in the Gulf* (Gulf Research Center 2006)

Klabbers J, Peters A and Ulfstein G, *The Constitutionalization of International Law* (Oxford University Press 2009)

Kleingeld P and Brown E, in E N Zalta (ed) 'Cosmopolitanism' *The Stanford Encyclopedia of Philosophy* (Fall 2013 edn) <<http://plato.stanford.edu/>> accessed 15 May 2014

Krasner S, *International Regimes* (Cornell University Press 1983)

-- *Power, the State and Sovereignty* (Routledge 2009)

Krawietz B, 'Justice as a Pervasive Principle in Islamic Law' in *Islam and the Rule of Law between Shar'ia and Secularization* (Konrad-Adenauer-Stiftung 2008) ch,40.

Krisch N, *Beyond Constitutionalism: The Pluralistic Structure of Post National Law* (Oxford University 2012)

Kuo M-S, 'Review of Ruling the World? Constitutionalism, International Law, and Global Governance' in Jeffrey L. Dunoff and Joel Trachtman (eds), (2010) 20 (2) *Law and Politics Book Review*

Luciani G, 'Democracy vs. Shura in the age of the Internet' in Khalaf and Luciani (eds) *Constitutional Reform and Political Participation in the Gulf* (Gulf Research Center 2006)

Mayer A E, *Islam and Human Rights Tradition and Politics* (Westview Press 2013)

Mearsheimer J, 'Structural Realism' in T Dunne, M Kurki and S Smith (eds) *International Relations Theories: Discipline and Diversity* (Oxford University Press 2006)

Ming-Sung K, 'Ruling The World? Constitutionalism, International Law and Global Governance' in J Dunoff, and J P Trachtman (eds) *Law and Politics Book Review* (20 (2) Cambridge University Press 2009)

Moinuddin H, *The Charter of the Islamic Conference and Legal Framework of Economic Cooperation Among its Member States: A Study of the Charter, the General Agreement for Economic, Technical and Commercial Co-operation and the Agreement for Promotion, Protection and Guarantee of Investments Among Member States of the OIC* (Clarendon Press 1987)

Muslim S, *Saheh Al-Jama* (Hadith No, 2363, 84795 and 84076 Dar Arabic Book 198



*Nabataean History: 'Arabia' in Ancient History* (Canbooks, 2002)  
 <Nabataea.net/Arabia.html> accessed 12 April 2012

Niblock T, *Saudi Arabia: Power, Legitimacy and Survival* (Routledge 2006)

Ochsenwald W and S Nettleton Fisher, *The Middle East: A History* (6<sup>th</sup> edn McGraw Hill 2004)

O'Neil PH, *Essentials of Comparative Politics* (WW Norton Company 2010)

Parpworth N, *Constitutional and Administrative Law* (7<sup>th</sup> edn, Oxford University Press 2012)

Pease, K. *International Organizations* (Pearson 2002)

Quraishi A, 'The Separation of Powers in the Tradition of Muslim Governments', in R Grote and T Roeder (eds) *Constitutionalism in Islamic Countries* (Oxford University Press 2012)

Ragazzi M, *The Concept of International Obligations Erga Omnes* (Oxford University Press 2002) 5.

Rahman F, 'The Principle of Shura and the Role of the Ummah in Islam' in M Ahmad (ed) *State, Politics, and Islam* (American Trust Publications 1986)

Rawls, in E N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2014)  
 <<http://plato.stanford.edu/archives/spr2014/entries/legitimacy/>> accessed 15 April 2014

Roder TJ, 'The Separation of Powers in Muslim Countries, Historical and Comparative Perspectives' in Rainer Grote and Tilman Roeder (eds) *Constitutionalism in Islamic Countries* (Oxford University Press 2012)

Saheh M, *Hadith No, 2363, 84795, and 84076 Saheh Al-Jama* (Dar Arabic Book 1984)

Salter M, *Carl Schmitt: Law as Politics, Ideology and Strategic Myth* (Routledge 2012)

Schwobel CE, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff Publishers 2011)

Siddiqi AH, *Studies in Islamic History* (Jamiyatul Falah Publications 1967)

Stein A, 'Coordination and Collaboration: Regimes in an Anarchic World' in Stephen Krasner (ed), *International Regimes* (Cornell University Press 1983)

Strange S, 'Cave! Hic Dragones' in Stephen Krasner (ed) *International Regimes* (Cornell University Press 1983)

Weber M, 'The Types of Legitimate Domination' in Laura Desfor Edles and Scott Appelrouth (eds) *Sociological Theory in the Classical Era* (Sage Publications 2005)

Weiler J and M Wind, *European Constitutionalism Beyond the State* (Cambridge University Press 2003)

Wolfrum R, 'Constitutionalism in Islamic Countries, A Survey from the Perspective of International Law' in RGrote and T Roeder (eds) *Constitutionalism in Islamic Countries* (Oxford University Press 2012)

Zartner D, *Courts, Codes and Customs* (Oxford University Press 2014)

## Articles

Aaragon J, 'Political Legitimacy and Democracy' *Encyclopedia of Campaigns, Elections and Electoral Behavior* (nd) 2

<[http://www.luc.edu/media/lucedu/dccirp/pdfs/articlesforresourc/Article\\_-\\_Aragon\\_Trelles,\\_Jorge\\_2.pdf](http://www.luc.edu/media/lucedu/dccirp/pdfs/articlesforresourc/Article_-_Aragon_Trelles,_Jorge_2.pdf)> accessed 2 May 2014

'About Saudi Arabia' (2006) Saudi Arabian Embassy <<http://www.saudiembassy.net/about/country-information/government/> para 3> accessed 15 August 2013

'About the Court' The International Criminal Court (2014) <[http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx)> accessed 1 April 2014

'A Force for Saudi Reform' (2003) 101 (35) *Oil & Gas Journal* 19

Abdullah, His Majesty King of Saudi Arabia 'Annual State of the Nation Presentation to the Majlis Al Shura' (2011)

Akhavi S, 'Sunni Modernist Theories of Social Contract in Contemporary Egypt' (2003) 35 (1) *International Journal of Middle East Studies* 23

Albassam B A, 'Political Reform in Saudi Arabia: Luxury or Necessity?' (2011) 693 *Middle East Studies* 76.

