

# **CONSTITUTION-MAKING IN THE CONTEMPORARY MUSLIM WORLD: A POST COLONIAL INQUIRY**

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## **ABSTRACT**

Although the constitution is not a novel phenomenon for Muslims, the modern concepts of constitutionalism emerged in the Muslim world in the mid-twentieth century. The first written constitution in modern times in the Muslim world was adopted by the Ottoman Empire in 1876, reflecting the Belgian constitution in 1831. Despite the recognition of Islam as the official state religion, the early Muslim constitutions did not pay much emphasis on Islamic constitutionalism. Hence, this paper explores the extent of Islamic influence in constitution-making in the contemporary Muslim world. The second phase of modern constitutional development happened in the early twentieth century, and the last phase of constitutional development took place in the post-colonial era in the mid-twentieth century. This research employed doctrinal research methodology through the analysis of older and modern constitutions of the contemporary Muslim world. The application of Islamic Sharia in modern constitution-making was highly debated, and only a few modern nation states have adopted fully Islamized constitutions, while most countries inserted just a nominal recognition of Islam as the state religion in their constitutions. The influence of contemporary Muslim

scholars and Islamic political organizations are highly valued during the constitution-making process in many countries.

**Keywords:** Contemporary Muslim Constitutions; Islamic Constitutionalism; Islamic influence; Democratic norms; Modern Constitutions.

## BACKGROUND

*Islami Khilafah* (Caliphate) is a centralised, unified governing system run under one leader called Imam or Caliph of the *Ummah*. Prophet Mohamed (Peace be upon him) founded the first Islamic state in Madina in 622 after he migrated from Makkah to Madina by adopting the Madina pact, popularly known as the Madinah Constitution.<sup>1</sup> Since then, Islamic Ideology has spread to all corners of the world, and believers around the globe have taken allegiance to the Islamic leadership, first stationed in Madina and later in Syria, Iraq, and elsewhere in the world. Under Islamic leadership, the Islamic state is called the *Ummah* or the Nation of Believers. The Islamic State was governed according to Islamic law ordained by God All Mighty.

Despite a few Muslim regions being ruled by individual independent Muslim rulers, the vast Islamic world is primarily governed by one leader called the *Khalifah*. The last Islamic caliphate was ruled by the Ottoman Turks until 1924.<sup>2</sup> The *Kamalist* movement in Turkey abolished the centuries-old Islamic institution of the Caliphate in 1924 and disintegrated the Muslim *Ummah* into pieces. Subsequently, a mini-nation state called the Secular Turkish Republic was created based on Turkish ethnicity, contrary to the fundamental pillar of the Islamic state founded by the Prophet Mohamed that had survived for almost fourteen centuries, which was built on creed rather than ethnicity. Many Muslim scholars, for this reason, described the Islamic state as an ideological state as it was based on the belief in the oneness of God.<sup>3</sup> The former territories of the Ottoman-Turkish Empire started to declare their independence. Decades later, many other Muslim territories previously colonized by European colonial powers accelerated their struggle for independence. Especially in the areas of the Indian subcontinent, territories in Africa, and countries in Southeast Asia, independence was acquired in the mid-twentieth century.

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<sup>1</sup> Muhammad Hamidullah, *The First Written Constitution in the World* (Kazi Publications Chicago, IL, 1986).

<sup>2</sup> Pietro Longo, *Theory and Practice in Islamic Constitutionalism: From Classica Fiqh to Modern Systems* (Piscataway, NJ, USA: Gorgias Press, 2019), <https://doi.org/10.31826/9781463239640>.

<sup>3</sup> Sayyid Abul A'la Maududi, *Islamic Law and Constitution* (Islamic Publications, 1960).

Most countries declared their independence with a written constitution that would define and describe the attributes of the country. Drafting for the independence constitutions was also challenging for many Muslim countries. Disagreement among the parties within was prevalent to the extent that the colonial powers intervened and forced the inclusion of provisions related to colonial legacies rather than the interests of those nations. Some constitutions marginalized Islam to a nominal level just to recognize Islam as the state religion, while others adopted Islam as the main source of their constitutions.

Understanding the influence of Islam in constitution-making in modern Islamic nations has received little attention in academia, making it necessary to conduct research on this topic. Constitutional law was an area that classical Muslim scholars hardly touched. Medieval Muslim scholars started developing constitutional law theories in the early eleventh century.<sup>4</sup> This research aims to explore Islamic influence in constitution-making in the contemporary Muslim world by analyzing the events during the constitution-making process of some selected Muslim countries.

## **METHODOLOGY**

This study adopted a doctrinal research methodology by examining the basic documents of those nations. This research also focuses explicitly on the challenges of constitution-making to showcase the influence of Islam in the constitutions of those countries. Therefore, this paper explores the depths of the popular notion of the constitution-making process after the liberation from colonial forces in those countries. Hence, a thematic content analysis approach is employed in this study to examine the textual data towards the Islamic legal paradigm. This study also evaluates available secondary data along with scholarly debates during the construction of constitutions, scrutinising Islamic legal doctrines to achieve the main objectives of this research.

## **ISLAMIC NOTION OF THE CONSTITUTION**

Although the founding document of the first Islamic state, the *Sahifa Al-Madina*<sup>5</sup> was made in the 7<sup>th</sup> century, the document was first organized and compiled by Indian scholar Professor Dr. Muhammad Hamidullah in 1941 and extensively used as a referencing source in modern

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<sup>4</sup> Longo, *Theory and Practice in Islamic Constitutionalism*.

<sup>5</sup> Hamidullah, *The First Written Constitution in the World*.

literature. However, the areas of constitutional law were ‘untouched’ until the eleventh century, according to most scholars.<sup>6</sup> The first comprehensive academic document related to constitutional law was Imam al-Mawardi (927-1058 CE) in his book *al-Ahkam as-Sultaniyyah* (The Laws of Islamic Governance),<sup>7</sup> and later Imam al-Haramain al-Juwaini (1028-1085 CE) developed constitutional principles based on his experiences during the chaotic period in the Islamic Caliphate. His famous theory, *al-Shawkah* (Effectiveness of the government), was instrumental in addressing the issues of *de facto* government under Islamic Shari’ah. Al-Juwaini addressed many contemporary constitutional issues emerging during that time.<sup>8</sup> Subsequently, his student Abu Hamid Al-Ghazali’s (1058–1111 C.E.) contribution to Islamic Constitutional law is another remarkable milestone during the same era. The fourteenth-century Muslim reformer Taqi al-Din Ibn Taymiyya (1263–1328 CE) developed his theory of the Islamic political system, a treatise titled *Siyasa Shar’iyya* during the era of Mamluk Sultanate, which was another significant contribution to Islamic constitutional law. With the remarkable difference of opinion and disputes on the major jurisprudential issues, the *Hanafi* Ottoman government extensively applied his treatise based on *Hambali fiqh* in their administrative affairs. The fundamental idea of Ibn Taymiyya’s constitutional theory is that “the exercise of authority for the benefit of the people” had been greatly appreciated by the Ottoman Sultanate from the 14<sup>th</sup> to 16<sup>th</sup> century.<sup>9</sup>

Islamic constitutionalism and constitutional law have been in academia since the mid-twentieth century as the more contemporary Islamic scholars started to discuss recent challenges, especially during the drafting process of the post-colonial constitution. Abul ‘Ala Maudidi was a veteran scholar on Islamic constitutional theories in modern times. His constitutional ideologies were in agreement with those of Egyptian scholar and political activist Sayyid Qutb. These scholars discussed their theories on the importance of adhering to Islamic Sharia principles whilst constructing the constitutions for modern application. Allama Maududi was of the opinion that the Islamic state should not be regarded as a theocracy, autocracy, or even democracy. However, he argued that the Islamic state is closer to democracy than any other type of government system as it gives much value to the interests of

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<sup>6</sup> Mohammad Hashim Kamali, “Constitutionalism and Democracy: An Islamic Perspective,” *Icr Journal* 2, no. 1 (2010): 18–45, <https://icrjournal.org/index.php/icr/article/view/678>.

<sup>7</sup> Patricia Crone, *Medieval Islamic Political Thought* (Edinburgh University Press, 2014).

