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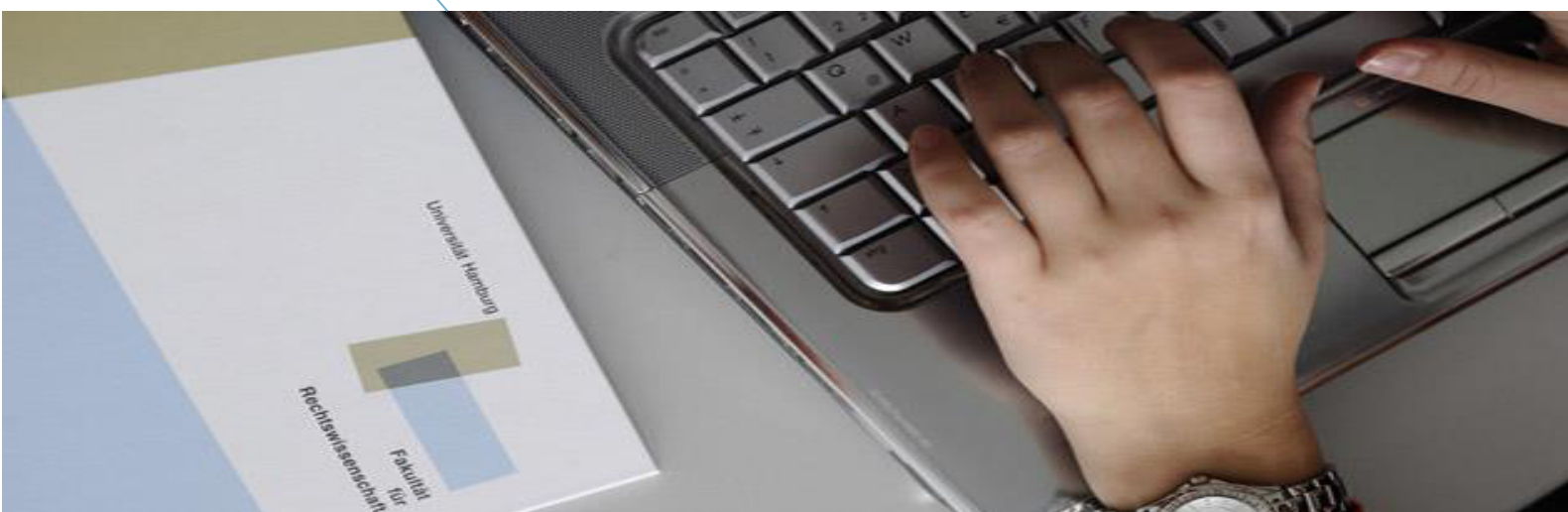
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# The rule of law and Islam

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# The rule of law and Islam

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*Jerg Gutmann and Stefan Voigt*<sup>1</sup>

No other religion's role in politics is as controversial as that of Islam – at least in Western societies. It has been claimed that Muslims are more likely than others to voice opinions that conflict with core elements of a free society, such as capitalism, constitutional democracy, and the rule of law.<sup>2</sup> Indeed, Muslim countries seem to struggle with establishing democracy<sup>3</sup> and the rule of law,<sup>4</sup> while the acknowledgement and protection of minority rights in particular are a constant concern in Muslim societies.<sup>5</sup>

A recent survey by the PEW Research Centre<sup>6</sup> indicates that values expressed by large numbers of Muslims around the world remain incompatible with the liberalism favoured in modern-day Western societies. Although Muslims in most parts of the world think that women should decide whether they veil themselves, overwhelming majorities of Muslims also say that a wife should always obey her husband. Furthermore it is still controversial whether women should have a right to divorce and whether sons and daughters have the same inheritance rights. Even though a majority of Muslims support democracy and it is almost universally agreed that religious freedom is something positive, the view that religion should play a role in politics is widely embraced among Muslims. A majority of Muslims favour enshrining *Shari'a* in official state law and specifically among those Muslims, honour killings and the death penalty for apostates are widely supported.