Al-Fahad A, 'Ornamental Constitutionalism: the Saudi Basic Law of Governance' (2005) 30 *The Yale Journal of International Law* 347

Al-Haj AJ, 'The Politics of Participation in the Gulf Cooperation Council States: The Omani Consultative Council' (1996) 50 (4) *Middle East Journal* 559

Al-Harbi I, 'Democracy in Islamic and International Law: A Case Study in Saudi Arabia' (DPhil thesis, School of Law, Brunel University 2010)

- Al-Hargan A, 'Saudi Arabia and the International Covenant on Civil and Political Rights 1966: a stalemate situation' (2005) 9 (4) *International Journal of Human Rights* 491
- Alhargan R A, 'Saudi Arabia: Civil Rights and Local Actors' (2012) 19 (1) *Middle East Policy* 1:2
- Al-Jarbou and Ayoub M, 'Judicial Independence: Case Study of Saudi Arabia' (2004) 19 (1/4) *Arab Law Quarterly* 5
- Al-Jumali R Z, 'Oman, kind of not quiet' *Foreign Press*, (November 2011) 7 1  
<[http://mideastafrica.foreignpolicy.com/posts/2011/11/07/kind\\_of\\_not\\_quiet](http://mideastafrica.foreignpolicy.com/posts/2011/11/07/kind_of_not_quiet)>  
accessed 1 January 2013
- Al-Muhanna M, 'The Saudi Majlis Ash Shura, Functions and International Role: 1993-2003' (DPhil thesis, University of Durham 2005) 1-331
- Al-Nowaiser K, 'Meeting New Challenges' *Arab News* (5 March 2011) 1<  
[http://www.al-bab.com/arab/docs/saudi/saudi\\_reform\\_documents\\_2011.htm](http://www.al-bab.com/arab/docs/saudi/saudi_reform_documents_2011.htm)>  
accessed 1 June 2013
- Al-Ridai H, 'The Literal and Figurative Definition of Jurisprudence' <[www.al-Islam.org](http://www.al-Islam.org).> 1 accessed 1 June 2013
- Al-Saddan S, *Stages of issuing law in the Kingdom of Saudi Arabia* (2009) 15
- Al-Samak F, 'The Arab Spring: Muslims Embracing Democracy' (July 18 2011)  
*Encompassing Crescent* 1
- Al-Sudairy Z A, 'The Constitutional Appeal of Shar'ia in a Modernizing Saudi State'  
*Middle East Law & Governance* 2 (1) 2 doi:10.1163/187633610X12538730567044,  
2010
- Al Tirmithi J, *Hadith, No 4/213, Article 68*, Basic Law of Governance, Royal Order No. A/90, March 1992
- Anderson G, 'Beyond Constitutionalism: Beyond the State' (2012) 39 (3) *Journal of Law and Society* 359
- Ansary AF, 'A brief overview of the Saudi Arabian Legal System' (July 2008)  
<[http://www.nyulawglobal.org/globalex/saudi\\_arabia.htm#\\_Toc200894561](http://www.nyulawglobal.org/globalex/saudi_arabia.htm#_Toc200894561)>  
accessed 1 September 2013
- Arjomand SA, 'Islamic Constitutionalism' (2007) 3 (1) *Annual Review of Law and Social Science* 115
- Backer LC, 'Theocratic Constitutionalism: An Introduction to a New Global Legal

Ordering' (2009) 16 (1) *Indiana Journal of Global Legal Studies* 85

Baker A, 'In Saudi Arabia women's voices are starting to be heard' *Time* (27 March 2013) <<http://world.time.com/2013/03/27/in-saudi-arabia-womens-voices-are-starting-to-be-heard/>>

Barrow CW, 'The Return of the State: Globalization, State Theory and the New Imperialism' (2005) 27 (2) *New Political Science* 123

Bernstein A, 'Political Cosmopolitanism' University of Ohio <[http://www.philosophy.ohiou.edu/PDF/EGJ\\_Political%20Cosmopolitanism\\_Vol-2.pdf](http://www.philosophy.ohiou.edu/PDF/EGJ_Political%20Cosmopolitanism_Vol-2.pdf) > accessed 15 May 2014, 857

Bianchi A, 'Human Rights and the Magic of Jus Cogens' (2008) 19 (3) *European Journal of International Law* 491

Bielefeldt H "'Western" versus "Islamic" Human Rights Conceptions? A critique of Cultural Essentialism in the Discussion on Human Rights' (2000) 28 (1) *Political theory* 90

Bishara M, 'Year Four: The Seasons Turn on the Arab Spring' (17 December 2013) *Al-Jazeera* <<http://www.aljazeera.com/indepth/opinion/2013/12/year-four-seasons-turn-arab-spring-2013121762345793639.html>> 16 February 2015

Bohman J, 'Institutional Reform and Democratic Legitimacy: Deliberative Democracy and Transnational Constitutionalism' (2007) T45 (136) *Revue européenne des sciences sociales, Démocratie délibérative, démocratie débattante, démocratie participative* 97

Bol Li, 'What is Constitutionalism?' (2000) 1 (6) *Perspectives* <[http://www.oycf.org/perspectives2/6\\_063000/contents.htm](http://www.oycf.org/perspectives2/6_063000/contents.htm)>

Brahm E, 'International Regimes, Beyond Intractability' (2005) <<http://www.beyondintractability.org/bi-essay/international-regimes>> para. 3, accessed 25 January 2013

Breau S, 'The Constitutionalization of the International Legal Order' (2008) 21 (2) *Leiden Journal of International Law* 545

Brimontiene T, 'Social Rights In The Jurisprudence Of The Constitutional Court Of Lithuania' (2008) 9 (111) *Jurisprudencija: Mokslo Darbai* 7

Broude T, 'The Constitutional Function of Contemporary International Tribunals, or Kelsen's Visions Vindicated' (2012) 4 (2) *Goettingen Journal of International Law* 519

Brown LD, S Kagram , MH Moore, P Frumkin, ‘Globalization, NGOs and Multi-Sectoral Relations’ (2000) 1 The Hauser Centre for Nonprofit Organisations and The Kennedy School of Government, Harvard University

Buchanan A and R Keohane, ‘The Legitimacy Of Global Governance Institutions’ (2006) 20 (4) Ethics & International Affairs 406

Bukay D, ‘Can there be an Islamic democracy?’ (2007) 14 (2) Middle East Quarterly 71

Buzek J, ‘Introduction: A New Vision for a Changing World’ (2011) Encompassing Crescent 1

Clark R, Chapter 44, ‘Saudi Arabia’ (2012) The Dispute Resolution Review 664  
 <<http://www.nortonrosefulbright.com/files/us/images/publications/20120401SaudiArabia.pdf>> accessed 20 October 2014.

