

**GOVERNMENT BY JUDICIARY IN ISLAM: ISLAMIC THEORY
OF GOVERNMENT AND MAL/PRACTICE OF MUSLIM
GOVERNMENTS (TURKEY, SAUDI ARABIA,
EGYPT AND MOROCCO)**

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“If a Judge strives hard to seek the truth and reaches the right judgment, he will be rewarded twice; and if he strives to seek the truth but fails to reach the truth, he will be rewarded once.”¹

INTRODUCTION: ISLAM AND MUSLIM GOVERNMENTS TODAY

This Article argues Islam is not responsible for the malpractice of some Muslim States. Islam is based on government by judiciary with enumerated executive authorities. The term “government by judiciary” is rather controversial. In Western countries, it usually conveys a deprecatory rather than a laudatory meaning.² It usually refers to the

1. The Prophet Mohammed (peace be upon him).

2. Philip P. Kurland, *Government by Judiciary*, 2 U. ARK. LITTLE ROCK L. J. 307, 307–08 (1979).

judiciary being above the law.³ This is because the court regards itself above the law, especially when judges are considered the legal elite.⁴ It is believed that they can abuse their legal powers.⁵ In Islam, however, the term “government by judiciary” is used as a complimentary expression, referring to governmental and political obedience of the law.⁶ In Islam, the government consists of judges, or jurists who are qualified as judges, according to both *Shia* and *Sunni* scholars.⁷

In early Muslim governments, the Prophet had enumerated executive authorities.⁸ He was the founder of the first Muslim government.⁹ He was a judge with three executive powers, namely the collection of *Sadaqat* (state financial revenue),¹⁰ military power,¹¹ and foreign affairs’ representation.¹² After the Prophet’s death, the Prophet’s first successor understood the relationship between the ruler and the people.¹³ He followed the Prophet’s tradition, based on public

3. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 18–19 (1997).

4. See James S. Amelang, *Barristers and Judges in Early Modern Barcelona: The Rise of a Legal Elite*, 89 AM. HIST. REV. 1264, 1264–65 (1984).

5. Graham Gee, *The Persistent Politics of Judicial Selection: A Comparative Analysis*, 233 JUD. INDEPENDENCE TRANSITION 121, 125 (2012).

6. See Khaled Abou El Fadl, *The Centrality of Shri’ah to Government and Constitutionalism*, in *CONSTITUTIONALISM IN THE ISLAMIC COUNTRIES, BETWEEN UPHEAVAL AND CONTINUITY* 39 (Rainer Grote & Tilmann Rode eds., 2012).

7. For Shia, see IMAM KHOMENI, *ISLAMIC GOVERNMENT: GOVERNANCE OF THE JURIST (VELAYAT-E FAQEEH)* 50 (2017) (Hamid Algar trans.); for Sunni, see Ersilia Francesca, *The Concept of Sunna in Ibadī School*, in *THE SUNNA AND ITS STATUS IN ISLAMIC LAW: THE SEARCH FOR A SOUND HADITH* 105 (Adis Dufeija ed., 2015).

8. See *infra* Discussion Part.II.B.

9. RICHARD BONNEY, *JIHAD: FROM QUR’AN TO BIN LADEN* 33–43 (2004).

10. SEYED KAZEM SADR, *THE ECONOMIC SYSTEM OF THE EARLY ISLAMIC PERIOD* 89–92 (2016); see also Sayyid Tahir, *Fiscal and Monetary Policies in Islamic Economics Contours of an Institutional Framework*, 21 ISLAMIC ECON. STUD. 1, 4–5 (2013).

11. AHMAD ATIF AHMAD, *ISLAM, MODERNITY, VIOLENCE AND EVERYDAY LIFE* 117–19 (2009).

12. Gavin N. Picken, *The Concept of Sunna in Early Shafi’i Madhahb*, in *THE SUNNA AND ITS STATUS IN ISLAMIC LAW: THE SEARCH FOR A SOUND HADITH* 149 (Adis Dufeija ed., 2015).

13. WAEEL B. HALLAQ, *AN INTRODUCTION TO ISLAMIC LAW* 35 (2009).

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participation and enumerated powers.¹⁴ Hence, the early Islamic government was one by judiciary with enumerated executive authorities.

Some contemporary Islamic governments disregard the Quran and *Sunnah* understandings of public participation and enumerated executive powers.¹⁵ The current Muslim regimes are either authoritarian or totalitarian. These systems lack not only any form of transparent public participation in good government, but also any form of enumerated powers, like Turkey.¹⁶ Election fraud takes place in many Islamic countries, like Egypt.¹⁷ They use fraudulence to impose a certain pathway upon the people.¹⁸ Additionally, the unlimited and undisputed authority of the rulers in many Islamic countries, like Saudi Arabia¹⁹ and Morocco,²⁰ are not based in Islam. Thus, even though these countries practice Islam, their political regimes do not.

14. AHMED AL-RAYSUNI, AL-SHURA: THE QUR'ANIC PRINCIPLE OF CONSULTATION 16–17 (2011).

15. *See infra* Discussion Part.III.

16. OZLEM MADI-SISMAN, MUSLIMS, MONEY AND DEMOCRACY IN TURKEY: RELUCTANT CAPITALISTS 86 (2017); *see also* Spyridon Kotsovilis, *Between Fedora and Fez: Modern Turkey's Troubled Road to Democratic Consolidation and the Pluralizing Role of Erdogan's Pro-Islam Government*, in *TURKEY AND THE EUROPEAN UNION INTERNAL DYNAMICS AND EXTERNAL CHALLENGES* 56 (Joseph S. Joseph ed., 2006); *Why Did Turkey Hold a Referendum*, BBC NEWS (Apr. 16, 2017), <http://www.bbc.com/news/world-europe-38883556>.

17. Shams Al Din Al Hajjaji, *A Call for Judicial Reform in Egypt*, 11 VIENNA J. INT'L CONST. L. 256, 256–59 (2017).

18. *Id.*

19. THE CONSTITUTION OF THE KINGDOM OF SAUDI ARABIA Mar. 2, 1992, art. 6. (“Citizens shall pledge allegiance to the King on the basis of the Book of God and the Sunna of his Messenger, and on the basis of Submission and Obedience in times of Hardship and ease, fortune and adversity.”)

20. CONSTITUTION OF KINGDOM OF MOROCCO June 17, 2011, art. 42.

The King Head of State, His Supreme Representative, Symbol of the unity of the Nation, Guarantor of the Permanence and of the continuity of the state and supreme arbiter between the institutions, sees to respect for the constitution, to the good functioning of the constitutional institutions, to the protection of democratic choice and of the rights and freedoms of the citizens (feminine) and citizens (masculine), of the collectivities, and to respect for the international commitments of the Kingdom. He is the Guarantor of the Independence of the Country and of the territorial integrity of the kingdom within its authentic frontiers.

As a rule, Islam is neutral in relation to people's daily practices.²¹ It neither applauds nor condemns any set of rules or regimes.²² However, it takes a firmer stand regarding the administration of the government.²³ Islam is against exclusion from the decision-making process.²⁴ The pervasiveness of the non-democratic regimes across the Islamic world raises the question of Islam's position from the point of view of Islam itself.²⁵ Many authoritarian or totalitarian Islamic regimes are keen to apply Islamic *Sharia* as their main source of legislation.²⁶ They turn a blind eye to the core notions of the Islamic principle of good government, either from the *Shura* principle (public participation principle) or enumerated government authorities.²⁷

Government by judiciary in Islam overlaps with several secular legal concepts.²⁸ These concepts are checks-and-balance, separation of powers, and democratic public participation. This Article, nonetheless, introduces only the concept of government by judiciary in theory and the (mal)practices of four major Muslim-majority countries, which are Egypt, Turkey, Saudi Arabia, and Morocco. Clarifying the meaning of government by judiciary in Islam sets the basis for a good government that many Islamic governments lack in their practices. Hence, revisiting their systems and practice helps in understanding the concept of government by judiciary.

21. *Sahih Muslim* 43:186 (Hadith) ("You have better knowledge (of a technical skill) in the affairs of the world.")

22. *Id.*

23. AL-RAYSUNI, *supra* note 14, at 5.

24. *Id.* at 1–4.

25. To read about the relation between Islam and Authoritarianism *see*, LAUREL E. MILLER ET AL., *DEMOCRATIZATION IN THE ARAB WORLD: PROSPECTS AND LESSONS FROM AROUND THE GLOBE* 46 (2012).

26. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Jan. 18, 2014, art. 2 ("Islamic sharia is the main source of Legislation"); CONSTITUTION OF ISLAMIC REPUBLIC OF IRAN Oct. 24, 1979 amended on July, 28 1982, art. 1 ("the government of Iran is an Islamic Republic"); CONSTITUTION OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA 1989 amended 1996, art. 2 ("Islam is the religion of the State").

27. Abdul Rashid Moten, *Democracy and Development in the Muslim World*, in *THE MUSLIM WORLD IN THE 21ST CENTURY SPACE, POWER, AND HUMAN DEVELOPMENT* 280–84 (Samiul Hasan ed. 2012).

28. Samiul Hasan, *Islamic Jurisprudence: Sources and Traditions Creating Diversity in Human Relationships*, in *THE MUSLIM WORLD IN THE 21ST CENTURY SPACE, POWER, AND HUMAN DEVELOPMENT* 36–37 (Samiul Hasan ed., 2012).

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This Article is divided into three main sections. The first section tackles the nature of the government in Islam, which is based on government by judiciary. This section applies the historical case study method. It is based on presenting the development of the rules of government in Islamic jurisprudence. The aim of this method is to shed fresh light on the form of government, which both the Quran and the Prophet introduced to Muslims. The Quran and the Prophet's traditions are clear regarding the general principle of good government among Muslims.²⁹ However, the increase in the Muslim population raised new challenges regarding the modern application of the principle that was primarily set in the Quran and *Sunnah*.³⁰ While there are now more than one and a half billion around the world, Muslims were very few in number during the Prophet's time.³¹ As a result, a historical perspective is the cornerstone of this Article, and its basis to propose a new and modern Islamic civil law.

The second section presents practices and (mal)practices of four Muslim-majority countries: Turkey, Saudi Arabia, Morocco and Egypt. The third section recommends reform in the administration of Islamic countries. In last two sections, the Article applies the mixed Islamic *Sharia* rules, with secular modern-principle methodology. There are two applications of this method. The first is through arguing that modern legal rules and jurisprudence are in line with Islamic *Sharia* rules.³² For example, many contemporary Muslim scholars argue that democracy is Islamic.³³ They argue that democracy is the modern application of the *Shura* principle, which is the Islamic principle of public participation.³⁴ However, there are three major differences

29. Abdul Rashid Moten, *Al-Siyasha al-Shar'iyah: Good Governance in Islam*, in *QUR'ANIC GUIDANCE FOR GOOD GOVERNANCE* 55–58 (Abdullah al-Ahsan & Stephen B. Young eds., 2017).

30. For statistics of the Muslims majority countries, please refer to Hasan, *supra* note 28, at 5–6.

31. *Id.*

32. Liv Tonnessen, *Democratizing Islam and Islamizing Democracy: An Inquiry into Hasan Al-Turabi's Conception of Shura in Light of Western Democratic Theory*, 27 *NORDIC J. HUM. RTS.* 313, 314 (2009).

33. Ali Iyad Yakub, *The Islamic Roots of Democracy*, 12 *U. MIAMI INT'L & COMP. L. REV.* 269, 270 (2004); see also Azizah Al-Hibri, *Islamic Constitutionalism and the Concept of Democracy*, 24 *CASE W. RES. J. INT'L L.* 1, 2 (1992).

34. Al-Hibri, *supra* note 33.

between *Shura* and democracy. The first being exclusivity (Muslims versus non-Muslims in a plural society, where each group has its own rules),³⁵ second frequency (each Muslim has to perform his/her political role in isolation of religious duties),³⁶ and third generality (each Muslim has his/her political persuasion, not limited to politicians).³⁷ This is not the most successful application of the study of Islamic *Sharia* and modern laws. As a result, the Article does not adopt this form.

The second and most successful application of this methodology is a true mixture of both rules (Islamic and secular), to establish new rules that will truly comply with Islamic *Sharia*. The founding father of this application in modern history is the ex-president of the State Council, law professor, and prominent legal scholar Abd El-Razzak El-Sanhuri.³⁸ He integrated the French administrative courts' system (the State Council) and the French Civil Code into Egypt, Iraq and Syria; while continuing to reference to Islamic *Sharia*.³⁹ His Civil Code Commentary of April 1952 is made up of ten volumes, which constitute the major reference on Civil Law in Arab/Islamic countries.⁴⁰ Hence,

35. THE HOLY QURAN 5:43 (denying that non-Muslims, like Christians and Jews, consult Muslims about their religion. It states, "But how is it that they [the people of the book] come to you for judgement while they have the Torah, in which is the judgement of Allah?") (Sahih International version).

36. THE HOLY QURAN 3:159 states:

So by mercy from God, [O Muhammad], you were lenient with them. And if you had been rude [in speech] and harsh in heart, they would have disbanded from about you. So pardon them and ask forgiveness for them and consult them in the matter. And when you have decided, then rely upon Allah. Indeed, Allah loves those who rely [upon him].

37. THE HOLY QURAN 4:83 states:

And when there comes to them information about [public] security or fear, they spread it around. But if they had referred it back to the Messenger or to those of authority among them, then the ones who [can] draw correct conclusions from it would have known about it. And if not for the favor of Allah upon you and His mercy, you would have followed Satan, except for a few.

38. AMR SHALAKANY, *IZDIHĀR WA-ĪNHIYĀR AL-NUKHBA AL-QĀNŪNIYYA AL-MIŞRIYYA* 277 (2013) (on file with author).

39. *Id.*

40. Shams Al Din Al Hajjaji, *The Egyptian Judiciary in the Age of the Republic: The Role of Internal Conflicts in Controlling the Judicial System*, 4 *INDON. J. INT'L & COMP. L.* 363, 368 (2017).

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this Article endeavors to follow the method and application of El-Sanhuri in mixing modern rules with Islamic *Sharia*.

I. THEORY: GOVERNMENT BY JUDICIARY IN ISLAM

A. *The Nature of the Prophet*

1. *The Dual Nature of the Prophet's Character: Divine versus Earthly*

The Quran gives several descriptions of the Prophet. Some are exclusive to him, and others are general characteristics.⁴¹ The first characteristic is the Prophet's divine nature.⁴² The Quran bestows on the Prophet two prerogatives: one is being the last Prophet, and the other is being God's messenger.⁴³ There is always a question in Islamic jurisprudence about the nature of the Prophet in both capacities. This questioning has never arisen for any other Muslim.

The second characteristic of the Prophet is his earthly nature.⁴⁴ According to Islam, the Prophet is human, chosen as God's last prophet and messenger.⁴⁵ The Quran was clear about the human nature of the Prophet as an illiterate man.⁴⁶ His role was to guide people to the right

41. THE HOLY QURAN 18:110 ("Say, 'I am only a man like you, to whom has been revealed that your god is one God. So, whoever would hope for the meeting with his Lord—let him do righteous work and not associate in the worship of his Lord anyone."); *see also id.* at 10:2 ("Have the people been amazed that We revealed [revelation] to a man from among them, [saying], 'Warn mankind and give good tidings to those who believe that they will have a [firm] precedence of honor with their Lord?' [But] the disbelievers say, 'Indeed, this is an obvious magician.'").

42. *Id.* at 33:40 (identifying Muhammad as "the Messenger of Allah and last of the Prophets.").

43. *Id.*

44. *Id.* at 41:6 ("Say, O [Muhammad], 'I am only a man like you to whom it has been revealed that your god is but one God; so, take a straight course to Him and seek His forgiveness.' And woe to those who associate others with Allah").

45. *Id.* at 33:40.

46. *Id.* at 7:157.

