

JURODYNAMICS OF ISLAMIC LAW

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Abrogation is a classical concept of Islamic law, which allows jurists to organize the normative complexity of divine texts. As a rule of temporality, abrogation invalidates prior rules found incompatible with subsequent rules. By stretching the rule, critics and reformers of Islamic law wish to abrogate substantial portions of the Quran and the Prophet's Sunnah. This methodology of modernizing Islamic law secures no following in the Muslim world, which jealously defends the integrity of divine texts. Jurodynamics of Islamic law offers a sophisticated methodology, which respects the integrity of divine texts, retains the jurisprudential heritage of past centuries, but at the same time, modernizes legal systems to absorb modernity and constantly evolving spatiotemporal realities. No dynamic legal tradition cuts loose from the past or dwells exclusively in the past. Jurodynamics is the study of Shariah norms in motion, signifying both stability and change. Jurodynamics recognizes the Shariah as the Basic Code, which empowers Islamic states to construct dynamic bonds with classical jurisprudence (fiqh), positive law (qanun), and international law (siyar). Accusations that the Shariah is a barrier to modernity dissipate under the scrutiny of jurodynamics.

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I. INTRODUCTION

This Article¹ presents the “jurodynamics of Islamic law,”² a concept that studies the spatiotemporal dynamics of divine texts. More specifically, jurodynamics studies the relationship between the Shariah³ and other bodies of law, including classical jurisprudence (*fiqh*) developed in the formative period of Islam,⁴ modern legislation

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1. It is my view that the Quran cannot be translated; it can only be understood. Normally, after conducting my own research, I adopt the translation that in my view best captures the meaning of the verse. Unless otherwise specified, all translations of the Quran in this Article are mine. Other translations include those by Abdullah Yusuf Ali, Marmaduke William Pickthall, and Muhammad Asad.

2. The idea of jurodynamics is deduced from the Quran. In describing the movement of sun and moon in celestial space, the Quran invokes the notions of orbit and motion. “It is not for the sun to overtake the moon, nor doth the night outstrip the day. They float each in an orbit (according to law).” QURAN, sura Yasin 36:40 (Pickthall trans.). This verse of the Quran contains the idea of law in motion, an idea that represents both discipline and movement. God’s law is neither static, nor chaotic. Jurodynamics is the study of Islamic law as a dynamic normative system subject to God’s Law.

3. Here, the Shariah, used interchangeably with the Basic Code, means the Quran and the Prophet’s Sunnah, the primary sources of divine law. See FAZLUR RAHMAN, ISLAM 100 (2d ed. 1979) (providing the classical meaning of the Shariah as the path or road leading to water). *Ijmah* or *qiyas*, which serve as legal methods to derive rules from the Basic Code, are not included in the divine concept of the Shariah. *Id.* at 68. Terminological confusions about the Shariah can lead to mixing divine sources with human sources and law with legal methods, generating intellectual morass, erroneous reasoning, and dubious conclusions. For instance, J.N.D. Anderson, a noted Islamic expert, confuses the Shariah with classical *fiqh* in his analysis of modern legislation in *The Significance of Islamic Law in the World Today*, 9 AM. J. COMP. L. 187 (1960). Note the following sentence: “The fact remains, then, first that the Sharia—whether in its original or a somewhat modified form—still represents the family law” *Id.* at 197. Here, the author means rules of the classical *fiqh* because there exists no modified form of the Quran or the Prophet’s Sunnah. See Noor Mohammed, *Principles of Islamic Contract Law*, 6 J. L. & RELIGION 115 (1988) (listing *ijmah* and *qiyas* as additional sources of Shariah).

4. *Fiqh* is essentially a body of opinions derived from the Basic Code. Classical *fiqh* means both legal methods and substantive opinions formulated in the formative period of Islamic history (AD 632-892). *Fiqh*, in a more general sense, means classical *fiqh* as well as its development in subsequent centuries. Liaquat Ali Khan, *The*

(*qanun*),⁵ and international law (*siyar*).⁶ Muslim states⁷ need a functional methodology to compose these variant bodies of law into an integrated, operative legal system. Jurodynamics recognizes abrogation, a longstanding legal method learned from the Quran and known as *naskh*,⁸ to harmonize the conflicting norms of various bodies of law. Generally, abrogation invalidates prior rules found to be incompatible with subsequent rules.⁹ Jurodynamics, however, embraces a more sophisticated methodology that, in addition to abrogation, consists of specification, gradualism, and cyclical desuetude, to organize various bodies of law that cohabit the same legal system. This methodology does not question the immutability of the Shariah, a central belief of Islam, but rather presumes that the Shariah consists of a fluid normative energy that can change forms to satisfy spatiotemporal needs.

Calls are echoing in the world that the Shariah¹⁰ be abrogated to meet the many new social, economic, and cultural needs of Muslim communities.¹¹ Critics of the Shariah are vociferous. They argue that

Reopening of the Islamic Code: The Second Era of Ijtihad, 1 ST. THOMAS L.J. 341 (2003); see George Makdisi, *The Juridical Theology of Shāfi'ī: Origins and Significance of Uṣūl al Fiqh*, 59 STUDIA ISLAMICA 5 (1984) (describing the origins of the science of jurisprudence in Islamic history).

5. *Qanun* means modern positive law consisting of national and provincial constitutions, statutes, regulations, court cases, precedents, and other rules that a Muslim state promulgates in its legal system. See RAHMAN, *supra* note 3, at 80.

6. The first comprehensive Islamic book on international law was written at the end of the eighth century. MUHAMMAD IBN AL-HASSAN AL-SHAYBANI, *THE ISLAMIC LAW OF NATIONS* (Majid Khadduri trans., 1966). Shaybani's book on international law was part of a larger work called *Kitab al-Asl* or *Kitab al Mabsut*.

7. A Muslim state may be distinguished from an Islamic state. A Muslim state is one where the majority of the population identifies with the religion of Islam; an Islamic state is a Muslim state that upholds the supremacy of the Shariah. *Id.* at 19-22.

8. QURAN, sura Al-Baqarah 2:106.

9. MICHAEL DAVID BONNER, *JIHAD IN ISLAMIC HISTORY* 24 (2006).

10. The word "Shariah" in the popular press is generally associated with Islamic law or anything Islamic or Islam-based. This broad meaning of the Shariah, however, discounts important distinctions between divine law and its juristic opinions.

11. The most dramatic call in the Muslim world has come from Nasr Abu Zeid, a professor at Cairo University in Egypt, who argues that the Shariah texts are products of their spatiotemporal realities. Nasr Hamid Abu-Zeid, *The Sectarian and the Renaissance Discourse*, 19 ALIF: J. COMP. POETICS 203, 217-18 (Muna Mikhail trans., 1999). Distinguishing between the "essence" and "literal readings" of Shariah texts, Abu-Zeid argues that literal readings of the Quran, revealed to correct social injustices of the seventh century Arab conditions, must be abandoned. *Id.* at 218. Focusing on issues of women, for example, Abu-Zeid argues that the Quran's inheritance laws discriminate against women, giving them only half of what is given to men. *Id.* at 217. Abu-Zeid would discard the Quran's inheritance laws in favor of an equality that is compatible with the essence of Islam, which was aimed at liberating women from social injustices at the time. *Id.* In light of these and other jurisprudential positions

the Shariah oppresses women,¹² denies Muslims the freedom to change religion,¹³ prohibits the modernization of lending practices, imposes cruel and unusual punishment,¹⁴ mistreats non-Muslims, and demands imposition of laws invented centuries ago.¹⁵ Some critics are Muslims, while others are not; some enjoy academic respectability, while others are politicians carrying authority in influential circles.¹⁶ Some non-Muslim critics associate the Shariah with yet greater offenses, arguing that puritanical followers of the Shariah are prone to violence and terrorism.¹⁷ Turkey, a Muslim state—the successor to the Ottoman Empire, which enforced the Shariah for centuries in large parts of the Muslim world under its

that Abu-Zeid advocated, a group of lawyers approached Egyptian courts to argue that Abu-Zeid was unfit to be married to a Muslim woman. *Id.* at 203. In 1996, Egypt's Court of Cassation upheld the lower court's ruling in favor of a forced divorce. *Id.* The couple fled to the Netherlands in "self-imposed exile." *Id.*

12. See, e.g., Adrienne Katherine Wing, *Custom, Religion, and Rights: The Future Legal Status of Palestinian Women*, 35 HARV. INT'L L. J. 149, 158-59 (1994) (praising the Shariah for improving women's rights in the seventh century, but declaring that the Shariah "generally sanctions inferior treatment of women"); cf. Roksana Bahramitash, *Myths and Realities of the Impact of Political Islam on Women: Female Employment in Indonesia and Iran*, 14 DEV. PRAC. 508 (2004); Carol J. Riphenburg, *Post-Taliban Afghanistan: Changed Outlook for Women?*, 44 ASIAN SURV. 401 (May-June 2004) (concluding that empowerment of Afghan women has remained elusive, even after the fall of the Taliban).

13. See, e.g., Thomas Barfield, *Culture and Custom in Nation-Building: Law in Afghanistan*, 60 ME. L. REV. 347, 372 (2008) (noting the lack of legal equality for religions other than Islam).

14. See, e.g., William A. Schabas, *Islam and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 223, 234 (2000) (arguing that capital punishment for adultery and apostasy are incompatible with the law of human rights).

15. See Liaquat Ali Khan, *Free Markets of Islamic Jurisprudence*, 2006 MICH. ST. L. REV. 1487, 1540-60 (analyzing the externalist scholarship that criticizes various aspects of the Shariah).

16. The most provocative, though erratic, theory has been the so-called "clash of civilizations," which Samuel Huntington presented in the closing decade of the twentieth century. SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996). For a more complex historical relationship between Islam and the West, see Shahrough Akhavi, *Islam and the West in World History*, 24 THIRD WORLD Q. 545, 558-59 (2003) (explaining that despite their divergent values, Islam and the West can coexist in the future as they have in the past).

17. See Wael B. Hallaq, "Muslim Rage" and Islamic Law, 54 HASTINGS L. J. 1705, 1705-06 (2003) (refuting the thesis that Islam is an inherently violent religion); Liaquat Ali Khan, *The Essentialist Terrorist*, 45 WASHBURN L.J. 47, 54 (2006) (discussing literature presenting puritanical Islam as a violence-prone faith). The most dramatic criticism of Islam, although it was universally condemned, was made in the form of a short film, *Fitna*, which alternated clips of violence against women, tirades against Jews, and terrorist attacks in Western cities with images of verses of the Quran, suggesting that the Quran is the ultimate source of all these offenses. Gregory Crouch, *Dutch Film Against Islam is Released on the Internet*, N.Y. TIMES, Mar. 28, 2008, at A8.

dominion—practices a rigid form of secularism that not only separates the state from the Shariah, but preserves the secular state through non-amendable constitutional provisions.¹⁸

Resisting these calls and criticisms, numerous Muslim states have renewed their commitment to the Shariah.¹⁹ Muslim nations that imported Western law during the colonial period are now reviewing their concepts and doctrines to bring them in harmony with the Shariah.²⁰ Some Muslim states have introduced a supremacy clause in their national constitutions to abrogate laws that violate the Shariah.²¹ They subordinate even human rights treaties to the Shariah by making explicit reservations to incompatible treaty provisions.²² Muslims living in non-Muslim countries are also devising strategies to fashion their lives in accordance with the Shariah.²³ In the United Kingdom, Shariah courts are being established to enforce contracts that Muslims make in compliance with Shariah laws.²⁴ A similar demand for the enforcement of Shariah laws, at least in family matters, is likely to be made in the United States.²⁵

18. See TURK. CONST. arts. 3-4; Feroz Ahmad, *Politics and Islam in Modern Turkey*, 27 MIDDLE E. STUD. 3, 3 (1991) (describing the struggle between Islamic and secular forces in Turkey); Banu Helvacioğlu, 'Allahu Ekber', *We Are Turks: Yearning for a Different Homecoming at the Periphery of Europe*, 17 THIRD WORLD Q. 503, 503-05 (1996) (exploring binary tensions between Turkey's secular and Islamic forces).

19. See R. Scott Appleby, *History in the Fundamentalist Imagination*, 89 J. AM. HIST. 498, 505-11 (2002) (providing insights into Islamic movements in Egypt and Pakistan); Simon Barraclough, *Managing the Challenges of Islamic Revival in Malaysia*, 23 ASIAN SURV. 958 (1987) (discussing the challenges of Islamic revival in a multi-religious nation such as Malaysia).

20. For a study of reactions to the borrowing of Western law, see Ann Elizabeth Mayer, *Law and Religion in the Muslim Middle East*, 35 AM. J. COMP. L. 127 (1987).

21. See, e.g., AFG. CONST. ch. 1, art. 3; CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN art. 227; cf. EGYPT CONST. art. 2. Robbert A.F.L. Woltering, *The Roots of Islamist Popularity*, 23 THIRD WORLD Q. 1133 (2002), argues that Islamists wish to overthrow existing political and legal systems in Muslim nations and wish to install Shariah rule. This thesis, somewhat alarmist in content, discounts the fact that even mainstream political forces strive, through constitutional means, to establish supremacy of the Shariah.

22. See, e.g., Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271, 372 (1997) (discussing Shariah-based reservations to women's rights treaties).

23. See Melanie D. Reed, *Western Democracy and Islamic Tradition: The Application of Shari'a in a Modern World*, 19 AM. U. INT'L L. REV. 485, 486-87 (2004).

24. Mark Rice-Oxley, *Archbishop Controversy: Does Sharia Have a Role in Britain?*, CHRISTIAN SCI. MONITOR, Feb. 12, 2008; see Reed, *supra* note 23, at 487 (expressing skepticism over human rights protections through Islamic courts in Muslim and non-Muslim jurisdictions).

25. This may occur when Muslim couples draft prenuptial agreements to enforce Shariah laws. For a broader relational dynamic between Islam and America, see Ali A.

This epic struggle between opponents and proponents of the Shariah raise earnest questions. Is the Shariah immutable divine law, or is it subject to abrogation? Are there any recognized legal methods that jurists and judges may employ to abrogate the Shariah? Is the Shariah a monolithic body of law that remains the same across historical periods and national boundaries? Is the Shariah immune from spatiotemporal contingencies? Or, can it adapt to variant conditions in the enforcement of its decrees? These and similar questions must be answered satisfactorily to calm fears of critics who view the Shariah as an aggressive ideology determined to undermine Western values and global diversity. Misconceptions among Muslim communities that may view the Shariah through unexamined assumptions must also be corrected.

Jurodynamics distinguishes three models to explore the relationship between the modern state and the Shariah. First, the separation model mandates that Islam be privatized, separating the state from the Shariah.²⁶ In the secular state, Muslims may order their private affairs according to the Quran and Sunnah; however, the secular state, though it respects the freedom of religion, is not obliged to enforce the Shariah or make the *qanun* in deference to the Basic Code.²⁷ In theory, therefore, a secular state may abrogate Shariah prescriptions. Second, the suppression model is vigorously opposed to the Shariah. This model prohibits public and private recognition of the Shariah. Communism, for example, opposes any enforcement of the Shariah in public and private spheres.²⁸ Although communism has lost its appeal, similar ideologies may still sprout in the future to suppress the Shariah as a body of law altogether.

Third, the fusion model blends the state with the Shariah.²⁹ In the fusion state, the Basic Code is the supreme law of the land and

Mazrui, *Islam and the United States: Streams of Convergence, Strands of Divergence*, 25 THIRD WORLD Q. 793, 793-94 (2004), which discusses historical periods in which Euro-American and Islamic values have experienced harmony and tension.

26. In the early twentieth century, Turkey and Egypt began to separate church from state, and considered "the entire abrogation of the traditional system of law, the Shari'a," and its replacement with "a modern code of laws after a European model." William Thomson, *The Renaissance of Islam*, 30 HARV. THEO. REV. 51, 56 (1937).

27. As noted above, the Basic Code means the Quran and the Prophet's Sunnah. It is synonymous with the Shariah as defined in this Article. I constructed this term to avoid the confusion that surrounds the term "Shariah." See Liaquat Ali Khan, *The Reopening of the Islamic Code: The Second Era of Ijtihad*, 1 U. ST. THOMAS L.J. 341, 342-43 & n.11 (2003).

28. See Paul Froese, *"I am an Atheist and a Muslim": Islam, Communism, and Ideological Competition*, 47 J. CHURCH & ST. 473, 476-77, 488 (2005) (explaining how the Soviet government, pursuant to an anti-religious agenda, closed mosques and abolished the Islamic court system that adjudicated Shariah law).

29. In *A Theory of Universal Democracy: Beyond the End of History*, I developed the concept of a fusion state, but did not discuss the concept of jurodynamics. L. ALI

any laws contrary to or incompatible with the Basic Code are repealed through the legislature or struck down through courts.³⁰ No new laws are made unless they are compatible with the Shariah. The distinction between the private and public spheres is therefore rejected. The fusion state strives to enforce the Shariah and the Shariah informs the fusion state in all matters. Although the fusion state respects the rights of religious minorities, Islam remains the dominant state religion. Most Muslim states are either fusion states or in the process of becoming fusion states.³¹ Note, however, a fusion state may or may not be theocratic in its political setup.³²

Regardless of whether the Muslim state is secular, suppressive, or fusion,³³ jurodynamics of Shariah influences the state law. Drawing insights from the scientific concept of thermodynamics, jurodynamics postulates that the Shariah is a form of energy that cannot be created or destroyed, but can change forms.³⁴ History demonstrates that the law of conservation applies to Shariah because any forcible suppression of its norms generates vexatious consequences. When a Muslim state suppresses the Shariah, the Shariah goes underground, permeating local communities, generating resistance, and challenging suppressive institutions.³⁵ The theocratic revolution in Iran exemplifies severe reaction to royal authoritarian institutions that suppressed the Shariah and imported

KHAN, A THEORY OF UNIVERSAL DEMOCRACY: BEYOND THE END OF HISTORY 43-48 (2003). This Article is an important supplement to the theory of the fusion state.

30. As noted above, a fusion state is synonymous with an Islamic state.

31. KHAN, *supra* note 29, at 43.

32. In a theocratic state, the clergy monopolizes political power to the exclusion of others. A fusion state, however, may allow political parties with diverse platforms. Regardless of political structures, the fusion state is constitutionally committed to the supremacy of the Shariah. *See id.* at 43-45.

33. I write this Article from an internal viewpoint of a Sunni Muslim. Non-Muslims, who do not subscribe to Islamic beliefs, can benefit from jurodynamics to understand how the internal viewpoint shapes legal debates within Islamic juristic circles.

34. The first law of thermodynamics holds that energy cannot be created or destroyed; it can only change forms. JAMES P. ALLEN, BIOPHYSICAL CHEMISTRY 23 (2008). The Quran itself claims its own preservation. *See* QURAN, sura Al-Buruj 85:21-22. Since the Prophet's Sunnah is simply an explication of the Quran, it is preserved as well. However, the Prophet's Sunnah is preserved in prescriptions (*ahkam*) whereas the Quran is preserved in both prescriptions and Arabic text. The Sunnah is the Quran's first *tafsir* (exegetical commentary). *See generally* Irshad Abdal-Haqq, *Islamic Law: An Overview of its Origins and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 46-54 (2002) (explaining the methodologies and hierarchy of Islamic law sources).

35. *See generally* KNUT VIKOR, BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW 254 (2005) (describing Shariah movements in various Muslim and non-Muslim states).

discordant secular values.³⁶ The religio-political rise of the Taliban and their resolve to enforce a stricter version of the Shariah counter-weighted the Soviet suffusion of Afghanistan with communism.³⁷ These and other movements demonstrate that jurodynamics produces social disequilibrium when the Shariah is forcibly suppressed.