Clemens M, ‘The System Theory of Niklas Luhmann and the Constitutionalization of the World Society’ (2012) 4 (2) Goettingen Journal of International Law 625

‘Constitutionalism’ (2001) Stanford Encyclopedia of Philosophy  
 <<http://plato.stanford.edu/entries/constitutionalism/>> accessed 15 January 2013

‘Constitutional Reform in Saudi Arabia’ Al Quds Al Arabi (29 August 2005)

Coulson NJ, ‘Muslim Custom and Case-Law’ (1959) 6 (1/2) Die Welt des Islams, New Series 20

Crass DZ, ‘The Constitutionalisation of International Trade Law’ (2001) 12 (1) EJIL 39

‘Cultural Relativism vs. Universalism’ Global Policy Forum 1  
 <<https://www.globalpolicy.org/home/163-general/29441.html>> accessed 10 February 2015

Davenport D, ‘International Criminal Court: 12 Years, \$1 Billion, Two Convictions’ *Forbes* (3 December 2012)  
 <<http://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/>> accessed 10 May 2014

Dekmejian R, ‘ Saudi Arabia’s Consultative Council’ (1998) 52 (2) Middle East Journal 205

-- ‘The liberal impulse in Saudi Arabia’ (2003) 57 (3) Middle East Journal 29

De Varennes F, ‘The Fallacies in the “Universalism Versus Cultural Relativism Debate” in Human Rights Law’ (2006) Asia-Pacific Journal on Human Rights and the Law 69

- De Wet E, 'The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation?' (2009) 5 (2) *European Constitutional Law Review* 287
- Dhanani G, 'Political Institutions in Saudi Arabia' (1980) 19 (1) *International Studies* 59
- Djelic M, 'From the Rule of Law to the Law of Rules' (2011) 41 (1) *International Studies of Management and Organization* 35
- Dobner P, 'On the Constitutionability of Global Public Policy Networks' (2009) 16 (2) *The Indiana Journal of Global Legal Studies* 605
- Dunoff J and J Trachtman, 'Ruling the world? Constitutionalism, International Law and Global Governance' (EJIL Talk! Blog of the European Journal of International Law 10 December 2009) <<http://www.ejiltalk.org/ruling-the-world-constitutionalism-international-law-and-global-governance/>> accessed 15 April 2013
- Dyzenhaus D, M Hunt and M Taggart, 'The Principle of Legality in Administrative Law: Internationalism as Constitutionalism' (2001) 1 (1) *Oxford University Commonwealth Law Journal* 5
- Edinger E, 'The Constitutionalization of the Conflict of Laws' (1995) 25 (1) *The Canadian Business Law Journal* 38
- Ehteshami A, 'Reform from above: The Politics of Participation in the Oil Monarchies' (2003) 79 (1) *International Affairs* (Royal Institute of International Affairs 1944) 53
- Elkins Z, 'Diffusion and the Constitutionalism of Europe' (2010) 43 (8-9) *Comparative Political Studies* 969
- El-Sergany R, 'Shura in Islam' (27 November 2010) 14 *On Islam* <<http://www.onislam.net/english/Shar'iah/Shar'iah-and-humanity/Shar'iah-and-life/449889-shura-in-islam-concept-and-importance.html?Life=>> accessed 1 August 2013
- Elstub S, 'The Third Generation of Deliberative Democracy' (2010) 8 (3) *Political Studies Review* 291
- Esposito JL and JO Voll, 'Islam's Democratic Essence' (1994) 3 (5) *Middle East Quarterly* 1
- 'Islam and Democracy' (2001) 22 (6) *Humanities* 2

Esmaeili H, 'On a Slow Boat Towards the Rule of Law: the Nature of Law in the Saudi Arabian Legal System' (2009) 26 (1) *Arizona Journal of International and Comparative Law* 1

Fabre C, 'Constitutionalising Social Rights' (1998) 6 (3) *Journal of Political Philosophy* 263

Fadel M, 'On the Validity of Ijtihad' <[http://www.Sunna.org/fiqh/usul/on\\_the\\_validity\\_of\\_ijtihad.htm](http://www.Sunna.org/fiqh/usul/on_the_validity_of_ijtihad.htm)>

-- 'The Representational Ideal and the Sunni Conception of Public Law' (6 February 2014) University of Toronto 6

Fahmy M, 'Mubarak to Put Economy before Politics' Reuters Global Newsbank, 27 September 1999

Fallon R, 'Legitimacy and the Constitution' (2005) 118 (6) *Harvard Law Review* 1795

Fishkin J 'Reviving Deliberative Democracy' (nd) The Centre for Deliberative Democracy, Stanford University  
<<http://cdd.stanford.edu/research/papers/2014/fishkin-reviving-deliberative-democracy.pdf>>

Galston W, 'Pluralist Constitutionalism' (2011) 28 (1) *Social Philosophy and Policy* 228

Gehring T, 'Dynamic International Regimes' (1992) *Studies of the Environmental Law Network International* 5

Ghanoushi in Colin Bower 'Whose Democracy Is it Anyway?' *The Guardian Magazine* <<http://mg.co.za/article/2007-04-05-whose-democracy-is-it-anyway>> Accessed 1 September 2014

Gover K, 'Comparative Tribal Constitutionalism: Membership Governance in Australia, Canada, New Zealand and the United States' (2010) 35 (3) *Law and Social Inquiry* 689

Grovogui S, M Sellers, D Cass, F Teson and D Orentlicher, 'Separatism and the Democratic Entitlement' (1998) 92 *American Society of International Law* 131

Habermas J, 'Constitutional Democracy A Paradoxical Union of Contradictory Principles?' (December 2001) *Political Theory* 29 (6) 767

Haddad GF, 'Imam Ahmad'  
<[http://Sunna.org/publication/khulafa\\_rashideen/hanbal.htm](http://Sunna.org/publication/khulafa_rashideen/hanbal.htm)>

Haggard S and B Simmons, 'Theories of international regimes' (1987) 41 (3) *International Organization*  
 491 <[http://dash.harvard.edu/bitstream/handle/1/3117934/Simmons\\_TheoriesInternational.pdf?sequence=2](http://dash.harvard.edu/bitstream/handle/1/3117934/Simmons_TheoriesInternational.pdf?sequence=2)> accessed on 2 Feb. 2013.