Those who follow the Messenger, the unlettered prophet, whom they find written in what they have of the Torah and the Gospel, who enjoins upon them what is right and forbids them what is wrong and makes lawful for them the good things and prohibits for them the evil and relieves them of their burden and the shackles which were upon them. So, they who have

and to steer them away from the wrong.⁴⁷ Moreover, the Prophet was not a king with unlimited authority over Muslims.⁴⁸ The Quran also denies any form of control⁴⁹ or guardianship of the Prophet over the people.⁵⁰ Instead, he established a Muslim society in 622 A.D.,⁵¹ which is based on justice⁵² and equality.⁵³ Moreover, the Prophet discouraged his followers from striking friendships with kings and forbade them from wrongfully helping them.⁵⁴

The struggle between what is divine and what is earthly was much easier during the Prophet's life, and has become more complicated after his death. During the Battle of *Badr*, (the first Islamic war against the non-Muslims), one of the Prophet's companions, Al-Khabab Ibn Monzer, asked him a question regarding the position of the Muslim soldiers on the battlefield.⁵⁵ Al-Khabab probed, "Is this battlefield a place of Allah's choice for us, or a place of your choice based on war

believed in him, honored him, supported him and followed the light that was sent down with him - it is those who will be the successful.

Id.

47. *Id.*

48. JALAL AL-DIN AL-SUYUTI, MA RAWAH AL-ASADIEN FI A'DAM AL-MAJIE ILA-AL-SALATIN: ZAM ALQADA' WA-TAQOLD AL-AKHKAM 44 (Dar Al-Sahabah Lel-torath ed., 1991) (on file with author).

49. THE HOLY QURAN 88:22 ("You are not over them a controller.").

50. *Id.* at 4:81 ("He who obeys the Messenger has obeyed Allah; but those who turn away - We have not sent you over them as a guardian.").

51. *Muhammad – Muslims Find Refuge in Yathrib (Madina)*, ALIM, <http://www.alim.org/library/biography/stories/content/SOP/28/30/Muhammad%20%28Muhammad%29/Muslims%20Find%20Refuge%20in%20Yathrib%20%28Medina%29%20> (last visited Apr. 12, 2018).

52. TERENCE LOVAT & AMIR MOGHADAM, THE HISTORY OF ISLAM: REVELATION, RECONSTRUCTION OR BOTH?, 63 (2018).

53. Mohamed Abdallah & Halim Rane, *Behind a Veil: Islam's Democratic History*, in THE SECRET HISTORY OF DEMOCRACY 82 (Benjamin Isakhan & Stephen Stockwell eds., 2011).

54. THE HOLY QURAN 39:59 states:

After me there will be rulers, whoever believes in their lies and helps them in their wrongdoing is not of me, and I am not of him, and he will not come to me at the Cistern. Whoever does not believe their lies and does not help them in their wrongdoing, he is of me, and I am of hi, and he will come to me at the Cistern.

55. *Ibn Hesham, 2 El Saira el Nabawaya* 278 (on file with author) (Arab.).

tactics and intrigue?”⁵⁶ The Prophet said, “the choice was based on war tactics and intrigue,” to which Al-Khabab answered that the place was not suitable for war.⁵⁷ Al-Khabab suggested that they find a battlefield where there was an adequate source of water.⁵⁸ In this incident, the Prophet and his companions set a clear division between what is divine, and what is earthly. The significance of this differentiation is that any decision made by God is undisputable; while a decision made by the Prophet based on his own knowledge is arguable and can be contested.

2. The Quranic Basis of the Prophet’s Character: The Prophet as a Judge

The Quran and the Prophet’s traditions balance two issues when there is a dispute: accepting the Prophet’s judgment⁵⁹ and requesting his judgment.⁶⁰ When Muslims are in dispute, they should accept the Prophet’s judgments. The Quran describes the Prophet as the supreme judge who rules among Muslims pursuant to the Quran.⁶¹ God is the ultimate judge and ruler,⁶² and he delegated his power to the Prophet.⁶³

56. *Id.*

57. *Id.*

58. *Id.*

59. THE HOLY QURAN 4:65:

But no, by your Lord, they will not [truly] believe until they make you, [O Muhammad], judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and submit in [full, willing] submission.

60. *Id.* at 5:101:

O you who have believed, do not ask about things which, if they are shown to you, will distress you. But if you ask about them while the Qur’an is being revealed, they will be shown to you. Allah has pardoned that which is past; and Allah is Forgiving and Forbearing.

61. *Id.* at 5:49:

And judge, [O Muhammad], between them by what Allah has revealed and do not follow their inclinations and beware of them, lest they tempt you away from some of what Allah has revealed to you. And if they turn away - then know that Allah only intends to afflict them with some of their [own] sins. And indeed, many among the people are defiantly disobedient.

62. *Id.* at 11:45 (“you [Allah] are the most just of judges!”).

63. *Id.* at 57:25 (“We have already sent Our messengers with clear evidences and sent down with them the Scripture and the balance that the people may maintain [their affairs] in justice.”).

God sent his messengers to rule by the Book, including the Torah, the Bible, and the Quran.⁶⁴ Moreover, the Quran establishes that believing in God is conditioned upon accepting the Prophet as a judge⁶⁵ ruling under God's command.⁶⁶ A person cannot rightfully embrace Islam without believing in God and fully submitting to his Messenger's ruling.⁶⁷ Thus, the Quran directs Muslims to seek the Prophet's judgment to settle their disputes.

Conversely, the Quran discourages Muslims from requesting the Prophet's judgment on the legitimacy of certain behaviors.⁶⁸ The Prophet's role as a judge serves only to solve disagreements among Muslims.⁶⁹ The reason for the discouragement is two-fold. First, everything in Islam is permissible,⁷⁰ unless there is a clear Quranic verse or *Sunnah* that categorically bans it.⁷¹ The Prophet's judgment,

64. *Id.* at 5:46 ("We sent, following in their footsteps, Jesus, the son of Mary, confirming that which came before him in the Torah; and We gave him the Gospel, in which was guidance and light and confirming that which preceded it of the Torah as guidance and instruction for the righteous.").

65. *Id.* at 5:44:

Indeed, We sent down the Torah, in which was guidance and light. The prophets who submitted [to God] judged by it for the Jews, as did the rabbis and scholars by that with which they were entrusted of the Scripture of God (Allah), and they were witnesses thereto. So, do not fear the people but fear Me, and do not exchange My verses for a small price. And whoever does not judge by what God (Allah) has revealed - then it is those who are the disbelievers.

66. *Id.* at 5:48:

And We have revealed to you, [O Muhammad], the Book in truth, confirming that which preceded it of the Scripture and as a criterion over it. So, judge between them by what Allah has revealed and do not follow their inclinations away from what has come to you of the truth. To each of you We prescribed a law and a method. Had Allah willed, He would have made you one nation [united in religion], but [He intended] to test you in what He has given you; so race to [all that is] good. To Allah is your return all together, and He will [then] inform you concerning that over which you used to differ.

67. *Id.*

68. *Id.* at 5:101.

69. *Id.*

70. *Id.*

71. *Id.*

in some cases, leads to the ban of certain actions.⁷² The Prophet then said, “If I had said yes, it would have become obligatory.”⁷³ Moreover, the Quran narrates the story of the cow and the Jewish people during Moses’s time⁷⁴ as an example of how incessant investigation can lead to heavy burdens.⁷⁵ As a result, Islam tried to establish a balance between accepting the Prophet’s judgment and not seeking that judgment.

3. Distinctions regarding the Prophet’s Nature: Earthly Judge versus Divine Judge

The distinction between the divine and earthly sides of the Prophet was clear during his time. However, that distinction became more complicated after the Prophet’s death.⁷⁶ Current developments in Islamic societies mandate drawing a dividing line between both capacities. Breaking down each form of judgment into elements helps clarify this dividing line.

72. *Id.* at 59:7 (“And whatever the Messenger has given you - take; and what he has forbidden you - refrain from. And fear Allah; indeed, Allah is severe in penalty.”).

73. *Id.*

74. *Id.* at 2:67–2:73.

And [recall] when Moses said to his people, “Indeed, Allah commands you to slaughter a cow.” They said, “Do you take us in ridicule?” He said, “I seek refuge in Allah from being among the ignorant.” They said, “Call upon your Lord to make clear to us what it is.” [Moses] said, “[Allah] says, ‘It is a cow which is neither old nor virgin, but median between that, so do what you are commanded.’” They said, “Call upon your Lord to show us what is her color.” He said, “He says, ‘It is a yellow cow, bright in color - pleasing to the observers.’” They said “Call upon your Lord to make clear to us what it is. Indeed, [all] cows look alike to us. And indeed we, if Allah wills, will be guided.” He said, “He says, ‘It is a cow neither trained to plow the earth nor to irrigate the field, on free from fault with no spot upon her.’” They said, “Now you have come with the truth.” So, they slaughtered her, but they could hardly do it. And [recall] when you slew a man disputed over it, but Allah was to bring out that which you were concealing. So, We said, “Strike the man with part of the it.” Thus, does Allah bring the dead to life, and He shows you His signs that you might reason.

Id.

75. *Id.*

76. Shams Al Din Al Hajjaji, Book Note, *Review of The New Global Law by Rafael Domingo*, 32 BERKELEY J. INT’L L. 268, 276 (2014).

The first capacity of the Prophet is that of a judge ruling directly from divine revelation.⁷⁷ Divine revelation can take three forms. The first involves the Quran as the main source.⁷⁸ It is the first legislative source given to the Prophet and his followers. In the Quran, God presents his eternal ruling regarding specific issues.⁷⁹ For example, the rule in causing harm is “a life for a life, and an eye for an eye.”⁸⁰ The Quran makes sure that this ruling is lasting, as it was mentioned in the earlier code.⁸¹ In this case, the Prophet ruled based on the Quranic verse. The second involves a revelation conveyed to the Prophet that is not part of the Quran.⁸² During the Truce of *Hudaybiyyah*, God

77. THE HOLY QURAN 53:1-11:

By the star when it descends, Your companion [Muhammad] has not strayed, nor has he erred, Nor does he speak from [his own] inclination. It is not but a revelation revealed, Taught to him by one intense in strength— One of soundness. And he rose [his] true form, While he was in the higher [part of the] horizon. Then he approached and descended, And was at a distance of two bow lengths or nearer. And he revealed to His Servant what he revealed. The heart did not lie [about] what it saw.

Id.

78. *Id.* at 4:82 (“Then do they not reflect upon the Qur’an? If it had been from [any] other than Allah, they would have found within it much contradiction.”).

79. MOHAMED EL-AWA, PUNISHMENT IN ISLAMIC LAW 1 (2000).

80. THE HOLY QURAN 5:44–45:

Indeed, We sent down the Torah, in which was guidance and light. The prophets who submitted [to Allah] judged by it for the Jews, as did the rabbis and scholars by that with which they were entrusted of the Scripture of Allah, and they were witnesses thereto. So do not fear the people but fear Me, and do not exchange My verses for a small price. And whoever does not judge by what Allah has revealed—then it is those who are the disbelievers. And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed—then it is those who are the wrongdoers.

81. *4c. Hammurabi’s Code: An Eye for an Eye*, U.S. HIST., <http://www.ushistory.org/civ/4c.asp> (last visited Apr. 12, 2018).

82. The Editors of the Encyclopedia Britannica, *Pact of Hudaybiyah*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Pact-of-Al-Hudaybiyah> (last visited Apr. 12, 2018) (In the truce of *Hudaybiyah*, the Prophet decided to visit Mecca, but when he reached the border of the city, the infidels prevented him from entering with the Muslims. After long negotiation, the Prophet decided to enter in a peace treaty with them. Many Muslims refused to enter within such a treaty.). Umar Ibn Al-khatab, who later became the second successor, told the

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revealed to the Prophet that he should sign the treaty despite the absence of a clear verse in the Quran that obliged him to ratify this treaty.⁸³ The third form of revelation occurred through dreams or visions.⁸⁴ This took place on several occasions. The Muslim's daily call for prayer was revealed through a vision.⁸⁵

The second capacity of the Prophet is that of being human.⁸⁶ The Quran instructed the Prophet to the sources of his judgments. First, the Prophet was required to resort to the Principle of *Shura* in the case of absence of a divine revelation or a Quran verse.⁸⁷ The Quran encouraged the Prophet to consult with his followers, whereupon he would meet with them in the mosque to discuss their issues and concerns.⁸⁸ They never spared any effort to offer good advice to the

Prophet "why should we put a blot upon our religion and return," as a form of refusal to ratify the peace treaty? The Prophet answered him that "I am the messenger of God, and I will not disobey Him, and He will render me victorious." *Sahih Muslim* 32:115.

83. On the contrary, the Quran is clear about not proposing peace treaty with infidels. "So do not weaken and call for peace while you are superior; and God is with you and will never deprive you of [the reward of] your deeds." THE HOLY QURAN 47:35.

84. Marcia Hermansen, *Dreams and Dreaming in Islam*, in DREAMS A READER ON RELIGIOUS CULTURAL AND PSYCHOLOGICAL DIMENSIONS OF DREAMING 73–74 (Kelly Bulkeley ed., 2001).

85. *History of Adhan (Calls to Prayers)*, NAVEDZ, <http://navedz.com/history-of-adhan/> (last visited Apr. 12, 2018).

86. The Prophet said:

Verily, I am only a human and the claimants bring to me (their disputes); perhaps some of them are more eloquent than others. I judge according to what I hear from them). So, he whom I, by my judgment, (give the undue share) out of the right of a Muslim, I in fact give him a portion of (Hell) Fire.

Riyad as Salihin 1:219.

87. THE HOLY QURAN 42:38 ("And those who have responded to their lord and established prayer and whose affair is [determined by] consultation among themselves, and from what We have provided them, they spend.").

88. *Id.* at 3:159:

So by mercy from Allah, [O Muhammad], you were lenient with them. And if you had been rude [in speech] and harsh in heart, they would have disbanded from about you. So pardon them and ask forgiveness for them and consult them in the matter. And when you have decided, then rely upon Allah. Indeed, Allah loves those who rely [upon Him].

best of their knowledge to the Prophet.⁸⁹ He always consulted with his followers on questions regarding the prisoners of *Badr*,⁹⁰ the Battle of *Uhud*,⁹¹ the tactics of the Battle of *Badr*,⁹² and the Battle of the Trench.⁹³

Second, the Quran urges the Prophet to follow the principles of justice and fairness in his rulings.⁹⁴ However, such principles should not contradict clear Quranic verses. Before Islam, Arabs used to bury their daughters alive.⁹⁵ They believed female children brought poverty and scarcity to their parents.⁹⁶ They also denied women their financial and property rights; if women succeeded in obtaining these rights, they would be prosecuted for “unauthorized exercise of guardianship.”⁹⁷ Guardianship of women would start with their fathers, and would later be transferred to their husbands.⁹⁸ The Quran completely prohibits

89. *Id.* at 9:91 (“There is not upon the weak or upon the ill or upon those who do not find anything to spend any discomfort when they are sincere to Allah and His Messenger. There is not upon the doers of good any cause [for blame]. And Allah is Forgiving and Merciful.”).

90. Tony Bunting, *Battle of Badr*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Battle-of-Badr> (last visited May 1, 2018).

91. *Id.*

92. *Id.*

93. *Id.*

94. IMAM ABDELLAH MOHMAED IDERAD AL-SHAFI, AKHKAM AL-QURAN 230 (1951) (on file with author).

95. *Female Infanticide*, BBC, http://www.bbc.co.uk/ethics/abortion/medical/infanticide_1.shtml (last visited Apr. 12, 2018); see also Zakir Naik, *Islam and Female Infanticide*, ISLAM AWARENESS, http://www.islamawareness.net/FamilyPlanning/Infanticide/fit_article001.html (last visited Apr. 12, 2018).

96. See THE HOLY QURAN 17:31 (“And do not kill your children for fear of poverty. We provide for them and for you. Indeed, their killing is ever a great sin.”).

97. This is part of the Roman law that was applicable on Arabs before Islam. See Stanley N. Ktaz, *Women*, in 6 OXFORD INT’L ENCYCLOPEDIA OF LEGAL HISTORY 117 (2009).