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<sup>1</sup> The authors thank Moamen Gouda, Dina Rabie, and the editors of this handbook for valuable comments and suggestions.

<sup>2</sup> Voigt, Stefan (2005). Islam and the Institutions of a Free Society. *The Independent Review* 10(1):59–82.

<sup>3</sup> See: Rowley, Charles K., and Nathanael Smith (2009). Islam's Democracy Paradox: Muslims Claim to Like Democracy, So Why Do They Have So Little? *Public Choice* 139(3):273–99; Potrafke, Niklas (2012). Islam and Democracy. *Public Choice* 151(1):185–92.

<sup>4</sup> See: Gouda, Moamen (2013). Islamic Constitutionalism and Rule of Law: A Constitutional Economics Perspective. *Constitutional Political Economy* 24(1):5785; Gutmann, Jerg and Stefan Voigt (2015). The Rule of Law and Constitutionalism in Muslim Countries. *Public Choice* 162(3):351–80.

<sup>5</sup> See: Berggren, Niclas, Christian Bjørnskov and Therese Nilsson (2017). What Aspects of Society Matter for the Quality of Life of a Minority? Global Evidence from the New Gay Happiness Index. *Social Indicators Research* 132(3):1163–92; Cooray, Arusha and Niklas Potrafke (2011). Gender Inequality in Education: Political Institutions or Culture and Religion? *European Journal of Political Economy* 27(2):268–80; Gouda, Moamen and Niklas Potrafke (2016). Gender Equality in Muslim-Majority Countries. *Economic Systems* 40(4):683–98.

<sup>6</sup> PEW Research Center (2013). The World's Muslims: Religion, Politics, and Society. Available at: <http://www.pewforum.org/Muslim/the-worlds-muslims-religion-politics-society.aspx>.

This chapter is concerned with the question whether political Islam is compatible with the rule of law. This question can be discussed on two levels: Is Islamic thought and jurisprudence fundamentally compatible with the concept of the rule of law or is pursuing both a contradictory enterprise? Moreover, how does Islam as practiced by Muslims (and in Muslim societies) compare with the rule of law?

The rule of law can be considered a Western concept in a double sense. First, thinkers, primarily originating from what is today referred to as ‘the West’, developed its conceptual foundations. Secondly, when it comes to implementing the rule of law, it has been shown that a country’s rule of law score is linked to the proportion of European descendants among its current population.<sup>7</sup> This association seems to suggest that the presence of European descendants is conducive to the implementation of the rule of law. Over the past decades, the rule of law has become something that almost everybody seems to endorse. For our analysis, we use the concept of the rule of law as our normative benchmark, despite the possibility that it might still not be endorsed by some leaders, especially outside the Western world.

Given that the rule of law has been a prominent concept in governance circles for quite some time, analyses of the compatibility of Islam and the rule of law are surprisingly scarce. After presenting our delineation of the rule of law in the following section, we set out to analyse the compatibility between the rule of law and Islamic thinking and the compatibility between the rule of law and policies pursued in Muslim countries. Our concluding section provides a summary of our arguments and points out the challenges for non-Muslim-majority societies that have experienced a large influx of Muslims recently.

## DEFINING THE RULE OF LAW

Although the exact delineation of the rule of law is the subject of intense debate, different conceptions share at least one fundamental trait: the law must be applied equally to all members of society, those holding political power included. This is to make sure that all power is limited and governments are not able to rule arbitrarily. Although democracy and the rule of law are typically mentioned in the same breath, these are very different concepts. Democracy refers to the citizens choosing their own policies or electing representatives to take these decisions for a limited period of time; the simplest definition of what makes a country democratic is, hence, majority decision-making. The rule of law, in contrast, sets constraints on political decision-making; decisions have to be taken within the legal framework of a country. This serves, among other things, to protect minorities from a tyranny of the majority. Despite this inherent conflict between democracy and rule of law, the two can be understood as complementary. The majority of the population is granted the right to take political decisions, as long as these abide by the standards of the rule of law. Nevertheless, the rule of law can in principle function without democracy – as long as it is self-enforcing.<sup>8</sup>

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<sup>7</sup> Gutmann, Jerg and Stefan Voigt (2018). *The Rule of Law: Measurement and Deep Roots*. Forthcoming with the *European Journal of Political Economy*.