Hamdan S, 'Women appointed to Saudi Council for first time' *The New York Times* (New York 16 January 2013)

Hanson M, 'The Influence of French Law on the Legal Development of Saudi Arabia' (1987) 2 (3) *Arab Law Quarterly* 275

Hart in Sadurski Wojciech, 'Law's Legitimacy and 'Democracy-Plus' (2006) 26 (2) *Oxford Journal of Legal Studies* 377

Haykel B, 'What Makes the Kingdom Different?' *The New York Times* <<http://www.nytimes.com/roomfordebate/2011/03/14/how-stable-is-saudi-arabia/what-makes-the-kingdom-different>> accessed 14 March 2011

Hazeltine H D, 'The Influence of Magna Carta on American Constitutional Development' (1917) 17(1) *Columbia Law Review* 3

Hedrick T, 'Constitutionalization and Democratization: Habermas on Postnational Governance' (2007) 33 (3) *Social Theory and Practice* 387

Hefner RW, 'Public Islam and the Problem of Democratization' (2001) 62 (4) *Sociology of Religion* (Special Issue: Religion and Globalization at the Turn of the Millennium) 491

Heidrun A and T Hitzel-Cassagnes, 'Constitutional Change and Contractual Revision' (1999) 5 (1) *European Law Journal* 23

Metin Heper, 'Islam and Democracy in Turkey: Toward a Reconciliation?' (1997) 5 (1) *Middle East Journal* 35

Hershkoff H, 'Public Law Litigation: Lessons and Questions' (2009) 10 (2) *Human Rights Review* 157

Hill G and A Stone, 'Constitutionalism of the Common Law' (2004) 25 (1) *Adelaide Law Review* 67

Hirschl R, 'The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions' (2000) 25 (1) *Law & Social Inquiry* 91

--The Political Origins of the New Constitutionalism' (2004) 11 (1) *Indiana Journal of Global Legal Studies* 71



--The theocratic challenge to Constitution drafting in post-conflict States' (2008) 49 (4) *William and Mary Law Review* 1179

Hofstötter B, 'Can she excuse my wrongs?' (2003) 3 (3) *The European Court Of Justice and International Courts And Tribunals Croatian Yearbook of European Law & Policy* 391

'Human Rights, an Overview' (nd) Legal Information Institute, Cornell University Law School <[http://www.law.cornell.edu/wex/human\\_rights](http://www.law.cornell.edu/wex/human_rights)> accessed 2 May 2013

Human Rights Watch, 'Human Rights in Saudi Arabia' (August, 2014) 1 <<http://www.hrw.org/middle-eastn-africa/saudi-arabia>> accessed 10 September 2014.

Huntington S, 'The Clash of Civilizations?' (1993) 72 (3) *Foreign Affairs* 22

'In Saudi Arabia women's voices are starting to be heard' *Time.com* <<http://world.time.com/2013/03/27/in-saudi-arabia-womens-voices-are-starting-to-be-heard/>> accessed 1 April 2014

Issacharoff S, 'Constitutionalizing democracy in fractured societies' (2004) 82 (7) *Texas Law Review* 1861

Jaaskinen N, 'Constitutions in the European Union – Some Questions of Conflict and Convergence' (2011) 12 (1) *ERA Forum* 206

'Jailed And On Trial For Reporting Human Rights Violations' *Reporters Without Borders* <<http://en.rsf.org/saudi-arabia-jailed-and-on-trial-for-reporting-20-06-2014,46489.html>> accessed 20 June 2014

Johnson in E Petersmann, 'Towards World Constitutionalism: Issues in the Legal Ordering of the World Community' (2007) 44 (5) *Common Market Law Review* 1535

Jones T, 'Seeking A Social Contract for Saudi Arabia' (2003) 228 *Middle East Report* 42

-- 'Seeking Reform, Not Regime Change' *The New York Times* (New York, 14 March 2011) <<http://www.nytimes.com/roomfordebate/2011/03/14/how-stable-is-saudi-arabia/seeking-reform-not-regime-change>>

Kabbani SMH, 'Understanding Islamic Law' *The Islamic Supreme Council of America*, para. 4 <<http://islamicsupremecouncil.org/understanding-islam/legal-rulings/52-understanding-islamic-law.html>> accessed 1 June 2013.

Kabelli S, 'Saudi Arabia Faces More Immediate Threats Than Arab Spring' Al-Monitor <<http://www.al-monitor.com/pulse/security/2014/01/arab-spring-threat-saudi-arabia.html#>> accessed 30 January 2014

Kamali MH, 'The Limits of Power in Islamic States' (1989) 28 (4) *Islamic Studies* 323

-- 'Civil Society and Islam: A Sociological Perspective' (2001) 42 (3) *European Journal of Sociology* 457

-- 'Legal Maxims and Other Genres of Literature in Islamic Jurisprudence' (2006) 20 (1) *Arab Law Quarterly* 80

-- 'Democratizing the Arab States, the Case of Monarchies of the Gulf, 1991-2004' (2004) 3 *Krakowskie Studia Miedzynarodowe* 78

Kapiszewski A, 'Broadening Political Representation in the Oil Monarchies of the Persian Gulf. Are These Regimes Moving Towards Democracy?' (2000) 15 *Hemispheres* 25

Katz S, 'Constitutionalism and Civil Society' (2000) The Jefferson Lecture Princeton University <<http://www.princeton.edu/~snkatz/papers/JeffersonLecture.pdf>>

Kechichian J, 'Saudi Arabia's Will to Power' (2008) 7 (2) *Middle East Policy* 47

Kemmerer A, 'Kelsen, Schmitt, Arendt, and the Possibilities of Constitutionalization in International Law: Introduction' (2010) 23 *Leiden Journal of International Law* 718