98. Emma Fall Schofield, *Status of Women Under the Early Roman Law and Under the Old English Law*, 16 WOMEN LAW. J. 3, 5 (1928).

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these practices⁹⁹ and allows women complete financial independence.¹⁰⁰

In both capacities, God intervenes in three forms to support the Prophet's judgment. First, when the Prophet was unable to reach a rightful answer to a legal question, God intervened by offering guidance. A woman came to the Prophet to complain about her husband.¹⁰¹ Her husband complained that she was like his mother; his statement, according to the customs of the time, meant that she was still his wife, but he would not touch her since he gave her the status of a mother.¹⁰² The Prophet told her that he did not have a solution to her situation.¹⁰³ Later, the Quran revealed to him that the husband was at fault by making such a statement.¹⁰⁴

Second, when the Prophet made a faulty judgment in legal affairs, God intervened to correct said judgment through the Quran.¹⁰⁵ Divine revelation showed God's help in rectifying the Prophet's ruling.¹⁰⁶ When the Prophet declared that he was no longer going to eat honey, because it gave him bad breath, the Quran clarified he could not forbid what God had permitted.¹⁰⁷

99. See THE HOLY QURAN 6:151:

Say, "Come, I will recite what your Lord has prohibited to you. [He commands] that you not associate anything with Him, and to parents, good treatment, and do not kill your children out of poverty; We will provide for you and them. And do not approach immoralities—what is apparent of them and what is concealed. And do not kill the soul which Allah has forbidden [to be killed] except by [legal] right. This has He instructed you that you may use reason."

100. MUHAMMAD ZAFRULLA KHAN, WOMEN IN ISLAM 23–25 (2008).

101. Mohamed Taher ibn Ashour, *Al-Tahrir wa-al-Tanour (Liberation and Enlightenment)*, ISLAMWEB, http://library.islamweb.net/newlibrary/display_book.php?idfrom=3972&idto=3972&bk_no=61&ID=4031 (Google trans.).

102. THE HOLY QURAN 58:2.

103. *Id.*

104. *Id.* at 58:3 ("And those who pronounce thihar from their wives and then [wish to] go back on what they said - then [there must be] the freeing of a slave before they touch one another. That is what you are admonished thereby; and Allah is Acquainted with what you do.").

105. *Id.* at 66:1 ("O Prophet, Why do you prohibit [Yourself from] what Allah has made lawful for you, seeking the approval of your wives? And God is Forgiving and Merciful.").

106. *Id.*

107. *Id.*

Third, when the Prophet made a wrongful legal judgment, God sustained the ruling and forgave the human Prophet for his mistake. After the Battle of *Badr*, a legal question was raised about how Muslims should handle prisoners of war.¹⁰⁸ The Quran contained no clear rule in this regard. The Prophet sought his followers' advice. They, however, were divided into two main groups. The first group recommended killing them all, since they had killed many Muslims before.¹⁰⁹ The second group chose to release them.¹¹⁰ While the Prophet supported the second opinion, the Quran later revealed God's disagreement with the Prophet's choice.¹¹¹

B. The Enumerated Executive Authorities of the Prophet

The Prophet had very limited executive authorities over early Muslims. The authorities he had were power over military,¹¹² *Zakat* collection (the Islamic form of paying taxes),¹¹³ and foreign affairs.¹¹⁴ The following section tackles the three executive powers of the Prophet.

The first is the Prophet's military power. It was limited and restricted to specific circumstances. The Quran identifies and regulates two types of wars. The first is civil wars among Muslims.¹¹⁵ This

108. *Sahih Muslim* 32:69.

109. *Id.*

110. *Id.*

111. THE HOLY QURAN 8:68-69 ("If not for a decree from Allah that preceded, you would have been touched for what you took by a great punishment. So, consume what you have taken of war booty [as being] lawful and good, and fear Allah. Indeed, Allah is Forgiving and Merciful.").

112. *Id.* at 4:84 ("So fight, [O Muhammad], in the cause of Allah; you are not held responsible except for yourself. And encourage the believers [to join you] that perhaps Allah will restrain the [military] might of those who disbelieve. And Allah is greater in might and stronger in [exemplary] punishment.").

113. *Id.* at 9:103 ("Take, [O, Muhammad], from their wealth a charity by which you purify them and cause them increase and invoke [Allah's blessings] upon them. Indeed, your invocations are reassurance for them. And Allah is Hearing and Knowing.").

114. *Id.* at 10:2 ("Have the people been amazed that We revealed [revelation] to a man from among them, [saying], 'Warn mankind and give good tidings to those who believe that they will have a [firm] precedence of honor with their Lord'? [But] the disbelievers say, 'Indeed, this is an obvious magician.'").

115. *Id.* at 49:9 ("And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight

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occurs when a disagreement arises between two groups of Muslims who are unable to solve their disputes peacefully.¹¹⁶ The second type of war is between Muslims and non-Muslims (international form of war).¹¹⁷ The first part of this section presents each type of war, and the difference between the Prophet's military power, and other forms of executive military power.¹¹⁸

The second power is the Prophet's power to collect *Zakat*.¹¹⁹ The Quran did not impose any form of tax or royalties on Muslims.¹²⁰ However, it did ask Muslims to pay *Sadaqat*, which comes from the word *Sadq*, meaning truth.¹²¹ Islamic rules differentiate between *Zakat*, *Sadaqat*, and tax rules.¹²² The second part of the following section shows the different types of *Zakat*, its amounts, calculation, exempt categories, and the Prophet's share of it. Finally, the third power is the Prophet's power to represent Muslims in front of non-Muslims. This power is very limited—it only includes inviting people to embrace Islam and signing peace treaties with non-Muslims.

1. Restricted Military Powers

a. Civil War: Reconciliation and Use of Power

Islam did not deny that Muslims might engage in civil wars. However, the Quran advocates that their fights should not extend over long periods of time,¹²³ and that disputes are better resolved

against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly, Indeed, Allah love those who act justly.”).

116. *Id.*

117. *Infra* Discussion Part.II.B.1.b.

118. *Infra* Discussion Part.II.B.1.a.

119. See Anwar & Mulia Saputra, *The Empowerment of Zakah According to Islamic Law*, 8 J. ISLAMIC ST. PRAC. INT'L L. 69, 72 (2012); see also THE HOLY QURAN 9:104.

120. See Adnan Kahn, *Islam and Taxation*, KALIFAH, <http://www.khilafah.com/islam-and-taxation/> (last visited Apr. 12, 2018).

121. AHMED RADA, MA'JAM AL-LOGHA: MAWSOW'AH LAGHAYAHA HADITHA 434 (1959) (on file with author).

122. *Infra* Discussion Part.I.B.2.

123. THE HOLY QURAN 2:193–194.

peacefully.¹²⁴ The Quran clearly shows methods of resolving disputes.¹²⁵ First, a neutral entity should intervene to create common ground between conflicting parties and encourage reconciliation.¹²⁶ The aim of this process is to identify the righteous and the wrongful parties. Once the mediating group has identified the righteous party, it should support their cause.¹²⁷ Second, if the aggressors choose not to comply with the judgment of the neutral party's ruling, then the neutral party shall fight the aggressor.¹²⁸ Hence, the Islamic approach to resolving civil wars is a mixture of reconciliation and the use of power against aggressors.

The Prophet has been part of some successful examples. For example, the *Banu Aws* and *Khazraj*, two Muslim tribes, that fought during the Prophet's era.¹²⁹ When the Prophet received news of the fight, he went to reconcile the two tribes.¹³⁰ The reconciliation process was successful, since the Prophet did not resort to the use of power against the aggressor.¹³¹ The use of power is employed to force the aggressor to comply with the right judgment.¹³² Both approaches (power and reconciliation) are adopted simultaneously, to ensure the eradication of civil wars among Muslims.¹³³ As a result, the continuity of any civil war among Muslims is not tolerated in Islam.

b. International War: Self Defense and Protecting the Freedom of Religion

The Prophet went into several international wars against non-Muslims.¹³⁴ In these wars, the Quran made sure to strike a balance between both interests. On one hand, Muslims fought only

124. *Id.* at 49:9.

125. *See id.*

126. *Id.*

127. *Id.*

128. *Id.* at 49:10.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 9:36 (“And fight against the disbelievers collectively as they fight against you collectively. And know that Allah is with the righteous [who fear Him].”).

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transgressors.¹³⁵ They were not encouraged to wage wars against other nations or religions.¹³⁶ The Quran bans Muslims from forcefully converting others to Islam.¹³⁷ This ban applies to the Prophet,¹³⁸ even though his mission is to call people to Islam.¹³⁹ The Prophet's role was to deliver God's message, not to make people believe it.¹⁴⁰ Additionally, Muslims only fight for a cause.¹⁴¹ The Quran orders Muslims to fight against any religious discrimination,¹⁴² whether the victims are Muslim or non-Muslim.¹⁴³ Hence, the two permitted types of wars are either retaliation or defense wars.

The Prophet's first type of war involved retaliation. These wars were always connected to a legal question that Muslims raised with the

135. *Id.* at 2:190 ("Fight in the way of Allah those who fight you but do not transgress. Indeed, Allah does not like transgressors.").

136. MAHMOUD HAMDY ZAQQOWQ, HAQAIQ ISLAMIYAH FI-MOWAJAHAT HAMALAT AL-TASHKIK 33 (2002) (on file with author).

137. THE HOLY QURAN 2:256 ("There shall be no compulsion in [acceptance of] the religion. The right course has become clear from the wrong. So whoever disbelieves in Taghut and believes in Allah has grasped the most trustworthy handhold with no break in it. And Allah is Hearing and Knowing.").

138. *Id.* at 10:99 ("And had your Lord willed, those on earth would have believed—all of them entirely. Then, [O Muhammed], would you compel the people in order that they become believers?").

139. *Id.* at 26:3 ("Perhaps, [O Muhammad], you would kill yourself with grief that they will not be believers.").

140. *Id.* at 43:40 ("Then will you make the deaf hear, [O Muhammad], or guide the blind or he who is in clear error?"); *see also id.* at 5:67 ("O Messenger, announce that which has been revealed to you from your Lord, and if you do not, then you have not conveyed His message. And Allah [God] will protect you from the people. Indeed, Allah [God] does not guide the disbelieving people.").

141. *Id.* at 60:8 ("Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes - from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly.").

142. *Id.* at 2:193 ("Fight them until there is no fitnah [persecution], and worship is for Allah. But if they cease, then there is to be no aggression except against the oppressors.").

143. *Id.* at 4:75:

And what is [the matter] with you that you fight not in the cause of Allah and [for] the oppressed among men, women, and children who say, "Our Lord, take us out of this city of oppressive people and appoint for us from Yourself a protector and appoint for us from Yourself a helper?"

Prophet.¹⁴⁴ The answer to their question came in the form of using power.¹⁴⁵ One such question was the legality of retaliation against infidels, who persecuted and confiscated Muslims' properties.¹⁴⁶ For the first ten years in the history of Islam, non-Muslims regularly discriminated against those who converted to Islam.¹⁴⁷ The property of Muslims, who managed to leave *Makkah*, was confiscated without any proper reasoning.¹⁴⁸ Discrimination against early Muslims was aggressive, forcing them to immigrate twice to Abyssinia (Ethiopia, Somalia and Eritrea), and to Madinah.¹⁴⁹

When Muslims went to the Prophet and asked whether they should fight back and retrieve their properties, and put an end to the discrimination against them, he responded that he was not yet given permission to fight.¹⁵⁰ He stated, "Patience, I have not been ordered to fight."¹⁵¹ The Prophet, as a judge, did not have an answer to this legal question. The answer was later conveyed to him, and then Muslims were given permission to retaliate against persecution and

144. *Id.* at 22:38-41:

Indeed, Allah [God] defends those who have believed. Indeed, Allah [God] does not like everyone treacherous and ungrateful. Permission [to fight] has been given to those who are being fought, because they were wronged. And indeed, Allah [God] is competent to give them victory. [They are] those who have been evicted from their homes without right—only because they say, "Our Lord is Allah [God]." And were it not that Allah [God] checks the people, some by means of others, there would have been demolished monasteries, churches, synagogues, and mosques in which the name of Allah [God] is much mentioned. And Allah [God] will surely support those who support Him. Indeed, Allah [God] is Powerful and Exalted in Might. [And they are] those who, if We give them authority in the land, establish prayer and give zakah and enjoin what is right and forbid what is wrong. And to Allah belongs the outcome of [all] matters.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *The Two Migrations of Muslims to Abyssinia*, AL-ISLAM, <https://www.al-islam.org/restatement-history-islam-and-muslims-sayyid-ali-ashgar-razwy/two-migrations-muslims-abyssinia> (last visited Apr. 12, 2018).

150. ALI MOHAMED AL-SALABI, *GHAZAWAT ALRASUL SALAA ALLAH EALAYH WASALAM DURUS W EABR W FAWAYID 7* (2007) (on file with author).

151. *Id.*

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discrimination.¹⁵² Two years after the immigration to Medina, the commercial caravan of the infidels of Mecca was passing near the borders of Medina.¹⁵³ Muslims decided to take this caravan as compensation for the unjust looting of their property in Mecca.¹⁵⁴ When the infidels heard news of the Muslims' intention to retaliate, they decided to fight them in the Battle of *Badr*.¹⁵⁵

The second type of war allowed by the Prophet involved defensive wars.¹⁵⁶ Their purpose was to protect Muslims' dominance and integrity.¹⁵⁷ Defensive wars were started as a response to aggression by non-Muslims over Muslims' territories and possessions.¹⁵⁸ The non-Muslims initiated such wars for two reasons. First, the infidels wished to annihilate Islam and Muslims. In the Battle of *Khandaq* (Trench), the Arab infidels allied with the Jews against the Prophet and the Muslims in Madinah.¹⁵⁹ They surrounded the city.¹⁶⁰ During this period, there were several clashes between the Muslims and the allied forces.¹⁶¹ The battle ended with the defeat of the alliance, and the exile of the Jews.¹⁶² Second, the infidels fought Muslims to retaliate their losses in previous battles, like in the Battle of *Uhud*.¹⁶³ After the Muslims won the Battle of *Badr*, the infidels decided to retaliate for

152. THE HOLY QURAN 22:39 ("Permission [to fight] has been given to those who are being fought, because they were wronged. And indeed, Allah is competent to give them victory.").

153. Bunting, *supra* note 90.

154. *Id.*

155. *Id.*

156. THE HOLY QURAN 2:190 ("Fight in the way of Allah those who fight you but do not transgress. Indeed, Allah does not like transgressors.").

157. M. Cherif Bassiouni, *Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence*, 10 J. ISLAMIC L. & CULTURE 61, 62 (2008).

158. *See id.*

159. Abdul Ghafur Hamid & Khin Maung Sein, *Islamic International Law and the Right of Self-Defense of States*, 2 J. E. ASIA & INT'L L. 67, 85–86 (2009).

160. *Id.* at 86.

161. *Id.* at 85–90.

162. *Id.* at 86.

163. *Id.* at 85.

their loss.¹⁶⁴ The following year, they decided to fight the Muslims at *Uhud*. These were examples of defensive wars.¹⁶⁵

c. The Difference between Islamic and non-Islamic Military Power

There are three major differences between Islamic understanding of military power, and the commonplace system of armies. First, ordinary armies have been a permanent setup since the Byzantine (224-1453 A.D.)¹⁶⁶ and Sasanian (224-651 A.D.) empires,¹⁶⁷ as well as during the Prophet's time (570-632 A.D.).¹⁶⁸ However, the Prophet neither had permanent military forces¹⁶⁹ nor guards.¹⁷⁰ He practiced his military power using the *Jihad* mechanism.¹⁷¹ *Jihad* operates through general mobilization, and without any pressure, or coercion on individuals to join the army.¹⁷² The Prophet did not have any power to force Muslims to join the *Jihad*.¹⁷³ His role was limited to a declaration of his intent to go to war, and the decision was left to the Muslims to

164. *Id.*

165. *Id.* at 83–84.