<sup>8</sup> Omar Jah, “Defecto Government and the Problem of Legitimacy: A Comparative Juristic Approach with Special Reference to the Buyid and Saljuq Governments.” (Malaysia, International Institute of Islamic Thought & Civilisation, IIUM, 1999).

<sup>9</sup> Tijana Krstić and Derin Terzioglu, *Historicizing Sunni Islam in the Ottoman Empire, c. 1450-c. 1750* (Brill, 2021), <https://library.oapen.org/handle/20.500.12657/42547>.

the people. He also agreed that the modern parliament is a law-making body with a *caveat* that all laws passed by the parliament must be in harmony with Islamic Sharia. Maududi claimed that the Islamic state must be a nomocracy based on the principles of justice and welfare of the people, upholding Islamic Sharia.<sup>10</sup> This idea has also been agreed upon by some contemporary scholars such as Thomas W. Arnold<sup>11</sup> and Mohamed Hashim Kamali.<sup>12</sup> Two recent Egyptian scholars, Abdu al-Razzaq al-Sanhuri<sup>13</sup> and Yusuf al-Qaradawi,<sup>14</sup> further addressed the notion of modern constitutions. They are both more recent and modern legal theorists who have experienced the current issues of the contemporary world order and have significantly contributed to Islamic constitutional law.

## EARLY MUSLIM CONSTITUTIONS

Written constitutions started emerging in the Islamic world in the mid-nineteenth century, and the main purpose of those constitutions was to systemise the existing governing system by emphasizing the check and balance mechanism. Contrary to the Western constitutional doctrine of separation of church and the government, there was never such a demand from the public in the Muslim world. The government and political system never divorce from religion. In fact, the rulers legitimize their decisions from religious laws, i.e., in accordance with Islamic Sharia. This was the established practice of the Muslim world as early as the Umayyads until the Ottoman Empire in the early twentieth century.<sup>15</sup> Hence, emphasis on Islamic Sharia was never a central issue in early Islamic governments. Muslim states accept the entire religion as an inseparable component of government. Early Muslim jurists debated the legality of certain new issues that had never been experienced before in the Muslim states, such as the legality of mutiny, *coup de'tate*, and *de facto* leaderships.<sup>16</sup> Most importantly, they deduced the prevalent rulings to test the legitimacy using the Quran and Sunnah, the basic sources of Islamic Sharia. This is evident in early Muslim constitutions.

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<sup>10</sup> Maududi, *Islamic Law and Constitution*.

<sup>11</sup> Thomas W. Arnold, *The Caliphate* (Routledge, 2016).

<sup>12</sup> Mohammad Hashim Kamali, "Characteristics of the Islamic State," *Islamic Studies* 32, no. 1 (1993): 17–40.

<sup>13</sup> Abd al-Razzaq al-Sanhuri, *Le Califat: Son Évolution Vers Une Société Des Nations Orientale (The Caliphate. Its Evolution towards a League of Oriental Nations)* (Paris: (Librairie Orientaliste Paul Geuthner, 1926); Samy A Ayoub, "A Theory of a State? How Civil Law Ended Legal Pluralism in Modern Egypt," *Journal of Law and Religion* 37, no. 1 (2022): 133–52.

<sup>14</sup> Yusuf al-Qaradawi, *Al-Din Wa al-Siyasah* (Kairo: Dar al-Shuruq, 2006).

<sup>15</sup> Gábor Ágoston and Bruce Alan Masters, *Encyclopedia of the Ottoman Empire* (Infobase Publishing, 2009).

<sup>16</sup> The eleventh-century Muslim Jurist Al-Juwaini specifically focused on the constitutionality of emerging issues of revolt and coup against the existing Muslim governments. The Doctrine of Al Shwkah is one aspect he developed specifically concerning the legitimacy of such issues.

### (a) The Ottoman Constitutions

The Ottoman constitutional era began in the early nineteenth century during the reign of Mahmud II (1808-1839). The first constitutional document was *Sened-I Itifak*, popularly known as the Deed Agreement, which came into force on October 7, 1808, during the reign of Sultan Mahmud II. Most Turkish constitutionalists refer the *Sened-I Itifak* as the Magna Carta of Turkey.<sup>17</sup> This agreement recognized the power and participation of the provincial heads in decision-making and restricted the absolute and arbitrary power of the Sultan.<sup>18</sup> Although *Sened-I Itifak* lived for a very short period of time, it opened the door for sweeping political reforms in the Ottoman Empire that led to the introduction of its first written constitution in 1876.

The political instability within the empire forced them to leave many territories while others were granted autonomous status. Therefore, the first constitutions within the Ottoman territories were enacted, including the Wallachia and Moldavia constitutions in 1831, and then Ottoman Serbia introduced its constitution in 1835. Before the promulgation of the first official Ottoman empire Constitution in 1867, autonomous Tunisia adopted its first constitution in 1861. Similarly, the Armenian *millet* introduced its first constitution in 1863.<sup>19</sup>

Sultan Abdulhamid II (1876–1909) ascended the first Ottoman constitution, which contained 12 sections and 119 articles, on 23<sup>rd</sup> December 1876.<sup>20</sup> Although the constitution upholds Islamic values and recognizes Islam as the official religion of the state, the first constitution, the *Kanun-i Esasi*, according to Robert Devereux, was inspired by the 1831 Belgian Constitution and the Prussian<sup>21</sup> Constitution of 1850. One reason for the introduction of the first Ottoman Constitution was to protect European interests within the empire, as deteriorating financial crises forced the empire to surrender many of its interests to European counterparts even before the defeat of the First World War.<sup>22</sup>

In the first Ottoman constitution, emphasis on Islamic principles was not considered significant as Islamic Sharia naturally has been part and parcel of all Islamic governments in the Muslim world. It is also evident that the first Ottoman constitutions were also influenced

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<sup>17</sup> J. A. M. Caldwell, *Dustūr: A Survey of the Constitutions of the Arab and Muslim States* (Brill, 1966).

<sup>18</sup> Ágoston and Masters, *Encyclopedia of the Ottoman Empire*.

<sup>19</sup> Agoston and Masters.

<sup>20</sup> Caldwell, *Dustūr*.

<sup>21</sup> Prussia was a German state located on most of the North European Plain.

<sup>22</sup> Robert Devereux, *The First Ottoman Constitutional Period: A Study of the Midhat Constitution and Parliament* (Baltimore, Md: Johns Hopkins Press, 1963).

by Islamic constitutional principles to a certain extent. For instance, the first official constitution of the Ottoman Empire 1876 recognized Islam as the official state religion.

### **(b) The Tunisian Constitution**

In 1857, autonomous Ottoman Tunisia introduced its first constitutional document, popularly known as the “fundamental pact.” The document guaranteed the rights of citizens, property rights, and freedom of religion to minority groups.<sup>23</sup> The fundamental pact led to the introduction of its first constitution four years later, in 1861.<sup>24</sup> The Tunisian Constitution contained 114 articles in 13 chapters and declared the Tunisian ruler Muhammad Bey as the head of the state and the head of the religion. This constitution also does not place much emphasis on Islamic constitutional principles. The constitution was designed to give constitutional recognition to the incumbent Tunisian government under its existing regime. The 1861 Constitution provided a *quasi-Islamic* legal system for Tunisia, but when Tunisia entered the French protectorate agreement, the constitution was suspended, and Islamic law had no significant status in the Tunisian legal system.<sup>25</sup> During French colonial rule, the Tunisian Islamic legal system was replaced with the French civil law system. However, the first Tunisian constitution recognizes Islam as the state religion despite the minimal emphasis on Islamic law in the constitution.

### **(c) Iranian Constitution**

The economic recession, maladministration and arbitrary rule of *Qajar* rulers, among many other causes, paved the way for introduction of the first Iranian constitution. Although religious scholars initially opposed the constitutional scheme, their open criticism of opium and tobacco production in Iran ignited the constitutional revolution. In July 1906, tens of thousands of people from all walks of life gathered at the Shi'a holy shrine in Qum and in the vicinity of the British central headquarters in Tehran to demand the establishment of a National Consultative Assembly (Majlis). As a result, the incumbent Qajar Shah, Muzaffar al-Din Shah, convened the Majlis to draft Iran's first Fundamental laws on 5<sup>th</sup> August 1906.<sup>26</sup>

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<sup>23</sup> Nathan Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (New York: SUNY Press, 2002).