Keohane R, 'The Demand for International Regimes' (1982) 36 (2) *International Organization* 325

Keohane R and JS Nye, 'Transgovernmental Relations and International Organizations' (1974) 27 (1) *World Politics* 39

Khan M, 'Shura and The Islamic Vision of Democracy' (2002) <<http://www.usislam.org/debate/ShuraDemocracy.htm>>

Khel M, 'The Conceptual and Institutional Development of Shura in Early Islam' (1980) 19 (4) *Islamic Studies* 271

Khurshid A, 'Islam and Democracy: Some Conceptual and Contemporary Dimensions' (2000) 90 (1/2) *Muslim World* 1

Kleinlein T, 'On Holism, Pluralism, and Democracy: Approaches to Constitutionalism beyond the State' (2010) 21 (4) *European Journal of International Law* 1075

Krlev N, 'Abdullah sees elected leaders within 15 years' *The Washington Times* (Washington 19 August 2005)

Krasner S, 'Global Communications and National Power: Life on the Pareto Frontier' (1991) 43 (3) *World Politics* 342

Krisch N, 'Beyond Constitutionalism – Pluralism's Promise' (2012) 25 (2) *LJIL Symposium*

Kumm M, 'Constitutionalism and experimentalist government' (2012) 6 (3) *Regulation and Governance* 401

Kuo M-S, 'Review of Ruling the World? Constitutionalism, International Law, and Global Governance' in J L Dunoff and J P Trachtman (eds)' (2010) 20 (2) *Law and Politics Book Review* 73

Lacroix S, 'Between Islamists and Liberals: Saudi Arabia's New "Islam Liberal" Reformists' (2004) 58 (3) *The Middle East Journal* 346

Lacroix S, 'Is Saudi Arabia Immune?' (2011) 22 (4) *Journal of Democracy* 48

L'Heureux-Dube C, 'It Takes a Vision: The Constitutionalization of Equality in Canada' (2002) 14 (2) *Yale Journal of Law and Feminism* 363

Li B, 'What is Constitutionalism?' (2000) 1 (6) *Perspectives*

Lindseth P L, 'The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration since the 1950s' (2003) 37 *Loyola Law Review* 367.

Lipset SM, in Richard Fallon 'Legitimacy and the Constitution' (2005) 118 (6) *Harvard Law Review* 1795

Lombardi C, 'Islamic law as a Source of Constitutional Law in Egypt: The Constitutionalization of the *Shar'ia* in a Modern Arab State' (1998) 37 (1) *Columbia Journal of Transnational Law* 81

Loughlin M, 'What is Constitutionalization?' (nd) *Jus Politicum* <[http://www.juspoliticum.com/IMG/mp3/loughlin\\_IMV\\_constitutionalisation.mp3](http://www.juspoliticum.com/IMG/mp3/loughlin_IMV_constitutionalisation.mp3)> accessed 10 January 2013

-- 'What is Constitutionalisation? The Concept of a Constitution' (nd) *Jus Politicum* <<http://www.juspoliticum.com/What-is-constitutionalisation.html>> accessed 13 February 2012.

Manzer R, 'Hume's Constitutionalism and the Identity of Constitutional Democracy' (1996) 90 (3) *The American Political Science Review* 488

Marshall S, 'Liberalism, Constitutionalism and Democracy: Indeterminacy and Society' (2005) 55 (220) *The Philosophical Quarterly* 534

Martin L, and B Simmons, 'Theories and Empirical Studies of International Institutions' (1998) 52 (4) *International Organization* 729,  
 <<http://nrs.harvard.edu/urn-3:HUL.InstRepos:3382862>> accessed 2 February 2013

Mattheis C, 'The System Theory of Niklas Luhmann and the Constitutionalisation of the World Society' (2012) 4 (2) *Goettingen Journal of International Law* 625

Mayer EA, *Islamic Reservations to Human Rights Conventions* (1998) 15 *Recht van de Islam* 25

-- 'Evolving political contingencies, not Islamic beliefs, turn out to be the determinative factors' 1, < <http://www.univie.ac.at/recht-religion/kultur-religion/isl/a%20e%20mayer%20en.pdf> >accessed on 1 August 2014.

Mehmiti A and B Nuhija, 'The Concept of Erga Omnes in International Law' (2013) 14 *New Balkan Politics* 22

Midlarsky MI, 'Democracy and Islam: Implications for Civilizational Conflict and the Democratic Peace' (1998) 42 (3) *International Studies Quarterly* 485

Milewicz K, 'Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework' (2009) 16 (2) *Indiana Journal of Global Legal Studies* 415

Minkenbergh M, 'Democracy and Religion: Theoretical and Empirical Observations on the Relationship between Christianity, Islam and Liberal Democracy' (2007) 33 (6) *Journal Of Ethnic & Migration Studies* 887

Minkler L and S Sweeney, 'On the Indivisibility and Interdependence of Basic Rights in Developing Countries' (2011) 33 (2) *Human Rights Quarterly* 351

Moussalli A, 'Hasan al-Turabi's Islamist Discourse on Democracy and "Shura" ' (1994) 30 (1) *Middle Eastern Studies* 52

Mughal MA, 'Islamic Jurisprudence' < <http://ssrn.com/abstract=1903980>>accessed 15 April 2014.

Najjer T, 'Democracy under Islam: Rejection, Adoption, Or Containment?' (2008) 6 (2) *Regent Journal of International Law* 419

Nakissa A, 'Book Review: Islam and Human Rights Tradition and Politics' (2013) 8 (1) *Societies Without Borders* 173

Neumeyer E, 'How Regime Theory and the Economic Theory of International Environmental Cooperation Can Learn from Each Other' (2001) 1 (1) *Global*

Environmental Politics 122

Nickel P, 'Network Governance and the New Constitutionalism' (2007) 29 (2)

Administrative Theory and Praxis 198

Nollkaemper A, 'Constitutionalisation and the Unity of the Law of International Responsibility' (2009) 16 (2) *Indiana Journal of Global Legal Studies* 540.