<sup>8</sup> Ibid.

According to Kant (1797) laws should be universalizable, i.e., they should be general (not only applicable to a specific case), open (not prescribing specific behaviour), and certain (their enforcement should be predictable). Lon Fuller's<sup>9</sup> Storrs Lectures provide another famous list of traits that laws should exhibit. All of these can be interpreted as describing necessary components of the rule of law. According to Fuller's list, the law shall be (1) general, (2) publicly promulgated, (3) prospective (i.e., not retroactive), (4) clear, (5) consistent (i.e., without contradictions), (6) practicable (i.e., not demand the impossible), (7) sufficiently constant over time, and (8) congruent with the actions of public officials.

This list describes desirable attributes of legislation. It focuses on formal traits but remains silent regarding the substance of rules. Limiting the rule of law to such formal traits is sometimes referred to as employing a 'thin' conception.<sup>10</sup> However, many atrocities that have been committed by governments the world over would not be in violation of such a thin conception. To give the rule of law more substance, the concept needs to be enriched with some minimum content. Adding substance comes, however, at a cost. The more is added and the 'thicker' the concept gets, the lower the number of people who would approve of the concept as a normative standard. Here, we propose to include only a narrowly defined set of basic human rights, such as the absence of extrajudicial killings, torture, and the like. To facilitate the enforcement of the rule of law, a number of instruments have proven helpful. These include, first and foremost, the separation of powers and judicial independence.

This delineation of the rule of law is, however, not shared by all scholars. In a similar context, Fukuyama,<sup>11</sup> for instance, proposes to define the rule of law as 'the government's acceptance of the sovereignty of a pre-existing body of law representing a social consensus on rules of justice'. No requirements regarding the formal traits of law are mentioned, neither is a minimum core regarding the substance of the law. This implies that the criterion for judging whether the rule of law prevails is context-dependent, i.e., it depends on whatever social consensus exists. In Fukuyama's argument, checks on arbitrary government power are key and the substance of the rules governing society is of lesser importance. He even concedes that this could imply that women are treated differently than men. Such a delineation of the rule of law is 'too thin' for our purposes, as the substance of the rules is completely context-dependent. Moreover, this definition does not impose more than procedural constraints on majority decision-making, potentially exposing minorities to a tyranny of the majority.<sup>12</sup>

We do explicitly separate the rule of law from other concepts, such as democracy. However, there are a few concepts which could be treated as 'logically connected' to the rule of law in that their realization seems to be a precondition for the

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<sup>9</sup> Fuller, Lon (1969). *The Morality of Law*. New Haven: Yale. pp 44–91.

<sup>10</sup> HiiL (Hague Institute for the Internationalization of Law, 2007). *Rule of Law – Inventory Report*. The Hague.

<sup>11</sup> Fukuyama, Francis (2010). 'Transitions to the Rule of Law'. *Journal of Democracy* 21(1):33–44.

<sup>12</sup> This possibility cannot be excluded as long as collective decisions are taken based on anything less than unanimity. See also Mukand, Sharun and Dani Rodrik (2017) *The Political Economy of Liberal Democracy*. CESifo Working Paper 6433.

implementation of the rule of law. These closely related concepts are (i) individualism, (ii) sovereignty, and (iii) the nation-state. In the next section, we discuss in detail whether Islam is conceptually compatible with the rule of law, as it has been defined above; we also come back to and elaborate further on the three concepts that were just introduced as being closely related to the rule of law.