<sup>24</sup> Mathias Rohe, “Constitutionalism in Islamic Countries between Upheaval and Continuity, Edited by Rainer Grote and Tilman J. Röder, 2012,” *Die Welt Des Islams* 56, no. 2 (2016): 264–66.

<sup>25</sup> Caldwell, *Dustūr*.

<sup>26</sup> Ali M Ansari, *Iran's Constitutional Revolution of 1906 and Narratives of the Enlightenment* (London: Gingko Library, 2016).

On 30 December 1906, the absolute hereditary monarchy in Iran became a constitutional monarchy by adopting its first written constitution.<sup>27</sup>

The 1906 constitution of Iran was fundamentally targeted to limit the absolute power of the ruler, and not much attention was given to the principles of Islamic constitutionalism. Consequently, the *Ulema* were alarmed by the Western-style secular constitutional principles. Sheikh Fazlollah Nuri, a leading Shi'a scholar at the time, was vocal against the new secular constitution. As a result, the Supplementary Constitution of 1907 of Iran was amalgamated into the constitution on 2 July 1907 by incorporating Islamic constitutional features, which came into force on 7 October 1907.<sup>28</sup> These constitutional amendments provided Islamic supremacy and repugnancy clauses for the first time.

The supplementary constitution of 1907 incorporated numerous significant Islamic constitutional provisions.<sup>29</sup> The first article of the constitution declared Islam as the official religion of Iran, while Article 2 formulates the Supreme Council of Ulema, currently known as the Guardian Council. The same article also provides Islamic repugnancy provision, stating that no law shall be passed in violation of Islamic Shari'ah.<sup>30</sup> The King is only allowed to ascend the throne after taking an oath before the legislative assembly to protect the religion, the constitution and the nation by the name of God the Almighty.<sup>31</sup> Thus, the Iranian Constitution 1906-7, especially the supplementary constitution, was greatly influenced by Islamic constitutional norms.

#### **(d) The Afghanistan Constitution**

After defeating the British Raj's imperial army in the Third Anglo-Afghan War in 1919, the new King of Afghanistan, Aman Allah Khan, introduced sweeping reforms to modernize the governance of Afghanistan. He was aware of the constitutional revolution in neighbouring Iran and the Turkish Ottoman modernization agenda in the early twentieth century.<sup>32</sup> The promulgation of the first Afghan Constitution 1923, the “*Qanun-i Asasi*” was the most significant step towards modernization and the introduction of written laws in Afghanistan.

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<sup>27</sup> Mathias Rohe, “Constitutionalism in Islamic Countries between Upheaval and Continuity, Edited by Rainer Grote and Tilmann J. Röder, 2012.”

<sup>28</sup> Ansari, *Iran's Constitutional Revolution of 1906 and Narratives of the Enlightenment*.

<sup>29</sup> Mohammad Touhid-Khaneh and Tilmann Röder, *The Fundamental Law [Qānūn-e Asāsī-e Mashrūtah] of the Iranian Empire of 30 December 1906: Scientific English Translation.*, 2012.

<sup>30</sup> “Supplementary Constitution of Iran 1907” (n.d.), arts. 1 & 2.

<sup>31</sup> Supplementary Constitution of Iran 1907, art. 39.

<sup>32</sup> Faiz Ahmed, “In the Name of a Law: Islamic Legal Modernism and the Making of Afghanistan’s 1923 Constitution,” *International Journal of Middle East Studies* 48, no. 4 (November 2016): 655–77, <https://doi.org/10.1017/S0020743816000817>.

The Constitution 1923 establishes Islam as the official religion of the state,<sup>33</sup> and the King as the servant and protector of religion.<sup>34</sup> However, religious scholars demanded new amendments to the Afghan Constitution in 1923 to give Islam its proper sacred status. These protests led to a rebellion against the government, staged and led by the Mullahs of the *Mangal tribe*. In response, King Amanullah Khan declared the amendments to the new constitution and convened the *Loya Jirgah* in 1924. The new amendments came into force on 28 January 1925.<sup>35</sup> In addition to Islam as the official religion of the state, Article 2 was amended to include, *inter alia*, the *Hanafi* jurisprudence as the primary source of Afghanistan laws.<sup>36</sup> Article 24 was also amended to give the courts autonomy to apply Islamic penal laws (Shariah) to penal offences.<sup>37</sup> Hence, the Islamic supremacy and repugnancy clauses are provided in the first Afghanistan Constitution.

#### **(e) Egyptian Constitution**

The first Egyptian Constitution was promulgated in 1923,<sup>38</sup> just after Iran and Afghanistan in 1906 and 1923, respectively. However, Egyptian constitutional ideals were not novel to the twentieth century. They began the constitutional enterprise in the late nineteenth century, while the British controlled most of Egypt's affairs under the protectorate agreement.

According to some authors, the first Egyptian constitution was, in fact, enacted in 1882 during the Ottoman era. This document was silent on state religion and other religious issues, as Nathan Brown argues that it might have been because Egypt was still under the Ottoman Empire.<sup>39</sup> This constitutional document survived only for a year, and it was abolished in 1883.<sup>40</sup>

However, according to most contemporary scholars and Egyptian state documents, the first Constitution of Egypt was promulgated in 1923. This document contained all the essential elements of a modern constitution. This constitution also declared its independence, stating that Egypt was a sovereign, free, and independent state, as this constitution was promulgated after it gained independence from the British protectorate in 1922. Article 149 provides,

<sup>33</sup> “The Constitution of Afghanistan 1923” (n.d.), art. 2.

<sup>34</sup> “Constitution of Afghanistan 1923” (n.d.), art. 5.

<sup>35</sup> Amin Tarzi, “Islam and Constitutionalism in Afghanistan,” *Journal of Persianate Studies* 5, no. 2 (2012): 205–43.

<sup>36</sup> “The Constitution of Afghanistan 1923. (Amended Constitution 1925)” (n.d.), art. 2.

<sup>37</sup> The Constitution of Afghanistan 1923. (Amended Constitution 1925), art. 24.

<sup>38</sup> Norman Bentwich, “The Constitution of Egypt,” *Journal of Comparative Legislation and International Law*, 1924, 41–49; Arthur Goldschmidt Jr, *Historical Dictionary of Egypt* (Rowman & Littlefield, 2023).

<sup>39</sup> Rachel M. Scott, *Recasting Islamic Law: Religion and the Nation State in Egyptian Constitution Making* (Cornell University Press, 2021), <https://library.oapen.org/handle/20.500.12657/62024>.

<sup>40</sup> Goldschmidt Jr, *Historical Dictionary of Egypt*.

“Islam shall be the State’s religion and Arabic its official language.”<sup>41</sup> Other constitutional principles, *inter alia* include, freedom of expression, freedom of assembly, and many other individual rights. Hassan Al-Banna, one of the most prominent Muslim scholars at the time and the founder of the Muslim Brotherhood, agreed with Article 149 and expressed his approval as it allowed the establishment of the religion.<sup>42</sup> He contends that Article 149 allows legislating laws according to Islamic Sharia.<sup>43</sup> The first Egyptian constitution lived until its dissolution in 1952 during the revolution.<sup>44</sup> Islamic repugnancy clauses were inserted later in the 1971 Constitution, providing that Islamic Sharia as the primary source of legislation in Egypt.

#### **(f) The Maldives Constitution**

The Maldivian King, As-Sultan Mohamed Shamsudin III, ordered the draft of the first written constitution by stating *“without violating the tenets of Islam, the customary norms of the people of Maldives, and the agreements with the British...”* The first constitution of the Maldives came into force in December 1932.<sup>45</sup> The first Maldivian Constitution contained 92 Articles. The constitution defined the Maldivian state, the King, the cabinet, the legislature and other state organs. The Constitution also provides for the election of the King<sup>46</sup> and the conditions and procedures for his removal from office.<sup>47</sup> The most significant change introduced by the first Constitution of the Maldives is the country’s shift from an absolute hereditary monarchy to an elected hereditary constitutional monarchy, subject to the Constitution and law,<sup>48</sup> paving the way for future democracy in the Maldives.