-- 'The Internationalized Rule of Law' (2009) 1 (1) *Hague Journal on the Rule of Law* 74

'No Time to Lose: Saudi reforms' (2009) 39 *The Economist* 13

Obaid N, 'What the Saudi Public Really Thinks?' *Daily Star* (London 23 June 2004)

Okafor OC, 'The Concept of Legitimate Governance in the Contemporary International Legal System' (1997) 4 (1) *The Netherlands International Law Review* 33

'Oman: Country Outlook' (EIU Views Wire, 9 November 2011)

Opwis F, 'Maṣlaḥa in Contemporary Islamic Legal Theory' (2005) 12(2) *Islamic Law and Society* 182.

Osakue D, 'Reservation to treaties: A Summary' (2010) academia.edu 5.

<[http://www.academia.edu/1129892/Reservation\\_to\\_Treaties](http://www.academia.edu/1129892/Reservation_to_Treaties)> accessed on 30 January 2015.

Osman F, 'Islam in a Modern State: Democracy and the Concept of Shura' (1997) Center for Muslim-Christian Understanding History and International Affairs Georgetown University

Paciocco D, 'Why the Constitutionalization of Victim Rights Should Not Occur' (2005) 49 (4) *Criminal Law Quarterly* 393

Parray TA, 'Islam-Democracy Discourse in Twenty-First Century: Views of 2 Indo-Pak Intellectuals – Prof Khurshid Ahmad and Asghar Ali Engineer' (2011) 18

-- 'Islamic Democracy or Democracy in Islam: Some Key Operational Democratic Concepts and Notions' (2012) 2 (2) *World Journal of Islamic History and Civilization* 66

-- 'Islam-Democracy Discourse in 1900s: Approaching the Views of 20th Century Indian Scholar, Mawlana Abul Kalam Azad (d.1958)' (2013) 1 *Encompassing Crescent*

Pasha, M.K. 'Predatory Globalization and Democracy in the Islamic World' (2002) 581 (1) *Annals of the American Academy of Political and Social Science* 121

Percy S, 'Mercenaries: Strong Norm, Weak Law' (2007) 61 (2) *International*

Organization 367

Peters A, 'Merits of Global Constitutionalism' (2009) 16 (2) *Indiana Journal of Global Legal Studies* 397

Petersmann E, 'Towards World Constitutionalism: Issues in the Legal Ordering of the World Community' (2007) 44 (5) *Common Market Law Review* 1535

Peterson J, 'Succession in the States of the Gulf Cooperation Council' (2001) 24 (4) *The Washington Quarterly* 173

Picciotto S, 'Constitutionalizing Multilevel Governance?' (2008) 6 (3-4) *Icon-International Journal of Constitutional Law* 457

Pildes R, 'Democracy and Disorder' (2001) 68 (3) *The University of Chicago Law Review* 695

-- 'The Constitutionalization of Democratic Politics (The Supreme Court: 2003 Term)' (2004) 118 (1) *Harvard Law Review* 28

Post R, 'Democracy, Popular Sovereignty, and Judicial Review' (1998) 86 (3) *California Law Review* 429

Pratap A, 'Saudi Women Make Gains' *Saudi Gazette* (Jeddah 16 October 2004)

Preuss U, 'Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization' (2007) 51 (3) *New York Law School Law Review* 466

Pripstein-Posusney M, 'Behind the Ballot Box: Electoral Engineering in the Arab World' (1999) 209 (12) *Middle East Report* 12

Rahman F, 'A Recent Controversy over the Interpretation of "Shūrā"' (1981) 20 (4) *History of Religions* 292

Raube K, 'The Constitutionalization of International Law' (2011) 48 (1) *Common Market Law Review* 268

Rehman J and A Ahmedov, 'Sources of Islamic Law' (2011) *UK Centre for Legal Education*

Rentlen A D, 'Relativism and the Search for Human Rights' (1988) 90 (1) *American Anthropologist* 56

Reporters Without Borders, 'Jailed And On Trial For Reporting Human Rights Violations' <<http://en.rsf.org/saudi-arabia-jailed-and-on-trial-for-reporting-20-06-2014,46489.html>>

Rittberger B and F Schimmelfennig, 'The Constitutionalization of the European Union Explaining the Parliamentarization and Institutionalization of Human Rights' (The State of the Union, Princeton University 2005)  
<http://www.princeton.edu/~smeunier/Rittberger&Schimmelfennig%20Princeton%20memo.pdf> accessed 20 January 2013

Rivers J, 'Constitutional Theocracy by Ran Hirschi' (2011) 74 (4) *The Modern Law Review* 655

Ruggie J, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic System' (1982) 36 (2) *International Organization* 379

Russell J, 'Political and Economic Transition on the Arabian Peninsula: Perils and Prospects' (2003) 2 (5) *Strategic Insights*  
 'Saudi Arabia; Illusion of Change' (1995) 336 (7927) *The Economist* 37  
 'Saudi Arabia: The New Constitution: The Kingdom of Saudi Arabia' (1993) 8 (3) *Arab Law Quarterly* 258  
 'Saudi Arabia: The New Constitution: The Kingdom of Saudi Arabia' (1993) 8 (3) *Arab Law Quarterly* 262

Schwobel C, 'Organic Global Constitutionalism' (2012) 65 (2) *Leiden Journal of International Law* 262/529

Scicluna N, 'EU Constitutionalism in Flux,' (2012) 18 (4) *European Law Journal* 490

Scott P, 'Political Constitutions and Political Constitutionalism' (2013) 14 (12) *German Law Journal* 1257

Selim J, 'A Parliament According to *Shar'ia*' (April 1998) 26 *Arabies Trends*  
 <[www.shura.gov.sa](http://www.shura.gov.sa)>

Shafaat A, 'A More Detailed Look at the *Quranic* Principle of Shura' (1983) *Islamic Perspectives* < <http://www.islamicperspectives.com/Shura.htm>> accessed 15 November 2013

Shafiq M, 'The Role and Place of Shura in the Islamic Polity' (1984) 23 (4) *Islamic Studies* 420

Shavit U, 'Is Shura a Muslim Form of Democracy? Roots and Systemization of a Polemic' (2010) 46 (3) *Middle Eastern Studies* 351

Sheean V, 'King Faisal's First Year' (1966) 82 (7) *Foreign Affairs* 304

Sherret L, 'Law and Rights: Global Perspectives on Constitutionalism and Governance' (2010) 36 (1) Queen's Law Journal 331