#### THE RULE OF LAW AND SOCIAL ORDER IN ISLAMIC THINKING

Islam is not organized hierarchically as is, for example, the Catholic Church. There is, hence, no equivalent to papal encyclicals which could be used as an authorized source regarding Islamic conceptions of a preferred social order. To describe such conceptions, we therefore rely on a variety of sources beginning with the Qur'an and including some of the most influential Islamic thinkers for current Islamist movements, such as Sayyid Qutb. Including them in our analysis will facilitate inquiring into the compatibility between the rule of law and what has been framed<sup>13</sup> as the puritan or traditionalist – as opposed to a moderate – interpretation of Islam.

Why do we emphasize these elements of Islam here, despite a large variety of religious doctrine that could be analysed? It is certainly not to portray Islam 'in the face of all historical present-day experiences to the contrary – as an unchanging quantity that will always oppose secular systems and the rule of law',<sup>14</sup> as some might think. The reason is that in this section we are interested in identifying potential (or theoretical) points of conflict between Islam and the rule of law. Only in the next section do we ask the empirical question whether Islam constitutes an obstacle to realizing the rule of law in practice. The observation that there are also more moderate positions in Islam is consequently beside the point of this section, when we highlight that some influential ideas in Islam might not be compatible with the rule of law. Another way of taking the heterogeneity within Islam into account would be to distinguish between the different Sunni and Shia schools of Islam and their respective compatibility with the rule of law. While appealing at first sight, this approach is not feasible due to the significant internal variety in these schools. It is virtually impossible to characterize the different schools according to, for example, their liberalism or traditionalism.<sup>15</sup>

A characteristic feature of Islam is the prescription of rules not only for religious practice and social interaction, but also for how the political system of an Islamic society should be organized. Islam is also unique in that *Shari'a* is prescribed in a number of constitutions of Muslim countries to be a main source of legislation; legislation that violates the principles of *Shari'a* is often prohibited. Islam claims to be relevant in all walks of life, not just in the spiritual realm. Mohammed and his successors are considered to be both religious leaders and worldly rulers. This all-

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<sup>13</sup> Abou El Fadl, Khaled M. (2005). *The Great Theft: Wrestling Islam from the Extremists*. New York: Harper.

<sup>14</sup> Rohe, Matthias (2015). *Islamic Law in Past and Present*. Leiden: Brill. p.X.

<sup>15</sup> Ibid., p.37.

encompassing self-image of Islam makes a separation between church and state, as has become predominant in the West, much more difficult to realize in the Muslim world.<sup>16</sup>

*Prima facie*, *Shari'a*, i.e., Muslim religious law, is in accordance with many of the traits in Fuller's list. The *Shari'a* has been publicly promulgated; it is prospective, and practicable. The trait of *Shari'a* most clearly in line with one of Fuller's criteria is its stability over time. For some, the perception of *Shari'a* as God-given law is important because this makes it more difficult for the government to disregard the law – or even to change the law according to the government's preferences;<sup>17</sup> Islamic law binds all Muslims, their rulers included. One could therefore argue that it also displays generality, another trait contained in Fuller's list.

However, evaluating Islamic law based on concrete properties prescribed by the rule of law-concept, Kuran<sup>18</sup> concludes that Islamic law fails to meet many requirements of the rule of law for modern-day nation states. One key trait of the rule of law is that all persons are treated equally (*isonomia*). Since Islam's inception, three social inequalities have not only been sanctioned but 'sanctified by holy writ'.<sup>19</sup> These inequalities concern the relationships between master and slave, between man and woman, and between believer and non-believer.

The differential treatment of men and women is still the law in many Muslim countries in that women's legal entitlements, often including voting rights, are different from men's. The inequality between Muslims and non-Muslims also has far-reaching consequences. Historically, non-Muslims residing in Muslim countries have been subject to specific legislation called *dhimmi* comprising a poll tax (the *jizya*), the obligation to identify as non-Muslims due to clothing requirements, and exclusion from testifying in court.<sup>20</sup> A distinction between superior and inferior inhabitants of a country implies a similar distinction between 'good' and 'bad' countries, namely between those belonging (*dar al-Islam*) and those not belonging to the Islamic world (*dar al-harb*). From the point of view of Muslim fundamentalists, a *jihad* must be fought against *dar al-harb* until the whole world is governed in line with the principles of Islam.