In this Article, however, jurodynamics focuses neither on the forcible suppression of the Shariah nor on the negative consequences of the Shariah's forcible separation from the state. Rather, it explores whether the Shariah, given its internal law of conservation, is inflexible, or whether its normative prescriptions adjust to changing circumstances. The analogy to thermodynamics is offered to demonstrate that the Shariah is a dynamic energy that flows into diverse legal regimes, creating new equilibriums. There are certain immutable norms that the Shariah preserves while it would never allow other normative changes. Beyond its permanent and incorruptible core, however, the Shariah accommodates evolutionary forces and strikes complex connections with diverse legal regimes in national and international contexts.

Jurodynamics assumes critical importance, particularly in fusion states that blend the Shariah with *qanun*. A fusion state must contend with the classical concept of abrogation applied to the Quran and the Prophet's Sunnah. Two additional questions must also be examined. First, practically all fusion states have accumulated a vast amount of *qanun* by way of codes, statutes, and cases that are not derived from the Shariah. Most fusion states have promulgated national constitutions that serve as the *grundnorm* for the ordering of norms belonging to various bodies of law.³⁸ These constitutions and laws have developed externally from the *fiqh* methodology that deduces laws directly from the Basic Code. What, one ponders, is the relationship between the Shariah and *qanun* in a fusion state? And how are incompatibilities between these two bodies of law resolved? Crucial is the question whether the *qanun* may abrogate Shariah law.

Second, almost all fusion states participate in the international legal system by signing treaties and subscribing to customary

36. Kamari Maxine Clarke, *Internationalizing the Statecraft: Genocide, Religious Revivalism, and the Cultural Politics of International Criminal Law*, 28 LOY. L.A. INT'L & COMP. L. REV. 279, 286 (2006) (arguing that religious revivalism is constitutive of the democratization process).

37. See generally AHMED RASHID, *TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA* (2000) (describing the Taliban's origins and rise to power, as well as its economic and social impact on Afghanistan's culture and future).

38. See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 115 (Anders Wedberg trans., The Lawbook Exch., Ltd. 1999) (1945) (defining the *Grundnorm* as juristic rationalization of the validity of basic norms that belong to a specific legal system).

international law. Among international agreements, human rights treaties claim normative permanence and universality, almost at par with divine texts. The Universal Declaration of Human Rights, for example, has become a new sacred text for the peoples of the world.³⁹ Likewise, human rights treaties protecting the rights of women and religious minorities are global in reach. A new regime that could be called “universal values” permeates human civilization, regardless of ethnic, racial, national, and religious diversity.⁴⁰ Obviously, international law is not derived from the Shariah. What, then, is the relationship between the Shariah and international norms in fusion states? And how are incompatibilities between these two legal regimes resolved? May international law abrogate provisions of the Shariah?

To answer these questions, the Article is organized as follows. Part II explains the basics of jurodynamics, explaining abrogation, specification, gradualism, and cyclical desuetude. This discussion presents legal methods that Muslim states may employ to harmonize norms belonging to diverse bodies of law, such as *fiqh*, *qanun*, and *siyar*. Part III explains intra-scriptural jurodynamics, arguing that no jurist is vested with the authority to abrogate any part of divine texts. Part IV presents the concept of inter-scriptural jurodynamics, explaining the theses of Al-Shafi'i and Al-Ghazali. This section examines whether the Quran can abrogate the Sunnah or the Sunnah can abrogate the Quran. Part V explores the jurodynamics of positive law and *fiqh*. This discussion acknowledges the pronounced existence of *qanun* that Muslim states have accumulated via constitutions, statutes, case law, and regulations. Part VI elucidates the practice of making reservations to international treaties, demonstrating that Muslim states, in order to preserve the supremacy of Shariah law, discount incompatible treaty provisions.

II. BASICS OF JURDYNAMICS

As noted in the introduction, jurodynamics studies the normative motion of Islamic law in spatiotemporal contexts. It acknowledges the Muslim belief that the Shariah—the Quran and the Prophet's Sunnah—is valid for all times and in all places.⁴¹ This universality means that the Shariah is inherently resourceful to meet the evolving demands of Muslim states at varying social, political,

39. See Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1153 (1998) (noting that the Declaration has “achieved the status of a holy writ within the human rights movement”).

40. See KHAN, *supra* note 29, at 81-112.

41. See Marie Bernand, *Hanafi Usul al-Fiqh Through a Manuscript of al-Ghassas*, 105 J. AM. ORIENTAL SOC'Y 623, 627 (1985) (describing through the works of Abu Bakr al-Ghassas that human reasoning cannot modify the Quran and scriptural sources).

economic, and moral stages. The Shariah originated in the seventh century to respond to specific spatiotemporal conditions of Makka and Medina, the two cities where the Quran was revealed and the Sunnah inspired.⁴² However, throughout subsequent centuries, the Shariah continued to inform diverse cultures, empires, and kingdoms established in Syria, Iraq, Spain, Persia, Egypt, and India. The Shariah is still vibrant and influential in nations as diverse as Indonesia,⁴³ the largest Muslim country, and the United Kingdom, where a substantial Muslim community has taken roots.

Bearing in mind the diversity of Muslim states and communities, this section examines legal methods with which the Shariah texts are understood, harmonized, and applied. The primary purpose of these methods is to clarify the application of divine texts and explain the resolution of seemingly incompatible textual provisions. Once these methods are learned in the context of divine texts, they can be applied to other bodies of law, such as *fiqh*, *qanun*, and *siyar*. Particularly, fusion states need harmonizing legal methods to establish a coherent legal system. Although this section explores only a few legal methods—abrogation, specification, gradualism, and cyclical desuetude—other methods are not excluded.

A. Abrogation

The idea behind abrogation is simple: two incompatible rules cannot coexist at the same time, though they can in two different time frames. To resolve incompatibility, one rule has to yield to the other. Temporality is frequently used to determine abrogation; the later-in-time rule is presumed to abrogate the prior rule.⁴⁴ If the abrogating and the abrogated rule originate from the same sovereign, the later-in-time rule represents the sovereign's change of mind and the most recent normative will. Abrogation presupposes that the lawmaker can change his normative will over the content of a rule. The Quran reveals God's abrogation powers in the following verse: "None of Our revelations [signs] do We abrogate or cause to be

42. Encyclopædia Britannica Online, Shariah, <http://www.britannica.com/EBchecked/topic/538793/Shariah> (last visited Mar. 20, 2009).

43. Alfitri, *Expanding a Formal Role for Islamic Law in the Indonesian Legal System: The Case of Mu'amalat*, 23 J. L. & RELIGION 249 (2007-08) (describing the expanding role of Islamic law in commercial transactions and banking).

44. Abrogation provides a temporality standard to resolve the contest between conflicting norms, declaring that the norm revealed later in time prevails over an earlier revealed norm. The spatial argument, that is, the place where either norm is revealed, is irrelevant to abrogation methodology.

forgotten, but We substitute something better or similar: Knowest thou not that Allah has power over all things?"⁴⁵

It may be argued that abrogation is contrary to the eternality of divine law. If God can abrogate His own commands, God's commandments seem ephemeral. Critics may ridicule religion by saying that God is unsure about His commandments or that He cannot make up His mind. These criticisms misconceive the jurodynamics of divine law. Abrogation serves numerous purposes in shaping legal systems, and no legal system can function without exercising the power of abrogation. The system must be able to modify and repeal laws that no longer provide utility or serve changed values.⁴⁶

Abrogation shares characteristics with repeal, overruling, preemption, and similar concepts used in modern legal systems to prioritize conflicting norms. Abrogation is closer to repeal when a rule is abolished and the text containing the rule has been removed from sacred scriptures.⁴⁷ In secular law, the physical removal of a repealed rule from statutes contributes to transparency. Otherwise, lawyers and judges may continue to give effect to repealed rules that inadvertently, or for some other reason, remain part of the statutory code. This form of abrogation, however, challenges the integrity of scriptures because physical elimination of revealed verses indicates tampering and doctoring of sacred texts.⁴⁸ Very few Muslim jurists concede that any portion of the Quran has been removed through abrogation.⁴⁹

The most acceptable form of abrogation that Muslim jurists concede is one where the ordainment is withdrawn but the text of the abrogated rule continues to exist alongside the text of the abrogating rule.⁵⁰ Since no human being has the authority to remove even a

45. QURAN, sura Al-Baqarah 2:106 (Yusuf Ali trans.). This verse may not be confined to textual abrogation and must be read more broadly to understand that God may remove or substitute any signs of His creation.

46. AHMAD VON DENFFER, 'ULUM AL-QUR'AN: AN INTRODUCTION TO THE SCIENCES OF THE QUR'AN 87-91 (1983) (describing how the Quran responded to the changing needs of the Islamic community).

47. In Islamic *fiqh*, this form of abrogation is known as *naskh al hukm wal talawa*, which means that both the ordainment and the text have been removed from the Quran.

48. This abrogation is known as *naskh al tilawah*, or *nask al qirra'ah*, which means that the ordainment remains while the text is removed from the scriptures.

49. See Fazlur Rehman, *Some Recent Books on the Qur'an by Western Authors*, 64 J. RELIGION 73, 90-91 (1984) (indicating that the idea that the Quran was doctored after its text had been fixed is contrary to the Muslim belief).

50. This form of abrogation is known as *naskh al hukm*, which means that the ordainment has been repealed even though the text containing the ordainment (*hukm*) continues to be part of the scriptures.

single word from the Quran, much confusion and controversy gathers around abrogating and abrogated rules. Speculative interpretations may multiply if jurists are given a free hand to, in effect, abrogate the Quran with the Quran. Because of the textual presence of both abrogating and abrogated verses in the Quran, and because of potentially abusive practices of abrogation, some jurists completely reject the concept of abrogation and make every effort to reconcile the conflicting verses.⁵¹ Critics, however, may conclude that the Quran is replete with contradictions.⁵²

Abrogation also applies to the Prophet's Sunnah, where it resembles the concept of overruling.⁵³ In the common law tradition, the holding of a previous case may be overruled in a subsequent case.⁵⁴ Rarely is a case whose holding has been overruled removed from case law repositories. The overruled case continues to exist alongside the overruling case, even though modern repositories may red-flag overruled cases.⁵⁵ Thus, while it is customary to delete repealed sections of a statute, it is equally customary not to delete overruled cases. There is some wisdom in not deleting overruled cases. Overruled cases may no longer carry the current law, but they nonetheless furnish contextual information that supported the prior holdings. The Prophet's Sunnah, which is analogous to case law, contains the approval of practices that were later overruled. Learned jurists may alert readers that certain *hadith* have been overruled. A mere reading of the Prophet's Sunnah from un-annotated sources can lead to error, misunderstanding, and confusion. By failing to detect abrogated practices, uninformed or unsympathetic critics may find that the Prophet's Sunnah is internally contradictory.

The challenge of understanding the Basic Code becomes even more complex because the abrogating and abrogated prescriptions may not belong to the same textual source. For example, the abrogating rule may be found in the Quran, whereas the abrogated prescription may exist in the Sunnah.⁵⁶ Even though, as discussed elsewhere, some Muslim jurists strongly believe that the Sunnah cannot abrogate the Quran, some argue that the Sunnah has indeed

51. Muhammad Asad, a noted translator of the Quran in English, does not subscribe to abrogation.

52. See Reza Aslan, Comment, *The Problem of Stoning in the Islamic Penal Code: An Argument for Reform*, 3 UCLA J. ISLAMIC & NEAR E. L. 91, 103 (2003).

53. Faisal Kutty, Note, *The Shari'a Factor in International Commercial Arbitration*, 28 LOY. L.A. INT'L & COMP. L. REV. 565, 588 (2006).

54. See Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1522, 1574 (2001) (discussing the common law tradition of precedent).

55. Westlaw, for example, provides the history of the case, which shows whether the case is followed, disapproved of, or overruled in subsequent cases.

56. See *infra* text accompanying notes 173-174.

abrogated some prescriptions of the Quran.⁵⁷ Thus, cross-source abrogation, which resembles the common law concept of preemption,⁵⁸ adds further complexity to the understanding of the Basic Code. This complexity arises when the Sunnah reports are not only internally incompatible, but also cannot be reconciled with the text of the Quran. Jurists of immense competence must engage in extensive research to prioritize conflicting norms of the Shariah's primary sources, the Quran, and the Prophet's Sunnah.⁵⁹ But even jurists cannot sort out conflicting norms if temporality information about these norms is unavailable or unreliable. Since both the Quran and the Prophet's Sunnah were accumulated over a period of twenty-two years, sometimes it is impossible to precisely determine the temporality of each verse of the Quran or of each report of the Prophet's Sunnah.

B. Specification

Jurodynamics distinguishes between abrogation and specification, a longstanding distinction in Islamic jurisprudence.⁶⁰ Abrogation completely nullifies the meaning of a prescription, whereas specification provides an exception, condition, restriction, limitation, or enlargement to the prescription's application. The Quran first reveals a prescription that prohibits intoxication while praying.⁶¹ Later, it reveals a prescription that prohibits intoxicants.⁶² It would be inaccurate to say that the second prescription abrogates the first prescription. It would be more accurate to say that the second prescription expands the scope of the first prescription. The first prescription is valid in that Muslims are still prohibited from saying prayers in a state of intoxication. In fact, the first prescription, in addition to prohibiting the state of intoxication during worship, underscores an additional point that praying is a rational submission to God, and the meaning of prayer is

57. Chibli Mallat, *From Islamic to Middle Eastern Law: A Restatement of the Field (Part I)*, 51 AM. J. COMP. L. 699, 724 (2003); Aslan, *supra* note 52, at 97.

58. Cross-source abrogation is similar to the common law concept of preemption, such as in the United States, under which federal law may preempt state law. See Siegel, *supra* note 54, at 1522, 1574.

59. See Kelsen, *supra* note 38, at 115.

60. Bernard, *supra* note 41, at 626. Bernard discusses specification as examined in the works of Abu Bakr al-Gassas, a Hanafi jurist. *Id.* As a rationalist, al-Gassas viewed the Quran as God's revealed arguments. *Id.* Therefore, according to al-Gassas, reason played a significant role in specification. *Id.* Al-Gassas is also spelled as al-Jassas, and his original works are in Arabic. See Nabil Shehaby, *Illa and Qiyās in Early Islamic Legal Theory*, 102 J. AM. ORIENTAL SOC'Y 27, 30 n.20 (1982).

61. QURAN, sura An-Nisa 4:43.

62. QURAN, sura Al Maidah 5:90.

compromised when the prayer is offered in a self-induced state of diminished rationality, alertness, or full consciousness.

In light of this distinction, jurodynamics mandates that seemingly incompatible prescriptions must first be analyzed for specification to determine whether the later prescription is meant to restrict or enlarge the meaning of the prior prescription. If incompatible prescriptions cannot be reconciled through specification, the jurist must still avoid any resort to intra- or inter-scriptural abrogation simply because no jurist has the vested authority to abrogate any divine law. In sorting out incompatibilities, the jurist must not engage in any interpretive speculation if no concrete issue is at stake. If an Islamic court must choose one of the incompatible prescriptions to resolve an actual case, the court must apply the prescription that best serves the interests of justice in the particular case. The methodology that confers discretion on the court is one of specification and not abrogation. It is on these occasions that an Islamic court delivers its opinion with a humbling prayer: "God is the best judge."

C. *Gradualism*

The positive contributions of jurodynamics are critical to the understanding of a legal system. By modifying and explaining revelations, God is teaching the Prophet and Muslims that even the divine legal system must evolve to respond to changing realities. The principle underlying creation is that of evolutionary dynamism and not that of static rigidity. If God is willing to explain and change His own laws, earthly rulers cannot argue that laws must remain unchanged. A dynamic legal system responsive to changing realities is therefore open to explanations and amendments. In its most fundamental sense, jurodynamics empowers a legal system to adapt its juristic concepts to evolutionary forces.

A complete substitution of one normative system with another is neither the purpose nor the methodology of jurodynamics. When the Shariah influences a normative system, its jurodynamics does not abrogate each and every aspect of the receptive system.⁶³ In fact, the Shariah retains substantial portions of the receptive system. Specific norms, and not the entire normative system, are the target of

63. Here the receptive system means a system that is open to the influence of the Shariah. Again, the law of thermodynamics is helpful in understanding the interaction between two sources of energy. When a hot surface is brought in close proximity with a cold surface, the heat flows from the hot surface to the cold surface. ALLEN, *supra* note 34, at 23-25. Similarly, water flows from high elevation to low elevation. *Id.* at 46-47. In these examples, the cold surface and lower elevation are receptive systems. Applying this analogy to normative interactions between systems, a system that receives the Shariah energy may be identified as a receptive system.

jurodynamics. Local customs, habits, cultural traits, and even laws, for the most part, remain unchanged. Only selective customs, habits, cultural traits, and laws incompatible with the normative core of the Shariah are abrogated.⁶⁴ Jurodynamics, therefore, aims at selective amendments of the receptive normative system.

Gradualism is a distinct legal method that jurodynamics employs to effect change. In some cases, God does not impose the ultimate obligation all at once, instructing communities to bring fundamental changes through pragmatic gradualism and not through revolutionary instantaneousness. Related to gradualism is the legal method of stagism (*atwar*), a concept mentioned in the Quran to remind human beings of their phased development as individuals and communities: "What is amiss with you that you cannot look forward to God's majesty, seeing that He has created [every one of] you in successive stages?"⁶⁵ Stagism and gradualism thus reinforce each other as processes of normative development.

In light of stagism and gradualism, let us further examine the intoxication prescriptions discussed above. The Quran's prohibition of consuming alcohol was gradual. The Quran first instructed Muslims not to worship under the influence of intoxicants.⁶⁶ This limited prohibition purified prayers and submission to God, but did not place a complete ban on the consumption of intoxicants. Next, the Quran made an empirical observation that there are indeed some benefits in consuming intoxicants, but the harm outweighs the benefits.⁶⁷ This utilitarian argument introduced reflective elements into the consumption of intoxicants. The people may consume intoxicants to relieve stress, intensify joy, or enjoy social company in a relaxed atmosphere. By drawing these benefits, however, consumers may disregard the harm that intoxicants cause to health, family happiness, functional alertness, or social relations. Finally, after partially reforming their conduct in prayer and educating them

64. Abdur Rahim, *A Historical Sketch of Mohammedan Jurisprudence*, 7 COLUM. L. REV. 101, 103 (1907) (explaining that Islam did not repeal the entire customary law of Arabia). Despite the unfortunate expression of "Mohammedan," the author's contributions to the clarification of Islamic jurisprudence are impressive.

65. QURAN, sura Nuh 71:13-14 (Asad trans.).

66. QURAN, sura An-Nisa 4:43; see SAYYID ABUL A'L MAWDUD, TAFHIM AL-QUR'AN, sura An-Nisa 4:43 n.65 (Zafar Ishaq Ansari trans., 1989) [hereinafter TAFHIM].

67. QURAN, sura Al-Baqarah 2:219. The utilitarian argument regarding the benefits and harm of consuming alcohol has not been brought to any finality. Research continues to show that a limited consumption of red wine, for example, is beneficial to the maintenance of cardiovascular health. However, other studies demonstrate the harm that the consumption of alcohol may cause. The deaths caused by drunk drivers demonstrate that even if alcohol consumption is allowed, it may nonetheless have to be regulated.

in the cost-benefit analysis of consuming intoxicants, the Quran categorically prohibits Muslims from the consumption of intoxicants.⁶⁸ The Quran presents complete withdrawal from intoxicants as a sign of success and cultivated bliss.⁶⁹

Gradualism rather than abrogation is a superior method to explain the verses prohibiting intoxicants, instructing Muslims to bring about behavioral changes in a steady and programmatic manner. It would therefore be inaccurate to conclude that the Quran is full of contradictions on the consumption of intoxicants. It would be equally inaccurate to conclude that subsequent verses abrogate prior verses. The Quran is teaching a methodology of gradualism to bring about efficacious change.