166. See Donald McGillivray Nicol & John Teall, *Byzantine Empire Historical Empire, Eurasia*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Byzantine-Empire> (last visited Apr. 3, 2018).

167. *History of Iran, Sassanid Empire*, IRAN CHAMBER SOC'Y, <http://www.iranchamber.com/history/sassanids/sassanids.php> (last visited Feb. 12, 2018).

168. See Nicolai Sinai & William Montgomery Watt, *Muhammad Prophet of Islam*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Muhammad> (last visited Mar. 21, 2018).

169. See Hamid & Sein, *supra* note 159, at 85 (noting that armies needed to be gathered to fight).

170. THE HOLY QURAN 15:95 (“Indeed, we are sufficient for you against the mockers.”).

171. The concept of Jihad was corrupted several times. To read about the Ottoman and Jihad Akbar during the First World War see, LEON BUSKENS, *JIHAD AND ISLAM IN WORLD WAR I STUDIES ON THE OTTOMAN JIHAD ON THE CENTENARY OF SNOUCK HURGRONJE'S HOLY WAR MADE IN GERMANY 37–39* (Erik-Jan Zürcher ed., 2016).

172. THE HOLY QURAN 4:84 (“So fight, [O Muhammad], in the cause of Allah [God]; you are not held responsible except for yourself. And encourage the believers [to join you] that perhaps Allah will restrain the [military] might of those who disbelieve. And Allah is greater in might and stronger in [exemplary] punishment.”).

173. *Id.*

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join.¹⁷⁴ Moreover, it is not a religious obligation for all Muslims to participate in *Jihad*.¹⁷⁵ The Quran ensures that not all Muslims join the Jihad call.¹⁷⁶ Muslims were required to divide forces, some joining Jihad, while others ensured the continuity of everyday life.¹⁷⁷

Second, professional and well-trained officers lead commonplace military forces.¹⁷⁸ Prior to Islam, the Prophet had never been to war; his main bread-winning profession was that of a shepherd.¹⁷⁹ After Islam, the Prophet led most of the wars, and rarely delegated this power to anyone. Additionally, the Quran bans Muslims from initiating aggression and starting wars.¹⁸⁰ The only two permitted forms of using force are wars of either defense or retaliation.¹⁸¹ Most of the Prophet's followers were slaves, poor, and weak.¹⁸² This encouraged the infidels to discriminate and persecute them.¹⁸³ God did not order his Prophet to fight, until the Prophet immigrated to Medina.¹⁸⁴ God then permitted

174. *Id.*

175. *See id.*

176. *Id.* at 9:122 (“And it is not for the believers to go forth [to battle] all at once. For there should separate from every division of them a group [remaining] to obtain understanding in the religion and warn their people when they return to them that they might be cautious.”).

177. *Id.*

178. *Id.*

179. *Sahih al-Bukhari* 37:3 (“The Prophet said, ‘Allah did not send any prophet but shepherded sheep.’ His companions asked him, ‘Did you do the same?’ The Prophet replied, ‘Yes, I used to shepherd the sheep of the people of Mecca for some Qirates.’”).

180. THE HOLY QURAN 66:1.

181. Onder Bakircioglu, *A Socio-Legal Analysis of the Concept of Jihad*, 59 INT’L & COMP. L. Q. 413, 417 (2010).

182. QAMAR-UL HUDA, STRIVING FOR DIVINE UNION, SPIRITUAL EXERCISES FOR SUHRAQARDI SUFIS 51 (2003).

183. *Id.*

184. AHMED AL-DAWOODY, THE ISLAMIC LAW OF WAR, JUSTIFICATION AND REGULATIONS 43–45 (2011).

Muslims the right to fight back.¹⁸⁵ The Prophet started to lead an army and fight against the infidels.¹⁸⁶ This was *Jihad*.¹⁸⁷

Third, setting up common military forces is usually done by imposing taxes on citizens.¹⁸⁸ However, imposing taxes or any other financial burdens on Muslims was not permissible.¹⁸⁹ Nor did the Prophet punish the hypocrites who left the army directly before the Battle of *Uhud*.¹⁹⁰ As for the *Zakat*, it is the second executive power of the Prophet, which is tackled in the following section.

2. Collecting Only Sadaqat

a. Compensation from Sadaqat

Neither the Prophet nor any of his kinship (*Ahl al-Bayt*) were allowed to receive money from the *Zakat*'s treasury for any public work they performed.¹⁹¹ They were not allowed any remuneration for their public work.¹⁹² When Al-Hassan, the grandson of the Prophet, was a small child, he took a date, collected as *Zakah*, to eat.¹⁹³ The Prophet took it from him and returned it. He said to him that they do not eat from *Sadaqat*.¹⁹⁴ The Prophet died without having any money, even his

185. Noor Mohammad, *The Doctrine of Jihad: An Introduction*, 3 J. L. & RELIGION 381, 386 (1985).

186. THE HOLY QURAN 2:193.

187. MO'JAM AL-LAGHAH: MAWSHOUA'H LOGHAWAYAH HADITHAH, MOJALAD AL-AWAL 587 (1985) (on file with author).

188. See R.D.N., *The Business of Government*, THE ECONOMIST (Feb. 26, 2013), <https://www.economist.com/blogs/democracyinamerica/2013/02/deficit-and-social-insurance>.

189. THE HOLY QURAN 9:90–96.

190. JEFFRY R. HALVERSON ET AL., MASTER NARRATIVES OF ISLAMIST EXTREMISM 60 (2013).

191. THE HOLY QURAN 42:23 (“Say, [O Muhammad], ‘I do not ask you for this message any payment [but] only good will through kinship.’”).

192. *Id.*

193. Alsadqat Muharamat Ealaa Muhamad Walih Lihukm Jalila [Charity is Haraam to Muhammad and His Family for Great Judgment], FATWA CTR. (Apr. 24, 2002), <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=15881> (Google trans.).

194. *Id.*

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daughter's small ranch was taken from her.¹⁹⁵ Abu Bakr, the first successor, and Omar requested she return it to the public treasury.¹⁹⁶ They based their judgment on the Prophet's *Sunnah*.¹⁹⁷ The Prophet stated, "Prophets leave neither dinar nor dirham (name of old currencies), they only leave knowledge."¹⁹⁸

Unlike the Prophet and his kinship, judges and rulers can be compensated for their work and time. Compensation for being a judge was prohibited for the Prophet and his next of kin.¹⁹⁹ The Prophet compensated whomever he assigned work or a task to. The Quran is clear in giving these workers a fair compensation for their work. The Prophet also ensured the Quran teachings.²⁰⁰

195. ABU MUHAMMAD ORDONI, *FATIMA: THE GRACIOUS* 215 (2014).

196. *Id.* at 224.

197. The full Sunna states:

If anyone travels on a road in search of knowledge, Allah [God] will cause him to travel on one of the roads of Paradise. The angels will lower their wings in their great pleasure with one who seeks knowledge, the inhabitants of the heavens and the Earth and the fish in the deep waters will ask forgiveness for the learned man. The superiority of the learned man over the devout is like that of the moon, on the night when it is full, over the rest of the stars. The learned are the heirs of the Prophets, and the Prophets leave neither dinar nor dirham [Muslim's currency], leaving only knowledge, and he who takes it takes an abundant portion.

Sunan Abi Dawud 26:1.

198. *Id.*

199. See THE HOLY QURAN 33:33:

Allah [God] only wishes to remove the Rijs from you, "O members of the family, and to purify you with a thorough purification." In Sunnah, "When these Ayat were revealed to the Prophet: 'in the home of Umm Salamah (the Prophet's wife), he called for Fatimah, Hasan, Husain, and wrapped him in the cloak,' and Ali was behind him, so he wrapped him in the cloak, then he said: 'O Allah! These are the people of my house, so remove the Rijs from them, and purify them with a thorough purification.' So Umm Salamah said: 'And I, Prophet of Allah?' He said: 'You are in your place (meaning you are already a member of my household), and you are goodness.'"

200. The Prophet stated, "Give the worker his wages before his sweat dries." *Sunan Ibn Majah* 16:2433.

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b. Types of Sadaqat, and Their Amount

The main idea of *Sadaqat* is Islam's right to Muslims' money.²⁰¹ The Prophet collected only three types of *Sadaqat* from Muslims. The first is *Zakat*.²⁰² Its main aim is to eliminate poverty.²⁰³ God ordered Muslims to pay their Islamic financial duties to the poor and needy.²⁰⁴ The financial rate of *Zakat* is 2.5% of the individual's annual savings, not income.²⁰⁵ For example, if a Muslim saves \$1000, and this amount is not used for a whole year, the Muslim pays \$25 as *Zakat*. The second type of *Sadaqat* is *Kharaj*.²⁰⁶ This is the money paid for any agricultural land.²⁰⁷ The condition of the land determines a portion of *Kharaj*.²⁰⁸ Land which requires little to no labor to cultivate requires higher taxes than land that may only be cultivated with effort.²⁰⁹ Hence, the calculation of *Kharaj* is based on the type of land use.²¹⁰ The third type is *Sadaqah* (Charity) and *Waqf* (Trust).²¹¹ These types of revenue

201. Tafseer Surat Al-Isra, *Episode 12*, YOUTUBE (May 5, 2013), <https://www.youtube.com/watch?v=xhcmn2o5kiI> (Arabic).

202. Anwar & Saputra, *supra* note 119, at 72; *see also* THE HOLY QURAN 9:104 ("Do they not know that it is Allah [God] who accepts repentance from His servants and receives charities and that it is Allah [God] who is the Accepting of repentance, the Merciful?").

203. THE HOLY QURAN 22:37-38.

204. *Id.* at 9:60:

Zakah expenditures are only for the poor and for the needy and for those employed to collect [zakah] and for bringing hearts together [for Islam] and for freeing captives [or slaves] and for those in debt and for the cause of Allah [God] and for the [stranded] traveler—an obligation [imposed] by Allah [God]. And Allah [God] is Knowing and Wise.

205. *See* Abullah Al-Lami, *Zakah as Islamic Taxation and its Application in the Contemporary Saudi Legal System*, 5 J. ISLAMIC ST. PRAC. INT'L L. 83, 99 (2009).

206. *See id.* at 85, n.12.

207. *Id.*

208. Fuadah Johari & Patmawati Ibrahim, *The Dynamism in the Implementation of Al-Kharaj During the Islamic Rule*, 18 SHARIAH J. 629, 651 (2010).

209. *See id.*

210. YAHYA IBN ADAM, KITAB AL-KHARAJ 15 (1896) (on file with author).

211. *Sadaqah and Waqf in Islam*, GLOBAL RESOURCE GIVING, <http://www.globalgivingresource.com/blog/sadaqah-waqf-in-islam/> (last visited Apr. 13, 2018); THE HOLY QURAN 9:103 ("Take, [O, Muhammad], from their wealth a charity by which you purify them and cause them increase, and invoke [Allah's

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are not religious rights; Muslims voluntarily give them to increase their favor with Allah.²¹² *Waqf* has only one restriction: a person cannot distribute more than one third of his/her wealth after his/her death.²¹³ The Prophet encouraged his followers to perform this type of charity,²¹⁴ because a person's deeds end at his death, except a *Sadaqat* in the form of *Waqf*.²¹⁵ Deeds known to benefit people after they die are: beneficial knowledge that continually benefit the people,²¹⁶ a *Waqf*, and a virtuous descendant who prays for his/her deceased parents.²¹⁷

The Prophet collected one type of revenue from non-Muslims: *Jizyah*.²¹⁸ The rate of *Jizyah* is fixed at a much lower rate than that of Muslims, making it a privilege for non-Muslims in Islamic countries.²¹⁹ Forcing non-Muslims to pay the same rate as Muslims may raise questions of Muslims enticing non-Muslims to convert to Islam.²²⁰ This distinction between the two tax rates is, therefore, based on the freedom of religion in Islam.²²¹

The distinction in the names and the amount between *Sadaqat* and *Jizyah* reflect a divine nature. When Muslims pay their financial duties

blessings] upon them. Indeed, your invocations are reassurance for them. And Allah is Hearing and Knowing.”).

212. THE HOLY QURAN 64:17 (“If you loan Allah a goodly loan, He will multiply it for you and forgive you. And Allah is Most Appreciative and Forbearing.”).

213. *Jamî at-Tirmidhi* 10:11.

214. See *Abu Hurairah* 13:1383 (“When a man dies, his deeds come to an end except for three things: Sadaqah Jariyah (ceaseless charity); a knowledge which is beneficial, or a virtuous descendant who prays for him (for the deceased).”).

215. *Id.*

216. *Id.*

217. *Id.*

218. THE HOLY QURAN 9:29:

Fight those who do not believe in God (Allah) or in the Last Day and who do not consider unlawful what God (Allah) and His Messenger have made unlawful and who do not adopt the religion of truth from those who were given the Scripture - [fight] until they give the jizyah willingly while they are humbled.

219. Kamran Hashemi, *The Right of Minorities to Identity and the Challenge of non-Discrimination: A Study on the Effect of Traditional Muslims Dhimmah on Current State Practices*, 13 INT’L J. ON MINORITY & GROUP RTS. 1, 15 (2006).

220. *Id.* at 14.

221. *Id.*

to the state, God rewards them for complying with his commands.²²² They do not expect, in principle, to obtain a service from the government in return for their financial duties.²²³ Conversely, non-Muslims pay their financial duties (*Jizyah*) in return for services from the Islamic government, not from God.²²⁴ Hence, the distinction in the name serves a religious purpose, rather than being used for discriminatory purposes, as some writers argue.²²⁵

c. The Difference between Zakat and the Tax Systems

There are six differences between the *Zakat* and the tax systems. First, there is no coercion in imposing *Zakat*,²²⁶ as opposed to other governments that impose tax payments on their citizens.²²⁷ Second, women, minors, elders, and special needs individuals are exempt from paying *Zakat*.²²⁸ Third, *Zakat* is a religious right to Muslims'

222. THE HOLY QURAN 76:8–11.

223. *See id.*

224. Hashemi, *supra* note 219, at 15; THE HOLY QURAN 9:29 (“Fight those who do not believe in Allah or in the Last Day and who do not consider unlawful what Allah and His Messenger have made unlawful and who do not adopt the religion of truth from those who were given the Scripture—[fight] until they give the jizyah willingly while they are humbled.”).

225. M.K. Nawaz, *The Concept of Human Rights in Islamic Law*, 11 HOW. L.J. 325, 327 (1965); *see also* Daveed Gartenstein-Ross, *No Other Gods Before Me: Spheres of Influence in the Relationship Between Christianity and Islam*, 2 DENV. J. INT’L L. & POL’Y 223, 249 (2005).

226. Nicolas Prodromou Aghnides, *Mohammedan Theories of Finance, with an Introduction to Mohammedan Law, and a Bibliography 202–03* (1916) (unpublished Ph.D. dissertation, Columbia University).

227. Randall G. Holcombe, *Consent or Coercion? A Critical Analysis of the Constitutional Contract*, in CONSTITUTIONAL MYTHOLOGIES NEW PERSPECTIVES ON CONTROLLING THE STATE 9–11 (Alain Marciano ed., 2011).

228. *See generally* THE HOLY QURAN 9:91 (“There is not upon the weak or upon the ill or upon those who do not find anything to spend any discomfort when they are sincere to Allah and His Messenger. There is not upon the doers of good any cause [for blame]. And Allah is Forgiving and Merciful.”).