This Constitution also recognized Islam as the official religion of the Maldives. Article 2 provides that “the Official religion of the state is the religion of Islam, the official language is Dhivehi, and the capital is Male.”<sup>49</sup> Identical to most Constitutions in the Muslim world at the time, the Maldivian Constitution was also silent on Islamic repugnancy provisions. However, Islamic precepts are apparent in the Constitution. As such, the King, the cabinet

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<sup>41</sup> “Egypt: Constitution of 1923,” ConstitutionNet, accessed July 30, 2024, <http://constitutionnet.org/vl/item/egypt-constitution-1923>.

<sup>42</sup> Scott, *Recasting Islamic Law*.

<sup>43</sup> Scott.

<sup>44</sup> Clark B. Lombardi, “Constitutional Provisions Making Sharia” A” or “The” Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?,” *Am. U. Int’l L. Rev.* 28 (2012): 733, [https://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/amuilr28&section=25](https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amuilr28&section=25).

<sup>45</sup> Mohamed Amin Didi, *Dhivehiraajjeyge Gaanoonu Asaasee Hayai (Constitutional Life of Maldives)* (Male’: Novelty Press, 2005).

<sup>46</sup> “Constitution of the Maldives 1932” (n.d.), art. 26.

<sup>47</sup> Constitution of the Maldives 1932, art. 54 (2).

<sup>48</sup> Constitution of the Maldives 1932, art. 1.

<sup>49</sup> Constitution of the Maldives 1932.

minister and the members of the legislature must be Sunni Muslims. The King must take an oath before ascending to the throne by God to protect the nation, religion and Constitution. Citizens are required to learn to recite the holy Quran and learn to read and write Dhivehi and Arabic script.<sup>50</sup>

The Constitution begins with a glorious verse of the Quran, where Allah says, "and whose affair is [determined by] consultation among themselves."<sup>51</sup> While the constitution concluded with verse 4 of *Surah al-Rum*, which states, "to Allah belongs the command before and after."<sup>52</sup> Inclusion of these Quranic verses demonstrates the Islamic constitutional principle of *Shura* (consultations), and establishes the sovereignty of Allah, the Almighty. The first Constitution of the Maldives lasted only for about a year, and it was abolished on 20<sup>th</sup> Rajab 1352, 9<sup>th</sup> November 1933.<sup>53</sup>

## POSTCOLONIAL CONSTITUTIONS

With the emergence of new nation-states in the post-colonial era, new constitutions emerged in different forms. One of the biggest challenges the new Muslim nation-states faced was the dilemma of choosing a practical and proper national legal system. The question of whether to incorporate Islamic laws into the respective legal systems was one of the greatest challenges for new Muslim nations, especially those countries that gained independence in the mid-twentieth century. Despite 57 Muslim-majority countries associated as member states of the Organization of Islamic Conference (OIC) today,<sup>54</sup> several Muslim nations opted for their former colonial laws, believing that they were better and more practical than the classic and so-called "outdated religious laws."<sup>55</sup> Despite the governing law on them contrary to their beliefs, the vast majority of the population of these countries are Muslims who are by faith bound to abide by the laws of Islamic Shari'ah.

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<sup>50</sup> Constitution of the Maldives 1932, art. 14.

<sup>51</sup> *The Holy Quran*, n.d., v. 42:38.

<sup>52</sup> *The Holy Quran*, v. 30:4.

<sup>53</sup> Amin Didi, *Dhivehiraajjege Gaanoonu Asaasee Hayai (Constitutional Life of Maldives)*.

<sup>54</sup> "A Brief on the Organisation of Islamic Cooperation (OIC - SESRIC," accessed July 25, 2024, <https://www.sesric.org/about-oic.php>.

<sup>55</sup> One example is that the Indonesian Nationalist leader Hatta stated that his sense of logic does not dictate that it was possible for national laws to base on Islamic Shariah. He stated that various legal needs of today find no regulations in the Qur'an.

It is also significant to note that numerous Muslim countries have at least symbolically recognize Islam as the state religion, and some incorporate some Islamic principles, while few accepted Islam as the primary source of their constitutions.

The declaration of state religion was an old constitutional norm amongst Muslim countries. The Ottoman Constitution 1876, the early Tunisian Constitution in 1861, the Iranian Constitution of 1906-7, the Afghanistan Constitution 1923, the Egyptian Constitution 1923, and the Maldivian Constitution 1932 were some early constitutions in which Islam was stated as the state religion. However, Iran and Afghanistan pioneered introducing Islamic repugnancy clauses for the first time.<sup>56</sup>

In contrast, the Turkish Republic, after dissolving the Ottoman Caliphate in 1924, adopted a secular constitution totally divorced from Islam and secularism was entrenched in the constitution as an untouchable pillar of the Turkish constitution. Turkey was in the past not only secular by adopting secular constitutional principles *per se*, but the secular Turkish governments, especially the military, demonstrated enormous hostility towards Islam. Bangladesh was another Muslim country separated from the greater Islamic Republic of Pakistan in 1971, which adopted another secular constitution in 1971. However, after the military coup in 1982, General Hussain Mohamed Irshad amended the Bangladesh Constitution in 1988, inserting Islam into the constitution as the state religion.<sup>57</sup> The opposition secular groups petitioned the case in the Supreme Court in 1988, seeking the insertion as unconstitutional,<sup>58</sup> where a decision was given in 2016 on the contrary.<sup>59</sup> The Supreme Court dismissed the petition on the ground of *locus standi*. The court further held that the inclusion of the state religion does not offend the constitutional principles of secularism as provided in the Bangladeshi Constitution.<sup>60</sup> However, the Bangladeshi constitutional position of Islam is still unclear as secularism was reinserted in 2011 by the then-ruling political party, the Awami League of Sheikh Hasina.

There are many more Muslim Majority countries where this issue is still unresolved. The debate over the constitutional position of Islam over secularism has been extensively

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<sup>56</sup> See the Supplementary Constitution of Iran 1907 and Amended Constitution of Afghanistan 1924.

<sup>57</sup> Shah Alam, “The State-Religion Amendment to the Constitution of Bangladesh: A Critique,” *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 24, no. 2 (1991): 209–25, <https://www.jstor.org/stable/43110030>.

<sup>58</sup> Writ Petition No. 1434 of 1988, Supreme Court of Bangladesh. (n.d.).

<sup>59</sup> David Bergman, “Bangladesh Court Upholds Islam as Religion of the State,” *Al Jazeera*, March 28, 2016, <https://www.aljazeera.com/news/2016/3/28/bangladesh-court-upholds-islam-as-religion-of-the-state>.

<sup>60</sup> Nafiz Ahmed, “Secularism and State Religion in the Bangladesh Constitution,” *The Daily Star*, June 21, 2024, <https://www.thedailystar.net/law-our-rights/news/secularism-and-state-religion-the-bangladesh-constitution-3637926>.

discussed in the constitution-making of three important Muslim countries, namely, Nigeria, Malaysia, and Indonesia. The issue of the constitutional position of Islam in these countries is still being debated among politicians and academicians. Hence, we take the privilege of elaborating a bit more by visiting the historical dialogues of constitution-making in these countries in the unending political debate of Islamic constitutionalism.

### **(a) Nigeria**

Nigeria gained its Independence in 1960 from the British and became a republic in 1963.<sup>61</sup> Nigeria is the most populous country in Africa, with a large percentage of Muslims, especially in Northern Nigerian states.<sup>62</sup> Prior to the occupation, the *lex loci* in Nigeria was Islamic law.<sup>63</sup> However, when the British occupied Nigeria, English common law became the applicable law in Nigeria.<sup>64</sup> When Nigeria won independence in 1960, Islamic law was accepted as one of the operating legal systems in Nigeria in the draft constitution of 1979.<sup>65</sup> It also recognizes the Islamic courts<sup>66</sup> in Nigeria. However, the application of Islamic law was confined only to Muslim personal law.<sup>67</sup>

The new constitution, enacted in 1999, recognizes three legal systems: English common law, customary law, and Islamic law. This constitution also allows the establishment of Sharia courts. Section 260 (1) of the Constitution provides for the establishment of a Sharia Court of Appeal.<sup>68</sup> Similarly, states that have adopted Sharia penal codes are constitutionally valid by virtue of sections 7 and 36 of the Nigerian Constitution of 1999.