The most notable substantiation of gradualism is made through the very revelation of the Quran over a period of more than twenty-two years. Critics argued with the Prophet over the gradual revelation of the Quran, demanding an explanation of why the Quran was revealed in bits and pieces. The Quran itself responds to the criticism in the following verse: "Those who reject faith say: 'Why is not the Qur'an revealed to him all at once?' Thus (is it revealed), that We may strengthen thy heart [and understanding] thereby, and We have rehearsed it to thee in slow, well-arranged stages, gradually."⁷⁰ Even God's Prophet needs time and rehearsal to understand the profundity of divine texts.

D. Cyclical Desuetude

While gradualism introduces norms in increments to prepare communities to accept the final obligation, cyclicity allows a shift in the normative framework more appropriate to specific spatiotemporal contingencies. Cyclicity does not presuppose that cultures and communities progress in a linear manner from barbarity to civilization. Cyclicity represents rotational changes⁷¹ in communities from belief to disbelief and from disbelief to belief,⁷² from prosperity to adversity and from adversity to prosperity,⁷³ and from a state of ignorance to a state of knowledge (and vice versa).⁷⁴ In the words of the Quran: "And We dispersed them as [separate] communities all over the earth; some of them were righteous, and

68. QURAN, sura Al Maidah 5:90; see TAFHIM, *supra* note 66, sura Al-Maidah 5:90 n.109.

69. QURAN, sura Al Maidah 5:90.

70. QURAN, sura Al-Furqan 25:32 (Yusuf Ali trans.); see QURAN, sura Bani Israel 17:106.

71. See *supra* note 2 for the definition of jurodynamics.

72. QURAN, sura An-Nisa 4:137.

73. QURAN, sura Al-A'raf 7:95.

74. QURAN, sura Al-Ahqaf 46:23.

some of them less than that: and the latter We tried with blessings as well as with afflictions, so that they might mend their ways.”⁷⁵ There is no one divine method to mend all nations. Following the divine course, jurodynamics espouses a cyclical normative framework that responds to the development and degeneration of communities.

The jurodynamics of cyclicity affirms that the Basic Code is immutable and that none of its prescriptions (*ahkam*) can be abrogated, even though some may not be used in certain spatiotemporal contexts. In modern legal language, the word “desuetude,” though not tied to the idea of cyclicity, captures the concept of the non-use of legal norms.⁷⁶ The Basic Code is valid for all times and under all circumstances. This understanding of the Basic Code, however, can lead to error if one were to conclude that every prescription (*hukm*) of the Basic Code must be enforced at all times in all Muslim communities regardless of their spatiotemporal contingencies. True, the Basic Code offers solutions to the basic needs of Muslim communities. But basic needs vary from time to time and community to community. When certain prescriptions of the Basic Code are not needed, the lack of need does not nullify these prescriptions. No prescriptions of the Basic Code can be altered on the basis of need. Yet, spatiotemporal needs determine which Shariah prescriptions are operative and which are non-operative and therefore subject to cyclical desuetude.

The Quran itself provides spatiotemporal exceptions to its prescriptions. The Quran invokes the parable of ships moving through high seas like floating mountains.⁷⁷ The Quran calls the motion of ships the evidence of God’s presence.⁷⁸ But the motion of ships can never be taken for granted: “[I]f He so wills, He stills the wind, and then [ships] lie motionless on the sea’s surface – [and] herein, behold, there are messages indeed for all who are wholly patient in adversity and deeply grateful [to God].”⁷⁹ The message is consistent with jurodynamics. The norms presuppose supportive spatiotemporal conditions. When winds are still, when circumstances change, the norms in motion are rendered motionless. This is indeed the conception of cyclical desuetude.

Consider, for example, Shariah warfare prescriptions. If a Muslim state or community is engaged in a lawful war, the warfare prescriptions are operative. Muslims fighting for a just cause may

75. QURAN, sura Al-A’raf 7:168 (Asad trans.).

76. Note, *Desuetude*, 119 HARV. L. REV. 2209 (2006) (discussing the concept of desuetude in the common law tradition and examining whether the judiciary should abrogate old statutes).

77. QURAN, sura Ash-Shu’ra 42:32.

78. See *id.*

79. QURAN, sura Ash-Shu’ra 42:33 (Asad trans.).

use force to subdue the enemy. However, the battlefield is not a lawless domain of arbitrary killings.⁸⁰ Notwithstanding the pressures of the battlefield, the Prophet expressed disapproval over the killing of non-combatant women and children.⁸¹ During night raids, however, the Prophet exempted Muslim warriors from blame if the enemy's women and children were inadvertently killed.⁸² These prescriptions are fully operative when Muslims go to the battlefield. Muslims must fight in a manner that inflicts minimal suffering on non-combatants. Even during night raids or similar military expeditions, any reckless slaughter of non-combatants is prohibited. Night raids symbolize battlefields shrouded in actual and figurative darkness, with unknown and unknowable contingencies. Therefore, the infliction of suffering on non-combatants is excused only if the harm is unforeseeable.⁸³

These and other warfare prescriptions, which the Basic Code provides, are not needed in peacetime. Although warfare prescriptions are timeless and immutable, they are operative only in times of war and not in times of peace. In peacetime, warfare prescriptions do not lose their validity. They are simply not used because no need arises to use them. Furthermore, Islamic warfare prescriptions may be needed in one community but not in others. If a Muslim community in Africa is engaged in military jihad, it may invoke warfare prescriptions to conduct battles. Hundreds of other Muslim communities, enjoying peace, have no operative use for the prescriptions. In this sense, warfare prescriptions are subject to spatiotemporality. They are operative in times of war for the Muslim community engaged in battle. This specificity in the use of warfare prescriptions does not challenge their universality. The prescriptions are valid for all places and all times, although their use is conditioned upon the existence of warfare.

One may argue that warfare may allow need-based cyclicity, but there are certain Shariah prescriptions that, unlike warfare prescriptions, would be needed in all communities at all times. Warfare may not be a permanent condition of every Muslim community, but other conditions are. One may offer the crime of theft to argue that because theft occurs at all times in all Muslim

80. Liaquat Ali Khan, *An Islamic View of the Battlefield*, 7 BARRY L. REV. 21, 57-64 (2006) (explaining normative restraints on the battlefield).

81. SAHIH MUSLIM, Kitab Al-Jihad wa'l-Siyar 19:4319 (Abdul Hamid Siddiqui trans.), <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/muslim>.

82. SAHIH MUSLIM, *supra* note 81, Kitab Al-Jihad wa'l-Siyar 19:4321.

83. There is however a disturbing trend in modern warfare. Hundreds of thousands of civilians are killed in international wars. In Iraq, Sudan, and Lebanon, civilian deaths exceed combatant deaths by multiples. See Aaron Xavier Fellmeth, *Questioning Civilian Immunity*, 43 TEX. INT'L L. J. 453, 454-55 (2008).

communities, the prescribed punishment for theft⁸⁴ is immune from spatiotemporal cyclicity. On further examination, however, we find that even Shariah prescriptions, such as the one against theft, which seems universal and timeless, may indeed become inoperative under specific spatiotemporal circumstances.

For example, the prescribed punishment for theft may be suspended in times of famine.⁸⁵ The theft punishment underscores the sacredness of personal property and maintains law and order and tranquility in the community. In a Muslim community, where Muslims are paying *zakat* and feeding the poor and the hungry, as they must, no one would steal out of necessity. However, if a Muslim community is suffering from resource scarcity, has abandoned charity, or is hoarding essential goods for profit, the prescribed punishment for theft may be lawfully suspended. By suspending punishment, the Islamic state is not engaging in willful disobedience of God's Law, nor is it transgressing limits.

More specific examples illuminate the point even further. Eating the meat of dead animals or that of swine is prohibited.⁸⁶ However, if a Muslim "is forced by necessity, without willful disobedience, [and without] transgressing due limits, then [he is] guiltless. For Allah is Oft-forgiving Most Merciful."⁸⁷ Necessity suspends application of the prohibition. This suspension is available even to entire communities suffering from the threat of starvation. Of course, the prescription cannot be suspended in good faith if the Muslim community commands the means to alleviate the threatened starvation either through self-help or with the help of others.

Jurodynamics distinguishes between lawful and unlawful desuetude. Lawful desuetude occurs when a spatiotemporal condition warrants the suspension of a divine prescription. By contrast, unlawful desuetude occurs when a prescription of the Shariah is suspended, even though the spatiotemporal contingency warrants no such suspension. If a leader commands Muslim warriors to slaughter civilians or non-combatants, the command is unlawful under the Shariah, which grants no such blanket authority to any individual, ruler, or government. Note, however, that when a lawful derogation is sought from a divine prescription, the prescription is not abrogated; the prescription remains valid and immutable.

Jurodynamics also distinguishes between temporary and permanent desuetude. No jurist, leader, or even an entire community

84. QURAN, sura Al-Maidah 5:38 (Pickthall trans.) ("As for the thief, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from Allah. Allah is Mighty, Wise.").

85. QURAN, sura Al-Baqarah 2:173 (Yusuf Ali trans.).

86. *Id.*

87. *Id.*

of believers has the peremptory authority to permanently suspend a Shariah prescription. The derogation from a Shariah prescription is temporary, minimalist in scope, and aimed at meeting spatiotemporal compulsion.⁸⁸ The derogation from the prescription ceases to exist when the compulsion is removed. Even if the emergency persists and the derogation from the divine prescription lingers for a length of time, the prescription is still a valid and integral part of the Shariah.

A Shariah prescription is rarely suspended for the entire Muslim world. The suspension is often community-specific. For example, interest-bearing lending (*riba*) is generally prohibited.⁸⁹ A Muslim state will have no valid basis to allow *riba*. However, a Muslim community living in a non-Muslim state may have no option but to buy houses with interest-bearing loans. In such communities, the prescription against *riba* may be temporarily suspended until Shariah-compliant lending is available. Suspension of the *riba* prescription in one community, however, sets no precedent for a similar suspension in other Muslim communities that can obtain *halal* funding.

This part of the Article concludes that jurodynamics allows a sophisticated application of the Shariah. Abrogation of divine prescriptions is unavailable to Muslim states. However, Muslim states may employ other legal methods, such as specification, gradualism, and cyclical desuetude to intelligently interpret scriptures and enforce divine commands in good faith and without any willful disobedience.

III. INTRA-SCRIPTURAL JURODYNAMICS

Jurodynamics presumes that the entire Quran is valid as-is and no part can be abrogated. This presumption does not dispute the thesis of intra-scriptural abrogation under which a scripture may modify or repeal its own prescriptions. The concept of intra-scriptural abrogation might also apply to other divine texts, including the

88. A parallel concept of derogation is found in the law of human rights. However, not all rights are derogable. The right to life, for example, cannot be suspended. Even derogable rights are inseparable from non-derogable rights. Intrusive interrogation, for example, can result in degrading treatment. Thus permitting the former will result in violation of the latter; thus, derogable rights are no less important to the mental and physical well-being of individuals. See, e.g., Mohamed M. El Zeidy, *The ECHR and States of Emergency: Article 15—A Domestic Power of Derogation from Human Rights Obligations*, 4 SAN DIEGO INT'L L. J. 277 (2003) (arguing that international institutions must be more vigilant, and not deferential, when a state invokes emergency to derogate from human rights).

89. See QURAN, sura Al-Baqarah 2:275-80.

Prophet's Sunnah.⁹⁰ Jurodynamics prohibits abrogation as an exegetical method to invalidate the Word of God. Eminent scholars, including Al-Shafi'i⁹¹ and Al-Ghazali,⁹² accept that abrogation did occur in the Quran. Others do not. Intra-scriptural abrogation is presumed to have occurred because abrogating verses and abrogated verses both are found in the Quran. In prohibiting abrogation as an exegetical method, jurodynamics empowers Muslim jurists to reconcile the seemingly incompatible prescriptions of the Quran through legal methods such as specification, gradualism, and cyclical desuetude.

A. Immunity from Abrogation

Jurodynamics espouses a core principle that no one but the author of the scripture has the sole authority to abrogate any prescription in the scripture.⁹³ A scripture is corrupted and unlawfully amended when a person other than the author makes changes to it. More specifically, the Quran is immune from juristic abrogation. According to Muslim belief, God is the sole Author of the Quran, which was transmitted to humanity through the Prophet Muhammad. Al-Shafi'i rightfully argues that no person, not even the Prophet, has the authority to amend God's Book.⁹⁴ Only God can modify His own Word. Likewise, the Prophet is the author of the Prophet's Sunnah, though the Sunnah was transmitted through various chains of reporters. Only the Prophet can modify the Prophet's Sunnah. This point is crucial in understanding the scope of intra-scriptural abrogation because it rules out the possibility that Muslim jurists (or anyone else) possess the power to modify any prescription of the Quran or the Prophet's Sunnah. Any such claimed power subordinates divine texts to human authority.

90. The Prophet, for example, did abrogate his prescriptions. As a human being, the Prophet was open to changing his personal views. At one point, for example, the Prophet prohibited cross-pollination of dates. Muslims complied with the Prophet's prescription. When the date yield declined, the Prophet changed his prescription and allowed date growers to resume the practice of cross-pollination. SAHIH MUSLIM, *supra* note 81, Kitab Al-Fada'il 30:5832; *see also* Ali Khan, *A Culture of Solving Problems* (Washburn Univ. – Sch. of Law, Working Paper Series), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=942679 (arguing, by relying on this *hadith*, that Islam encourages the scientific method of research and solving problems).

91. ISLAMIC JURISPRUDENCE: SHAFI'IS RISALA 123-130 (Majid Khadduri trans., 1961) [hereinafter RISALA].

92. *See* ABU HAMID AL-GHAZALI, AL-MUSTASFA MIN ILM AL-USUL 135 (Ahmad Zaki Mansur Hammad trans., 1987) [hereinafter MUSTASFA].

93. This thesis is valid even under secular law. In the United States, for example, no one but a supermajority can amend the Constitution. U.S. CONST. art. V.

94. RISALA, *supra* note 91, at 124.

Even though God can do whatever He wishes—a central belief in Islam⁹⁵—a question persists as to why God would abrogate His own laws as rendered in the Quran. Intra-scriptural abrogation creates the impression that an unsure God was constantly editing the Quran over the two-decade period during which it was revealed to the Prophet, modifying verses to convey His Truth. Furthermore, abrogation poses a direct challenge to the Quran's textual integrity when Muslim scholars, such as Al-Ghazali, maintain that in addition to God, the Prophet too edited the Quran and changed its meaning.⁹⁶ Abrogation becomes problematic, even subversive, when modern jurists pursuing a reformist agenda arrogate to themselves the authority to invalidate self-selected portions of the Quran.⁹⁷

If abrogation is permitted to shear off all perceived textual incompatibilities, even a conservative abrogation thesis under which God alone can abrogate His laws would invalidate substantial portions of the Quran. Critics of Islam, who wish to portray Islam as an aggressive ideology, use intra-scriptural abrogation to contend that the Quran evolved from a scripture of peace to a scripture of violence as the verses of war (revealed in Medina when the Prophet was militarily strong) abrogated the earlier verses of peace (revealed in Makka when the Prophet was militarily weak).⁹⁸ They also assert that the Quran's verses of tolerance, which forbid religious compulsion, were later abrogated, substituting new verses to advocate conversion by force.⁹⁹ Jurists who subscribe to such an extensive scope of abrogation might indeed sponsor a more militant and intolerant version of Islam. Others, such as Mahmoud Taha, who too subscribe to extensive abrogation, but wish to portray Islam as a religion of peace and tolerance, claim juristic authority to counter-abrogate verses of war and intolerance and restore verses of peace

95. QURAN, sura Al-e-Imram 3:26 (God can do all things).

96. MUSTASFA, *supra* note 92, at 137.

97. Sudanese jurist Mahmoud Mohamed Taha and his disciple Abdullahi Ahmed An-Na'im present a bold theory of abrogation under which they claim authority to abrogate verses of the Quran that no longer serve purposes of modern times and human rights norms. Calling it the "evolutionary approach," An-Na'im supports Taha's comprehensive effort to comb through the Quran "identifying which verses to implement and which to repeal in the modern context." ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION 60 (1990). This approach to abrogation is not a serious proposal for reformation as it empowers human beings to declare that certain portions of the Quran are no longer valid.

98. See, e.g., Robert J. D'Agostino, *The Religious Rights of Incarcerated Persons: The Georgia Clergy Privilege, RLUIPA, and the Free Exercise Clause*, 1 J. MARSHALL L.J. 91, 127-28 (2008) (concluding that the Quran mandates the killing of non-Muslims).

99. Donald P. Little, *Coptic Conversion to Islam Under the Bahri Mamluks, 692-755/1293-1354*, 39 BULL. SCH. ORIENTAL & AFR. STUD. 552, 566 (1976) (describing forced conversions in Egypt).

and tolerance.¹⁰⁰ If all these advocates of abrogation were to be taken seriously, the verses of war and the verses of peace, as well as the verses of intolerance and the verses of tolerance, would all stand abrogated, leaving behind only a slender Quran. Perpetrating such exegetical excisions on the Quran, which render most of its text inoperative, cannot be acceptable jurisprudence.

Jurodynamics rejects the notion that God was actively engaged in editing the Quran to adjust its text to changing realities on the ground. Nor does it endorse any extensive concept of intra-scriptural abrogation of the Quran under which war replaced peace or forced conversion abrogated religious coexistence. Most importantly, jurodynamics repudiates the thesis that jurists possess the hermeneutic authority to abrogate any portion of the Quran. The theses and counter-theses of abrogation subvert the integrity of the Quran.¹⁰¹ Even when a textual incompatibility in the Quran is apparent and cannot be reconciled, jurodynamics empowers no jurist to surgically operate on the perceived textual contradiction and abrogate the undesirable part of the text. This exegetical prohibition on abrogation is consistent with the Quran's commandment: "No one can change the Word of God."¹⁰²

B. Interpretive Reconciliation

This section argues for the reconciliation of incompatible verses, even though classical *fiqh* made extensive use of abrogation to remove incompatibilities. Reconciliation is consistent with the Quran's commandment: "And those who are firmly grounded in knowledge say: 'We believe in the Book; the whole of [the Quran] is from our Lord'; and none will grasp the Message except men of understanding."¹⁰³ A detailed analysis of every verse of the Quran, which has presumably been abrogated, is beyond the scope of this section. Such detailed analysis is perhaps unnecessary since

100. MAHMUD MUHAMMUD TAHA, *THE SECOND MESSAGE OF ISLAM* 137 (Abdullahi Ahmed An-Na'im trans., 1987).

101. For the most part, scholars are free to research divine texts regardless of how the believers would react to their findings. By definition, however, the so-called reformation of divine law is aimed at believers, for reformation is designed to change views and behavior. While scholars may freely propose and counter-propose exegetical theories for an academic debate, reformers are practical jurists who must assess the viability of reform. A lawmaker may propose any bill to make a political, social, or moral statement, but a prudent lawmaker must weigh what is needed along with what is practically achievable. In the United States, for example, a scholar might propose the abrogation of the First Amendment and may even make weighty arguments to support such an abrogation, but the scholar must recognize that the probability of abrogating the First Amendment is low and will most likely be rejected in scholarly and popular circles.