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revenue,²²⁹ while taxes are a state right to citizens' money.²³⁰ Fourth, *Zakat* aims to primarily eliminate poverty, and offer services,²³¹ while taxes only offers services to the public in general.²³² Fifth, *Zakat* is calculated based on individual annual savings,²³³ while taxes are based on an individual's income.²³⁴ Sixth, *Zakat* rates range from 2.5% to 10%,²³⁵ while tax rates range from 20% to 60% of total income.²³⁶

3. *Partial Foreign Affairs Authority*

a. *Foreign Affairs Limits*

Foreign affairs during the Prophet's time consisted of two forms. The first was sending messengers to rulers, kings, and emperors to invite them to embrace Islam. For example, after residing in Madinah, the Prophet sent six messengers to Hercules (the Byzantine emperor), Negus (the King of Abyssinia), Chosroes II (the emperor of the Persian Empire), Muqawqis (the Ruler of Egypt), Gassani (the Governor of

229. The Quran makes a clear connection between doing the prayers and paying the Zakat. The Quran states, "Who establish prayer and give zakah, and of the Hereafter they are certain [in faith]." THE HOLY QURAN 27:3; The Quran also states, "Who establish prayer and give zakah, and they, of the Hereafter, are certain [in faith]." *Id.* at 31:4. Quran Surah Al-Anbya states, "And We made them leaders guiding by Our Command. And We inspired to them the doing of good deeds, establishment of prayer, and giving of the Zakat; and they were worshippers of Us." *Id.* at 21:73. Quran Surat Al-Ma'idah which states, "Your ally is none but Allah and [therefore] His Messenger and those who have believed—those who establish prayer and give zakah, and they bow [in worship]." *Id.* at 5:55.

230. Robert W. McGee, *Duty to Whom?*, in THE ETHICS OF TAX EVASION PERSPECTIVES IN THEORY AND PRACTICE 48 (Robert W. McGee ed., 2012).

231. Aghnides, *supra* note 226, at 527.

232. Keith Snavelly, *Government Policies to Reduce Tax Evasion: Coerced Behavior Versus Services and Value Development*, 23 POL'Y SCI. 57, 64 (1990).

233. Samiul Hasan, *Islam, Property and Philanthropy Ethical and Philosophical Foundation and Cultural Influence*, in HUMAN SECURITY AND PHILANTHROPY: ISLAMIC PERSPECTIVES AND MUSLIM MAJORITY COUNTRY PRACTICES 65 (Samiul Hasan ed., 2015).

234. JEFFREY A. DUBIN, THE CAUSES AND CONSEQUENCES OF INCOME TAX NONCOMPLIANCE 5 (2012).

235. Hasan, *supra* note 233.

236. *Individual Income Tax Rates Table*, KPMG, <https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/individual-income-tax-rates-table.html> (last visited Mar. 1, 2018).

Syria), and Al-Mundhir bin Sawa (the Ruler of Bahrain).²³⁷ Their responses to the Prophet's call varied between positive and negative. Negus, the King of Abyssinia, had the most positive response. Negus was the first to offer Muslims refuge and protection²³⁸ when the infidels persecuted them.²³⁹ Muqawqis, the Ruler of Egypt, response was also positive; he sent gifts to the Prophet following the invitation.²⁴⁰ The most negative answer came from Chosroes of Persia,²⁴¹ who tore the Prophet's message into pieces.²⁴² Hercules and Gassani received the message with respect.²⁴³

The second form of the Prophet's foreign affairs authority involved signing peace treaties with non-Muslims.²⁴⁴ The Prophet signed many treaties, three of which are the most renowned.²⁴⁵ The first treaty was with the Christians of Najran.²⁴⁶ After the Christians and the Prophet concluded their theological debate, they signed a treaty of religious freedom.²⁴⁷ The second treaty was with the Quraysh of Mecca, Treaty of *Al Hdaybiyah*, which lasted only a few years.²⁴⁸ The infidels

237. A. Zahoor & Z. Haq, *Prophet Muhammad's Treaty with Jews (622 C.E.)*, CYBERISTAN, <http://www.cyberistan.org/islamic/treaty22.html> (last visited May 23, 2018).

238. Liaquat Ali Khan, *Protection of Languages and Self-Expressions Under Islamic Law*, 19 J. TRANSNAT'L L. & POL'Y 61, 87 (2009).

239. *Id.*

240. A. Zahoor & Z. Haq, *Muqawqis and the Prophet (628 CE)*, CYBERISTAN, <http://www.cyberistan.org/islamic/muqawqis.html> (last visited Apr. 12, 2018).

241. Nowar Zahid & Rohimi Shapiee, *Customs as a Source of Siyar and International Law: A Comparison of Qualifying Criteria*, 8 INT'L J. CIV. SOC'Y L. 36, 54 (2010).

242. *Id.*

243. *Id.*

244. Aibek S. Ahmedov, *Origins of Law of Religious Minorities in Islam: Evolution of Concept of Dhimmi as Portrayed in Early Sources*, 3 J. ISLAMIC ST. PRAC. INT'L L. 23, 28 (2007).

245. *Id.*

246. *Id.* at 29.

247. *Id.* at 28.

248. John Hursh, *The Role of Culture in the Creation of Islamic Law*, 84 IND. L.J. 1401, 1410 (2009).

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violated the conditions of the truce and killed Muslims.²⁴⁹ This led the Prophet to invade Mecca, the ex-capital of the infidels.²⁵⁰ The third treaty was with the Jews who resided in Medina before the Prophet's arrival.²⁵¹ The treaty was mainly one of mutual defense and peaceful cooperation. It aimed to restrict the Jews from forming alliances with groups who would willingly transgress against Muslims.²⁵² The Jews violated this treaty,²⁵³ when they helped the infidels against the Prophet in the Battle of *Khandaq*.²⁵⁴

b. Islamic Foreign Affairs and Contemporary Foreign Affairs

The difference between the Prophet's foreign affairs and the state's foreign affairs is that the Prophet did not have permanent ambassadors residing in other countries.²⁵⁵ Unlike the state, the Prophet did not derive any personal gain or interest for himself or his people.²⁵⁶ He did not wish to establish political, commercial, or social relationships with other nations.²⁵⁷ He sought to invite people to embrace Islam (kings/emperors of all other nations).²⁵⁸ He sent messengers to deliver the Islamic message, and called on other leaders to embrace Islam.²⁵⁹

249. *Important Events: The Conquest of Mecca*, INSIDE ISLAM, <https://insideislam.wisc.edu/2012/04/important-events-the-conquest-of-mecca/> (last visited on Apr. 13, 2018).

250. *Id.*

251. Zahoor & Haq, *supra* note 237.

252. *Id.*

253. PHILIP KHURI HITT, ORIGINS OF ISLAMIC STATE 40 (Faculty of Pol. Sci. of Colum. U. ed., 1919).

254. Ulvi Karagedik, *The Sunna of Fighting: Background, Dimensions, Scope, and Consequences*, in RELIGION AND VIOLENCE MUSLIM AND CHRISTIAN THEOLOGICAL AND PEDAGOGICAL REFLECTIONS 163, 169 (Ednan Aslan & Marcia Hermansen eds., 2018).

255. Zahid & Shapiee, *supra* note 241.

256. *See generally* Ahlul Bayt Digital Islamic Library Project, *Hercules and Islam*, AL-ISLAM, <https://www.al-islam.org/islamic-stories/hercules-and-islam> (last visited Mar. 1, 2018).

257. *Id.*

258. *Id.*

259. *Id.*

Moreover, setting up permanent conveyors would have cost the Muslims, and their treasury, dearly.²⁶⁰ The revenue collected from *Zakat* had to be spent primarily to help society according to God's commands; and foreign representation was not listed among these commands.²⁶¹ Thus, permanent embassies in other nations were not part of the Prophet's duties/jobs.

C. Legal Standing of the Prophet's Successors

Some argue, "[I]t is fairly clear that early *Caliphs*, including the Umayyad, considered themselves the deputies of God on earth, and thus looked to the Quran as a source, from which they could draw their legal decisions."²⁶² However, this opinion is considered a stark misunderstanding of the legal and historical meaning of the term "*Caliph*." The word *Caliph* has two meanings. The first meaning is spiritual head of Islam.²⁶³ The second means successor of the Prophet.²⁶⁴ The meaning changes according to the time and the person it is attached to.²⁶⁵ Hence, there are discrepancies between the meaning of *Caliph* during the first four Islamic rulers Abu Bakr, Omar, Othman, and Ali, and the meaning of *Caliph* during the Umayyad era.²⁶⁶

The first four Islamic leaders did not consider themselves "the deputies of God on earth,"²⁶⁷ but the successors of the Prophet.²⁶⁸ After the death of the Prophet, he did not name anyone as his successor.²⁶⁹ The question arose among Muslims about who would succeed the

260. *Supra* Discussion Part.I.B.3.a.

261. Anwar & Saputra, *supra* note 119, at 71.

262. WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE SYSTEMS OF ASIA AND AFRICA* 320 (2d ed. 2006).

263. *Definition of Caliph*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/caliph> (last visited Mar. 15, 2018).

264. *Id.*

265. ABU AL-HASSAN ALI MOHAMED HABIB AL-BASRI, *ALKAM AL-SULTANYAH WA-AL-WALAYAT AL-DEYNAYAH* 38 (on file with author).

266. *Id.*

267. *Ibn Hesham*, *supra* note 55, at 321.

268. *See* AL-BASRI, *supra* note 265.

269. WILFERD MADELUNG, *THE SUCCESSION TO MUHAMMAD: A STUDY OF THE EARLY CALIPHATE* 54 (1997).

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Prophet, and what his title would be.²⁷⁰ The Prophet did not designate anyone as his successor, as he left it to the Muslim community to decide its own.²⁷¹ The Muslims met at *Saqifah bani Sa'idah* to decide who would follow in the footsteps of the Prophet.²⁷² After a long debate, they chose Abu Bakr, but did not know what title to give him.²⁷³ Therefore, they called him the successor of the Messenger of God (*Caliph*).²⁷⁴ In Caliph Abu Bakr's first speech, he stated he was the successor of the Prophet, but he did not consider himself above other Muslims.²⁷⁵

The same question was also raised during Abu Bakr's time. In his final days, Abu Bakr felt his death was near.²⁷⁶ He met with his fellow Muslims and asked them to choose someone to be their next leader.²⁷⁷ His hope was that Muslims would not disagree if they chose their leader during his lifetime.²⁷⁸ However, the Muslims delegated the authority to choose whomever he thought best to succeed him.²⁷⁹ After long deliberations with his friends, he decided to appoint Omar ibn Al-Khatab.²⁸⁰ After Abu Bakr's death, a dispute arose about whether to call Omar ibn Al-Khatab the successor of the successor of the Messenger of God (*Caliphate-Caliphate Rasul Allah*), or the Commander of the Faithful (*Amir al-Mu'minin*).²⁸¹ The decision was finally made to give him the latter title, *Amir al-Mu'minin*.²⁸²

The following successors, *Amir al-Mu'minin* Othman ibn Affan and Ali Ibn Abi-Talib, took the same title as Omar.²⁸³ The Prophet

270. *Id.*

271. HARRY S. NEALE, *JIHAD IN PREMODERN SUFI WRITINGS* 42 (2017).

272. AL-DAWOODY, *supra* note 184, at 147.

273. *Id.*

274. *Id.*

275. *Id.*

276. ABU FARJ ABDEL RAHMAN ABN EL JAWZI, *MANAQIB AMIR EL MO'MENIEN OMER IBN EL KATAB* 47 (on file with author) (trans. by author).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Sunan Abi Dawud* 42:52.

expected caliphate of Prophecy would end after thirty years.²⁸⁴ This expectation came true when the fourth *Amir al-Mu'minin* Ali Ibn Abi-Talib was assassinated thirty years after the Prophet's death.²⁸⁵ After his assassination, the entire Islamic government became corrupt.²⁸⁶

During the Umayyad era, the word "*Calipha*" changed significantly. The new meaning of Caliph was the deputy of God on earth,²⁸⁷ rather than the successor of the Prophet. Moawia ibn Abi-Sofian, the founder of the Umayyad dynasty, succeeded Ali ibn Abi-Talib after the Great Muslims' Civil War (656-661 A.D.).²⁸⁸ Mua'wiya Ibn Abi Soufiane transformed the Muslim ruler from an equal of the people into a monarch with absolute rights. He abolished the traditions of the Prophet and his four successors. In Mua'wiya Ibn Abi Soufiane's first speech, he stated "the Land is for God, and I am the Successor of God, what I take from the money of God is for me, and what I left was permissible to me."²⁸⁹ Nearly all Muslim scholars disagree with his statement.²⁹⁰

Before his death, Mua'wiya Ibn Abi Soufiane handed down the Muslim government to his son Yazid Ibn Mua'wiya Ibn Abi Soufiane. Mua'wiya Ibn Abi Soufiane had yet again gone against the traditions of Islamic government. The Prophet and his followers had never handed down Islamic rule to their families. The Prophet entrusted Muslims, especially Muslim jurists²⁹¹ to determine the suitable form of government, based on their own understanding of the Quran and the

284. *Id.*

285. Mohamed Emarah, *Ya'rafun 'walakan yathyalun, in AL-A'MANYAH HEYA AL-HAL: MEN AJL MOWATNAH AL-HAQAH WA-AL-SALAM ALIJTMA'I 140* (Farouk al-Qadi ed., 2d ed. 2014) (the first great Muslim Civil War occurred between the Ali Ibn Abi Talib and Mouawiya ibn abi Soufiane. The later denied the authority of the Ali as Amir al-Mu'minin "Commander of the Faithful." The Civil War took place for four years until the assassination of Ali Ibn Abi Talib. Mouawiya was later declared as the following Amir al-Mu'minin. However, he turned to Monarch system rather than Shura).

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. THE HOLY QURAN 16:43 ("And We sent not before you except men to whom We revealed [our message]. So ask the people of the knowledge if you do not know.").

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Prophet's tradition.²⁹² The Quran makes it clear that God made all humans his successors on earth.²⁹³ Mua'wiya Ibn Abi Soufiane, therefore, changed the ruling system from *Shura* (consultation and public participation) to a theocratic regime.²⁹⁴

II. (MAL)PRACTICE OF SOME CONTEMPORARY ISLAMIC GOVERNMENTS

There is a connection between Islam and authoritarianism and totalitarianism. This connection is drawn from the Islamic countries' governments' application of power within their regimes. More than fifty-seven States around the globe identify as Islamic.²⁹⁵ Each State has its own understanding of Islamic governance, basing governmental practices on their understanding of modern laws and Islamic principles. Turkey, Saudi Arabia, Egypt, and Morocco are four current examples of countries with a Muslim majority population. Even though these countries share the same religion—some share the same language and culture—they differ in their application of Islamic principles. These regimes, however, share a common aspect: they practice totalitarian or authoritarian governments.

A. Turkey: Secularism and Islamic Authoritarianism

The current Turkish regime is using Islam to strengthen the new authoritarian government.²⁹⁶ While Turkey struggles between secularism and religious fundamentalism, the regime is using Islam to achieve its goals of religious fundamentalism.²⁹⁷ A recently failed

292. *Id.*

293. *Id.* at 6:165. (“And it is He who has made you successors upon the earth and has raised some of you above others in degrees [of rank] that He may try you through what He has given you. Indeed, your Lord is swift in penalty; but indeed, He is Forgiving and Merciful.”).

294. *Id.*

295. Toni Johnson, *The Organization of the Islamic Conference*, COUNCIL ON FOREIGN REL., (June 29, 2010), <https://www.cfr.org/backgrounder/organization-islamic-conference>.

296. PELIN AYAN MUSIL, *AUTHORITARIAN PARTY STRUCTURES AND DEMOCRATIC POLITICAL SETTING IN TURKEY* 48–50 (2011).

297. Elliot Ackerman, *Ataturk Versus Erdogan: Turkey's Long Struggle*, NEW YORKER (July 16, 2016), <http://www.newyorker.com/news/news-desk/ataturk-versus-erdogan-turkeys-long-struggle>.

military coup in Turkey fortified the regime's control over the military, police, and judiciary.²⁹⁸ While the military and the police were originally part of the executive's authority, control over the judiciary is a drastic step towards the new Turkish authoritarianist government.²⁹⁹

The Turkish Constitution purports to be based on the principal of secularism.³⁰⁰ It bans any religious interference with state affairs. However, it gives the state the right to regulate the religion.³⁰¹ In practice, the principle of separation of church and state has been applied selectively in Turkey.³⁰² Despite giving the state the right to orchestrate affairs of religion, the Constitution does not ban religion from interfering in the government.³⁰³ Consequently, this inadequate form of secularism gives a layaway to Islamic government to win the Turkish government.