'Shura in the Kingdom of Saudi Arabia: A Historical Background' Kingdom of Saudi Arabia,  
 <<http://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/Historical+BG/>>  
 accessed 20 May 2010

'Shura in the Kingdom of Saudi Arabia' (2013) Kingdom of Saudi Arabia  
 <<http://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/Historical+BG/>>  
 accessed 1 April 2014

Slaughter A, 'Liberal International Relations Theory and International Economic Law' (1995) 10 (2) American University International Law Review 719

Stein E, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1

Stotzky I, 'Constitutionalism and Democracy: An Essay in Honor of Stanley M. Katz' (2008) 63 (1) University of Miami Law Review 83

Sulaiman SJ, 'The Shura Principle in Islam' (1999)  
 <<http://www.alhewar.com/SadekShura.htm>> accessed 17 December 2013

Syed S, 'The impact of Islamic law on the implementation of the Convention on the Rights of the Child: The plight of non-marital children under Shar'ia' (1998) 6 (4) The International Journal of Children's Rights 360

Tessler M, 'Islam and Democracy in the Middle East: The Impact of Religious Orientations on Attitudes Toward Democracy in Four Arab Countries' (2002) 34 (3) Comparative Politics 337

Tezcur G, 'Judiciary, and Democracy in Islamic Societies' (2007) 39 (4) Polity 479

'The Oxford History of Islam' Introduction, Oxford Islamic Studies Online  
 <<http://www.oxfordislamicstudies.com/article/book/islam-9780195107999/islam-9780195107999-miscMatter-6>> accessed 15 June 2014

Thio L, 'Soft constitutional law in non-liberal Asian constitutional democracies' (2010) 8 (4) International Journal of Constitutional Law 5

Tibi B, 'Islamism and Democracy: On the Compatibility of Institutional Islamism and the Political Culture of Democracy' (2009) 10 (2) Totalitarian Movements & Political Religions 135

Tooley M, 'The Nature of Laws' 1977 (7) 4 Canadian Journal of Philosophy 667



Ulfstein G, 'International Constitutionalisation: A Research Agenda' (2010) Guest Editorial ESIL Newsletter

'UN Admits Rwanda Genocide Failure' (21 April 2000) BBC News broadcast <<http://news.bbc.co.uk/1/hi/world/africa/714025.stm> > accessed May 10 2013

Vanberg V, 'Liberal Constitutionalism, Constitutional Liberalism and Democracy' (2011) 22 (1) Constitutional Political Economy 1

Van Biezen I, 'Constitutionalizing Party Democracy: the Constitutive Codification of Political Parties in Post-War Europe' (2012) 42 (1) British Journal of Political Science 187

Vischer R, 'The Dangers of Anti-*Shar'iah* Laws' (2012) 221 First Things: A Monthly Journal of Religion and Public Life 26

Vitkauskaitė-Meurice D 'The Arab Charter On Human Rights: The Naissance Of New Regional Human Rights System Or A Challenge To The Universality Of Human Rights?' (2010) 1 (119) Jurisprudencija/jurisprudence 165

Vogel F, 'The Public and Private in Saudi Arabia' (2003) 70 (3) Social Research 75

Voigt S, 'How to Measure the Rule of Law' (2012) 65 (2) Kyklos 262

Waldron J, 'How Law Protects Dignity' (2012) 71 (1) Cambridge Law Journal 200

Walker G, 'The Constitutional Good: Constitutionalism's Equivocal Moral Imperative' (1993) 26 (1) Polity 91

Wesson M, 'Disagreement and the Constitutionalization of Social Rights' (2012) 12 (2) Human Rights Law Review 221

Wigley S, 'Parliamentary Immunity in Democratizing Countries: The Case of Turkey' (2009) 31(3) Human Rights Quarterly 567

'Why *Shar'iah*?' The New York Times (16 March 2008)  
 <[http://www.nytimes.com/2008/03/16/magazine/16Shar'iah-t.html?ei=5070&em=&en=5c1b8de536ce606f&ex=1205812800&pagewanted=all&\\_r=0](http://www.nytimes.com/2008/03/16/magazine/16Shar'iah-t.html?ei=5070&em=&en=5c1b8de536ce606f&ex=1205812800&pagewanted=all&_r=0)> accessed 15 April 2015

'Why not *Shar'iah*?' *Daily Mail* (London 19 February 2008) 66

Whyte J, 'Normative Order and Legalism' (1990) 40 (3) The University of Toronto Law Journal 491.

Wojciech S, 'Law's Legitimacy and 'Democracy-Plus' (2006) 26 (2) Oxford Journal of Legal Studies 377

Worley J, 'Deliberative Constitutionalism' (2009) 2 Brigham Young University Law Review 431

Wurm I, 'In Doubt for the Monarchy Autocratic Modernization in Saudi-Arabia' (2008) Peace Research Institute Frankfurt 10

Wyrozumaka A, 'The Process of Constitutionalization of the EU and Related issues' (2011) 17 (1) European Law Journal 145

Yamani M, 'Democratic Facade' (2005) 61 (2) The World Today 14

Zartman W, 'Democracy and Islam: The Cultural Dialectic' (1992) 524 Annals of the American Academy of Political and Social Science 181

Zelin A, 'Democracy Al-Salafi Style' (2012) Foreign Policy 1,  
<[http://www.foreignpolicy.com/articles/2012/07/19/democracy\\_salafi\\_style](http://www.foreignpolicy.com/articles/2012/07/19/democracy_salafi_style)>  
accessed 15 April 2013

## Websites

'Article 18. Vienna Convention on the Law of Treaties. International Law Commission' (1969) <<https://web.archive.org/web/20050208040137/>>  
<<http://www.un.org/law/ilc/texts/treatfra.htm>> accessed 1 April 2014.