102. QURAN, sura Al-An'am 6:34.

103. QURAN, sura Al-e-Imram 3:7 (Yusuf Ali trans.).

jurodynamics excludes abrogation as a legal method for organizing seemingly incompatible prescriptions. Specification, gradualism, and cyclical desuetude are the preferred legal methods to reconcile verses of the Quran. Below, three verses of the Quran are discussed as examples to illustrate that intra-scriptural abrogation, which is tantamount to textual excision, is unjustifiable when reconciliation methods are available.¹⁰⁴

1. The Abrogation Verse

Exegetical misunderstanding arises from the so-called abrogation (*naskh*) verse of the Quran, which has been interpreted to sanction intra-scriptural abrogation: "None of Our [*ayatin*] do We abrogate or cause to be forgotten, but We substitute something better or similar: Knowest thou not that Allah Hath power over all things?"¹⁰⁵ This verse has been interpreted to conclude that God can abrogate His verses and has indeed done so in the Quran. Based on this verse, some jurists take the next exegetical step, arguing that since God has abrogated verses, jurists applying the Quran to human affairs carry the authority of abrogating the Quran as well. As noted above, jurodynamics rejects any such juristic authority of abrogation.¹⁰⁶

The key word in the abrogation verse is *ayatin*, which means both verses and signs. If the word *ayatin* is read to mean verses of the Quran, which some Muslim scholars do, the concept of abrogation takes on its classical meaning, presenting God as an editor engaged in perfecting some verses of the Quran with "something better or similar."¹⁰⁷ If the word *ayatin* means divine texts delivered over the centuries, including those revealed to prior prophets such as Moses and Jesus, abrogation refers to the replacement of older texts, such as the Torah and the New Testament, with "something better or similar."¹⁰⁸ According to Maududi, the abrogation verse demonstrates

104. Jurodynamics similarly explains other verses that have traditionally been subjected to abrogation analysis.

105. QURAN, sura Al-Baqarah 2:106 (Yusuf Ali trans.).

106. Certainly, common law courts exercise the authority to invalidate legislation incompatible with the national constitution. But even in the common law tradition, no judge or jurist claims the authority to abrogate portions of the constitution in any interpretive context.

107. QURAN, sura Al-Baqarah 2:106 (Yusuf Ali trans.).

108. *Id.* This interpretation suits the Muslim belief that God's prior revelations are corrupted and distorted because of poor preservation and forgetfulness. *But see* Hartwig Hirschfeld, *Mohammedan Criticism of the Bible*, 13 JEWISH Q. REV. 222, 234-35 (1901) (explaining the Islamic theme of abrogation of the Old Testament and Maimonides's vigorous defense that the Torah has not been changed or corrupted and that the Mosaic Law has never been abrogated or replaced by any subsequent Law from God).

that the Quran was replacing the forgotten or corrupted injunctions of earlier scriptures.¹⁰⁹ This meaning of abrogation establishes relational continuity among divine texts as God reinforces His message with each new revealed text.¹¹⁰

The word *ayatin* used in the abrogation verse may not even refer to any prescriptive text. Most frequently, *ayatin* means signs or indications or evidence of proof. The Quran speaks of God's signs (*ayatin*) in the creation of human beings from dust,¹¹¹ the creation of intimate partners from the same stock or species,¹¹² and the creation of diverse languages and colors.¹¹³ These signs demonstrate the evidentiary presence of God for those who pursue knowledge.¹¹⁴ Even punitive natural events are signs (*ayatin*) of God. When the people of Pharaoh rejected Moses and ridiculed his miracles as sorcery, God inflicted them with flood and plagues. These were self-explanatory signs (*ayatin*), says the Quran, but the people of Pharaoh were arrogant and constituted a nation of wrongdoers.¹¹⁵

If the word *ayatin* in the abrogation verse¹¹⁶ means signs or evidentiary proof, the verse is no longer tied to editing of the Quran or other divine texts. Abrogation in the verse means the substitution of an existing proof of God's wrath or mercy "with something better or similar." God's punitive signs may fade out of human memory, breeding arrogance and hubris. God has the power to create new punitive signs (*ayatin*) to remind nations that rejection of faith can bring disaster. Likewise, God's signs (*ayatin*) for His unlimited kindness may be corrupted, distorted, or erased, but God has the power to substitute the removed or forgotten signs (*ayatin*) of kindness "with something better or similar." Even the literal meaning of *naskh* denotes obliteration and elimination and not editorial changes in the text.¹¹⁷ The abrogation verse is a reminder of God's power to renew His signs (*ayatin*) to guide human beings toward gratitude and away from self-righteous forgetfulness.

2. The Stoning Verse

The most disquieting concept of abrogation involves the so-called stoning verse (*ayat al rajm*) that God physically deleted from the

109. TAFHIM, *supra* note 66, sura Al-Baqarah 2:106 n.109.

110. Liaquat Ali Khan, *The Immutability of Divine Texts*, 2008 BYU L. REV. 807, 825-26.

111. QURAN, sura Ar-Rum 30:20.

112. QURAN, sura Ar-Rum 30:21.

113. QURAN, sura Ar-Rum 30:22.

114. *Id.*

115. QURAN, sura Al-A'raf 7:130-33.

116. QURAN, sura Al-Baqarah 2:106.

117. MUSTASFA, *supra* note 92, at 475.

Quran without abrogating its prescriptive effect. This highly abstract and counter-intuitive notion of intra-scriptural abrogation contends that a prescription, the text of which has been physically removed from the Quran, is nonetheless effective and enforceable if the Prophet's Sunnah preserves the essence of the removed prescription. While the Prophet's Sunnah explains the law of the Quran, just as the case law explains the application of a statute, the Prophet claimed no authority to abrogate the text or meaning of the Quran. The normative hierarchy between the Quran and the Prophet's Sunnah is clear. The Prophet's Sunnah is subject to the Quran. Any interpretation or understanding of the Prophet's Sunnah that undermines the integrity of the Quran carries no legal effect.

The alleged removal of the stoning verse is attributed to Omar al-Khattab, the second Caliph of Islam. The Two Sahihs—*Sahih Bukhari* and *Sahih Muslim*—are the most authentic compilations of the Prophet's Sunnah and both mention Caliph Omar's remarks about the stoning verse.¹¹⁸ In both accounts, Caliph Omar, speaking from the Prophet's pulpit, reminded the audience that the Quran contained a verse sanctioning the stoning punishment (*ayat al rajm*) for adultery and that the Prophet imposed the punishment on persons committing adultery.¹¹⁹ Caliph Omar expressed grave

118. As narrated by Ibn Abbas:

'Umar said, "I am afraid that after a long time has passed, people may say, "We do not find the Verses of the Rajam (stoning to death) in the Holy Book," and consequently they may go astray by leaving an obligation that Allah has revealed. Lo! I confirm that the penalty of Rajam be inflicted on him who commits illegal sexual intercourse, if he is already married and the crime is proved by witnesses or pregnancy or confession." Sufyan added, "I have memorized this narration in this way." 'Umar added, "Surely Allah's Apostle carried out the penalty of Rajam, and so did we after him."

8 SAHIH BUKHARI 82:816 (M. Muhsin Khan trans.), <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/bukhari>; cf. *id.* 82:817 (quite similar to the one reported in Sahih Muslim); see SAHIH MUSLIM, *supra* note 81, Kitab Al-Hudud 17:4194. In both Sahihs, however, the reporter of Omar's speech is the same person, Ibn Abbas.

119. SAHIH MUSLIM, *supra* note 81, Kitab Al-Hudud 17:4194 states:

'Abdullah b. 'Abbas reported that 'Umar b. Khattab sat on the pulpit of Allah's Messenger (may peace be upon him) and said: Verily Allah sent Muhammad (may peace be upon him) with truth and He sent down the Book upon him, and the verse of stoning was included in what was sent down to him. We recited it, retained it in our memory and understood it. Allah's Messenger (may peace be upon him) awarded the punishment of stoning to death (to the married adulterer and adulteress) and, after him, we also awarded the punishment of stoning, I am afraid that with the lapse of time, the people (may forget it) and may say: We do not find the punishment of stoning in the Book of Allah, and thus go astray by abandoning this duty prescribed by Allah. Stoning is a duty laid down in Allah's Book for married men and women who commit adultery when proof is established, or [if] there is pregnancy, or a confession.

concern that with the lapse of time, the people would question the legitimacy of the stoning punishment for adultery because they would no longer find the stoning verse in the Quran, implying that the stoning verse had been removed from the “Book of Allah.”¹²⁰ The report does not clarify whether the stoning verse was deliberately removed from the Quran or whether its exact text had been completely forgotten.¹²¹ Interestingly, Al-Ghazali produces the stoning verse in his treatise on abrogation.¹²² If the stoning verse was not forgotten, the thesis of its removal from the Quran assumes more credibility.

It is unclear from Caliph Omar’s speech whether he was complaining about the unlawful removal of the stoning verse from the master manuscript of the Quran (*mushaf*),¹²³ or simply concerned about losing the stoning punishment because God had removed the stoning verse from the Quran, though without abrogating its prescriptive effect. It is highly unlikely that Caliph Omar was protesting any unlawful exclusion of the stoning verse from the master manuscript, which was in Caliph Omar’s own custody at the

See also 8 SAHIH BUKHARI, *supra* note 118, 82:816-17.

120. SAHIH MUSLIM, *supra* note 81, Kitab Al-Hudud 17:4194. Critics of Islam also challenge the integrity of the Quran, pointing out the missing stoning verses. See YouTube, Stoning Verse or Rajam Part 94, <http://www.youtube.com/watch?v=8arrpCUvh0g> (last visited Feb. 11, 2009) (discussing the absence of the stoning verses).

121. It is highly unlikely that no one remembered this highly important verse of the Quran. Note that more than one person had memorized the entire text of the Quran. See Khan, *supra* note 110, at 809-10.

122. MUSTASFA, *supra* note 92, at 525 (“The adult man and the adult woman, when they commit adultery, stone them as a punishment from Allah. And Allah is mighty and wise.”).

123. After the Prophet’s death, the Quran, which had been revealed in bits and pieces over a period of twenty-two years, was assembled and written in a book form. 6 SAHIH BUKHARI, *supra* note 118, 61:509. Omar requested the first Caliph to order the collection of the Quran because numerous Qurra (who had memorized the Quran by heart) were killed in battle. *Id.* Omar was afraid that the Quran’s integrity might be compromised if more Qurra were killed in the forthcoming battles. *Id.* The task of collection was given to Zaid bin Thabit, who used to write the Quran when revealed to the Prophet. The first Caliph retained the original manuscript of the Quran, and upon his death, the manuscript of transferred to Caliph Omar. At Caliph Omar’s death, the original manuscript was handed over to Hafsa, Caliph Omar’s daughter and the Prophet’s wife. *Id.* During the reign of the third Caliph, Usman, who succeeded Caliph Omar, the Quran was officially adopted at the state level. A committee of three men, including Zaid bin Thabit, was appointed to make copies of the manuscript and return the original manuscript to Hafsa. It was later reported that a verse of Sura Ahzab was missed in the official copy. This mistake was corrected and the verse, 33:23, was added to the official copy. 6 SAHIH BUKHARI, *supra* note 118, 61:510. The reporter of this information is Anas bin Malik, one of the four founding jurists of classical *fiqh*.

time of his reported speech.¹²⁴ As the topmost leader of Muslims, Caliph Omar could have ordered inclusion of the stoning verse into the master manuscript if he were certain that the verse constituted a lawful part of the Quran.¹²⁵

The removal of the stoning verse from the Quran, supposing that it actually occurred, would be lawful only if God had ordered the Prophet to do so. Exponents of physical removal would concede that the Prophet removed the stoning verse, if he did at all, with God's permission. They would also concede that the master manuscript of the Quran contained no stoning verse. Islamic history documents no controversy or exegetical battles over exclusion of the stoning verse from the Quran. External critics, however, highlight Omar's speech to challenge the Quran's presumed textual integrity.¹²⁶

For analytical purposes, jurodynamics places Caliph Omar's speech in the proper jurisprudential perspective. Though mentioned in the Two Sahihs, the reported speech is that of Caliph Omar and not that of the Prophet. Caliph Omar's speech is not divine text.¹²⁷ Caliph Omar attributes no words to the Prophet even though he mentions the fact that the Prophet imposed the stoning punishment—a well-established fact.¹²⁸ Furthermore, Caliph Omar's

124. Kazim Mudir Shانهchi, *Some Old Manuscripts of the Holy Qur'an*, AL-TAWHID, May 1991 (Mujahid Husayn trans.), <http://www.al-islam.org/al-tawhid/manuscripts.htm>.

125. Caliph Omar, however, could not have succeeded in implanting the stoning verse in the original manuscript if there was a consensus among companions of the Prophet that the verse had been repealed or was never revealed.

126. John Burton, *The Exegesis of Q. 2:106 and the Islamic Theories of Naskh: Mā Nansakh Min al-Shay' aw Nansah* [Nā'ī Bī Khairin Minh] *aw Mithlih*, 48 BULL. SCH. ORIENTAL & AFR. STUD. 452 (1985).

127. A note of caution is in order. While the Prophet's law is part of the Basic Code, opinions of the Prophet's companions, including those of the first four caliphs, though they must be respected as persuasive precedents and must not be ignored in the development of Islamic law, do not constitute any binding part of eternal law. Opinions of any person other than the Prophet, even if reported in the Two Sahihs, are not eternal law even if these opinions can be reconciled with fundamental principles and understandings of the Basic Code. This point is critical in understanding the normative difference between the Basic Code and classical *fiqh*.

128. The Prophet's Sunnah contains several adultery cases involving the stoning punishment. In one case, the Prophet allowed death by stoning for both the adulterer and adulteress of the Jewish faith in accordance with the Torah. 2 SAHIH BUKHARI, *supra* note 118, 23:413. A more detailed version of the Prophet's *hadith* discloses that when Jews presented the couple for prosecution, the Prophet did not impose the stoning punishment by invoking his own authority or any law of the Quran. 4 SAHIH BUKHARI 56:829. The Prophet asked the prosecuting Jews to read the punishment for adultery from the Torah. When it was made certain that the Torah prescribes death by stoning, the Prophet ordered the punishment to be carried out. *Id.* The capital punishment for adultery is the Mosaic Law that the Prophet enforced against Jews subject to the law's jurisdiction. SAHIH MUSLIM, *supra* note 81, Kitab Al-Hudud

speech does not contain verbatim the Quran's missing stoning verse, though Omar informs the audience that "we recited it [the verse], retained it in our memory and understood it."¹²⁹ Despite this strong reference to the missing verse, the reporter of Caliph Omar's speech makes no claim that he recited the missing verse to the audience. It is incredible that a verse of such significance, containing one of the six primary punishments in Islamic criminal law (the *Hadud*) would be deleted from the text of the Quran, even though its prescriptive effect would be retained in the Prophet's Sunnah.¹³⁰

A universal consensus exists among Muslims that the Prophet's Sunnah prescribes the stoning punishment for adultery. Yet, the Quran provides no punishment exclusively for adultery, but instead prescribes a more general prescription sanctioning a hundred stripes for each offender, man and woman, who engages in non-marital sexual intercourse (*zina*).¹³¹ Although the Quran condemns *zina* as a grave moral sin,¹³² it establishes a stiff procedure to prove the charges of *zina* that requires the accuser to produce four eyewitnesses to meet the evidentiary burden of proving *zina*.¹³³ And if the accuser fails to produce the required proof, the accuser is punished with eighty stripes and his testimony is rejected in all future cases.¹³⁴ Given the severity of proof and the attendant empirical fact that rarely do men and women engage in unlawful sexual acts in the presence of four eyewitnesses, the Quran's prescribed punishment is directed at deterring sexual acts committed in public and not at empowering enforcement officials to invade the privacy of homes. *Fiqh* rationalists¹³⁵ and *fiqh* textualists¹³⁶ insist that the Quran's procedure and punishment for all unlawful sexual intercourse, including adultery, must be strictly followed.¹³⁷

17:4214 (reviving the law of Torah). In another case, the Prophet ordered the punishment for a Bedouin. 8 SAHIH BUKHARI *supra* note 118, 82:821

129. SAHIH MUSLIM, *supra* note 81, Kitab Al-Hudud 17:4194.

130. There are other verses that seem to have been removed from the Quran as we know it. See MUSTASFA, *supra* note 92, at 526.

131. QURAN, sura Al-Nour 24:2. The Quran uses the word *zina* to describe any and all sexual intercourse outside marital relationship, and does not distinguish between premarital sex and adultery.

132. QURAN, sura Bani Israel 17:32 (Pickthall trans.) ("[Adultery] is an abomination and an evil way.").

133. This requirement of proof is mentioned three times in the Quran. QURAN, sura An-Nisa 4:15; QURAN, sura An-Nur 24:4, 24:13.

134. QURAN, sura An-Nur 24:4.

135. *Fiqh* rationalists, known as Mu'tazilis, represent an Islamic school of jurisprudence that insists on reason as the supreme tool of interpretation of sacred texts.

136. *Fiqh* textualists, known as Zahiris, represent another Islamic school of jurisprudence that insists on reading sacred texts in their plain meaning.

137. SAHIH MUSLIM, *supra* note 81, Kitab Al-Hudud 17:4194.

Has the Prophet's Sunnah abrogated the Quran's prescriptive punishment for *zina*? If the Prophet's Sunnah had preceded the Quran's prescription for *zina*, no jurisprudential difficulty would arise because God could abrogate the Prophet's law. However, the stoning punishment succeeded the Quran's prescription for *zina*.¹³⁸

Jurodynamics relies on specification, and not abrogation, to explain the stoning punishment absent in the Quran but prescribed in the Prophet's Sunnah. The Quran prescribes a more general prescription regarding non-marital sex, which includes fornication, adultery, and possibly other sexual acts. The Prophet's Sunnah furnishes a prescription for adultery, which is a more specific form of non-marital sex. Thus, the Prophet's law is specific to adultery, whereas the Quran's prescription is more general in scope.¹³⁹ Furthermore, the Prophet's stoning punishment was imposed in cases where offenders confessed to having committed adultery. Thus, the Prophet's law carves out a narrow specification to the Quran's prescription against *zina*. Under the combined effect of the Shariah, the capital punishment ought to be a rarity reserved for cases where married men and women engage in adultery in the presence of four or more eyewitnesses, show no repentance, and blatantly confess what they have done.¹⁴⁰ The purpose of the Prophet's punishment is to maintain public order and deter open adultery; it is not to invade the privacy of homes or to impose cruel and unusual punishment for non-marital sexuality. It is certainly not to abrogate the Word of God.

138. Assuming for the sake of argument that the stoning verse was in fact revealed before the stripes verse but was removed from the official text—an argument hard to accept for it challenges the Quran's authenticity—early Muslims, that is, the Prophet's companions, must have been fully aware that God had changed His mind on the punishment for adultery. If God's change of mind was evident to the Prophet's companions, why does the Prophet's law continue to sanction death by stoning? Any willful disobedience of God's Law does not correspond with the central message of Islam that God is Supreme and that the Prophet is simply a human messenger. Furthermore, it makes little sense that the Prophet would retain a punishment that God had withdrawn.

139. Under the combined effect of the Quran and the Prophet's law, the hundred stripes punishment is reserved for fornication, whereas the stoning punishment is ordered for adultery. This interpretation would uphold the Mosaic Law, which is indeed God's Law, reconciling the Bible with the Quran.

140. The Prophet discouraged persons from confessing to the offense of adultery. SAHIH MUSLIM, *supra* note 81, Kitab Al-Hudud 17:4205. In this hadith, the Prophet turned away a person who came to seek purification. *Id.* The Prophet suggested that the person seek purification through repentance. *Id.* But the person kept coming back, urging the Prophet to hear his story. *Id.* When the person confessed to have committed adultery, the Prophet asked whether the person was of sound mind and not under the influence of intoxication. *Id.* This hadith demonstrates that the Prophet was far from eager in hearing a confession for adultery. Furthermore, it appears from this hadith that the Prophet preferred that Muslims seek purification from adultery through repentance rather than punishment.

3. Consultation Verses

Similarly, specification rather than abrogation explains the consultation verses of the Quran. Due to the Prophet's wisdom and foresight, Muslims frequently sought the Prophet's private counsel. The Prophet rarely turned down consultation requests because he was averse to rebuffing the people who approached him for advice. As the Prophet's reputation spread wide and far, requests for private consultations multiplied, imposing a great burden on him. To ease the Prophet's onerous burden of private consultations, God revealed a prescription imposing a consultation fee on persons seeking advice.¹⁴¹ This fee was in the form of charity and not something that the Prophet collected for his own use. The purpose of consultation fee was twofold. In addition to reducing the burden on the Prophet, the Quran characterizes the consultation charity as a purification tool for the person seeking advice.¹⁴² A person purified with the act of giving in charity was more likely to take the Prophet's advice in good faith. At the same time, the consultation fee deterred distracters who simply wanted to test whether the Prophet's advice was any good.