The permission of the secular principle to interfere and regulate Islamic practices and rituals was incompatible with the principle of the separation of church and state.³⁰⁴ The Turkish government has used secular principles to limit its citizens' freedom to choose a religion.³⁰⁵ The Constitution sought to ensure a secular state would oversee political parties;³⁰⁶ however, Islamic parties found loopholes in a flawed system. During his term, as Prime Minister of Turkey, Recep Tayyip Erdogan declared himself to be secular,³⁰⁷ but he also said that secularism is not an alternative to religion.³⁰⁸ Erdogan's statement is not compatible with secularism.

298. *Id.*

299. *Id.*

300. CONSTITUTION OF THE REPUBLIC OF TURKEY Oct. 18, 1982, Preamble.

301. *See id.*

302. THIJL SUNIER & NICO LANDMAN, TRANSNATIONAL TURKISH ISLAM: SHIFTING GEOGRAPHIES OF RELIGIOUS ACTIVISM AND COMMUNITY BUILDING IN TURKEY AND EUROPE 21 (2015).

303. CONSTITUTION OF THE REPUBLIC OF TURKEY Oct. 18, 1982, art. 136.

304. Hakan Olgun, *Religion-State Relations in Turkey, the Prospect of European Union Membership and the Lutheran Doctrine of the Two Kingdoms*, 33 RELIGION, STATE & SOC. 339 (2005).

305. *Id.*

306. CONSTITUTION OF THE REPUBLIC OF TURKEY Oct. 18, 1982, art. 68.

307. Ahmet Kuru, *Secularism in Turkey: Myths and Realities*, 10 INSIGHT TURKEY 101, 103 (2008).

308. *Id.*

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The Turkish judiciary has struggled to balance the differing ideals of Islam, secularism, and authoritarianism.³⁰⁹ The judiciary's goal of protecting individuals has been replaced by the executive's initiative to protect government officials.³¹⁰ The Turkish judiciary is heavily involved in the social and political sphere, thus creating a "judicialization" of politics.³¹¹

Contemporary Turkish judges and prosecutors believe—or are forced to believe—their roles are not to deliver justice, but rather, to protect the state.³¹² The Turkish judiciary functions in two main ways: (1) intervening in the political sphere in a way that pleases the current authoritarian regime, and (2) helping to oppress those who oppose the regime.³¹³ In 2015, two judges were detained and arrested for issuing a judgment that did not meet the regime's approval.³¹⁴ The judiciary maintains authoritarian rule over Turkey.³¹⁵

The Turkish Supreme Constitutional Court is heavily involved in politics.³¹⁶ The Court itself is an apolitical body; however, the Court takes steps to limit political parties.³¹⁷ The Court, established in 1961, has taken several steps against the reigning regime to limit its unconditional power.³¹⁸ The President of the Court has issued several statements against the formation of political parties to avoid

309. Zuhtu Arslan, *Reluctantly Sailing towards Political Liberalism: The Political Role of the Judiciary, in TURKEY, FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* 220 (Terence Halliday, Lucien Karpik & Malcolm Feeley eds., 2007).

310. *Id.*

311. *Id.*

312. FATMA MUCA GOCOK, *DENIAL OF VIOLENCE: OTTOMAN PAST, TURKISH PRESET AND COLLECTIVE VIOLENCE AGAINST THE ARMENIANS, 1789-2009* 404 (2014).

313. Michael Gunter, *Turkey: the Politics of A New Democracy Constitution*, 19 *MIDDLE E. POL.* 119, 122 (2012).

314. The two judges have ruled to release of media members and officers. *See TooLateToDebate, Jurists: Arrest of Judges Leaves Black Mark on Turkish Judiciary*, YOUTUBE (May 4, 2015) <https://www.youtube.com/watch?v=i1mFFwUBXQE>.

315. *Id.*

316. Zuhtu Arslan, *Conflicting Paradigms: Political Rights in the Turkish Constitutional Court*, 11 *CRITICAL MIDDLE E. STUD.* 9, 15 (2002).

317. *Id.*

318. *Id.*

confrontation with the ruling party.³¹⁹ The Court has dissolved many political parties.³²⁰ For example, in 1991, the Court dissolved the United Communist Party of Turkey and the Socialist Party a year later.³²¹ In 1994, it dissolved the Freedom and Democracy Party, and in 2001, the Virtue Party.³²² Additionally, in 2008, the Court banned several political figures of the Justice and Development Party AKP from politics.³²³ As a result, the Court became part of the political dilemma in Turkey.

B. Saudi Arabia: Totalitarian Islamic Ideology

Saudi Arabia's Constitution is based on Islamic *Sharia*/jurisprudence, and the principle of *Shura* (public consultation).³²⁴ An examination of the Saudi government, however, reveals the government lacks Islamic principles. The Saudi Arabian government is an absolute monarchy.³²⁵ The King is the prime minister.³²⁶ He is the supreme commander of the armed forces,³²⁷ with absolute powers to declare a state of emergency, mobilization, and war.³²⁸ The King also has complete power to impeach members of the *Shura* (legislative) Council.³²⁹ According to the Constitution, the King's authority is derived from the Quran and the Prophet's traditions.³³⁰ Hence, no one can dispute the King's authority.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.* at 16.

323. Fevzi Biligin, *The Turkish Constitutional Court's Struggle for Democracy and the Rule of Law*, RETHINK INST. (Oct. 2014), <http://www.rethinkinstitute.org/turkish-constitutional-courts-struggle-democracy-rule-law/>.

324. CONSTITUTION OF SAUDI ARABIA Mar. 1992, art. 1. (Islamic *Sharia* is all rules related to Islamic jurisprudence or legal theory. As for *Shura* principle, it is the Islamic principle of public consultation).

325. *Id.*

326. *Id.* art. 56.

327. *Id.* art. 60.

328. *Id.* art. 61.

329. *Id.* art. 68.

330. *Id.* arts. 1, 6.

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While the Prophet enjoyed very limited power over military forces, tax, and foreign representation, the King of Saudi Arabia controls them unapologetically and without inhibition.³³¹ Saudi Arabia's military is the fourth highest military-spending force in the world after the United States, China, and Russia.³³² The King's absolute control over the military is further strengthened by his intervention power. This intervention power takes on two forms: direct and indirect intervention. Direct intervention has occurred to sustain the status quo of political regimes in Bahrain and Yemen. In Bahrain, Saudi Arabia sent its National Guard forces, estimated to be 5,000 military personnel to aid the regime against the popular unrest.³³³ In Yemen, the situation was more complicated, because Yemen had a long history of civil wars.³³⁴ Saudi Arabia formulated a Saudi-led multinational coalition.³³⁵ Hence, the Saudi Arabian army became part of the civil war in Yemen.³³⁶ As for indirect intervention, Saudi Arabia played a vital role in Syria and Libya's internal conflicts by financing insurgents.³³⁷ Saudi Arabia was met with unprecedented failure when it applied the same strategies used in Bahrain and Yemen.

331. *Id.*

332. Niall McCarthy, *The Top 15 Countries for Military Expenditure in 2016*, FORBES BUS. (Apr. 24, 2017), <https://www.forbes.com/sites/niallmccarthy/2017/04/24/the-top-15-countries-for-military-expenditure-in-2016-infographic/#b51373543f32>.

333. Amy Austin Holmes, *The Military intervention that the World Forgot: Saudi and Emirati Forces Continue to Police Bahrain*, ALJAZEERA AM. (Mar. 29, 2014), <http://america.aljazeera.com/opinions/2014/3/bahrain-uprisinginterventionsaudiaraemiairates.html>.

334. Asher Aviad Orkaby, *The International History of Yemen Civil War, 1962-1968* (Apr. 2014) (unpublished Ph.D. dissertation, Harvard University) (on file with the Digital Access to Scholarship at Harvard DASH).

335. Jon Gambrell, *Here are the members of the Saudi-led Coalition in Yemen and What they're Contributing*, BUS. INSIDER (Mar. 30, 2015), <http://www.businessinsider.com/members-of-saudi-led-coalition-in-yemen-their-contributions-2015-3>.

336. *Yemen Crisis: Who is Fighting Whom?*, BBC NEWS (Jan. 30, 2018), <http://www.bbc.com/news/world-middle-east-29319423>.

337. C.J. Chivers & Eric Schmitt, *Saudis Step-up Help for Rebels in Syria With Croatian Arms*, N.Y. TIMES, Feb. 25, 2013, at A1. *See also Who is Supplying Weapons to the Warring Sides in Syria*, BBC NEWS (June 14, 2013), <http://www.bbc.com/news/world-middle-east-22906965>.

The foreign affairs policy of Saudi Arabia is geared towards protecting its regional interests, resulting in an ambivalent foreign policy. On one hand, Saudi Arabia intervened in Yemen to protect the legitimacy of Hadi's government in the wake of Saleh's government.³³⁸ It used military forces to protect its interests and policies in Yemen. On the other hand, Saudi Arabia financed the military coup of 2013 in Egypt, against the legitimate ex-President Morsi.³³⁹ It believed that the military regime in Egypt, rather than the Muslim Brotherhood regime, would better suit its interests in Egypt.³⁴⁰ Saudi Arabia offered Egypt plenty of aid in the form of cash and oil-industry commodities.³⁴¹ The Saudi policymakers believed that this was the way to buy the Egyptian regime's loyalty. Nonetheless, Saudi Arabia immediately stopped all kinds of aid to Egypt once it realized that the Egyptian regime would not abide by its regional policies.³⁴²

The taxation system of Saudi Arabia is based on *Zakat*. However, after the recent collapse of oil prices, Saudi Arabia imposed new taxes on its citizens and resident foreigners.³⁴³ One new tax is the expats' family tax: each foreign worker is now obliged to pay taxes for each

338. Mehmood Hussain, *Saudi Intervention in Yemen and its Impact on Saudi's Economy*, FOREIGN POL'Y NEWS, <http://foreignpolicynews.org/2016/12/11/saudi-intervention-yemen-impact-saudis-economy/> (last visited Mar. 1, 2018).

339. David Hearst, *Why Saudi Arabia is Taking a Risk by Backing the Egyptian Coup*, THE GUARDIAN (Aug. 20, 2013), <https://www.theguardian.com/commentisfree/2013/aug/20/saudi-arabia-coup-egypt>.

340. Rod Nordland, *Saudi Arabia Promises to Aid Egypt's Regime*, N.Y. TIMES, Aug. 20, 2013, at A1.

341. *Saudi Arabia Approves \$5 Billion aid package to Egypt*, AL ARABIYA ENG., <http://english.alarabiya.net/en/business/economy/2013/07/09/Saudi-Arabia-approves-5-billion-aid-package-to-Egypt.html> (last visited Mar. 1, 2018).

342. Lin Noueihed & Asma Al-Sharif, *Fuel Aid Halt Suggests Deeper Saudi Egyptian Rift*, REUTERS (Oct. 12, 2016), <http://www.reuters.com/article/us-egypt-saudi-analysis/fuel-aid-halt-suggests-deeper-saudi-egyptian-rift-idUSKBN12E1N8>; see also *Saudi Arabia halts \$23 bn oil Aid deal to Egypt indefinitely*, MIDDLE E. (Nov. 7, 2016), <http://www.middleeasteye.net/news/egypt-strike-new-oil-deals-iran-report-124526470>.

343. Liam Denning, *Wanted in Saudi Arabia: An Extremely Careful Driver*, BLOOMBERG BUSINESSWEEK (June 27, 2017), <https://www.bloomberg.com/news/articles/2017-06-27/saudi-arabia-and-oil-prices-careful-steering-needed>.

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member of his/her family.³⁴⁴ This tax is completely foreign to the Prophet's Islamic taxation system—which was limited to *Zakat*.³⁴⁵ The King's willingness to violate *Zakat* proves Saudi Arabia's absolute monarchy does not follow Islamic rule. Nonetheless, Saudi Arabia immediately stopped all kinds of aid to Egypt once it realized that the Egyptian regime would not follow and abide by its regional policies.³⁴⁶

C. Egypt: Islam and Militant Government

Egypt is an Islamic country.³⁴⁷ However, the ruling of the country's general affairs is not Islamic. Islam does not supersede the military regime in the country. President Anwar Al-Sadat started the constitutional nature of Islam in Egypt.³⁴⁸ The Islamists supported President Al-Sadat in his decision and expressed their political agreement in their campaigns.³⁴⁹ In return, he included an article in the Constitution to consider Islamic *Sharia* as the main source of legislation.³⁵⁰

In contemporary Egyptian history, the army dominates the political, social, and legal life in Egypt.³⁵¹ During the 1800s, Mohamed Ali Pasha founded modern Egypt.³⁵² He was Albanian and an officer in the Ottoman Army.³⁵³ After the French colonization of Egypt ended, the Egyptian jurists formed one of the early *Shura* councils and elected

344. Saudi Arabia Introduces New Tax for Expatriates, AL ARABIYA ENG. (July 3, 2017), <http://english.alarabiya.net/en/business/economy/2017/07/03/Saudi-Arabia-introduces-new-tax-for-expatriates.html>.

345. *Supra* Discussion Part.II.B.2.

346. Noueihed & Al-Sharif, *supra* note 342.

347. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Jan. 18, 2014, art. 2.

348. Clark B. Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 37 COLUM. J. TRANSNAT'L L. 81, 81–83 (1998-1999).

349. *Id.*

350. *Id.*

351. Michele Dunne & Amr Hamzawy, *Egypt's Secular Political Parties: A Struggle for Identity and Independence*, CARNEGIE ENDOWMENT INT'L PEACE (Mar. 31, 2017), <http://carnegieendowment.org/2017/03/31/egypt-s-secular-political-parties-struggle-for-identity-and-independence-pub-68482>.

352. ALI COSKUN TUNCER, SOVEREIGN DEBT AND INTERNATIONAL FINANCIAL CONTROL THE MIDDLE EAST AND THE BALKANS, 1870-1914 30–31 (2015).

353. *Id.*

Mohamed Ali to be the *Amir*.³⁵⁴ In a massacre known as the Massacre of Mamelukes at the Cairo Citadel, Ali killed all the senior officers in the Egyptian army who opposed him.³⁵⁵ He then led a war against the Ottomans to secure Egypt as his own property.³⁵⁶ This war spelled the end of him—and his dynasty—as a recognized ruler of Egypt.³⁵⁷ Ali's dynasty ruled Egypt until 1952.³⁵⁸

In 1952, the Egyptian military started a military coup against King Farouk, the great-grandson of Mohamed Ali and declared Egypt a republic. For the next 59 years almost every leader was a military officer: Mohamed Naguib (1952-1953),³⁵⁹ Gamal Abdel-Nasser (1953-1970),³⁶⁰ Anwar Al-Sadat (1970-1981),³⁶¹ and Mohamed Hosni Mubarak (1981-2011)³⁶² There were very few exceptions to the army officer rule, such as Supreme Court Chief Justice Judge Adly Mansour (2013-2014)³⁶³ and Professor Sofi Abu Talib (1980-1981).³⁶⁴ However, the most important exception occurred after the success of the 2011 Revolution.³⁶⁵ In 2012, Egypt had its first civilian president, who was a professor of engineering.³⁶⁶ His ascension to power lasted

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. Laura M. James, *Gamal Abdel Nasser*, in *MENTAL MAPS IN THE EARLY COLD WAR ERA, 1945-68* 218 (Steven Casey and Jonathan Wright eds., 2011).

360. *Id.*

361. MUSTAFA MENSRAWY, *STATE, MEMORY AND EGYPT'S VICTORY IN THE 1973 WAR RULING BY DISCOURSE* 149–55 (2017).

362. ALAA AL-DIN ARAFAT, *THE MUBARAK LEADERSHIP AND FUTURE OF DEMOCRACY IN EGYPT* 24 (2009).

363. ALAA AL-DIN ARAFAT, *EGYPT IN CRISIS THE FALL OF ISLAMISM AND PROSPECTS OF DEMOCRATIZATION* 124 (2017).

364. *Former acting President of Egypt dies in Malaysia*, REUTERS (Feb. 21, 2008), <http://www.reuters.com/article/idINIndia-32078520080221>.