Encompassing Crescent <<http://encompassingcrescent.com/2011/07/islam-democracy-discourse-in-twenty-first-century-views-of-2-indo-pak-intellectuals-prof-khurshid-ahmad-and-asghar-ali-engineer-by-tauseef-ahmad-parray/>> accessed 15 April 2013

Majlis Al-Shura, 'Kingdom of Saudi Arabia',  
<<http://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/Historical+BG/>>  
accessed 1 April 2013

Majlis Al Shura Law, Royal Embassy of Saudi Arabia  
<[http://www.saudiembassy.net/about/country-information/laws/Majlis\\_Ash\\_Shura\\_Law.aspx](http://www.saudiembassy.net/about/country-information/laws/Majlis_Ash_Shura_Law.aspx)> accessed 15 June 2014

Majlis Al-Shura, Saudi Arabian Embassy  
<[http://www.saudiembassy.net/about/country-information/government/Majlis\\_al\\_shura.aspx](http://www.saudiembassy.net/about/country-information/government/Majlis_al_shura.aspx)> accessed 1 April 2013

Part One, Law of the Judiciary, <[http://www.saudiembassy.net/about/country-information/laws/Law\\_of\\_the\\_Judiciary.aspx](http://www.saudiembassy.net/about/country-information/laws/Law_of_the_Judiciary.aspx)> accessed 10 May 2014

‘Preamble’ The Universal Declaration of Human Rights, para 1.  
 <<http://www.un.org/en/documents/udhr/> > accessed 1 September 2014.

Proprio motu investigation by the ICC Prosecutor’ (2014) The Peace and Justice Initiative, <<http://www.peaceandjusticeinitiative.org/implementation-resources/proprio-motu-investigation-by-the-icc-prosecutor>> accessed 10 May 2014

‘Responsibilities of States for Internationally Wrongful Acts 2001, United Nations Treaty, 2005,  
 <[http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf)> accessed 20 June 2013.

‘Rome Statute of the International Criminal Court’ (1998) <[http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)> accessed 28 March 2014.

Stanford Encyclopedia of Philosophy  
 <<http://plato.stanford.edu/archives/fall2013/entries/cosmopolitanism>>

‘Structure of the Court’, The International Criminal Court (2014) <[http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx)> accessed 1 April 2014.

‘The Core International Human Rights Instruments and their monitoring bodies’ (2014) Office of the High Commissioner on Human Rights, United Nations <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>> accessed 20 January 2014

The Foundation of International Human Rights Law, The United Nations, <[http://www.un.org/en/documents/udhr/hr\\_law.shtml](http://www.un.org/en/documents/udhr/hr_law.shtml)> accessed 15 April 2014

The International Court of Justice (2014) <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1>> accessed 20 June 2013

‘The Prosecutor v. Thomas Lubanga Dyilo’ (2012) International Criminal Court <[http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx)> accessed 10 May 2014

Umm al-Qura (2592/ 29) Sha'ban 1395 - 5 September 1975  
 <[http://www.saudiembassy.net/about/country-information/laws/Law\\_of\\_the\\_Judiciary.aspx](http://www.saudiembassy.net/about/country-information/laws/Law_of_the_Judiciary.aspx)>

## Reports

‘Cairo Declaration of Human Rights in Islam’ The Organisation of Islamic Cooperation <<http://www.oic-oci.org/english/article/human.htm>> accessed 1 February 2015

‘Can Saudi Arabia Reform Itself?’ (2004) International Crisis Group Middle East Report 28 Cairo/Brussels

Cass D, ‘The constitutionalization of self determination’ (1998) Proceedings of the annual meeting of the American Society of International Law, 92<sup>nd</sup> Annual Meeting 122

‘Concluding Comments of the Committee on the Elimination of Discrimination Against Women’ (April 8, 2008) CEDAW/C/SAU/CO/2 2, CEDAW/C/SAU/CO/2 3, CEDAW/C/SAU/CO/ 4

‘Constitutional and Legal Developments in the GCC States in 2004’ (Gulf Yearbook, Dubai: Gulf Research Center 2005)

‘Constitution of the Arab Republic of Egypt’ (1971)  
<<http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?CatID=208#.UxU0s-NdWSo>> accessed 15 April 2014

‘Constitution of Kuwait’ (1962) <[http://www.servat.unibe.ch/icl/ku00000\\_.html](http://www.servat.unibe.ch/icl/ku00000_.html)>

‘Council of Ministers System, Royal Embassy of Saudi Arabia’  
<[http://www.saudiembassy.net/about/country-information/government/Council\\_of\\_ministers\\_system.aspx](http://www.saudiembassy.net/about/country-information/government/Council_of_ministers_system.aspx)> accessed 1 April 2013

Deplano R, ‘Fragmentation And Constitutionalisation Of International Law: A Teleological Inquiry’ (Ph.D. Brunel Law School 2012)1

Dissenting Opinion of Judge Tanaka, International Justice Court Organization Docket File No. 4945 253 <<http://www.icj-cij.org/docket/files/46/4945.pdf>>

‘Empty Reforms: Saudi Arabia’s New Basic Laws’ Human Rights Watch May 1992

Hakala P, ‘Cautious Reforms in Saudi Arabia’ (2013) Policy Department. European Parliament DG EXPO/B/PolDep/Note/2013\_177 28 May 2013. 1

‘International Covenant on Economic, Social and Cultural Rights’ (1996) Office of the High Commissioner on Human Rights. United Nations  
<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>> accessed April 15 2013

‘International Human Rights Law’ (2014) The Office of the High Commissioner for Human Rights, United Nations

<<http://www.ohchr.org/en/professionalinterest/pages/internationalallaw.aspx>>

Jorgens H, M Bauer and C Knill, ‘Organizational Change in International Bureaucracies’ (2009) CEPAM Working Paper 2

Nye Jr J and RO Keohane, ‘Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy’, KSG Faculty Research Working Papers Series RWP01, Paper 004, February 2001

Sawad AA, ‘Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations’ (DPhil thesis, University of Otago 2011)

<<http://hdl.handle.net/10523/1692>> accessed 1 June 2014

Slaughter A ‘Global Government Networks, Global Information Agencies, and Disaggregated Democracy’ Harvard Law School Working Paper 18, 20 September 2001, 4

Summary of the Judgment, East Timor (Portugal v. Australia) International Court of Justice, June 1995.

United Nations Security Council, ‘The Rule Of Law And Transitional Justice In Conflict And Post-Conflict Societies Report Of The Secretary-General’ 12 October 2011, 2 <[http://www.unrol.org/files/S\\_2011\\_634EN.pdf](http://www.unrol.org/files/S_2011_634EN.pdf)> accessed 29 January 2015

United Nations, ‘Responsibilities of States for Internationally Wrongful Acts 2001’ (2005)

<[http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf)> accessed 20 January 2015