Soon after the initial revelation, however, another verse was revealed to withdraw the consultation fee. "In case you fear offering charity before your private consultation (with the Prophet), you may not do so. And if Allah forgives you, then establish regular prayer; practice regular charity; and obey Allah and His Messenger. And Allah is well-acquainted with all that you do."¹⁴³ Historical reports vary over how long the original prescription remained in force. Ibn Kathir relies on historical reports to show that the consultation charity was "in effect for only one hour of a day."¹⁴⁴ In fact, only one person paid consultation charity before the prescription was withdrawn.¹⁴⁵ Maududi mentions the competing historical report that the fee verse had remained in force for ten days.¹⁴⁶ Despite controversy, however, the weight of reports favors a shorter period.¹⁴⁷

One may ask why God would withdraw the consultation fee in a matter of an hour. There are at least two explanations, each one of which can be highly instructive for lawmakers. First, God is teaching

141. QURAN, sura Al-Mujadilah 58:12.

142. *Id.*

143. QURAN, sura Al-Mujadilah 58:13.

144. Tafsir ibn Kathir, *The Order to Give Charity Before One Speaks to the Prophet in Private*, <http://www.tafsir.com/default.asp?sid=58&tid=52960> (last updated Oct. 26, 2002).

145. *Id.*

146. TAFHIM, *supra* note 66, sura Al-Mujadilah 58:13 n.30.

147. Maududi also reports that the Prophet deliberated over reducing the amount of consultation charity from one dinar to half a dinar, but gold equal to a barley grain was disapproved as being too little. *Id.* sura Al-Mujadilah 58:12 n.29.

lawmakers that some burdens must be withdrawn soon after they are imposed. If an All-Knowing God is willing to withdraw a burden within an hour, earthly rulers too should be willing to quickly withdraw a piece of legislation that imposes burdensome obligations on the people.

Second, ease rather than hardship is a guiding legal principle of the Shariah. The principle of ease permeates the Quran. "God wills that you shall have ease, and does not will you to suffer hardship."¹⁴⁸ The Quran teaches human beings to pray to God for relief from burdens that one cannot shoulder: "O our Sustainer! Make us not bear burdens which we have no strength to bear!"¹⁴⁹ By withdrawing the consultation charity, God restores the principle of ease so that the people could seek private council from the Prophet without paying a fee for it. The withdrawal of burden emphasizes the ease principle.

There is no need to view the consultation verses through abrogation, as Al-Ghazali does. The initial verse is as much part of the Quran as is the subsequent verse. The initial verse continued to remind the Prophet's companions and other Muslims that, even though they were no longer saddled with paying the consultation fee, they must not inconvenience the Prophet with undue requests for personal advice. Thus, both verses remained operative. The subsequent verse withdrew the fee. But the initial verse remained efficacious in instructing Muslims not to hassle the Prophet. Abrogation would imply that since the consultation fee was withdrawn, Muslims were free to seek as much private consultation from the Prophet as they did before revelation of the initial verse.

IV. INTER-SCRIPTURAL JURODYNAMICS

Consistent with the above analysis, jurodynamics favors inter-scriptural reconciliation and coexistence over abrogation. Inter-scriptural abrogation means that prescriptions of one scripture abrogate those of the other scripture.¹⁵⁰ Inter-scriptural reconciliation means that divine texts can be reconciled without abrogating any divine command.¹⁵¹ Reconciliation occurs either across religions or within the same religion. If the Quran is reconciled with the Old Testament, inter-scriptural reconciliation

148. QURAN, sura Al-Baqarah 2:185 (Asad trans.).

149. QURAN, sura Al-Baqarah 2:286 (Asad trans.). The principle of ease is equally binding on earthly rulers who must make laws that provide comfort to the people and not crush them under weighty burdens.

150. See Farooq Ibrahim, *The Problem of Abrogation in the Quran*, http://www.answering-islam.org/Authors/Farooq_Ibrahim/abrogation.htm (last visited Feb. 11, 2009).

151. *Id.*

occurs across Islam and Judaism, two related but different religions. If the Quran is reconciled with the Prophet's Sunnah, inter-scriptural reconciliation occurs within the same religion. Scriptural systems across religions, just like secular systems across nations, may impose mutually discordant prescriptions. Each religion is autonomous and cannot be subjected to the prescriptions of another religion. While reconciliation of conflicting norms is necessary within the same religion, no such reconciliation is mandatory (or even desirable) for resolving normative incompatibilities across religions. Accordingly, jurodynamics offers reconciliation of divine texts that belong to the same religion and coexistence of discordant scriptures across religions.

A. Scriptural Coexistence

Inter-scriptural abrogation across religions is contrary to the Islamic principles of tolerance and faith diversity. There exists no universal consensus that the scripture of one religion can abrogate scriptural prescriptions of another religion. Although the Quran has been interpreted to suggest that its prescriptions abrogate laws of prior scriptures, followers of prior scriptures concede no such inter-scriptural abrogation. Muslims are free to believe that prior scriptural laws are no longer binding on them, particularly if the Quran and the Prophet's Sunnah offer substitute prescriptions. Without subscribing to abrogation, jurists of comparative religion may simply conclude that scriptures are mutually irreconcilable and, therefore, must coexist.

Islam constructs complex relationships with prior scriptures.¹⁵² Analytically, this relationship appears to be multi-dimensional. First, the Quran confirms that God has sent revelations in the past and obliges Muslims to believe in prior scriptures.¹⁵³ The Quran specifically mentions the Torah and Gospel as containing "guidance and light."¹⁵⁴ This special mentioning of the Torah and Gospel, however, may not be construed to conclude that the Quran excludes other divine scriptures. All scriptures that invite believers to God-focused spirituality emanate from the same Mother Book, which God has preserved.¹⁵⁵ Second, the Quran warns Muslims that prior

152. See George Rankin, *Custom and the Muslim Law in British India*, 25 TRANSACTIONS GROTIUS SOC'Y 89, 92 (1939) (stating that Islam was not a new religion but the continuation of prior religions).

153. QURAN, sura Al-Baqarah 2:4.

154. QURAN, sura Al Maidah 5:44 (mentioning Torah); QURAN, sura Al Maidah 5:46 (mentioning Gospel).

155. In fact, Islam recognizes wisdom books as well. The Quran constantly refers to revelation and wisdom and mentions Luqman who, though not a prophet, was a man of wisdom. See Khan, *supra* note 110, at 822.

scriptures may have been altered and corrupted.¹⁵⁶ This warning is a note of caution for Muslims not to recognize prior scriptural prescriptions found to be incompatible with Islamic scriptures.¹⁵⁷ Third, even if prior scriptures have not been altered or corrupted, the concept of inter-scriptural coexistence provides a basis for diverse religions to live in peace and engage in constructive dialogue over scriptural differences.

Determined not to completely discard prior scriptures, Islam opens the way for a meaningful coexistence and dialogue, and not indifference, toward Judaism and Christianity. The Quran invites the "people of the Book" to "come to common terms."¹⁵⁸ While recognizing that God has sent messengers to diverse nations and peoples at different times, Islam reaffirms prior religions. The nobility of prior prophets, including Abraham, Noah, Jacob, Moses, and Jesus, is highlighted and even celebrated. However, Islam challenges certain beliefs and practices of the two dominant religions.¹⁵⁹ According to the Quran, for example, God is not a human being and He has no Father or Son.¹⁶⁰ The Quran's teaching that nothing resembles God is incompatible with the Biblical concept that God created man in His own image.¹⁶¹ Would a universal God of all creatures create just one species in His own image? The Bible and the Quran do not give one and the same answer. The Bible presents an anthropocentric God closer to human beings; Islam presents a universal God bearing no resemblance to any of His creations. The Quran does not favor the concept of chosen people and offers a universal norm under which any person, regardless of race, ethnicity, color, language, gender, or nationality, can be closer to God on the sole basis of piety.¹⁶²

Jurodynamics recognizes the notion of incompatible norms in time and space. Incompatible norms can coexist if they cannot be reconciled. For example, Christians may continue to believe that Jesus is the Son of God and Muslims may continue to believe that

156. QURAN, sura Al-Baqarah 2:79; see TAFHIM, *supra* note 66, sura Al-Baqarah 2:79 n.90.

157. Rahim, *supra* note 64, at 186 (stating that "the laws of Moses and the teachings of Jesus are binding on a Muslim" except when altered).

158. QURAN, sura Al-e-Imram 3:64 (Yusuf Ali trans.).

159. It may be argued that Islam was the first Protestant form of Christianity. See Akhavi, *supra* note 16, at 546-48 ("Muslims felt . . . Christianity, though embodying many religious truths, [was a] superseded religion on the grounds that . . . Christians had turned from God's ordinances.").

160. QURAN, sura Ikhlas 112:1-3.

161. Compare QURAN, sura Ikhlas 112:4 (Yusuf Ali trans.) ("And there is none like unto Him."), with Genesis 1:27 (King James) ("So God created man in his own image, in the image of God he created him.").

162. QURAN, sura Al-Hujurat 49:13.

God has no Son. No reconciliation is possible on this fundamental incompatibility. However, coexistence of these divergent beliefs is critical for peaceful relations between Muslims and Christians. In contrast to coexistence, abrogation would imply that Muslims are obligated to actively reject the Christian belief, and vice versa, calling each other infidels and resorting to crusades and military jihad. The principle of coexistence empowers no individual, community, or nation to forcibly repeal revelatory laws of any religion. Nor does it empower any individual, community, or nation to engage in forcible or aggressive conversions.

God has not charged Muslims to enforce the abrogation of prior laws. The use of force, coerced conversions, or any other force-based or deceptive methodology to compel non-Muslims to shun their scriptures or to embrace the laws of Islam cannot be condoned under the classical concept of inter-scriptural abrogation. Non-Muslims are free to practice their beliefs contrary to the teachings of Islam. They may be invited to Islam with gentle persuasion and good manners, as the Quran instructs,¹⁶³ but they cannot be put to sword, humiliation, or to an inferior status for refusing to accept Islam. Jews, Christians, Hindus, Sikhs, and other religious groups living in Muslim nations are free to believe and practice their respective religions. According to an immutable principle of Islam, no person, not even the Prophet, can convert any person to Islam because God “guides whom He pleases.”¹⁶⁴

B. Classical Theses of Abrogation

In Islam, inter-scriptural reconciliation is a method of harmonizing incompatible prescriptions found in the primary divine texts—the Quran and the Prophet’s Sunnah. The text of the Quran is fixed and no competing versions of the scripture exist. The one and the same Quran, as originally revealed in Arabic, is the book that all Muslims, regardless of sectarian or spatiotemporal differences, hold to be God’s Book. The Prophet’s Sunnah, compiled decades after his death, has been controversial because false sayings were attributed to the Prophet for social, political, and economic purposes. It now appears that several compilations, particularly the Two Sahihs, have emerged as authentic collections of the Prophet’s Sunnah.¹⁶⁵

163. QURAN, sura An-Nahl 16:125.

164. QURAN, sura Ibrahim 14:4 (Yusuf Ali trans.).

165. It is beyond the scope of this study to identify all authentic sources of the Prophet’s Sunnah. However, jurodynamics presumes the validity of the Prophet’s Sunnah found in major collections if the Sunnah supports and reinforces the Quran. Difficulty arises when the Prophet’s Sunnah conflicts with provisions of the Quran. If reported in less credible collections, the incompatible Sunnah is ignored. Jurodynamics must explain the conflict, however, if the incompatible Sunnah is reported in credible

In order to preserve the integrity of the Basic Code and to be consistent with the mainstream belief of Muslims, jurodynamics disfavors abrogation as an appropriate legal method to resolve inter-scriptural incompatibilities. No jurist is vested with the interpretive authority to abrogate prescriptions of a scripture with those of another scripture. More specifically, no jurist may abrogate prescriptions of the Quran by relying on prescriptions of the Sunnah or abrogate prescriptions of the Sunnah by relying on prescriptions of the Quran. Any such juristic power, as discussed before, elevates human interpretive authority over divine texts. If jurists find incompatible scriptures, they must strive to reconcile texts. Legal methods, such as specification, gradualism, and cyclical desuetude are available for inter-scriptural reconciliation as well.

While jurists lack the interpretive authority to engage in inter-scriptural abrogation, evidence suggests that the Quran did abrogate the Prophet's prescriptions. This distinction is critical in understanding the classical concept of abrogation. In classical literature, two conflicting theses persist on inter-scriptural abrogation. These theses emanate from the works of two great jurists of Islam—Al-Shafi'i and Al-Ghazali. Al-Shafi'i rejects the concept of inter-scriptural abrogation and holds that neither can the Quran abrogate the Sunnah, nor the Sunnah abrogate the Quran.¹⁶⁶ Disputing with Al-Shafi'i, Al-Ghazali presents the contrary thesis. Al-Ghazali recognizes inter-scriptural abrogation and holds that the Quran can abrogate the Sunnah and the Sunnah can abrogate the Quran.¹⁶⁷

Both these theses, however, are descriptive and not prescriptive. They are descriptive in that they describe the historical phenomenon of abrogation as it occurred between the Quran and the Prophet's Sunnah during the Prophet's lifetime.¹⁶⁸ They are not prescriptive in the sense that they do not allow any jurists or exegetes to abrogate any portion of the Quran with help from the Prophet's Sunnah or vice versa.

compilations, such as the Two Sahihs. In such cases of conflict, inter-scriptural reconciliation provides a legal method to harmonize incompatible rules.

166. RISALA, *supra* note 91, at 123-28. However, Al-Shafi'i does sanction intra-scriptural abrogation in that the Quran can abrogate the Quran and the Sunnah can abrogate the Sunnah. *Id.*

167. MUSTASFA, *supra* note 92, at 517-38. Between these polar theses are intermediate juristic positions. One juristic position would argue that the Quran can abrogate the Sunnah but the Sunnah cannot abrogate the Quran because no one, not even the Prophet, can nullify the Word of God.

168. MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 203 (1989) (stating that abrogation is confined to the Prophet's lifetime and not anytime later).

1. Abrogating the Prophet's Sunnah

A clear distinction between the Word of God and the word of the Prophet informs the Basic Code, even though the Prophet alone is the ultimate source of both. Not everything the Prophet said was the Word of God, although the Prophet was the exclusive receiver and transmitter of God's revelations. The distinction between the Quran and the Prophet's Sunnah is a fundamental belief of Islam: The Quran is the Word of God; the Prophet's Sunnah reports what the Prophet said or did.¹⁶⁹ Yet the Prophet alone knew what was revealed to him as the Quran and when the Prophet was speaking on his own. Al-Ghazali observes that objective rationality can lead us to believe that the Prophet was a trustworthy man; but no objective rational scrutiny can validate the Quran's divinity. The distinction between the two genres of inspired utterances, the Quran and the Sunnah, is sustainable only because believers trust that the Prophet was telling the truth about God's revelations. Those who mistrust the Prophet would inevitably conclude that the Prophet himself is the author of both the Sunnah and the Quran and that no meaningful distinction exists between the two sources of Islamic law.

The distinction between the Quran and the Prophet's Sunnah implies that the Word of God is superior to the Prophet's Sunnah. And although the two normative sources of Shariah constitute harmonious unity with no internal contradictions, the Word of God could theoretically overrule the Prophet's law in case the two cannot be reconciled. Al-Shafi'i, however, maintains that the Quran could not overrule the Sunnah, although the Prophet could overrule his own prescriptions.¹⁷⁰ At first, Al-Shafi'i's assertion seems counterfactual because God can do anything.¹⁷¹ Al-Ghazali quarrels with Al-Shafi'i's assertion, citing cases where the Quran overruled Prophet's prescriptions on more than one occasion.¹⁷² For example, the Prophet had ordered believers to say their prayers facing Jerusalem.¹⁷³ The Quran "overruled" this practice by ordering believers to pray facing Kaa'ba, the House of God that the Prophet Abraham had built in Makka.¹⁷⁴

Upon more reflection, however, Al-Shafi'i seems to be making two sophisticated arguments that Al-Ghazali fails to notice. First, the act of overruling implies a conflict of authority that cannot exist

169. Al-Ghazali maintains, however, that it is possible that the Prophet received revelation that was not part of the Quran. MUSTASFA, *supra* note 92, at 459-60.

170. RISALA, *supra* note 91, at 123-30.

171. QURAN, sura Al-e-Imram 3:47.

172. MUSTASFA, *supra* note 92, at 527-28.

173. QURAN, sura Al-Baqarah 2:142.

174. QURAN, sura Al-Baqarah 2:125, 2:142-145.

between God and the Prophet, for the Prophet, according to the Quran, is God's slave.¹⁷⁵ The shift of *Qibla* from Jerusalem to Kaa'ba did not "abrogate" the Sunnah because the Prophet himself had been praying for such a change. Upon receiving God's revelation on the change of *Qibla*, the Prophet changed his Sunnah. Thus, according to Al-Shafi'i, the Sunnah changed the Sunnah.¹⁷⁶

Al-Shafi'i's thesis carries an additional strength when we consider the modern practice of overruling the holding of a case. In common law, for example, the inferior court whose holding is overruled would submit to the higher court, because such is the institutional hierarchy. However, the lower court may continue to disagree with the outcome, and might even resent the holding of the higher court. This sort of intellectual and emotional resentment cannot exist between God and the Prophet. Words such as abrogating and overruling connote elements of authority-based rebuff, which simply did not exist when the Quran changed a practice that the Prophet had previously approved for the community.¹⁷⁷

Second, and most important, Al-Shafi'i is unwilling to empower jurists to begin to nullify the Prophet's Sunnah through interpretations of the Quran. When Al-Shafi'i insists that only the Sunnah can change the Sunnah, he is denying jurists the authority to engage in any such exegetical undertaking. The Prophet's death terminates the so-called abrogation of Sunnah because only the Prophet could overrule his own laws. God has given authority to no human being, says Al-Shafi'i, to abrogate the Sunnah.¹⁷⁸ Muslims must obey the Prophet's law and cannot abrogate it on the basis of the Quran.¹⁷⁹ Any broad methodical concession that the Quran can overrule the Sunnah may be interpreted to mean that jurists or judges retain the authority to overrule the Prophet's law by means of the Quran. Al-Shafi'i is unwilling to allow any such legal methodology in Islamic jurisprudence because it would eventually lead to confusing and corrupting the Basic Code.¹⁸⁰

If jurists of any age find incompatibilities between the Quran and the Prophet's law, they may employ legal methods to harmonize

175. QURAN, sura Al Baqarah 2:23.

176. RISQLA, *supra* note 91, at 125.

177. There were occasions in the Quran, however, where God instructs the person of the Prophet rather firmly to give up a certain habit or wish. For example, God instructs the Prophet to be patient when receiving revelation. QURAN, sura Al-Qiyamat 75:16. Likewise, God instructs the Prophet that God alone has authority over who might embrace Islam and that the Prophet's duty is simply to deliver the message. QURAN, sura Al-e-Imram 3:20.

178. RISQLA, *supra* note 91, at 126.

179. *Id.*

180. *Id.* at 126-28.

the two sources. An interpretation that gives effect to both the Quran and the Prophet's Sunnah is preferred over another interpretation that repudiates or emaciates any one source. Jurists cannot rely on the concept of abrogation to weaken or overrule the Prophet's law. Al-Shafi'i's warning that only the Prophet can overrule his own law is highly relevant in the second era of *ijtihad* that is underway in the Muslim world.¹⁸¹ The Quran is indeed the Word of God and no law, not even the Prophet's law, can contradict it. But Muslim jurists must function under the assumption that no contradiction exists between the Quran and the Prophet's law and that they have no juristic authority to abrogate the Prophet's law by declaring it incompatible with the Quran.