365. JOSEPH J. KAMINSKI, *THE CONTEMPORARY ISLAMIC GOVERNED STATE A RECONCEPTUALIZATION* 231–33 (2017).

366. Mohamed Morsi Fast Facts, CNN LIBR. (Aug. 25, 2017), <http://edition.cnn.com/2012/12/28/world/meast/mohamed-morsy—fast-facts/index.html>.

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only for a year,³⁶⁷ before the army assumed the ruling authority once again in 2013, after a military coup against President Morsi.³⁶⁸

The 2013 military coup resulted in full domination by the military over every aspect of the government.³⁶⁹ In terms of executive authority, the current president of the republic is Field-Marshal Abdelfattah Al-Sisi.³⁷⁰ Al-Sisi was the mastermind behind the 2013 coup.³⁷¹ He was the Minister of Defense during the presidency of ex-President Mohamed Morsi.³⁷² Al-Sisi has appointed former army generals as governors.³⁷³

As for legislative authority, the Muslim Brotherhood won 48% of the 2013 parliamentary elections, while the other parties collectively won 52%.³⁷⁴ In the 2015 Parliament, the army formed a political coalition called “For the love of Egypt.”³⁷⁵ This coalition was made up

367. *Profile: Egypt’s Mohamed Morsi*, CNN NEWS (Apr. 21, 2015), <http://www.bbc.com/news/world-middle-east-18371427>.

368. Richard Spencer, *A Military Coup in All But Name: How Egypt’s Crisis Unfolded*, TELEGRAPH (July 3, 2013), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/10158641/A-military-coup-in-all-but-name-how-Egypt-s-crisis-unfolded.html>.

369. Joana Saba, *The Military and the State: The Role of the Armed Forces in Post- 30 June Egypt*, DAILY NEWS EGYPT (Sept. 27, 2014), <https://dailynewsegypt.com/2014/09/27/military-state-role-armed-forces-post-30-june-egypt/>.

370. *Id.*

371. David D. Kippatrick, *Egypt Army Outs Morsi, Suspends Charter*, N.Y. TIMES, July 3, 2013, at A1.

372. Kareem Fahim, *In Upheaval for Egypt, Morsi Forces out Military Chiefs*, N.Y. TIMES, (Aug. 12, 2012), <http://www.nytimes.com/2012/08/13/world/middleeast/egyptian-leader-ousts-military-chiefs.html?mcubz=1>.

373. *Egypt Names Six Provincial Governors, Mostly Ex-General*, REUTERS (Sept. 7, 2016), <http://www.reuters.com/article/us-egypt-governors/egypt-names-six-provincial-governors-mostly-ex-generals-idUSKCN11D285>; Sarah el-Sheikh, *Government Reshuffle Features Al-Sisi Appointment with Military Background*, DAILY NEWS EGYPT (Dec. 26, 2015), <https://dailynewsegypt.com/2015/12/26/government-reshuffle-features-al-sisi-appointments-with-military-backgrounds/>.

374. *Id.*

375. Abdullah Al-Arian, *Egypt’s Hollow Parliament*, AL-JAZEERA (Jan. 12, 2016), <https://www.aljazeera.com/indepth/opinion/2016/01/egypt-hollow-parliament-160112071640089.html>.

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of 380 members.³⁷⁶ At the time, parliament had 71 military generals, from a total of 445 members.³⁷⁷

As for the judiciary, an ongoing “judicial massacre” of judges has been taking place between the years 2014 and 2017. After the success of the 2013 military coup, many disciplinary trials took place to impeach a number of judges, who declared their opposition to the return of military rule of the government.³⁷⁸ Between 2014 and 2016, more than 200 judges were impeached.³⁷⁹ Military forces, again, have become an undisputed authority during Al-Sisi’s rule.

The military judiciary plays a vital role in the military authoritarian regime in Egypt.³⁸⁰ The military judiciary’s representatives have been members of all the constitutional assemblies since January 2011.³⁸¹ They advocate for a special status for the military judiciary in all constitutions. This is based on two reasons. First, the army advocates for exclusive jurisdiction by the military judiciary over any issues related to the army.³⁸² One of the aims of this exclusive jurisdiction is to protect army investments.³⁸³ The army owns farms, gas stations, factories, and outlet stores.³⁸⁴ Additionally, the army offers services to

376. Omar Halawa, *Meet Egypt’s New parliamentary Majority Bloc: In Support of Egypt*, ATLANTIC COUNCIL (Jan. 11, 2016), <http://www.atlanticcouncil.org/blogs/menasource/meet-egypt-s-new-parliamentary-majority-bloc-in-support-of-egypt>.

377. *Belasma’ ta’araf ‘al 71 lawa jaysh we-mokhabarat fi albarlaman al-’skari, nafazat Parlaman [By Name, You Know Seventy-One Brigades and Secretaries of Deputies in the Military]*, EGYPT WINDOW (Dec. 5, 2015), http://old.egyptwindow.net/news_Details.aspx?News_ID=90772 (Google trans.).

378. Ahmed Saliman, *37 kharqan fi mazbahat al-Qada’h fi misr*, AL-ARABY (on file with author).

379. Shams Al Din Al Hajjaji, *Clash of Titans: A Comparative Approach to Reform of Judicial Accountability in Egypt*, 41 SEATTLE U. L. REV. 1, 30 (2017).

380. ANTONI ABAT I NANET & MARK TUSHNET, *THE ARAB SPRING: AN ESSAY ON REVOLUTION AND CONSTITUTIONALISM* 242 (2015).

381. *Id.*

382. Stephan Roll, *Managing Change: How Egypt’s Military Leadership Shaped the Transformation*, 21 MEDITERRANEAN POL. 23, 23–26 (2016).

383. *Id.*

384. Shana Marshall, *The Egyptian Armed Forces and the Remaking of an Economic Empire*, CARNEGIE MIDDLE E. CTR. (Apr. 15, 2015), <http://carnegie-mec.org/2015/04/15/egyptian-armed-forces-and-remaking-of-economic-empire-pub-59726>.

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the public at a fair market price, without being subjected to the tax law.³⁸⁵ The 2014 Constitution reflects these objectives in Article 204.³⁸⁶

Second, the 2014 Constitution prohibits trials of civilians before military courts.³⁸⁷ However, the Constitution allows for a very broad exception to this rule.³⁸⁸ The exclusion includes: assault against military facilities, military barracks, or any establishments that falls under military authority.³⁸⁹ Army General Medhat Radwan, head of the Military Judiciary Authority, was asked during a television interview whether the army's facilities, such as the armed forces' clubs, military-run factory outlets, and gas stations are open to the public.³⁹⁰ He asserted there is no difference between a military facility for civilians and a military facility for the army. Both are military places.³⁹¹ He replied, "There is no difference between the soldier in these facilities, and the soldier sitting on a tank; it is not his fault that he serves in this place."³⁹² The interviewer responded with ". . . but this

385. Abigail Hauslohner, *Egypt's Military Inc. Expands its Control of the Economy*, GUARDIAN (Mar. 18, 2014), <https://www.theguardian.com/world/2014/mar/18/egypt-military-economy-power-elections>.

386. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Jan. 18, 2014, art. 204/1. Article 204/1 of Constitution of the Arab Republic of Egypt states:

The Military Judiciary is an independent judiciary that adjudicates exclusively in all crimes related to the armed forces, its officers, personnel, and their equals, and in the crimes committed by general intelligence personnel during and because of the service.

Id.

387. *Id.* art. 204/2 ("No civilian shall face trial before the Military Court").

388. *Id.* art. 204/3.

Except for crimes that represent a direct assault against military facilities, military barracks, or whatever falls under their authority; stipulated military or border zones; its equipment, vehicles, weapons, ammunition, documents, military secrets, public funds or military factories; crimes related to conscription; or crimes that represent a direct assault against its officers or personnel because of the performance of their duties.

Id.

389. *Id.*

390. Mohahkamat alskarayah elie Yatkhanak ma-a'mal albanzenat al-watanyah we-eli-mish A'gboh yeseab al-balad, YOUTUBE (Dec. 2, 2013), <https://www.youtube.com/watch?v=gp2HRVVC0QA> (Arab.)

391. *Id.*

392. *Id.*

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is a civilian activity,”³⁹³ to which he replied: “Sorry madam, it is not.”³⁹⁴

Moreover, many civilians were tried during and after the 2011 Revolution in front of military courts. More than 11,000 citizens stood trial before military courts from January 2011 to October 2014.³⁹⁵ In November 2014 alone, 820 civilians were put to trial and prosecuted before the military judiciary.³⁹⁶ In December 2014, top leaders of the Muslim Brotherhood, the political group in power before the military coup in 2014, were tried and prosecuted before military courts.³⁹⁷ Between the period of November 2014 and April 2016, 7,400 civilians were tried in military courts.³⁹⁸ The large amount of citizens being tried before military courts is evidence of the increasing military judiciary in Egypt’s political and legal life.³⁹⁹

*D. Morocco: Constitutional Monarch, or Retrieval of
Amir Al-Mu’minin*

Morocco is an Islamic country, and it follows a monarchic system.⁴⁰⁰ The 2011 Constitution of Morocco describes its ruler in two contradictory terms. The Moroccan ruler is a king, as well as a Commander of the Faith, *Amir Al-Mu’minin*.⁴⁰¹ By definition, a person cannot be a king and *Amir Al-Mu’minin* at the same time.⁴⁰² *Amir Al-*

393. *Id.*

394. *Id.*

395. *Egypt: Unprecedented Expansion of Military Courts, Decree Broaden Jurisdiction over Civilians*, HUM. RTS. WATCH (Nov. 17, 2014), <https://www.hrw.org/news/2014/11/17/egypt-unprecedented-expansion-military-courts>.

396. *Egypt: Surge of Military Trials Decree Used to Send Protesters to Flawed Courts*, HUM. RTS. WATCH (Dec. 18, 2014), <https://www.hrw.org/news/2014/12/18/egypt-surge-military-trials>.

397. *Id.*

398. *Egypt: 7,400 Civilians Tried in Military Courts: Torture, Disappearances Used to Elicit Confessions*, HUM. RTS. WATCH (Apr. 13, 2016), <https://www.hrw.org/news/2016/04/13/egypt-7400-civilians-tried-military-courts>.

399. *Id.*

400. CONSTITUTION OF KINGDOM OF MOROCCO, June 17, 2011, art. 1.

401. *Id.* art. 41.

402. M.A. SHABAN, ISLAMIC HISTORY A NEW INTERPRETATION VOL. I A.D. 600-750 (A.H.132) 37–39 (1999).

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Mu'minin is a governmental official, who has the qualification of judge (or former judge), with very limited enumerated executive authorities.⁴⁰³ *Amir Al-Mu'minin* is a term that has the historical meaning of successor to the Prophet.⁴⁰⁴ Instead of repeating the word “successor,” they replaced it with the word *Amir Al-Mu'minin*.⁴⁰⁵ It is not synonymous to the word “king” or “emperor.”

There are four major differences between the function of being a king, and that of being *Amir al-Mu'minin*. First, a king is a descendant of a royal family, who inherits the title from a blood relationship.⁴⁰⁶ *Amir Al-Mu'minin* is a person from the lay people, chosen by them to perform a certain public role.⁴⁰⁷ Second, the king can have absolute or constitutional rights.⁴⁰⁸ *Amir Al-Mu'minin*, on the other hand, has very limited authorities, as the authorities are originally drawn from the Quran or the *Sunnah*.⁴⁰⁹ Third, there are no pre-requisites, or qualifications required to be a king.⁴¹⁰ Usually, kings or presidents do not need certain qualifications⁴¹¹ to be appointed as such.⁴¹² *Amir Al-Mu'minin* is usually someone who is qualified as a judge,⁴¹³ whose main role is to ensure equality and justice among people, and to protect the state against wars. Fourth, the king gets sovereign grants, which are considered a right to the king and his family.⁴¹⁴ *Amir Al-Mu'minin* is

403. *Supra* Discussion Part.I.B.

404. *Id.*

405. *Id.*

406. HOWARD NENNER, *THE RIGHT TO BE KING: THE SUCCESSION TO THE CROWN OF ENGLAND 1603-1714*, 8 (1999).

407. *Id.*

408. GAVIN KENNEDY, *ADAM SMITH'S LOST LEGACY 78-81* (2005).

409. *Id.*

410. The Family Qualification, *THE TELEGRAPH* (Oct. 16, 2006), <http://www.telegraph.co.uk/news/uknews/1531553/The-family-qualifications.html>.

411. *Id.*

412. *Biography of HM. King Mohammed VI*, KINGDOM OF MOROCCO: MINISTRY OF CULTURE AND COMMUNICATION (2013), <http://www.maroc.ma/en/content/biography-hm-king-mohammed-vi>.

413. THE HOLY QURAN 38:26 (“O David, indeed We have made you a successor upon the earth, so judge between the people in truth and do not follow you own desires.”).

414. Kim Willsher, *Moroccans Pay 144m a year for Monarch*, *THE TELEGRAPH* (Jan. 23, 2005), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/morocco/1481846/Moroccans-pay-144m-a-year-for-monarch.html>.

an employee, who receives a modest or no salary for his public work.⁴¹⁵ Hence, these two terms are not synonymous.

Even though the King of Morocco introduced several reforms and a new Constitution, he still reserves many privileges that have the potential to jeopardize the whole political process. On the one hand, the King has the absolute right to dissolve Parliament.⁴¹⁶ He is the supreme leader of the army,⁴¹⁷ the police,⁴¹⁸ the supreme judge,⁴¹⁹ and the protector of judicial independence.⁴²⁰ The King is also the grantor of the democratic choice in Morocco.⁴²¹ Additionally, the King appoints the prime minister from the majority party⁴²² and has the power to remove any member of the cabinet at his own will.⁴²³ This gives the King a guardianship authority over the Moroccan people.

On the other hand, the King of Morocco has introduced substantial constitutional amendments.⁴²⁴ He introduced a new 2011 Constitution, which was aimed to squash protests in Arab countries. Revolutions swept the region in 2011, demanding more protection for citizens' rights and transparency in governance matters. The King initiated a constitutional reform movement, to avoid the consequences of these protests. The constitutional amendment was aimed at enhancing the role of law and legal transparency in Morocco's political and legal life. One of the most important reforms was the establishment of a new Constitutional Court. This Court introduced a new checks-and-balances mechanism between the King (government), Parliament, and the Judiciary. On the one hand, the Court can strike down any unconstitutional law. This authority is unconventional in monarchic systems.⁴²⁵ On the other hand, the appointment of judges of the new

415. *Id.*

416. CONSTITUTION OF KINGDOM OF MOROCCO, June 17, 2011, arts. 51, 104.

417. *Id.* art. 53.

418. *Id.* art. 54.

419. *Id.* art. 56.

420. *Id.* art. 57.

421. *Id.* art. 42.

422. *Id.* art. 46/1.

423. *Id.* art. 46/2.

424. *Id.*

425. In the United Kingdom, courts can issue a non-binding declaration of unconstitutionality. This means that the law is unconstitutional, yet still valid. *See,*

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Constitutional Court is jointly vested in the hands of both the King and Parliament.⁴²⁶ The King has the right to appoint only half the members of the Court, while Parliament elects the other half.⁴²⁷ In this regard, the Moroccan Constitutional Court avoids the problem of checks-and-balances that started with the newly instituted Jordanian Constitutional Court, which was established during the same period. The Jordanian Constitutional Court appointment process is solely in the King's hands.⁴²⁸

Morocco is no different from Turkey, Saudi Arabia and Egypt. Recently, the Islamist party in Morocco (Islamic Justice and Development Party) won the majority of votes in the parliamentary elections.⁴²⁹ However, there are no promises of reform, such as the tax system. Currently, tax rates have reached 15% to 35% of individual income, and corporate tax.⁴³⁰ It would also be quite impossible to reverse these tax hikes.⁴³¹ This is because the Islamists have promised the public that the party will offer more jobs,⁴³² and the Islamists are not popular among other political parties or with the King.⁴³³ It proved a very difficult process for the Islamist party to form a government.⁴³⁴

e.g., David Jenkins, *Common Law Declarations of Unconstitutionality*, 7 INT'L J. CONST. L. 183, 200 (2009).