Despite the constitutional provisions allowing the establishment of Sharia Courts and the application of Islamic law in Nigeria, a contentious debate is in progress.<sup>69</sup> Some influential Christians in Nigeria advocated to cease the application of Islamic law in Nigeria, claiming the application of Shariah to be unconstitutional and discriminatory and urged all states to cease applying Islamic law.<sup>70</sup>

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<sup>61</sup> Reuben Kenrick Udo and Toyin O. Falola, "Nigeria - People, Culture, Economy | Britannica," February 3, 2025, <https://www.britannica.com/place/Nigeria/Independent-Nigeria>.

<sup>62</sup> "Nigeria," in *The World Factbook* (Central Intelligence Agency, March 13, 2025), <https://www.cia.gov/the-world-factbook/countries/nigeria/>.

<sup>63</sup> Balogun, Ismail A.B, "The Penetration of Islam into Nigeria," *African Studies Seminar Paper*, no. 7 (1969).

<sup>64</sup> Yushau Sodiq, *A History of the Application of Islamic Law in Nigeria* (Palgrave Macmillan, 2017).

<sup>65</sup> "Draft Constitution of Nigerian 1979" (n.d.), sec. 256.

<sup>66</sup> Draft Constitution of Nigerian 1979, sec. 184.

<sup>67</sup> Draft Constitution of Nigerian 1979, sec. 189 (5).

<sup>68</sup> Draft Constitution of Nigerian 1979, sec. 260 (1).

<sup>69</sup> Sodiq, *A History of the Application of Islamic Law in Nigeria*.

<sup>70</sup> Justice Agabi Godwin Kanu, "Prohibition of Discriminatory Punishments. A Letter Written to All the Twelve States That Apply Sharia Law," *Jenda: A Journal of Culture and African Women Studies* 1 & 2 (March 18, 2002).

## (b) Malaysia

Malaysia is another predominantly Muslim country, and Islamic law was considered the law of the land before the British intervention on the Malay Peninsula. Codified Islamic laws have been applied in Malay states since the 16<sup>th</sup> century. However, when the British took control of the peninsula in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries, English common law became the dominant law, except for Muslim family law.<sup>71</sup> According to Farid Sufian Shuaib, Tajul Aris Ahmed Bustami, and Mohd Hisham Mohd Kamal, the colonial administration in Malay states imposed English law through legislation and through the civil court system, where judges were either trained in English law in England or imported from Britain.<sup>72</sup>

Malaysia gained independence from the British in 1957 with a British-tailored Constitution. The Malaysian Merdeka (Independence) Constitution drafting committee<sup>73</sup> consists of five members from the British and former British colonies. The prevailing opinion regarding the religious status of Malaysia was that it should be a secular state, or even if Islam were accepted as the state religion, it would uphold secular values in order to secure the interests of the minority faiths. Justice Abdul Hamid from Pakistan, a member of the drafting commission, suggested, contrary to the majority view, that Islam should be included as the religion of the Federation. On his descending note, he stressed that the Alliance parties also suggested the idea. At the same breath, he also recommended that it be made clear that non-Muslim citizens shall not be disabled to profess, propagate, and practice their religions.<sup>74</sup> Hence, Article 3(1) of the Federal Constitution of Malaysia was inserted as follows:

“Islam is the religion of the federation, but other religions may be practised in peace and harmony in any part of the federation.”<sup>75</sup>

There has been an unending debate on the legality of applying Sharia principles or Islamic law in Malaysia since its independence. Mohamed Azam Mohamed Adil and Nisar Mohammad Ahmad noted that despite Islam’s recognition as the religion of the federation, Islamic law, or Sharia Law, has never been considered a source of Law in Malaysia. Hence,

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<sup>71</sup> “Federal Constitution of Malaysia 1957” (n.d.), app. List II, State List.

<sup>72</sup> Farid Sufian Shuaib, Tajul Aris Ahmad Bustami, and Mohd Hisham Mohd Kamal, *Administration of Islamic Law in Malaysia: Text and Material* (Malaysia: Lexis Nexis, 2010), <https://cir.nii.ac.jp/crid/1130282268980260352>.

<sup>73</sup> Famously known as the Read Commission.

<sup>74</sup> Federation of Malaya Constitutional Commission, James Scott Cumberland Reid, and Baron Reid, *Report of the Federation of Malaya Constitutional Commission* (HM Stationery Office, 1957).

<sup>75</sup> Federal Constitution of Malaysia 1957.

“Islam as the religion of the Federation does not extend to its legal dimension.”<sup>76</sup> Unlike some constitutions in the Muslim world, the Federal Constitution of Malaysia does not recognise Sharia or Islamic law as a source of Malaysian law.<sup>77</sup> Therefore, Islamic law was recognized as a subordinate law with a very limited jurisdiction that was mostly confined to personal matters. In *Che Omar Che Soh v. Public Prosecutor*, the Supreme Court stated that Article 3 never intended to give legislative power to legislate Islamic law in the area of public law in Malaysia.<sup>78</sup>

In fact, Article 4 (1) proclaims that the Federal Constitution is the supreme law of the federation, and any law inconsistent with it is void to the extent of the inconsistency.<sup>79</sup> Additionally, according to Article 75, in the event of inconsistency between federal and state law, the federal law shall prevail, and the state law shall be void to the extent of the inconsistency.<sup>80</sup>

Lionel Astor Sheridan also expressed a similar view on Article 3 of the federal constitution. He argued that Article 3 does not provide a legitimate position to legislate Islamic laws. Further, he added that “...far from making such a provision, Article 162, on the other hand, purposely preserves the continuity of secular law prior to the constitution, unless such law is contrary to the letter.”<sup>81</sup> Ahmed Ibrahim, on the contrary, refuted the Supreme Court’s interpretation, claiming that it should not be interpreted from a Western perspective but should be according to an Islamic perspective. Ahmed Ibrahim’s opinion seems to be more factual in a practical sense. This is because Islam does not mean only to be rituals. Instead, Islam covers all aspects of Muslims’ lives, including rituals, social, political, and legal aspects.<sup>82</sup>

Public federal laws in Malaysia are shackled with secular constitutional norms. This can be seen in the failed attempt to implement *Qisas* and *Hudud* laws in Kelantan and Terengganu in 1993 and 2002, respectively, by PAS leadership. The Kelantan Chief Minister Nik Abdul Aziz Nik Mat has been reported to have said that even though the bill was passed by the

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<sup>76</sup> Mohamed Azam Mohamed Adil and Nisar Mohammad Ahmad, “Islamic Law and Human Rights in Malaysia,” *Islam and Civilisational Renewal* 5, no. 1 (January 2014): 43–67, <https://doi.org/10.12816/0009803>.

<sup>77</sup> Egyptian Constitution, Iranian Constitution, the Pakistan Constitution and the constitution of the Maldives recognizes Islamic Sharia as a source of law in the constitution.

<sup>78</sup> *Che Omar Che Soh v. Public Prosecutor* [1988]2 MLJ 55 (n.d.).

<sup>79</sup> Federal Constitution of Malaysia 1957.

<sup>80</sup> Federal Constitution of Malaysia 1957.

<sup>81</sup> Lionel Astor Sheridan, *The Religion of the Federation*, 1988.

<sup>82</sup> Ahmed Ibrahim, “Kedudukan Islam Dalamperlembagaan Malaysia,” *Ins. Jurnal Hokum* 10, no. 2 (1996): 143–44.

Kelantan legislative assembly, it could not be implemented until the Federal Government of Malaysia amended the Federal Constitution to give legal effect to the enactments.<sup>83</sup>

Therefore, the Qisas and Hudud Enactments of Malaysian states may be void ab initio as these enactments create an inconsistency with the Malaysian Penal Code,<sup>84</sup> a federal law. Hamid Jusoh rightly addressed this issue by stating that the difference between the colonial and post-independence eras is the authority of governance only. However, the structure of the government is continued on colonial ideas.<sup>85</sup> The analysis of the Malaysian Federal Constitution does not allow Islamic law to be incorporated into public laws at the national level.