2. Abrogating the Quran

No concept of abrogation may be invoked to overrule the Word of God, the Quran, on the basis of the Prophet's law. According to Muslim beliefs, the Prophet's law is subject to God's law as revealed in the Quran, and no contradiction exists between the two normative orders. However, the suggestion that the Prophet's law can modify or repeal God's law may come as a shock to ordinary Muslims (and even non-Muslims) for it leaves the impression that the Prophet is superior to God. However, great controversy has raged in the Islamic juristic literature over this issue. Al-Shafi'i insists that only the Quran may overrule the Quran, which parallels his other suggestion that only the Sunnah can overrule the Sunnah. Al-Ghazali, however, disagrees with Al-Shafi'i and believes that the Prophet's law can modify and even overrule the Quran. The following discussion highlights the debate between these two great jurists of Islam and concludes that the concept of *naskh* is fundamentally misconceived and must be discarded. Al-Shafi'i argues that the Prophet's law explains but does not modify or abrogate the law of the Quran.¹⁸² In support of his argument, Al-Shafi'i cites the following verse of the Quran:

"When Our signs are recited to them as Evidences, those who do not look forward to meeting us, say: Bring a Scripture other than this or change it. You [O Muhammad] say: It is not for me to change it of my own accord; I only follow what is revealed to me; verily I fear, if I go against my Lord, the punishment of a mighty day."¹⁸³

This verse clarifies, says Al-Shafi'i, that the Prophet has no power of his own to change, much less to abrogate, God's Law.¹⁸⁴ To

181. See Khan, *supra* note 4, at 369-74.

182. RISALA, *supra* note 91, at 123-24.

183. *Id.* at 124 (alteration in original); see QURAN, sura Yunus 10:15.

184. RISALA, *supra* note 91, at 124.

make the argument even more lucid, Al-Shafi'i quotes another verse of the Quran that "God repeals what He wills, or confirms; with Him is the Mother of the Book."¹⁸⁵ Although this verse is more general in its scope and may not even be applicable to the concept of inter-scriptural abrogation, jurists frequently cite the verse as an authority to argue that God can erase His earlier Commandments either within the same revealed Book or through a subsequent revealed Book.¹⁸⁶ Al-Shafi'i invokes the verse in support of the thesis that, first, abrogation is a method that God uses to annul prior commands, and second, that only the Quran can annul the Quran.¹⁸⁷

Disagreeing with Al-Shafi'i, Al-Ghazali contends that the Prophet's Sunnah may modify and even abrogate the law revealed in the Quran.¹⁸⁸ Al-Ghazali concedes that the Prophet would not modify or abrogate the Quran's law without God's permission.¹⁸⁹ To this extent, all Muslims jurists would agree that the Prophet has no independent or willful authority to ignore or set aside what God has prescribed. Al-Ghazali, however, contemplates a situation where God has instructed the Prophet to modify or abrogate the Quran's law, but without commanding any textual changes in the Quran.¹⁹⁰ Under such instructions, the Sunnah is the source of abrogation and, accordingly, a provision of the Quran stands modified or repealed even though God provides no abrogating text in the Quran. God's Speech is one, though it is communicated to the Prophet either through the text of the Quran or through the inspiration of the Sunnah. God may undo through the Sunnah what God has done through the Quran. Assuming that both the Quran and the Sunnah come from one and the same God, Al-Ghazali sees no problems with the Sunnah modifying or abrogating a prescription found in the Quran or vice versa. In both cases, concludes Al-Ghazali, Allah is the Abrogator.¹⁹¹

Al-Ghazali's position is mistaken on two distinct grounds. First, Al-Ghazali is assuming that both the Quran and the Sunnah come from God, thus obliterating the distinction between the two sources of law. The Prophet's Sunnah is sacred because he knew the Quran most intimately and, therefore, the Prophet's law could not presumably contradict the Quran. And although the Prophet was the ultimate source of the Quran and the Sunnah, the Prophet

185. *Id.*; see QURAN, sura Ar-Ra'd 13:39.

186. But according to Al-Ghazali, the verse could also mean that God erases good deeds with apostasy or bad deeds with repentance. MUSTASFA, *supra* note 92, at 484.

187. RISALA, *supra* note 91, at 128.

188. MUSTASFA, *supra* note 92, at 527-28.

189. *Id.* at 528-29.

190. *Id.* at 529.

191. *Id.*

nonetheless made a distinction between the two sources and let scribes know when he was dictating the Quran. The Prophet transmitted the Quran with meticulous care so that no confusion would arise or mistakes made. Even the Quran separates the two sources of law by commanding: "Obey God and obey the Prophet."¹⁹² If the Prophet was always communicating God's message, the Quran's distinction between the two forms of obedience seems unnecessary. God has promised to safeguard the Quran,¹⁹³ but no such promise is made to preserve the Prophet's Sunnah. Historically, Muslims have disputed the authenticity of the numerous *hadiths* constituting the Sunnah. No such dispute exists regarding the Quran's integrity. The Quran and the Sunnah are in harmony, but they are not co-equal sources of law. Al-Ghazali's position erases the normative hierarchy between the two sources, a position that cannot be reconciled with the special status the Quran holds in the realm of God's revelations.¹⁹⁴

Second, Al-Ghazali presumes that everything the Prophet said was divine and God-inspired. This merger, though it stops short of going as far as does the Christian merger between God and Jesus, introduces elements of confusion. The Prophet was chosen as a messenger to convey God's revelation to humanity. But he was not divine. The Quran instructs the Prophet to say to the people: "I am but a mortal man like all of you."¹⁹⁵ The Prophet's infallibility is no part of Islamic creed because no mortal man is infallible. What the Quran cautions about Jesus cannot be less true about the Prophet: "It is not conceivable that a human being unto whom God had granted revelation, and sound judgment, and prophethood, should thereafter have said unto people, 'Worship me beside God.'"¹⁹⁶ Of course, Al-Ghazali would never elevate the Prophet to merge with God, for *shirk* is strictly prohibited in Islam. But Al-Ghazali's insistence that the Sunnah and Quran are interchangeable ways through which God spoke to the Prophet dilutes the distinction between human speech and the Word of God. Though inspired, the Prophet's speech cannot abrogate the Word of God. Nor would God, a meticulous and sophisticated Creator of the universe, permit blurring the lines between human speech and His own Word.¹⁹⁷

192. QURAN, sura Al Maidah 5:7. This command is frequently mentioned in the Quran.

193. QURAN, sura Al-Buruj 85.

194. QURAN, sura Yunus 10:37.

195. QURAN, sura Al-Kahf 18:110 (Asad trans.).

196. QURAN, sura Al-e-Imram 3:79 (Asad trans.).

197. The notion that God can do whatever He pleases, though true, must not be invoked to defend positions that turn God into an arbitrary Deity. Al-Ghazali seems to be relying on this argument to support his position. MUSTASFA, *supra* note 92, at 530.

Al-Shafi'i's separability opinion is, therefore, much more consistent with the normative foundation of Islam than Al-Ghazali's doctrine to merge the Quran with the Sunnah. As noted before, no jurist is empowered to seek abrogation of the Quran with assistance from the Sunnah, nor is the jurist empowered to seek abrogation of the Sunnah with assistance from the Quran. Even if, contrary to Al-Shafi'i's teachings, the Quran abrogated the Sunnah or the Sunnah abrogated the Quran, the Prophet's death terminated any such concept of *naskh*. No exegetical authority has been transferred to Muslim jurists to seek abrogation of one source with the other. This is a critical point, which Al-Shafi'i makes but Al-Ghazali has overlooked, in advocating his merger doctrine.

V. JURODYNAMICS OF *QANUN*

This part of the Article explains jurodynamics of the *qanun* and its normative relationship with the Shariah and classical *fiqh*.¹⁹⁸ The *qanun* is positive law in the Muslim world.¹⁹⁹ The *qanun* is law that Muslim states make through their internal institutions, such as legislatures, councils, courts, and agencies.²⁰⁰ Constitutions, codes, statutes, cases, and regulations are primary sources of the *qanun*.²⁰¹ Background political institutions that confer legitimacy on the *qanun* vary from one Muslim state to another. Democratically elected legislatures, royal, military, or theocratic councils, and secular bodies are varying institutions empowered to make statutes and other legislation.²⁰² National and provincial courts apply, clarify, and even make the *qanun*. In many Muslim states, particularly those

198. See Seval Yildirim, *Aftermath of a Revolution: A Case Study of Turkish Family Law*, 17 PACE INT'L L. REV. 347 (2005) (describing *qanun* as positive law that could not contradict Islamic principles).

199. Marion Holmes Katz, *Pragmatic Rule and Personal Sanctification in Islamic Legal Theory*, in LAW AND THE SACRED 91, 93-94 (Austin Sarat et al. eds., 2007) (explaining that *qanun*, a word borrowed from the Greek language, was a term used to describe secular law). Avicenna, also known as Ibn Sina, titled his world renowned book on medicine *Al-Qanun fi al-Tibb*, which suggests that the word *qanun* had entered Islamic vocabulary earlier than its frequent currency in the Ottoman Empire.

200. Saudi Arabia, however, is reluctant to use *qanun* to describe legislation. See GEORGE N. SFEIR, MODERNIZATION OF THE LAW IN ARAB STATES: AN INVESTIGATION INTO CURRENT CIVIL, CRIMINAL AND CONSTITUTIONAL LAW IN THE ARAB WORLD 27 (1998).

201. John H. Donboli & Farnaz Keshefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38 CORNELL INT'L L. J. 413, 424-25 (2005) (stating that most Muslim states in the Middle East maintain two separate bodies of law, one of which is modern legislation on commercial law, taxation, investments, and intellectual property, the other is Islamic law of family and inheritance).

202. *Id.* at 423.

influenced by common law, case law is an integral part of the *qanun*.²⁰³

A. *Shariah and Qanun*

The Shariah is divine law preserved in the Quran and the Prophet's Sunnah. The Shariah is universal and beyond the confines of national and temporal boundaries. It is one and the same for Muslims across generations.²⁰⁴ By contrast, the *qanun* is predominantly territorial in scope, now tied to the nation-state.²⁰⁵ The *qanun* in Pakistan is not the same as the *qanun* in Egypt or in any other Muslim state. A statute made in Senegal has no legal effect in Chad, and a case decided under Indonesia's *qanun* has no binding effect in Malaysia. Muslim states may benefit from each other's *qanun*, but each state constructs its own national *qanun*.

The *qanun* represents the diversity of the Muslim world. It may be religious or secular in content. When a Muslim state subjects its *qanun* to the principles of the Shariah, it establishes a close nexus between the two genres of law. Saudi Arabia's constitution declares that the Quran and the Prophet's Sunnah are its High Law.²⁰⁶ It instructs Saudi courts to apply the Quran and the Sunnah, and statutes decreed by the Ruler do not contradict the Quran or the Sunnah.²⁰⁷ Thus, the Saudi constitution subjects national *qanun* to universal Shariah. By contrast, Turkey's constitution erects a permanent wall between state and religion. It establishes a secular state via constitutional provisions that cannot be amended.²⁰⁸ Turkey's constitution requires that there "be no interference whatsoever by sacred religious feelings in state affairs and politics."²⁰⁹ This contrast between the Saudi and Turkish constitutions demonstrates that the *qanun* in Muslim states may vary from manifestly religious to manifestly secular.²¹⁰

A complete separation between the Shariah and *qanun* is often unsustainable. In Muslim states, the Shariah permeates the culture.

203. *Id.* at 423-24.

204. With respect to the Prophet's Sunnah, however, small disagreements may divide communities. Shia communities, for example, may not subscribe to every reported *hadith* in the Two Sahihs.

205. Chibli Mallat, *From Islamic to Middle Eastern Law: A Restatement of the Field (Part II)*, 52 AM. J. COMP. L. 209, 276-77 (2004) (describing how Muslim states entered the age of *qanun*).

206. SAUDI ARABIA CONST. art. 1.

207. *Id.* art. 48.

208. TURK. CONST. arts. 2 & 4.

209. *Id.* pmbl.

210. In some Muslim nations, the separation between Shariah and *qanun* is ambiguous; in others, the nexus between the two is recognized. See generally VIKOR, *supra* note 35, at 207-08.

The Shariah is part of ordinary life and its hold over lives is even more significant if the community practices Islam. The Shariah determines the specifics of daily prayer, fasting, charity, respect for parents, affection for children, marriage, divorce, the waiting period after spousal death, private loan transactions, and numerous other aspects of individual, family, and community life. Banishing the Shariah from private spheres would be tantamount to denying the freedom of religion. Since even secular societies protect and defend freedom of religion, the Shariah would continue to inform private, family, and community relations among Muslims.²¹¹ In the United States, for example, the Shariah has blossomed as small Muslim communities construct mosques, Islamic centers, and congregate for celebrating a Shariah-informed communal life.²¹²

In Muslim states, the *qanun* may be separated from the Shariah to the extent that *qanun* makers do not have to be Muslim jurists. Substantively, however, the *qanun* rarely defies the Shariah. Ordinarily, the *qanun* will not allow what the Shariah prohibits and will not prohibit what the Shariah allows. In Turkey, the ban on the Islamic veil has failed to strengthen the nation's secular foundation.²¹³ In recent years, Shariah-based protests against the ban have gathered momentum. Even more broadly, the Kemalist Turkey cannot sustain its secular militancy.²¹⁴ Religiously-inclined political parties, though previously outlawed, have been voted into power. When the *qanun* dramatically deviates from the Shariah, as it did in Iran under the Shah, a violent revolution reverses deviation and restores the Shariah. In Pakistan, the Supreme Court reversed the interest-bearing banking system in compliance with the Shariah.²¹⁵

211. See Martha Minow, *Is Pluralism an Ideal or a Compromise?: An Essay for Carol Weisbrod*, 40 CONN. L. REV. 1287, 1289 (2008) (promoting the idea of normative pluralism that offers space to religious law).

212. Lisa Rossi, *First Full-Time Muslim Chaplain to Serve as Advocate for Students*, THE HERALD-SUN, June 21, 2008, at A1 (reporting that American universities are accommodating religious needs of Muslim students born in the United States); cf. Avigael N. Cymrot, *Reading, Writing, and Radicalism: The Limits on Government Control Over Private Schooling in an Age of Terrorism*, 37 ST. MARY'S L.J. 607 (2006) (expressing concern over Islamic schools in the United States).

213. See Sabrina Tavernise, *Move to Lift a Ban on Head Scarves Gains in Turkey*, N.Y. TIMES, Feb. 10, 2008, at A3.

214. Ian Ward, *The Culture of Enlargement*, 12 COLUM. J. EUR. L. 199, 220 (2005) (arguing that Turkey's secularism is founded on "cultural amnesia").

215. Haider ala Hamoudi, *The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law*, 56 AM. J. COMP. L. 423, 456-57 (2008) (criticizing the Supreme Court holding as a fundamentalist call).

One might argue that while the *qanun* is positive law, the Shariah is coterminous with natural law.²¹⁶ A binary jurisprudential distinction between natural law and positive law permeates Western jurisprudence. Positive law, made by human beings for human beings, is transient, rooted in history, modifiable, and even subject to repeal. By contrast, natural law, given by nature or God, is timeless, ahistorical, unchanging, and eternal. This distinction—found in the works of both Aristotle²¹⁷ and Cicero²¹⁸—has lost meaning in secular legal systems that have for the most part discarded notions of natural law and are presumptively founded on positive law. Though secular constitutions provide normative stability, all laws of a secular state, including the national constitution, are subject to change. No secular law is timeless.²¹⁹

Related to this Western jurisprudential distinction between positive law and natural law is the concept of spatiotemporality. As the phrase itself suggests, spatiotemporality represents the two dimensions of space—place and time. Spatiotemporality clarifies that positive law arises from concrete contexts of a given place (i.e., a territorial state) at a given time. While natural law is eternal, positive law is dynamic. Positive law is rooted in social, economic, and political realities. It changes with time.²²⁰ It emanates from the will of the people. Positive law is not one and the same in every state. More dynamic states have a more dynamic positive law. More

216. Hisham M. Ramadan, *On Islamic Punishment*, in UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 43 (Hisham M. Ramadan ed., 2008); see also Vikor, *supra* note 35, at 208-09.

217. ARISTOTLE, NICOMACHEAN ETHICS (Martin Ostwald trans., Bobbs-Merrill 1962).

218. Marcus Tullius Cicero, *Scipio's Dream*, in COMMENTARY ON THE DREAM OF SCIPIO 69 (William Harris Stahl trans., Columbia Univ. Press 1952).

219. De facto timelessness may be distinguished from natural timelessness. The Word of God is naturally timeless. No human agency has been empowered to modify, alter, or repeal divine laws found in the Word of God. Any human attempts to corrupt divine law are unlawful. De facto timelessness belongs to positive law whereas timelessness belongs to divine law. The First Amendment of the U.S. Constitution may be an example of de facto timelessness. Even though origin of the First Amendment is rooted in specific spatiotemporality, and even though it can be theoretically amended, restricted, expanded, and even repealed, it is highly unlikely that it will be. Thus, the First Amendment has acquired de facto timelessness in that it is no longer subject to specificities of time and place. Numerous human rights texts, including the Universal Declaration of Human Rights, may also be characterized as timeless texts.

220. The U.S. Constitution sanctioning of slavery arose from the concrete social realities of American communities in the eighteenth century. With the passage of time, however, the U.S. Constitution was amended to undo slavery. Thus, the spatiotemporality of the thirteenth amendment that abolished slavery is distinguishable from the spatiotemporality of slavery clauses in the original constitution. Each constitutional provision is rooted in the specific social, economic, and moral realities of its own time and space.

complex states, such as the United States, carry more complex positive law.

While the analogy of natural law to the Shariah is attractive, it does not explain the relationship between Shariah and *qanun*.²²¹ First of all, few Muslim states are willing to separate the *qanun* from the Shariah. Second, the secular idea that law emanates from the will of the people cannot take root in Muslim states that believe in God's Sovereignty. Third, positive law is unlikely to become the highest law in Muslim states. Despite these distinctions, the fact remains that the *qanun* is territorial, spatiotemporal, and changes with time. In this sense, the *qanun* can be highly dynamic and responsive to social, political, economic, and other needs of Muslim states. The dynamism of *qanun* in Muslim states can be robust, but rarely free of Shariah constraints.

B. Qanun and Fiqh

This section examines the normative relation between *qanun* and *fiqh*. Jurodynamics sees no inherent conflict between these two bodies of law. Muslim states may benefit from classical *fiqh* that contains the legal wisdom of earlier times. Any forced separation between *fiqh* and *qanun* is unworkable, even undesirable, for both are human laws.²²² Any complete rejection of classical *fiqh* is unwise as it denies Muslim states the ancient wisdom of jurists who deduced prescriptions from the Basic Code. Jurodynamics treats *qanun* and *fiqh* as two bodies of law at par. *Qanun* is not superior to *fiqh*, nor is *fiqh* superior to *qanun*. Their horizontal reconciliation, rather than vertical hierarchy, explains the jurodynamics of *qanun* and *fiqh*.

In any discussion of *qanun* and *fiqh*, it is vital not to confuse divine texts with juristic interpretations of these texts.²²³ Divine texts are the Shariah; their juristic interpretations are *fiqh*.²²⁴ The Quran and the Prophet's Sunnah are divine texts. The Quran's text is immutable; according to Muslim beliefs, the original Word of God as revealed to the Prophet has been preserved; and, over the centuries, not a single word has been removed from, replaced in, or added to the Quran.²²⁵ Since the Prophet's Sunnah was reported and collected years after the Prophet's death, the reported text may vary

221. See Katz, *supra* note 199, at 93-94.

222. Chibli Mallat, *Commercial Law in the Middle East: Between Classical Transactions and Modern Business*, 48 AM. J. COMP. L. 81 (2000) (stating that the separation of *qanun* and *fiqh* in the Ottoman Empire produced anomalous legal scenarios).

223. Irshad Abdal-Haqq, *Islamic Law: An Overview of its Origin and Elements*, in UNDERSTANDING ISLAMIC LAW, *supra* note 216, at 1, 3-4.

224. *Id.* at 4-7.