426. CONSTITUTION OF KINGDOM OF MOROCCO, June 17, 2011, art. 130.

427. *Id.*

428. JORDAN'S CONSTITUTION OF 1952, Jan. 1, 1952, art. 61.

429. Aziz El Yaakoubi & Patrick Markey, *Moderate Moroccan Islamists win Election, Coalition Talks Seen Tough*, REUTERS (Oct. 8, 2016, 4:07 AM), <http://www.reuters.com/article/us-morocco-election-tally-idUSKCN1280EP>.

430. *See Morocco: Tax System*, SANTANDER (2017), <https://en.portal.santandertrade.com/establish-overseas/morocco/tax-system>.

431. Lahcen Achy, *Morocco and the Justice and Development Party's Economic Program*, CARNEGIE MIDDLE E. CTR. (Dec. 13, 2011), <http://carnegie-mec.org/2011/12/13/morocco-and-justice-and-development-party-s-economic-program-pub-46836>.

432. *Id.*

433. Imad Stitou, *Morocco Finally Gets New Government, but at What Cost?*, FOR-MENA (May 14, 2017), <http://formena.org/en/morocco-finally-gets-new-government-cost/>.

434. Samia Errazzouki, *Morocco King Names New Cabinet, Islamists Lose Key Post*, REUTERS (Apr. 5, 2017, 10:43 AM), <http://www.reuters.com/article/us-morocco-politics/morocco-king-names-new-cabinet-islamists-lose-key-post-idUSKBN1772E5>.

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Islamists will not be able to achieve any progress with the high opposition from other parties.⁴³⁵ Therefore, the Islamic government's limited power is not a factual issue in the case of Morocco.

III. APPLYING ISLAMIC GOVERNMENT BY JUDICIARY

A. *Mandatory Qualification of the Head of the Executive Authority*

Current democratic, authoritarian, and totalitarian regimes do not require the head of state candidate to have any requisite educational or practical experience. Democratic countries require candidates to establish their own merits and credibility directly with the public.⁴³⁶ This has, on various occasions, resulted in highly qualified and educated presidents.⁴³⁷ Former President of the United States, Barack Obama, is an example of a superb, highly educated candidate.⁴³⁸ In most cases, presidential election campaigns in the US depend mainly on the presidential candidates. The cost of the last election in 2016 came to more than \$2 billion.⁴³⁹ In authoritarian military regimes, the only qualification needed to become a president is the rank within the army, as seen in Egypt.⁴⁴⁰ In totalitarian regimes, the only qualification is the power over the state, as seen in Saudi Arabia.⁴⁴¹ Therefore, each regime has failed to establish specific educational requirements.

In Islam, a candidate vying for the position of head of state enjoys high levels of educational and practical experience. Qualifications

435. Ahmet T. Kuru, *Muslim Politics Without An "Islamic State: Can Turkey's Justice and Development Party be a Model for Arab Islamists?*, at 6, BROOKINGS DOHA CTR. (Feb. 2013), https://www.brookings.edu/wp-content/uploads/2016/06/BDC_AKP-Model_Kuru.pdf.

436. ALEXANDER S. BELENKY, UNDERSTANDING THE FUNDAMENTALS OF THE US PRESIDENTIAL ELECTION SYSTEM 139 (2012).

437. *Id.*

438. BAODONG LIU, THE ELECTION OF BARACK OBAMA: HOW HE WON 9 (2010).

439. Anu Narayanswamy, Darla Cameron & Matea Gold, *Election 2016: Money Raises as of Dec. 31*, WASH. POST (last updated Feb. 1, 2017), <https://www.washingtonpost.com/graphics/politics/2016-election/campaign-finance/>.

440. *See Saba, supra* note 369.

441. *Profile: King Salman of Saudi Arabia*, BBC NEWS (Jan. 23, 2015), <http://www.bbc.com/news/world-middle-east-30945925>.

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should equal those of a judge at the Supreme Court level. The Quran stipulates clear knowledge and practical requirements in a Muslim leader.⁴⁴² The Prophet's main task was to rule in disputes among Muslims. The first four successors of the Prophet were either judges or had the qualifications of judges. Abu Bakr was one of the Prophet's closest friends, acting as his deputy on several occasions. Omar Ibn Al-Khatab was a judge during the Abu Bakr succession period. Ali Ibn Abi Taleb was the judge of Yemen during the Prophet's time, and the Supreme Judge during the Omar Ibn Al-Khatab and Othman Ibn Affan periods. Therefore, any Muslim who is appointed as a governor or ruler should be a judge.

B. Government with Enumerated Authorities

Based on the Quran and the Prophet's traditions, unlimited powers are not part of the Islamic understanding of good governance. The head of state and government's authority shall be enumerated similar to the U.S. government authorities. The U.S. Constitution ensures that the government has enumerated authorities⁴⁴³ and created a system of checks and balances with the government.⁴⁴⁴ The President cannot lead the country single-handedly without the legislative authorities.⁴⁴⁵ The Courts also play a significant role in ensuring that neither authority

442. Quran Surat Al-Baqarah States:

Have you not considered the assembly of the Children of Israel after [the time of] Moses when they said to a prophet of theirs, "Send to us a king, and we will fight in the way of God?" He said, "Would you perhaps refrain from fighting if fighting was prescribed for you?" They said, "And why should we not fight in the cause of God when we have been driven out from our homes and from our children?" . . . And their prophet said to them, "Indeed, God has sent to you Saul as a king." They said, "How can he have kingship over us while we are more worthy of kingship than him and he has not been given any measure of wealth?" He said, "Indeed, God has chosen him over you and has increased him abundantly in knowledge and stature. And God gives His sovereignty to whom He wills. And God is all-Encompassing [in favor] and Knowing."

Surat Al-Baqarah 2:246–247.

443. U.S. CONST. art. I.

444. BOGDAN IANCY, LEGISLATIVE DELEGATION, THE EROSION OF NORMATIVE LIMITS IN MODERN CONSTITUTIONALISM 104–08 (2012).

445. *Id.*

violates the Constitution.⁴⁴⁶ In Islamic governments, authorities are limited to three forms: military power, collection of *sadaqat*, and foreign representation.

As for the military power, a permanent army is not one of the features of Islam. However, this does not mean that Muslims must refrain from establishing national armies, like Iceland, Liechtenstein, and Costa Rica.⁴⁴⁷ Armies in Islamic countries have specific aims, which are self-defense and the protection of freedom of religion. Establishing and maintaining a fully-fledged army is a service that is very costly and time-consuming, especially in times of peace. According to the US Department of Defense, the budget of military personnel for the year 2017 is \$138 billion.⁴⁴⁸ Military personnel are the second highest spending item in the budget, after the operation and maintenance of the army.⁴⁴⁹ As a result, the human factor in Islamic armies is used on a needs basis.

The modern application of the Islamic military tradition is a mixture of what several countries have currently established. Any Islamic army consists of two main components. The first is the human component, which should always be fit and ready. That said, armies in Islamic countries function part-time in times of peace, and are fully-fledged in times of war. Armies function on a needs basis. The balancing point between not having a permanent army and ready soldiers is a part-time military service. Service in the Swiss army is part-time.⁴⁵⁰ It is mandatory for men, and voluntary for women.⁴⁵¹ The

446. *Id.*

447. Kathy Gilsinan, *Countries Without Militaries*, THE ATLANTIC (Nov. 11, 2014), <https://www.theatlantic.com/international/archive/2014/11/countries-without-militaries/382606/>.

448. *Department of Defense (DOD) Releases Fiscal Year 2017 President's Budget Proposal, Press Operation*, DEP'T OF DEFENSE, (Feb. 9, 2016), <https://www.defense.gov/News/News-Releases/News-Release-View/Article/652687/department-of-defense-dod-releases-fiscal-year-2017-presidents-budget-proposal/>.

449. *Id.*

450. *Switzerland, The World Factbook*, CTR. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/sz.html>; *see also* The Associated Press, *Swiss vote to Keep mandatory Army Service*, N.Y. TIMES (Sept. 22, 2013), <http://www.nytimes.com/2013/09/23/world/europe/swiss-vote-to-keep-mandatory-army-service.html?mcubz=1>.

451. *Id.*

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aim of part-time military service is to keep citizens alert in the event of threat or potential danger that might face the country.

The second component of any army is that of technology and science. This category includes all the equipment that is necessary for war: guns, airplanes, and satellites. The main spending of the army budget in Islamic countries should be focused on scientific research, rather than a permanent, fully equipped army. Islamic countries allocate a minimal fraction of their GDP to research and science. Turkey allocates 1% of its GDP,⁴⁵² Egypt and Morocco dedicate 0.6% of their GDP,⁴⁵³ and Saudi Arabia spends just 0.04% of its GDP on scientific research.⁴⁵⁴ Israel has one of the strongest armies in the Middle East. It dedicates 4% of its GDP to science and technology.⁴⁵⁵ This is an example of how Islamic countries should pay more attention to their spending on scientific research and technology.

As for collected revenue, the rule in Islam is “if you impose what God did not identify, God imposes on you what is not required.” Tax rates and methods of calculation should be changed to comply with the Islamic requirements.⁴⁵⁶ Tax rates should decrease to 2.5% of individual income, and a maximum of 10% for trade, agriculture, and manufacturing.⁴⁵⁷ Many Islamic countries impose on their citizens 10 to 15 times this rate. A modern application of the Islamic tax rate exists in Qatar, which applies a 0% personal income tax rate and a 10% corporate tax rate.⁴⁵⁸ As for the calculation, it is based on the annual savings of the individual. This means a deduction applies to what

452. *Research and Development Expenditure (% of GDP)*, WORLD BANK, <https://data.worldbank.org/indicator/GB.XPD.RSDV.GD.ZS?locations=EG-MA-TR-SA> (last visited May 29, 2018).

453. *Id.*

454. *Id.*

455. Rebecca Harrington, *These 9 Countries Spend a Greater Share of Money on Science than the United States*, BUS. INSIDER (Mar. 1, 2016, 8:44 AM), <http://www.businessinsider.com/american-science-funding-statistics-vs-world-2016-2?IR=T/#9-germany-29-of-its-gdp-1>.

456. Azman Mohd Noor & Muhamad Nasir Haron, *Imposing Zakat on Legal Entities and its Applications in Islamic Financial Institutions*, 27 ARAB L. Q. 71, 75–78 (2013).

457. *Id.*

458. *Qatar Personal Income Tax Rate (2004-2018)*, TRADE ECON., <https://tradingeconomics.com/qatar/personal-income-tax-rate> (last visited May 29, 2018).

exceeds an individual's basic need. On the one hand, the global tax system deducts tax from the source (net salary). This means 20% to 40% of the person's income is deducted. On the other hand, the person who saves 50% of his income would be entitled to pay 2.5% on the 50%, which equates to 1.25% of his income. Therefore, there is a big gap between the contemporary and Islamic applications of tax rates.

Certain categories in society should be subject to more lenient tax rate policies. They should be based on either the principle of freedom of religion or social justice. The first category applies to non-Muslims, who should pay less than what Muslims pay to the government.⁴⁵⁹ It is argued that offering non-Muslims a reduced tax rate is a form of discrimination based on religion.⁴⁶⁰ However, based on the Prophet's tradition, non-Muslims enjoy better tax rates than Muslims. Equating Muslims and non-Muslims in their financial duties may generate doubt of forcing non-Muslims to convert to Islam. The second category includes elderly citizens, women (upon their request), minors, the poor, and people with special needs. Individuals within these categories should be exempt from paying any taxes. Taxes were first introduced in the first place to help precisely these categories, and they should be entitled to the largest portion of spending. Moreover, Muslims and non-Muslims in the second category are treated equally.⁴⁶¹ Non-Muslim elderly citizens, women (upon their request), minors, the poor and people with special needs should be exempt from paying any taxes.

Last, but not least, foreign policy in Islamic governments should be neutral. They should have minimal representation in foreign countries, meaning that they do not interfere in other nations' affairs and politics. The core of Islam is far removed from imposing itself on the internal affairs of other nations. A perfect example of neutral foreign policy is that of Switzerland.⁴⁶² Switzerland adopts a neutral global position and never took part in either of the World Wars.⁴⁶³ Minimal representation of Islamic countries abroad is an attempt to save expenditure that is

459. Hashemi, *supra* note 219.

460. Gartenstein-Ross, *supra* note 225.

461. *See* Hashemi, *supra* note 219, at 14.

462. Oliver Pauchard, *The Day Switzerland Became Neutral*, SWISSINFO (Mar. 20, 2015, 11:00 PM), https://www.swissinfo.ch/eng/congress-of-vienna_the-day-switzerland-became-neutral/41335520.

463. *Id.*

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usually borne by the general public. The only exception from the previously proposed reform is the protection of the freedom of religion. Generally, Islam is not neutral regarding the principle of freedom of religion, be it against Muslims or non-Muslims. For Muslims, the Quran is clear about encouraging Muslims to support their fellow brothers and sisters, who are being discriminated against based on their religion. Currently, the Muslims of Rohingya in Myanmar are currently being systematically persecuted based on their religion. All Muslims are obligated to support and help them in any form they can.

CONCLUSION

This research endeavors to redefine the concept of government based on two major Islamic sources, which are the Quran and *Sunnah*. The concept of the government by judiciary in Islam is a genuine concept in Islamic history. The Prophet was a judge with limited enumerated executive authorities. These authorities were given to the Prophet so that he could handle Muslims' concerns effectively, including their legal concerns. They included the poor's right to the rich's money (*Zakat*), the mandate of reconciliation before using power in civil wars, retaliation wars against the aggressors, or granting refuge to weak Muslims. The first four successors of the Prophet followed his traditions. They claimed neither superiority over the people nor unlimited authority. They were either judges or else had the qualification of judges. The corruption of the principle of the government by judiciary in Islam occurred after the assassination of the fourth *Amir al-Mu'minin*, Ali Ibn Abi Talib, when the Umayyad dynasty changed the enumerated executive powers to unlimited powers.

The comparison offered in this research aims not to condemn certain practices of some Islamic countries. It does, however, aim to clarify that they do not belong to true Islam, despite claiming to be Islamic traditions. The Egyptian regime is military-based and uses its power to govern people and protect its own interest in society. Egypt demarcates itself as a better class than the rest of the population. The 2013 military coup used the government to hold all the authorities accountable, with very limited resistance from the judiciary and civil society. The Turkish system lives an ambivalent reality. They are Islamic but live by secular laws. The government is formed by conservative Muslims who had to deal with secular institutions. The

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Saudi Arabian regime is selective in applying Islamic principles. It claims to be the guardian of Islam, as the King is named “*the custodian of the two holy Muslim mosques.*” Islam, nonetheless, is not applicable once it threatens their thrones. The Moroccan King wishes to be *Amir al-Mu’minin*, with all the social and historical respect this commands in Muslim culture. However, he cannot leave all his authorities as a king. He still holds unlimited authorities and privileges. This, as a principle and by definition, contradicts the concept of the *Amir al-Mu’minin*.

Finally, the research offers some recommendations to contemporary Islamic governments to enable them to comply with the principle of “government by judiciary” in Islam. These recommendations are based on the Quranic and the Prophet’s traditions in governing the early Muslims. First, the governor or ruler in the Islamic government should have the qualifications of a judge. Second, the Islamic government should enjoy very limited authorities over Muslims. The government’s authorities are intended to protect the weak from the strong, and the poor from the rich, not take advantage of the rich and the strong people among its citizens.