### **(c) Indonesia**

Compared with Nigeria and Malaysia, Indonesia's situation seems much more complex and challenging. After the disintegration of the Ottoman Caliphate in Turkey in 1924, Indonesia maintained the world's largest Muslim population. Government records estimate that the Muslim population of Indonesia is roughly 242 million, which is 87 per cent of the Indonesian population.<sup>86</sup> According to Robert Cribb and Audrey Kahin, Islam gradually spread across Indonesia from the 13th to the 17th centuries.<sup>87</sup> Ever since Islam was introduced to the people, Islamic law has been applied extensively in Indonesia.<sup>88</sup> Indonesia acquired independence from the Japanese imperial regime in 1945<sup>89</sup> and from the colonial Dutch in 1950, respectively.<sup>90</sup>

The idea of an independent Indonesian Constitution and the form of its government and legal system emerged during the discussions held by Indonesian political groups much earlier than the Japanese announcement of the granting of independence in August 1945.<sup>91</sup> Some Islamic leaders<sup>92</sup> who represented the religion attempted to create an Islamic state through the

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<sup>83</sup> Hisham Mahzan and Shamsul Akmar, "Nik Aziz Tables Bill on Hudud Law," *New Strait Times*, November 25, 1993.

<sup>84</sup> "Penal Code of Malaysia (Act-574)" (n.d.).

<sup>85</sup> Hamid Jusoh, *Position of Islamic Law in the Malaysian Constitution with Special Reference to the Conversion Case in Family Law*. (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1991), 40–41.

<sup>86</sup> K. Caileigh Stirling, "5 Facts about Muslims and Christians in Indonesia," 2024, <https://policycommons.net/artifacts/12033187/5-facts-about-muslims-and-christians-in-indonesia/12926757/>.

<sup>87</sup> Robert B. Cribb and Audrey Kahin, *Historical Dictionary of Indonesia*, 51 (Scarecrow Press, 2004).

<sup>88</sup> Christian Pelras, *The Bugis* (John Wiley & Sons, 1997).

<sup>89</sup> Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia*, 2008.

<sup>90</sup> George McTurnan Kahin. *Nationalism and revolution in Indonesia..*

<sup>91</sup> Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia*.

<sup>92</sup> Among many Muslim leaders Abikusno Tjokrosuyoso is one, leader the leader of the Indonesian Islamic Union Party (PSII), advocated to establish an Islamic State in Indonesia.

constitution on the basis of the Qur'an and Sunnah,<sup>93</sup> while others deliberately ignored the idea and turned to the secular ideology. Secular leaders such as Soekarno, Hatta and others did not support the idea of deriving all laws from the Quran and Sunnah. Hatta, in one of his earlier speeches, stated that:

"[a] healthy sense of logic tells us it is not possible [to base national law purely on the Qur'an]... The Qur'an is especially the basis of religion, not a book of law. The various legal needs of today find no regulations in the Qur'an..."<sup>94</sup>

After a long, fierce debate over the constitutional position of Islam in Indonesia, political parties reached a compromise on 22 June 1945. Muslim leaders accepted the secularist's demand that the state of Indonesia would not be based on Islam, provided the latter accepted the statement which states "the practice of Islamic sharia would be obligatory for Muslim citizens." This agreement was later regarded as the Jakarta Charter, which constitutes the famous 'seven words' "*dengan kewajiban menjalankan syariat Islam bagi pemeluk-pemeluknya*," which was to be inserted into the preamble of the 1945 constitution.<sup>95</sup>

However, the Jakarta Charter turned out to be a deception for Muslim leaders, aimed at suppressing their voices and calling for the establishment of an Islamic state. Both the secular and Islamic groups interpreted it in the interest of the respective parties. Boland stated that the belief of Islamic parties was that the government is obliged to apply Shariah on a practical premise, while secular factions argued otherwise.<sup>96</sup> Some authors described the incident as a positive step that allowed all elements of Indonesian society (and especially the Muslim leaders as representatives of the majority population) to join the effort to achieve independence for Indonesia. On the other hand, the failure to incorporate Islam into the Jakarta Charter and the constitutional divorce from Islamic law was a huge blow for Muslim leaders. This resulted in the beginning of unending hostility in the Indonesian socio-political realm on the issue of the constitutionality of Islamic law in Indonesia.<sup>97</sup>

Therefore, Indonesia remains another Muslim-majority country with an uncertain constitutional position of Islam. As a result, non-Islamic secular laws were imposed on Muslims by a few secular-minded aristocrats of the country.

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<sup>93</sup> Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions*, vol. 12 (Univ of California Press, 1972), 36–39.

<sup>94</sup> Lev, *Islamic Courts in Indonesia*.

<sup>95</sup> B. J. Bolland, *The Struggle of Islam in Modern Indonesia: Slightly Revised Reprint* (Brill, 1971), 25–26.

<sup>96</sup> Bolland, *The Struggle of Islam in Modern Indonesia*.

<sup>97</sup> Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia*.

## MODERN ISLAMIC DEMOCRATIC CONSTITUTIONS

The late twentieth century saw a significant revival of Islamic constitutionalism in the Muslim world. The Pakistan Independence Constitution and the Iranian Islamic Revolutionary Constitution were two constitutions made in the mid and late-twentieth centuries. Another modern Islamic constitution emerged in the twenty-first century: the Constitution of the Maldives, which came into force in August 2008. This section briefly analyses the influence and position of Islam in the constitutions of these modern democratic countries.

### (a) Pakistan

The Muslim masses living in British India believed that there should be a separate independent Islamic state for Indian Muslims who could govern their affairs according to Islamic Sharia.<sup>98</sup> The independent struggle and creation of Pakistan was believed that it must be based on the foundation of the Quran and Sunnah.

However, after the creation of Pakistan in 1947, a dispute arose between Islamic scholars and secular-minded politicians on the issue of national identity.<sup>99</sup> The Muslim *Ulema* contended that the creation of Pakistan is none, but for the sake of the establishment of an Islamic state. Nonetheless, the secular-minded aristocrats argued that the nation should be based on secular democratic values. One of the prominent Muslim scholars at the time and the founder of *Jamat -e Islami*, 'Allama Abul 'Ala Maududi, contended that Pakistan must be an Islamic state based on Islamic values and laws. He argued that the establishment and function of a secular state is the antithesis of the establishment of an Islamic state. It is because in modern democratic states, the sovereignty rests with people instead of God, and this is against the basic tenets of Islam.<sup>100</sup> As a result, the concept of the sovereignty of Allah was first inserted into the constitution of the Islamic Republic of Pakistan in 1956. The principle was first enunciated in the Objectives Resolution of 1949.<sup>101</sup> The doctrine recognises the Almighty God as the ultimate authority of all Pakistani laws. The Pakistani people were entrusted with these powers as a sacred trust, and they must be exercised within the boundaries set by God, the Almighty. The preamble further elaborates on the principle that democracy, freedom, equality, tolerance, and social justice should be observed according to Islamic law. Muslims

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<sup>98</sup> Martin Lau, "Islam and the Constitutional Foundation of Pakistan," in *Constitutionalism in Islamic Countries between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Röder (Oxford University Press, 2012), 171–98.

<sup>99</sup> Rainer Grote and Tilmann J. Röder, *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press, 2012), 8.

<sup>100</sup> Maududi, *Islamic Law and Constitution*.

<sup>101</sup> "Constitution of Islamic Republic of Pakistan 1973" (n.d.), art. 2 A.

shall be enabled to live their lives in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah.<sup>102</sup>

Article two of the Pakistan Constitution provides Islam as the state religion.<sup>103</sup> In addition to the above provisions, the preamble further provides that Pakistan is a democratic State based on Islamic principles of social justice.<sup>104</sup> When the 1956 constitution came into force, the constitution provided the Islamic repugnancy clause in Article 198 of the constitution. However, the Islamic repugnancy provisions were detailed, and their application was expanded in the 1973 constitution of Pakistan.