225. *Id.* at 11.

from one chain of transmitters to the other, but the meaning of reports is frequently the same.²²⁶ In case of the Prophet's Sunnah, therefore, the focus of interpretation is on the meaning rather than on words of the reported text. Interpretations of the Quran and the Prophet's Sunnah constitute *fiqh*.²²⁷

Juristic interpretations, or the science of *fiqh*, are the human meaning of divine texts.²²⁸ The *fiqh* applies divine texts to human affairs.²²⁹ An interpretation or application of the divine text, therefore, must not be confused with the text itself. The text is divine, but interpretation of the text is human opinion.²³⁰ Pious and competent jurists may, in good faith and with utmost honesty, disagree in their interpretations.²³¹ Muslims in general may prefer one juristic interpretation over others. An interpretation favored in one period may not be as appealing as in another period. While divine texts are constant and immutable, *fiqh* is fluid and dynamic.

The *qanun* may now be distinguished from the *fiqh*. In a way, *fiqh* is similar to *qanun* since both are human in origin. Yet important distinctions turn them into separate genres of law. The *fiqh* is derived from the Quran and the Prophet's Sunnah. Classical *fiqh* is the hard work of thousands of jurists who labored over a period of centuries after the Prophet's death to construct and refine competing schools of jurisprudence.²³² In the classical period, the nexus between the Shariah and *fiqh* was so seamless and robust that Muslims began to see *fiqh* as part of the Shariah. But *fiqh* is not the Shariah, for one is human and the other is divine. The *fiqh* is indeed the *qanun* of the classical period, except that the *qanun* is associated with legislatures and courts whereas the *fiqh* develops in private chambers of pious and devoted jurists. The *fiqh* has an aura of sacredness.

With the emergence of Muslim states, the *qanun* is synonymous with modern legislation and case law.²³³ It is the product of national and provincial assemblies and courts. It is enforced through the state's coercive machinery, whereas the *fiqh* has sought voluntary compliance through adherence to schools of jurisprudence. The *qanun* may codify the opinions of *fiqh* in the form of statutes.

226. *Id.* at 12-13.

227. *Id.* at 5.

228. *Id.* at 5-6, 22.

229. *Id.* at 6, 19-21.

230. *Id.* at 6 (noting that nineteen schools have developed).

231. *Id.*

232. See GEORGE MAKDISI, THE RISE OF COLLEGES 133-34 (1981).

233. The recognition of *qanun* can be traced back to the Ottoman Empire, where the Caliph established *qanun* courts to supplement Shariah courts. Lino J. Lauro, *Toward Pluralism in Sudan: A Traditionalist Approach*, 37 HARV. INT'L L. J. 65, 97-98 (1996).

National and provincial courts may rely on *fiqh* to construct new holdings. Statutes and cases that incorporate *fiqh* may be called the *fiqh*-based *qanun*. In fact, a Muslim state may codify opinions of *fiqh* and officially adopt it as the *qanun*, thus removing doubts that the *fiqh* is the law of the state. The Muslim state will commit no sacrilegious error if its *qanun* makes amendments to, or even abrogates, some opinions of *fiqh*.

Abrogation of a *fiqh* ruling is not tantamount to abrogation of the Shariah. This critical point cannot be overemphasized. During the era of *taqlid*, what I have called the era of strict precedents, which spanned over several centuries, the *fiqh* was treated as immutable as divine texts, thus obliterating distinctions between divine texts and human interpretations.²³⁴ Part of this confusion arose from an unprecedented obedience to rulings of the Prophet's companions, the first four caliphs, and early jurists who established the prominent schools of jurisprudence (*madhhab*).²³⁵ While in the classical period, competing schools of jurisprudence vigorously disagreed with each other in their interpretations of divine texts, the juristic will to differ from the rulings of established *madhhab* gradually lost energy and even legitimacy. A dogma emerged in Islamic law that classical interpretations of divine texts are sacrosanct and that they cannot be abrogated or modified.²³⁶ The *fiqh* became inseparable from the Shariah.

Jurodynamics draws a fundamental distinction between divine texts and their interpretations. It treats divine texts as immutable sources of divine law over which human beings exercise no authority, whatever, of abrogation. However, as far as juristic interpretations are concerned, they must be respected as persuasive authority. No wholesale rejection of *fiqh* is permitted, primarily because a treasure of law such as the *fiqh* cannot be thrown away in its entirety. Each generation of jurists must begin with the presumption that past interpretations of sacred texts, as precedents, are valid, relevant, and enforceable. However, *fiqh* precedents are neither immutable, nor beyond modification or repeal. On a case-by-case basis, future generations of jurists are free to adopt, modify, and even abrogate a past ruling of the *fiqh*.

234. Khan, *supra* note 4, at 365.

235. However, the era of strict precedents offered normative stability and even justice under law. In the absence of *taqlid*, judicial decisionmaking in Islamic communities would have degenerated "into an unstable and dysfunctional system grounded in solipsism." Mohammad Fadel, *The True, the Good, and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 CAN. J. L. & JURIS. 5, 50 (2008).

236. See SFEIR, *supra* note 200, at 4-9.

In other words, a past interpretation of divine texts, that is, a ruling of classical *fiqh*—whether the human source of that ruling is one of the first four caliphs, a Prophet's companion or his wife, or one of the prominent founders of schools of jurisprudence (*madhhab*)—is subject to jurodynamics.²³⁷ The Quran does not endorse inter-generational burdens: "Past generations shall be accountable for what they have earned, and you what you have earned; and you will not be judged on the basis of what they did."²³⁸ This conception of accountability, however, does not mean that the wisdom of past generations ought to be discarded or disrespected. Nor does it mean that future generations cannot benefit from the knowledge of past generations. Islam recognizes and teaches that human evolution is continuous and seamless. Yet, the Quran holds each individual, each nation, and each generation accountable for its beliefs and deeds.²³⁹ It discourages avoiding reflective responsibility by blindly following the customs and practices of past generations. Deference to, and not replication of, past precedents is the governing principle of jurodynamics.

I have argued elsewhere that *fiqh* develops through free markets of juristic opinions.²⁴⁰ In the era of *qanun*, *fiqh* must be allowed to blossom. No Muslim state must abolish the free markets of *fiqh*, which bring dynamism and vitality to understanding of the Shariah. Just as in the classical period, the jurist's qualification and piety are factors that free markets of *fiqh* would take into account. Muslims would refuse to follow opinions of jurists whom they do not trust. But Muslims will follow the *fiqh* interpretation of a jurist who might have sinned in his or her personal life. Islam is a religion of mercy and past sins are rarely begrudged in determining the character of a Muslim jurist. The emphasis is on the substance of the interpretation rather than on the jurist's private life. However, a jurist whose public character is willfully anti-Islamic would fail to command respect among Muslims even if his personal life is flawless.

While *fiqh* markets blossom in the Muslim world, the *qanun* would continue to be the primary source of new laws. The interaction between *qanun* and *fiqh* will be complex and may vary from one Muslim state to another. Muslim states may establish institutional framework to review proposed legislation for its compatibility with *fiqh*. Eminent jurists may advise lawmakers while legislation is under consideration. Likewise, courts may be established to resolve

237. However, the jurist or the institution of jurists, such as high courts of Muslim nations, proposing an alternative interpretation must be highly qualified and broadly respected.

238. QURAN, sura Al-Baqarah 2:134.

239. QURAN, sura An-Nisa 4:41, 4:103, 19:59.

240. See generally Khan, *supra* note 15.

cases under *fiqh* rather than *qanun*. Mixed courts may use both *qanun* and *fiqh* to create new harmonies between the two bodies of law.

In normative interaction between *qanun* and *fiqh*, one might ask whether the *qanun* can modify or abrogate *ijmah* rulings of the *fiqh*. *Ijmah* rulings are obtained through the consensus of jurists. This methodology of *fiqh* was critical for the functioning of an emerging Islamic state soon after the Prophet's death.²⁴¹ However, the founding jurists of Islam perpetuated the methodology of *ijmah* for all times to come.²⁴² Given the diversity of Muslim states and cultural variations, new universal *ijmah* rulings are rare. In the classical period, however, *ijmah* rulings were relatively easier to obtain, even though the Muslim world had begun to become complex within a few decades after the Prophet's death when new territories and cultures accepted Islam. For the most part, therefore, *ijmah*, both as a legal methodology as well as a source of substantive rulings, can contribute to the enrichment of Islamic law in Muslim states.²⁴³

As a general principle, *ijmah* rulings serve as binding precedents and no *qanun* would lightly amend or overrule them. Some *ijmah* rulings are theological in nature and fall beyond the scope of *qanun*. Jurodynamics, however, allows the *qanun* to amend and abrogate *ijmah* rulings on the theory that even *ijmah* rulings are distinguishable from the Shariah—that is, the Quran and the Prophet's Sunnah. Even though the authors of *ijmah* rulings were highly pious jurists, they were nonetheless human and not divine. A meaningful separation between divine texts and *ijmah* rulings clarifies that while the Shariah is immutable, *ijmah* interpretations are not.²⁴⁴ It is not required that an *ijmah* ruling must only be modified with a new *ijmah* ruling on the theory that only a new consensus can overrule a past consensus.²⁴⁵ No such rigidity is needed to overrule a past precedent. In *qanun*, for example, the high court of a Muslim state may overrule the holding of a past case even

241. *Ijmah* played a constructive role in the formative period of Islamic *fiqh*. The consensus of the Prophet's companions, who knew the Prophet and the rationale of Islam, was a superb source of solving problems. Rahim, *supra* note 64, at 194.

242. *See id.* at 260 (explaining that while some jurists wished to confine *ijmah* to the Prophet's companions and others to their successors, Abu Hanfia affirmed the validity of *ijmah* in all ages).

243. *Ijmah*, however, can be a useful source of norm-building in Muslim states. In framing the constitution of Pakistan, for example, the Constituent Assembly was framed to operate on the principle of mutual consultation, a concept related to *ijmah*. *See* Ardath W. Burks, *Constitution-Making in Pakistan*, 69 POL. SCI. Q. 541, 553 (1954).

244. RAHMAN, *supra* note 3, at 71-74.

245. *Id.*

though the past case was unanimously decided. The same legal method applies to the overruling of a *fiqh* precedent that had been unanimously approved in the past. The reluctance to modifying or overruling a past *ijmah* precedent arises from the confusion of treating both Shariah and *fiqh* as immutable sources of law.

While the *qanun* may modify or overrule *ijmah* precedents, the *qanun* has no similar authority to modify or abrogate any provision of the Basic Code (i.e., the Quran and the Prophet's Sunnah). A secular state may exercise powers to make the *qanun* contrary to the explicit teachings of the Basic Code. In secular states, the *qanun* may prohibit what the Shariah allows and may allow what the Shariah prohibits. In such states, secular law asserts precedence over both *fiqh* and the Shariah. However, a Muslim state that allows the *qanun* to modify or overrule *fiqh* precedents, but not the Shariah, cannot be called a secular state. A Muslim state turns into an Islamic state when its *qanun* is subordinated to the injunction of the Basic Code through the principle of compatibility.

C. Principle of Compatibility

One important development in Islamic law has been a shift from the concept of deduction to the principle of compatibility. Classical jurisprudence deduced opinions from the Basic Code. Both legal methods, such as *qiyas* and *ijmah*, and substantive opinions were derived from divine texts of the Basic Code.²⁴⁶ Classical jurists were not at liberty to offer opinions based on pure speculation,²⁴⁷ nor were Muslim rulers completely free to provide legislation without regard to the Basic Code.²⁴⁸ Classical jurists and rulers made an effort to establish a deductive relationship between proposed opinions, substantive and procedural, and the Basic Code.²⁴⁹ Some text from the Quran or the Prophet's Sunnah was invoked to legitimize new opinions added to the storehouse of Islamic law.²⁵⁰ The classical period was essentially a deductive period in which the Basic Code was constantly consulted in juristic lawmaking. This period may properly be called the puritan period of Islamic law as jurists and rulers were under a self-imposed systemic constraint to draw new

246. Abdal-Haqq, *supra* note 223, at 16-19.

247. George Makdisi, *Ash'arī and the Ash'arites in Islamic Religious History I*, 17 *STUDIA ISLAMICA* 37 (1962); George Makdisi, *Ash'arī and the Ash'arites in Islamic Religious History II*, 18 *STUDIA ISLAMICA* 19 (1963) (discussing opposition to jurists who proposed speculative reason as a legal method to deduce rules).

248. See SFEIR, *supra* note 200, at 4-5.

249. Abdal-Haqq, *supra* note 223, at 24-25.

250. WAEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNĀ US-AL-FIQH* 82-83 (1997).

rules—legal methods, procedural, and substantive rules—from no other source but the Basic Code.

The enterprise of deduction gradually lost its vigor, and *ijtihad* (the creativity juristic activity to deduct new rules from the Basic Code) slowed down dramatically, though it did not cease to exist.²⁵¹ For over a thousand years, few new legal methods were added to interpret the Basic Code.²⁵² The hold of classical *fiqh* over legal methods was completely suffocative. In the absence of new legal methods, the succeeding generations of jurists could add very little to the enterprise of *fiqh*.²⁵³ For a thousand years, the *fiqh* was trapped into its formative spatiotemporality and was losing connections with evolutionary forces of Muslim life.²⁵⁴ This freezing of the *fiqh* slowed down the socioeconomic development of Muslim communities, since the Muslim world was alienated from the classical *fiqh* as much as the classical *fiqh* was nonresponsive to the ever-changing needs of the Muslim world.²⁵⁵ A fruitless view of the *fiqh* generated skeptical ideas even about the continued relevance of the Shariah, the Quran, and the Prophet's Sunnah.

The stalemate was finally shattered when Western nations began to colonize, occupy, and dominate Muslim lands across the world, from the shores of North Africa and the Middle East to Malaysia and Indonesia.²⁵⁶ Western colonizers, familiar with Islam's superb past achievements, were eager to export Western laws to colonized lands and thus deepen their footprints.²⁵⁷ Western imperialism was not content with the exploitation of trade and commerce in colonized lands; it was aggressively self-righteous in imposing Western laws over Muslim communities. Just as Islam promised to cure the era of ignorance, Western ideology promised to civilize barbaric nations, including Muslim communities.²⁵⁸ During the colonial period that stretched over more than a hundred years, massive Western legislation was introduced to "modernize" the Muslim world.²⁵⁹

251. Abdal-Haqq, *supra* note 223, at 20-22.

252. *See id.* at 26-28 (showing founding dates for the four major Sunni schools).

253. *See* SFEIR, *supra* note 200, at 4-9.

254. *Id.*

255. *But see* Abdal-Haqq, *supra* note 223, at 23-25 ("Islamic resurgence and increasing advocacy for the freedom to practice and implement Islamic law probably will result in a renewed interest in these aspects of traditional *madhhab* methodology that were established and universally accepted during earlier times.").

256. *See id.* at 25.

257. *See* SFEIR, *supra* note 200, at 23.

258. *Id.* at 36-42 (illuminating French Morocco as an example).

259. *Id.* The rhetoric of modernity continues to define the Western perception of the Muslim world. The critique of Islamic fundamentalism departs from a familiar cliché that fundamentalists are opposed to modernity. Even benevolent Western attitudes

Native Muslim rulers, whose kingdoms were directly threatened by Western invasions, were prepared to accommodate Western laws to rescue their weakened thrones. They accepted the suggested paradigm that the classical *fiqh* was outdated and could no longer respond to the legal needs of Muslim communities.²⁶⁰ The importation of European civil codes and other laws signaled a watershed in the development of Islamic law. At first, the importation of Western codes and laws took place under the banner of secularization by setting aside the classical *fiqh*. The native Muslim jurists opposed the importation of foreign laws, but they were too weak and marginalized to offer any meaningful resistance. This was the period in which imported laws replaced the *fiqh*, though not completely. Muslim family law, the laws of worship, and some other laws firmly rooted in culture, remained tied to the classical *fiqh*.²⁶¹ However, the law of contracts, civil procedure, criminal law, criminal procedure, and many modern areas of law were European in content, style, and supporting rationale.²⁶² In this period, the imported laws stood apart from the classical *fiqh* with little normative interaction between the two. There existed no professional class to navigate these distinct and separate bodies of law.

The yearning for Islamic law, however, began to assert itself when Muslim communities were liberated from colonial rule.²⁶³ The decolonization of the Muslim world did not remove Western codes and constitutions from legal systems, which had penetrated deeply into the legal fabric of daily life.²⁶⁴ Modern courts with judges and lawyers had effectively replaced classical Shariah courts.²⁶⁵ The Western procedures and rules of evidence to prosecute civil and

toward the Muslim world focus on modernizing the "backward economies and social conditions" prevailing in Muslim lands. See Terrance G. Carroll, *Secularization and States of Modernity*, 36 WORLD POL. 362 (1984) (arguing that secularization is not a prerequisite for modernity and that religion, including Islam, can be compatible with the development of a modern state).

260. Mark S. W. Hoyle, *The Origins of the Mixed Courts of Egypt*, 1 ARAB L. Q. 220, 223 (1985) (noting the importation of the French-based codes in Turkey in the 1850s in the areas of commercial law, maritime law, and criminal procedure).

261. See SFEIR, *supra* note 200, at 27.

262. See Oussama Arabi, *Al-Sanh-ur-i's Reconstruction of the Islamic Law of Contract Defects*, 6 J. ISLAMIC STUD. 153, 167 (1995) (describing the synthesis of Western law and Islamic law in the Iraqi Civil Code); Zuhair E. Jwaideh, *The New Civil Code of Iraq*, 22 GEO. WASH. L. REV. 176, 177 (1953) (describing the influence of Western law on the Iraqi Civil Code).

263. See, e.g., Scott Alan Kugle, *Framed, Blamed, and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia*, 35 MODERN ASIAN STUD. 257, 258 (2001).

264. See *id.* at 257-60 (describing the melding of Anglo laws and jurisprudential notions with Islamic law and producing hybrid law, called Anglo-Muhammadan law).

265. *Id.*

criminal cases were also firmly established in most Muslim communities across the world.²⁶⁶ The liberated Muslim nations found it daunting, if not impossible, to dismantle the imported legal infrastructure of codes and courts and replace it with classical *fiqh* developed in the early centuries of Islamic empires.²⁶⁷ In some Muslim nations, the importation of Soviet-sponsored socialist doctrines further confused the relevance of the *fiqh*.²⁶⁸

A new principle was therefore needed to reassert the relevance, and perhaps supremacy, of the Shariah without discarding the imported legal infrastructure. The principle of compatibility emerged as the magic principle to Islamize imported laws, which were now absorbed under the concept of *qanun*. The principle, most often implanted in Muslim state constitutions, furnishes a bridge between *qanun* and the Shariah.²⁶⁹ The principle is both reformatory and prospective.²⁷⁰ The principle is reformatory in that it requires that all existing laws be brought in conformity with the Shariah. The principle is prospective in that it requires that no future law be enacted repugnant to the Shariah. The task of creating the harmony between Shariah and *qanun* is left to legislatures and judges. Ironically, the principle of compatibility that began to reform the *qanun* in the image of the Shariah is to a large extent similar to the concept of the Supremacy Clause in the United States Constitution.

The principle of compatibility liberated state legislatures to make new legislation without any need to deduce it from the Basic Code. Laws could be made on the basis of economic and social policies. Classical legal methods of *qiyas* and *ijmah* are no longer used to extract new legislation from the Basic Code.²⁷¹ These methods no longer precede the making of laws, but are used to screen the law's compatibility with the Shariah after the enactment.²⁷² Thus, classical methods of the Shariah have turned into tools of "judicial review."²⁷³ Even though state legislatures are obligated to preview legislation for its compatibility with the Shariah, their

266. *Id.*

267. *Id.*

268. See generally Saba Habachy, *Property, Right, and Contract in Muslim Law*, 62 COLUM. L. REV. 450 (1962) (showing that private property and freedom of contract rights, parts of the Shariah, were incompatible with socialist doctrines).

269. Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379, 382 (2006) ("Apparently, the international community has concluded that the trend towards constitutional Islamization is harmless or else unstoppable.").