Part Nine of the 1973 Constitution is designated explicitly for Islamic constitutional provisions. Some significant provisions related to Islamic law, *inter alia*, include Article 227, which provides that “All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.”<sup>105</sup>

After the military coup orchestrated by General Mohamed Ziaul Haqq in 1980, he attempted further Islamization of the Pakistani legal regime. He introduced additional amendments related to Islamic constitutional provisions. One significant amendment was the insertion of Chapter 3A to the constitution to create the Federal Sharia Court of Pakistan,<sup>106</sup> whose jurisdiction is vested with all issues related to Islam, especially sets the jurisdiction to determine the constitutionality of laws pursuant to the Quran and Sunnah.<sup>107</sup> In 1985, Article 2A was inserted to merge the Objective Resolution of 1949 into the Constitution.<sup>108</sup>

The Constitution of the Islamic Republic of Pakistan is one of the remarkable modern democratic constitutions in the Muslim world, which accepts and demonstrates the highest Islamic constitutionalism. The national laws of Pakistan also hold great value to their Islamic constitutionality.

## **(b) Iran**

The Islamic revolution in 1979 not only changed the incumbent regime, but the revolution reformed the whole governing system of Iran. The hereditary monarchy was changed to a

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<sup>102</sup> Constitution of Islamic Republic of Pakistan 1973, pt. Preamble.

<sup>103</sup> Constitution of Islamic Republic of Pakistan 1973, art. 2.

<sup>104</sup> Constitution of Islamic Republic of Pakistan 1973, pt. Preamble.

<sup>105</sup> Constitution of Islamic Republic of Pakistan 1973, art. 227 (1).

<sup>106</sup> “The Constitution (Amdt) Order, 1980 (P.O. No. 1 of 1980).” (n.d.).

<sup>107</sup> Constitution of Islamic Republic of Pakistan 1973, art. 203D.

<sup>108</sup> “Revival of the Constitution of 1973 Order, 1985 (P.O. No. 14 of 1985)” (n.d.).

presidential republic founded on the Shi'a Islamic principles. The 1979 constitution of Iran laid the foundation for the future Islamic republic giving the highest constitutional power to religious clerics. Ayatullah Khomeini's idea of Islamic state was highly influenced by the Pakistan constitution which established the first Islamic state in the post-colonial era.<sup>109</sup> The constitution begins with Basmalah, and the first provision proclaimed that "the government of Iran is an Islamic republic, which the nation of Iran based on its long-held belief in the rule of the truth and the justice of the Quran..."<sup>110</sup>

Similar to the Pakistan Constitution, the Iranian Constitution also declared the sovereignty of God, shifting from popular sovereignty accepted in most secular democratic constitutions. The Iranian Constitution provides the following on the sovereignty:

"Absolute sovereignty belongs to God, and it is He who has made man the governor of his social destiny."<sup>111</sup>

Islam is provided as the official religion of Iran.<sup>112</sup> Although the Persian language was stated as the official language,<sup>113</sup> Arabic was made compulsory to teach in primary, secondary, and high school because it is the language of the Quran and Islamic culture.<sup>114</sup>

The constitution recognises the Western style of popular universal suffrage for the election of the president and the parliament. However, in the same vein, the constitution stipulates limitations based on Islamic principles. The constitution also adopted the principle of separation of power and established its own check and balance mechanism through the Guardian Council. The constitution provides the legislature,<sup>115</sup> the judiciary<sup>116</sup> and the executive power<sup>117</sup> Under the absolute supervision of the Guardian Council.<sup>118</sup> Section 2 of Chapter VI of the constitution provides the law-making power to the parliament<sup>119</sup> in accordance with Islamic Sharia. Article two additionally affirms the exclusive sovereignty of God on legislation and the necessity of surrendering to His commands.<sup>120</sup>

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<sup>109</sup> Grote and Röder, *Constitutionalism in Islamic Countries*, 157.

<sup>110</sup> "Constitution of the Islamic Republic of Iran 1979, (Rev. 1989)" (n.d.), art. 1.

<sup>111</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 56.

<sup>112</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 12.

<sup>113</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 15.

<sup>114</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 16.

<sup>115</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 58.

<sup>116</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 61.

<sup>117</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 60.

<sup>118</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 57.

<sup>119</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 71.

<sup>120</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 2 (1).

The Iranian Constitution is also influenced by Maududi's concept of a welfare Islamic state.<sup>121</sup> The constitution is highly cautious about economic equality<sup>122</sup> and its disapproval of capitalism and socialism, where these systems do not promote economic justice in society. The constitution also demands the application of Islamic principles in framing the nation's foreign policy.<sup>123</sup> Another significant Islamic principle endorsed in the constitution related to a just and equitable economic system in the country is the constitutional prohibition of usury (*Riba*) and all other forms of prohibited means of acquisition of wealth. No other Muslim country explicitly prohibits *Riba* in the constitution except for Iran.<sup>124</sup>

Another feature of the Iranian Islamic revolutionary constitution is the Quranic foundation of the constitution. The Constitution has two significant characteristics in general. One is the general constitutional characters harmonized with Islamic Sharia, *inter alia* including the basic attributes of democratic constitutional characters presented in the 1907 constitution, including the principles of justice, rule of law, check and balance mechanism and the fundamental rights of the people. The 1979 Constitution advanced these principles, strictly aligning with Islamic sharia. Articles 4 and 72 provide the provisions for Islamic repugnancy, leaving the determination of the law to the guardian council. Article four provides all laws and regulations must be based on Islamic principles.<sup>125</sup>

The second and most important characteristic is the mandate of the Council of Jurists or the *Welayat -e Faqih*, popularly known as the Guardian Council. The concept is based on the Quranic principle of *Ulul 'Amr*,<sup>126</sup> which the *Shi'a* interpreted as the 12<sup>th</sup> Imam of *Shi'a*.<sup>127</sup>

The Iranian Constitution was revolutionary in many aspects, and the Islamic influence in the constitution is profoundly remarkable. It established a hybrid form of democratic and Islamic theocratic state in Iran. Finally, to safeguard the Islamic theocratic principles of the constitution, the constitution entrenched all articles related to the Islamic character of the

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<sup>121</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 3.12.

<sup>122</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 48.

<sup>123</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 3.16.

<sup>124</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 49.

<sup>125</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 4.

<sup>126</sup> The concept refers in the Holy Quran verse as Allah says: Obey Allah, Obey the messenger and those who are on authority (ulul-amr).

<sup>127</sup> Saïd Amir Arjomand, "The Kingdom of Jurists: Constitutionalism and the Legal Order in Iran," in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, ed. Rainer Grote and Tilmann J. Röder (Oxford University Press, 2012).

political order of the Islamic Republic of Iran by making it unamendable in CHAPTER XIV of the Constitution.<sup>128</sup>

### **(c) The Maldives**

The Maldives Constitution, promulgated on 8 August 2008, is one of the modern democratic yet Islamic constitutions in the Muslim world. The constitution was a result of the continuous call for political reforms since the early 1990s in the Maldives.<sup>129</sup> Two major political factions were involved in framing the new constitution of the Maldives. The politicians representing the incumbent government<sup>130</sup> and their opposition groups, later known as the Maldives democratic party (MDP). The MDP members advocated introducing a secular liberal democratic political system, while the government was in favour of nationalist ideas. However, there is also a third group who advocated to include Islamic constitutionalism in the new constitution along with democratic values, later known as Adhaalath Party<sup>131</sup> (AP), which is led by *Ulema* or the religious scholars.

Similar to the Pakistan Constitution-making process, the Maldivian constitution was made without the active involvement of Adhaalath Party members in the Constitutional assembly. In Pakistan, Maududi and his ideological Islamic party *Jamat-e Islam*'s influences were greatly visible in the constitution despite the absence of their direct participation in the drafting of the Pakistan Constitution. The Maldivian constitution is also greatly influenced by religious scholars who do not directly represent the Constitutional assembly. Yet, their campaign outside the chamber strongly resonated with the sentiments of the general public. Thus, the Constitutional assembly was compelled to include Islamic principles in the constitution, as echoed in the public rallies organized by the scholars of AP.

The 2008 Constitution reflected significant Islamic characteristics. This constitution provides Islam as the nation's fundamental character by describing the Maldives as "a sovereign, independent, democratic Republic based on the principles of Islam, and is a unitary State, to be known as the Republic of the Maldives."<sup>132</sup> The new constitution also provides Islam as the religion of the state and Islam as one of the basis of all laws in Maldives.<sup>133</sup> This constitution

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<sup>128</sup> Constitution of the Islamic Republic of Iran 1979, (rev. 1989), art. 177.