270. See *id.* at 415-25 (describing Egypt's method of constitutional Islamization).

271. See *id.* at 394-418.

272. *Id.*

273. See *id.* at 415-25 (discussing the Supreme Constitutional Court of Egypt).

preview is not as rigorous and comprehensive as that of jurists in the classical period.

Under deduction, the power to extract laws from the Basic Code belongs to jurists. Under compatibility, the power to review legislation for compliance with the Basic Code has shifted to the judiciary.²⁷⁴ Deduction requires that jurists be religious leaders with a substantial following and that they be educated in the grammatical and linguistic niceties of Arabic, the original language of the Basic Code. The compatibility principle is less stringent about judges' religious qualifications, though judges must be practicing Muslims. In non-Arabic countries, the judiciary, though mostly familiar with the Quran in Arabic, rarely possesses the proficient knowledge of Arabic necessary to study the Basic Code and classical commentaries. However, readily available translations of the Basic Code and classical literature available in the vernacular help judges across the Muslim world to interpret divine texts while reviewing the *qanun*.

Another difference between deduction and compatibility clarifies the methodology of the *qanun*. Under classical *fiqh*, renowned jurists delivered opinions on issues facing the Muslim community. A vibrant free market of juristic opinions informed Muslims who, almost in a democratic manner, decided, through following, which opinions formed part of the mainstream *fiqh*. With the establishment of schools of jurisprudence, the followers of each school were expected to accept the opinions of the school; still, the freedom to reject the school's opinions was far from illusory. Even within the same school, jurists offered conflicting opinions over issues. Compatibility introduces a new methodology of compliance with the Shariah. Since national courts review legislation for its compatibility with the Basic Code, the court's hierarchy now is the final arbiter over whether the *qanun* complies with the Basic Code.

Furthermore, the judicialization of Shariah compliance is nationalist and not universal, since courts of one Muslim state are not bound to accept the judicial opinions of another. The Shariah is still universal, but the Shariah-complaint *qanun* has been nationalized. The *fiqh* markets are still vibrant as jurists issue opinions on issues facing the Muslim world, such as suicide bombing. The *fiqh* in its traditional methodology is still in business. Islamic law, however, is now as diverse as are Muslim states and cultures. What unites the Muslim world is the Shariah, whose supremacy is recognized even in state adherence to international law.

274. *Id.*

VI. JURODYNAMICS OF INTERNATIONAL LAW

Now that international law is maturing into an efficacious supranational legal system, jurodynamics must explain the relationship between the Shariah and international law. As a general principle, the Shariah preempts incompatible norms of international law in two distinct ways. First, the Shariah does not allow an incompatible norm of international law to become universal. Although universal norms are compatible with the Shariah, no norm can be universal unless it receives the approval of Muslim states.²⁷⁵ A universal norm comes into being when the peoples of the world, through representative governments, assent to the creation or recognition of the norm.²⁷⁶ A norm is universal when states unanimously sanction its approval. If Muslim states oppose a norm, the norm cannot be universal. Free speech that defames religions, for example, cannot become a universal norm because almost all states oppose any such conception of free speech.²⁷⁷ Given that Muslims constitute a substantial part of the world population and Muslim states constitute a substantial part of the United Nations, no norm can become universal without the explicit approval of the Muslim world.²⁷⁸ This point cannot be ignored in the analysis of universal values.

Some Muslim governments may lack the courage, competence, and democratic rooting to reflect normative aspirations of their

275. The Organization of the Islamic Conference, consisting of fifty-seven states, is the second largest inter-governmental organization after the United Nations, and is the collective voice of the Muslim world. *See* Organization of the Islamic Conference, About OIC, http://www.oic-oci.org/page_detail.asp?p_id=52 (last visited Jan. 23, 2009).

276. Under international treaty law doctrine, no derogation is allowed from *jus cogens* norms. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 344. The prohibition against genocide, for example, is such a norm. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 101 (June 27) (noting that *jus cogens* may also be known as “universal norm[s]” or “universally recognized principle[s] of international law”). No Muslim state has objected to the prohibition of genocide. Universal norms may also be called universal values, a term broader than *jus cogens* in scope and content because not all universal values are legal values.

277. Liaquat Ali Khan, *Combating Defamation of Religions*, AM. MUSLIM, Jan. 1, 2007, http://www.theamericanmuslim.org/tam.php/features/articles/combating_defamation_of_religions (analyzing the voting pattern on the United Nations General Assembly Resolution on Combating Defamation of Religions and showing Muslim states supporting the Resolution en masse).

278. Examples of *jus cogens* norms include prohibitions against torture, summary execution, prolonged arbitrary detention, genocide, and slavery. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). The right of self-defense is also considered a *jus cogens* norm. *See* Hans Kelsen, *Limitations on the Functions of the United Nations*, 55 YALE L. J. 997, 1011 (1946).

peoples. If Muslim governments are not true representatives of their peoples, they lack legitimacy to vest a norm with universality. The so-called universal norms that carry democratic deficit are weak and vulnerable. Universal norms stand on much firmer ground, and are theoretically sound, when they come into being through honest negotiations among representative governments. By definition, therefore, no norm is universal unless it is acceptable to Muslims. And Muslim states would not permit a norm, if it conflicts with the Shariah, to become universal.

Second, the Shariah asserts its supremacy over incompatible international norms through state reservations. The law of reservations allows Muslim states to make exceptions to international norms incompatible with the Shariah.²⁷⁹ A reservation furnishes a legal method not to accept specific provisions of a treaty. Reservations maximize international participation in treaty regimes as they allow nations to accept treaties that they otherwise would not. Muslim nations maintain the Shariah's supremacy by making reservations to specific provisions of treaties they consider incompatible with the Shariah. If a treaty allows no reservations, but some of its provisions are incompatible with the Shariah, most Muslim states are unlikely to sign it. By definition, no norm to which Muslim states make reservations can possibly achieve the status of universality.²⁸⁰

However, Muslim states may or may not make reservations to international norms that conflict with the classical *fiqh*. Some Muslim states may not accept the provision of a treaty, which conflicts with a ruling of the classical *fiqh*. Others may prefer to accept the treaty over an incompatible norm of the classical *fiqh*. Subscription to international law on the basis of *fiqh* would thus vary from state to state. Just as a Muslim state may vary its *qanun* from classical *fiqh*, the state may similarly accept international law contrary to the teachings of classical *fiqh*.

Take, for example, the debate in classical *fiqh* over the execution of prisoners of war. This debate carries great importance for our own times as Muslims are engaged in numerous military expeditions around the world. Ibn Rush (Averroes) reports that classical jurists

279. The International Court of Justice has ruled that reservations to human rights treaties should be available with greater latitude since these treaties do not create mutual obligations between signatory states and instead affirm broad commitments to the protection of populations. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28).

280. But see Charles H.B. Garraway, *State Intelligence Gathering: Conflict of Laws*, 28 MICH. J. INT'L L. 575, 592 (2007). Unfortunately, this author misconceives the notion of universality of the law of war, assuming that a norm can become universal without the consent of numerous states.

could not reach a consensus over a preferred treatment of prisoners of war.²⁸¹ However, a majority of classical jurists concluded that the *imam* could exercise any of the available options, “including their pardon, enslavement, execution, demand for ransom, and the imposition of *jizya* (poll tax) on them.”²⁸² While a juristic consensus emerged on the permissibility, though not preference, of enslavement, classical jurists strongly disagreed over whether the execution of prisoners of war was even a permissible option.²⁸³ Ibn Rushd reports that a group of jurists declared that the execution of prisoners of war was unlawful and there was even an assertion that classical jurists had reached a consensus to completely outlaw execution as a permissible option under the Shariah.²⁸⁴

The Basic Code contains various ordainments (*ahkam*) on the treatment of prisoners.²⁸⁵ The Quran offers two seemingly conflicting ordainments regarding the execution of prisoners of war. The first ordainment allows Muslims to release prisoners of war either for ransom or without any charge: “Therefore, when you face the enemy (in fight), kill them until they are thoroughly subdued; then take them as prisoners; thereafter (set them free for) either generosity or ransom.”²⁸⁶ Maududi explains that this ordainment was revealed before the Battle of Badr, the first war that the Prophet and his followers fought.²⁸⁷ Although the ordainment clarifies a sequential strategy of fighting, instructing Muslim warriors to first fight and kill fiercely until the enemy is completely subdued, and then take prisoners, the ordainment was misapplied in the actual battlefield of Badr.²⁸⁸ Because releasing prisoners was tied to ransom, some Muslim warriors were more interested in taking enemy warriors as prisoners rather than killing them.²⁸⁹ This shift of focus from fighting to taking captives can distort the dynamics of the battlefield. The primary purpose of war is to engage and defeat the enemy; it is not to generate ransom revenues by taking enemy soldiers as prisoners.

281. ABU AL-WALID MUHAMMAD IBN AHMAD IBN RUSHD, *BIDAYAT AL-MUJTAHID* [DISTINGUISHED JURIST'S PRIMER VOLUME I] 456 (Imran Ahsan Khan Nyazee trans., 1994).

282. *Id.*

283. *See id.* at 456-61.

284. *Id.* at 456; *cf.* Paola Gaeta, *On What Conditions Can a State Be Held Responsible for Genocide*, 18 EUR. J. INT'L L. 631, 641 (2007) (arguing that killing prisoners of war may not be a war crime unless committed on a systemic basis).

285. TAFHIM, *supra* note 66, sura Muhammad 47:4 n.8 (explaining the law of war regarding the treatment of prisoners).

286. QURAN, sura Muhammad 47:4.

287. TAFHIM, *supra* note 66, sura Muhammad 47:4 n.8.

288. *See id.*

289. *See id.*

This ransom-driven implementation of the first ordainment was clarified in the second ordainment.

The second ordainment states: "It is not fitting for an apostle that he should have prisoners of war until he hath thoroughly subdued the [battlefield]. Ye [warriors] look for temporal goods of this world; but Allah looketh to the Hereafter."²⁹⁰ A mechanical and erroneous concept of abrogation, when applied to these two ordainments, might suggest that the second ordainment repeals the first ordainment and, therefore, killing prisoners, rather than releasing them, is the final divine order. No Muslim jurist would sanction any such reading of the two ordainments. The second ordainment clarifies the first ordainment, which is neither abrogated nor modified.²⁹¹ Both divine ordainments emphasize one and the same battlefield strategy: in a lawful war, Muslims must fight fiercely and seriously with the singular aim of completely subduing the enemy. No distraction or worldly gain must weaken or confuse this simple and straightforward battlefield strategy.

Fighting is the logic of the battlefield. The first ordainment prohibits the killing of prisoners after the war is over. As a general principle, prisoners of war must not be killed. Muslim soldiers engaged in a battle have every right to fight and kill enemy warriors. But this right and obligation to fight and kill ceases to exist when the war is over. The Muslim commander or government has the authority to announce the end of war. After this announcement, Muslim soldiers lose the battlefield right to kill enemy soldiers. The end of war is thus a relief to enemy soldiers, for now they, if taken prisoners, cannot be killed. Needless to say, under appropriate circumstances, enemy soldiers may be taken as prisoners during the war. The first ordainment allows no needless killing of enemy warriors. It simply focuses on the reality of the battlefield, instructing Muslims not to confuse the issues of fighting with those of taking prisoners. If war has erupted, the first ordainment prioritizes the battlefield strategy: fighting and killing constitute the primary obligation. This obligation, however, does not warrant the killing of helpless or wounded enemy soldiers willing to surrender.²⁹² The Islamic law of mercy does not leave the battlefield.²⁹³

290. QURAN, sura Al-Anfal 8:67 (Yusuf Ali trans.).

291. But see Lena Salaymeh, *Early Islamic Legal-Historical Precedents: Prisoners of War*, 26 LAW & HIST. REV. 521, 529 (2008) (reporting that some Muslim rulers executed prisoners on the abrogation thesis).

292. The most pertinent on this point is the Prophet's following *hadith*:

Narrated Salim's father: The Prophet sent Khalid bin Al-Walid to the tribe of Jadhima and Khalid invited them to Islam but they could not express themselves by saying, "Aslamna (i.e. we have embraced Islam)," but they started saying "Saba'na! Saba'na (i.e. we have come out of one religion to another)." Khalid kept on killing (some of) them and taking (some of) them

Under exceptional circumstances, the "killing" of a prisoner of war is lawful. Here the word "killing" used in classical *fiqh* must be rephrased. A prisoner of war, for example, may be tried for committing war crimes. The execution of a war criminal, though a prisoner of war, will be allowed under the Shariah. The Prophet's law explains this exception. Although after the revelation of the first ordainment, prisoners of war were rarely executed en masse. Selective execution of individuals known for the commission of war crimes or for the commission of pre-war massacres was carried out under the Prophet's law. This exception to the first ordainment does not defeat purpose of the ordainment, nor does it in any way abrogate the first ordainment. It simply provides a more detailed application of the first ordainment under which prisoners of war cannot be arbitrarily killed. The most important part of the exception is the fact that the execution of a prisoner of war is no longer in the hands of any soldier. The Prophet as the head of the Muslim community could order the execution of a prisoner of war. By analogy, therefore, the decision to try and execute a prisoner of war for the commission of war crimes or other criminal activity would now belong to the Muslim government.

The first ordainment furnishes an option of freeing the prisoners of war either for ransom or gratuitously.²⁹⁴ This option is vested in the Muslim government and not in the soldier.²⁹⁵ The Muslim government has the authority to exercise the option of ransom. Depending on the realities of the battlefield, the resources of the enemy, and the complexity of international relations, the Muslim

as captives and gave every one of us his Captive. When there came the day then Khalid ordered that each man (i.e. Muslim soldier) should kill his captive, I said, "By Allah, I will not kill my captive, and none of my companions will kill his captive." When we reached the Prophet, we mentioned to him the whole story. On that, the Prophet raised both his hands and said twice, "O Allah! I am free from what Khalid has done."

5 SAHIH BUKHARI, *supra* note 118, 59:628.

293. Abu Bakr, the first Caliph of Islam, prohibited even destroying crops or cutting fruit trees belonging to the enemy. M. Cherif Bassiouni, *Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence*, 8 CHI. J. INT'L. 119, 140 (2007).

294. The Prophet freed the prisoners of war without compensation. See 4 SAHIH BUKHARI, *supra* note 118, 53:360 (explaining that the captives of Hawazin were freed without compensation because they had embraced Islam).

295. Islamic law thus modified the customary law under which the prisoner belonged to the captor. See MAHER HATHOUT, JIHAD VS. TERRORISM 25 (Samer Hathout ed., 2002). This rule of Islamic law is consistent with modern international law of war. See Hans-Peter Gasser, *International Humanitarian Law*, in A MANUAL OF INTERNATIONAL HUMANITARIAN LAWS 204, 241 (Naorem Sanajaoba ed., 2004).

state may release prisoners of war without any charge whatsoever.²⁹⁶ Likewise, the Muslim state may exchange prisoners of war to obtain the release of their own captured soldiers. Since the concept of ransom includes compensation, the Muslim state may bargain for an appropriate benefit before releasing prisoners of war.

Muslim states commit no wrong and their subscription to international law is consistent with the Shariah when they sign treaties that prohibit the killing of prisoners of war.²⁹⁷ The Quran's permissibility that prisoners of war may be released without any ransom or penalty allows Muslim states to universalize such a norm when other states are also willing to do so. The Prophet said, "Free the captives, feed the hungry and pay a visit to the sick."²⁹⁸ Freedom of captives has been a permanent promise of Islam. Enslavement of prisoners of war is no longer an international option and Muslim states have vigorously participated in forging a consensus on the prohibition of slavery in general²⁹⁹ and enslavement of prisoners of war in particular.³⁰⁰

While Muslim states would actively participate in the international legal system to establish a peaceful and prosperous world, they are unlikely to do so by retracting the supremacy of the Basic Code. Just as secular states, such as the United States, maintain the supremacy of their national constitutions over incompatible treaty norms, Muslim states would continue to develop international law consistent with the Shariah. Since no universality can be established without the participation of Muslim states, jurodynamics would continue to guard a normative affiliation between divine texts and universal values. Most importantly, Muslim states would uphold international law in times of peace and panic³⁰¹

296. The Prophet released prisoners of war captured in the battle of Hunain without ransom. See 4 SAHIH BUKHARI, *supra* note 118, 53:372.

297. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 287 (defining willful killing of prisoners of war as a war crime).

298. 4 SAHIH BUKHARI, *supra* note 118, 53:282.

299. Slavery is now prohibited under several human rights treaties. See, e.g., International Covenant on Civil and Political Rights art. 8, Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171 (prohibiting slavery and forced labor); see also International Convention on the Elimination of All Forms of Racial Discrimination art. 3, Dec. 21, 1965, 660 U.N.T.S. 195 (condemning apartheid and racial segregation).

300. The Organisation of Islamic Conference has adopted the following principle: "All member states undertake to contribute to the maintenance of international peace and security . . . as enshrined in the present Charter, the Charter of the United Nations, international law and international humanitarian law." Organisation of the Islamic Conference, Charter of the Organisation of the Islamic Conference art. 2(5), Mar. 4, 1972, 914 U.N.T.S. 103, <http://www.oic-oci.org/is11/english/Charter-en.pdf>.

301. It is unfortunate that some states abandon international law in times of stress, such as after the terrorist attacks on the United States in September 2001. See Susan

because the Quran specifically instructs Muslims: “[And truly pious are] they who keep their promises whenever they promise, and are patient in misfortune and hardship and in time of peril; it is they that have proved themselves true, and it is they, they who are Conscious of God.”³⁰²

VII. CONCLUSION

This Article examines the jurodynamics of Islamic divine texts, the Quran, and the Prophet's Sunnah, also known as the Shariah or Basic Code. Consistent with core Islamic beliefs, the Article concludes that no jurist has any authority whatsoever to abrogate any textual provisions of the Quran, which Muslims believe is God's Book. The thesis that a human being can modify or repeal portions of a divine text is fundamentally contrary to the notion of God's authority, insofar as believers obey God's Law and do not abrogate it after finding fault in its purpose or wisdom. The Article also concludes that no jurist has any authority to abrogate the core concepts transmitted through the Prophet's Sunnah. In the normative hierarchy between Islamic divine texts, the Quran is superior to the Prophet's Sunnah. If an incompatibility is found between the two scriptures, the jurist must find an interpretation that gives effect to both sources. If no such interpretation is possible, the Quran must be enforced, though without abrogating the Prophet's Sunnah. In drawing these conclusions, the Article relies on the jurodynamics under which the Shariah is spiritual energy that cannot be created or destroyed, though it yields appropriate interpretations in consonance with spatiotemporal externalities.

The Article further concludes that most Muslim states require that *qanun* (positive law) and international law be compatible with the Shariah. The compatibility principle, adopted in numerous Muslim states constitutions, is consistent with jurodynamics in that it harmonizes legislation, case law, and international law with the Shariah. The classical *fiqh*, deduced from the Basic Code, however, is not immune from abrogation. The Islamic state may modify, and even repeal, a *fiqh* opinion, provided the modifying *qanun* is consistent with the Basic Code. Likewise, the Islamic state may subscribe to provisions of international law, which conflict with *fiqh* opinions, but are otherwise compatible with the Basic Code. For pragmatic reasons, however, jurodynamics prohibits Muslim states from any wholesale repudiation of the *fiqh*. No prudent legal system throws away the treasures of law accumulated through the hard labor of past generations. However, any unreflective subservience to

Carle, *Structure and Integrity*, 93 CORNELL L. REV. 1311, 1335-41 (2008) (discussing the abandonment of ethics and international norms under pressure).

302. QURAN, sura Al-Baqarah 2:177.

classical *fiqh* is unnecessary for maintaining the supremacy of the Basic Code. Each generation of Muslims is spiritually and intellectually free to chart its own normative course consistent with the Basic Code. Accordingly, jurodynamics presents a dynamic view of the Shariah actively engaged with spatiotemporal evolution.