<sup>129</sup> Mohamed Abdulla Shafeeq, *Dhivehiraaje Democracy Ah Kuri Dhathuru (Maldives Journey to Democracy)* (Male', 2011).

<sup>130</sup> Later known as Dhivehi Rayyithuge Party (DRP), the political party led by the President Maumoon.

<sup>131</sup> Adhaalath Party also known as Justice Party was a Maldivian political party registered in 2005 by mostly Islamic scholars and its ideologies are based on Maududi's *Jamat-e Islami* and the doctrines of *Ikhwanulmuslimeen* of Egypt.

<sup>132</sup> "Constitution of the Republic of Maldives 2008" (n.d.), art. 2.

<sup>133</sup> Constitution of the Republic of Maldives 2008, art. 10 (a).

provides Islamic repugnancy provisions in Article 10, Article 70 and Article 90 of the Maldivian constitution.

The new constitution stipulated the separation of power and fundamental rights of individuals according to the tenets of Islam. All state organs are to be administered according to Islamic law. The constitution demands the president,<sup>134</sup> his deputy,<sup>135</sup> the cabinet ministers,<sup>136</sup> the members of the parliament,<sup>137</sup> members of judiciary<sup>138</sup> to be *Sunni* Muslims, and shall not be convicted of *Hadd* offence proscribed in Islamic Sharia. These criteria are, in fact, the basic conditions for all elected offices. Any state official, including the president, will be removed if he directly violates any tenets of Islam.<sup>139</sup>

The second chapter of the Constitution contains the fundamental rights of citizens, yet rights are guaranteed only in a manner that is not contrary to any tenet of Islam.<sup>140</sup> The same article also provides limitations on rights and freedoms to protect and maintain the tenets of Islam.<sup>141</sup>

The legislative authority is vested in the People's Majlis,<sup>142</sup> and its powers are limited to Islamic Sharia. The constitution states that "the People's Majlis shall not pass any law that contravenes any tenet of Islam."<sup>143</sup> Further, the privileges of parliament members are also limited in preserving Islamic Sharia.<sup>144</sup> The constitution also provided that when the constitution or law is silent, the judge must apply Islamic Sharia during the adjudication of any matter.<sup>145</sup>

The Constitution of the Maldives 2008 described the Maldives as a country founded on the basis of Islam. The constitution strictly upholds that claim, providing Islamic repugnancy provisions to safeguard the religion in every constitutional avenue. Though the constitution establishes a multi-party democratic presidential republic, the corpus of the whole constitution provides limitations and repugnancy provisions to safeguard Islam in the Maldives.

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<sup>134</sup> Constitution of the Republic of Maldives 2008, art. 109 (b).

<sup>135</sup> Constitution of the Republic of Maldives 2008, art. 112 (c).

<sup>136</sup> Constitution of the Republic of Maldives 2008, 130 (a) (3).

<sup>137</sup> Constitution of the Republic of Maldives 2008, art. 73 (a) (3).

<sup>138</sup> Constitution of the Republic of Maldives 2008, art. 149 (b) (1).

<sup>139</sup> Constitution of the Republic of Maldives 2008, art. 100 (a) (1).

<sup>140</sup> Constitution of the Republic of Maldives 2008, art. 16 (a).

<sup>141</sup> Constitution of the Republic of Maldives 2008, art. 16 (b).

<sup>142</sup> Constitution of the Republic of Maldives 2008, art. 70 (a).

<sup>143</sup> Constitution of the Republic of Maldives 2008, art. 70 (c).

<sup>144</sup> Constitution of the Republic of Maldives 2008, art. 90 (a).

<sup>145</sup> Constitution of the Republic of Maldives 2008, art. 142.

## ISLAMIC INFLUENCE IN MUSLIM CONSTITUTIONS

It is found that the early Muslim constitutions demanded a lesser emphasis on Islamic constitutional concepts compared to post-colonial and modern constitutions. As such, the first Ottoman Constitution in 1876, the Iranian Constitution in 1906, the Afghanistan and the Egyptian Constitution in 1923 and the Maldivian Constitution in 1932 only recognised Islam as the official state religion. It is also evident that the Muslim nations governed by Muslim rulers with lesser influence from colonial powers during that era were not very concerned over the protection of Islamic Sharia. This is because most rulers generally adhered to Islamic normative rules in governing their countries. Thus, the issues related to Islamic Constitutional Supremacy and repugnancy did not arise during that time, and there were no concerns over the foreign influences in their constitutions.

However, when the countries acquired independence from the colonial powers in the late 20<sup>th</sup> century, many countries were so attached to colonial legal systems. As a result, most nations adopted the colonial legacies rather than returning to their original Islamic norms. For instance, the Malaysian Constitution only recognised Islam as the official religion of the federation, while Indonesia and Bangladesh adopted a totally secular system of government, separating the legal system from Islamic Sharia. These countries demonstrated a lesser focus on Islam during the constitution-making process.

On the contrary, the independent Islamic Republic of Pakistan in 1953 initiated a new era of Islamic constitutionalism, followed by the Islamic Republic of Iran in 1979. Both these countries achieved Islamic constitutionalism in their modern democratic constitutions, demonstrating to the contemporary Muslim world that Islamic Constitutionalism is possible and applicable in this era. During the same period, Egypt took advantage of incorporating Islamic repugnancy provisions in the Egyptian Constitution in 1971, making Islamic Sharia the chief source of Egyptian laws. This progress was acquired as a result of continuous efforts of the popular Islamic revival movement the *Ikhwan al-Muslimeen*. The latest Islamic Constitution to this end was enacted in the Maldives in 2008. Pakistan, Iran and the Maldives acquired strikingly Islamic Constitutions concurrently presenting all the modern democratic constitutional apparatus, proving that Islamic countries are able to exercise modern democratic norms without violating basic tenets of Islam.

Islam was highly influenced in the Constitutions of these countries as a result of the significant efforts of influential Islamic scholars during that era. Scholars such as Allama

Maududi in Pakistan, Imam Ayatollah Ruhollah Khomeini and Ayatollah Mohammad Husyni in Iran, and Hassan al-Banna and Sayyid Qutb in Egypt were renowned influential scholars in developing Islamic constitutionalism in modern Muslim nations. Later, these Islamic scholars and associated political movements influenced many other countries' constitutions and political systems. They include Jamat e-Islami in the Indian Sub-Continent, the Egyptian Ikhwan al-Muslimeen and its affiliated political movements in the Middle East and North Africa, and recently, the Adhaalath Party in the Maldives, which played a significant role in the Islamization of modern constitutions. Regardless of the insignificant representation of Islamic Sharia in many constitutions in the contemporary Muslim world, a great effort to Islamize the Constitutions in the Muslim world has been made by Muslim scholars. As a result, almost all Muslim nations have at least some form of recognition of Islam, displaying the Islamic influence in contemporary constitutions in Muslim countries.

## CONCLUSION

There had been three significant stages of constitution-making in the Muslim world, excluding the First Islamic constitution enacted by prophet Mohamed in 622 in Madina. This research found that the early Muslim constitutions placed less emphasis on Islamic constitutional concepts than post-colonial and modern constitutions. For instance, the first Ottoman Constitution in 1876 only provided Islam as the official religion of the state. The main reason for this was that Islamic law was already recognized as *lex loci*, and Islamic Sharia was the primary source of law in almost all Islamic countries during this era. However, disputes over Islamic constitutional principles emerged during the era of the post-colonial constitution-making process in the mid-twentieth century.

Western-educated political elites in Muslim countries leaned towards Western-styled secular constitutions, while Muslim scholars fought to incorporate Islamic Sharia as a fundamental criterion in all constitutional provisions. The third phase of constitution-making materialized in some countries where they had lesser Western influences in their governance and legal systems. These countries strictly adhered to Islamic principles during the drafting of their constitution, resulting in constitutions entirely compatible with Islamic Sharia. The role of Muslim *Ulema* and Islamic political movements worldwide significantly impacted the development of Islamic constitutional principles in modern constitutions.

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