Earlier we outlined arguments for *Shari'a* being compatible with the rule of law to the extent that it is exempt from deliberate modification by worldly rulers. We have responded to this argumentation noting that *Shari'a* is incompatible with the rule of law

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<sup>16</sup> Fox, Jonathan, and Shmuel Sandler (2005). Separation of Religion and State in the Twenty-First Century: Comparing the Middle East and Western Democracies. *Comparative Politics* 37(3):317–35.

<sup>17</sup> See, e.g., Fukuyama 2010 who makes this argument for religious law in general and not exclusively with regard to Islamic law; Brown, Nathan (1999). Islamic Constitutionalism in Theory and Practice. In: Eugene Cotran and Adel O. Sherif (eds), *Democracy, the Rule of Law and Islam*. The Hague et al.: Kluwer refers explicitly to the *Shari'a*.

<sup>18</sup> Kuran, Timur (2010). The Rule of Law in Islamic Thought and Practice: A Historical Perspective. In: James J. Heckman, Robert L. Nelson, and Lee Cabatingan (eds), *Global Perspectives on the Rule of Law*. Abingdon and New York: Routledge.

<sup>19</sup> Lewis, Bernhard. 2002. *What Went Wrong? The Clash Between Islam and Modernity in the Middle East*. New York: Oxford University Press. p.83.

<sup>20</sup> Berkey, Jonathan P. (2003). *The Formation of Islam, Religion and Society in the Near East 600–1800*. Cambridge: Cambridge University Press. Ch 10.

to the extent that it sanctifies a number of inequalities, implying discrimination against specific social groups. Now it could be argued that the development towards the rule of law has not only been a very long intellectual journey (in which the concept was invented and developed), but it also took centuries to put the concept into practice.<sup>21</sup>

Emon<sup>22</sup> reminds us that even the Magna Carta, a document usually hailed as one of the most important steps towards the rule of law in Western Europe, contains provisions codifying discrimination against Jews. This raises the question whether mechanisms exist in a legal order that allow for the modification of such rules to align them over time with changing rule of law standards.

It is exactly here where the divine origin of Islamic law – that is hailed by some for reasons outlined above – becomes an obstacle for the implementation of the rule of law. Precisely because it is divine, it cannot simply be changed. This is a problem for all religions, but is particularly severe for (major parts of) Islam because of the belief that after the revelations of the prophet (which include the *Qur'an* and his sayings) and their interpretation by the first generations directly following the prophet, the door for new interpretations of the *Qur'an* has been closed. This notion is referred to as the closing of the gates of *Ijtihad*.

The implications of this closing of the gates can hardly be overstated. Its strict application would imply that no inspiration from real world rule of law developments can be integrated into the *Shari'a*. To grasp what this means, one only has to imagine what 'the West' would look like without the Protestant Reformation, without the enlightenment, and so forth. Hillman<sup>23</sup> argues that it is the pursuit of supreme values (values that subordinate all other goals) by radical Islam that prevents Islamic societies from institutionalizing concepts such as the rule of law which would enhance the well-being of their population.

In sum, the interpretation of *Shari'a* as divine in combination with the refusal to adopt a modern interpretation of the *Qur'an* is the main reason for concern about the incompatibility of Islam with the rule of law. Expressed differently, giving up the dogma of the closing of the gates of *Ijtihad* would be a necessary precondition for making Islamic law more compatible with the rule of law. We now move on to spell out some incompatibilities between Islam and concepts that are closely related to the rule of law, both theoretically and empirically. They are, properly speaking, not part of the concept of rule of law themselves, but their realization would greatly enhance the chances of the rule of law being implemented. These three concepts are (i) individualism, (ii) sovereignty, and (iii) the nation state.

One central function of the rule of law is to establish order among a multitude of individuals, enabling them to pursue their own goals. Rules are needed to prevent potentially conflicting individual goals from leading to conflict and eventually even chaos. Making everybody – those holding political power included – subject to

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<sup>21</sup> The former British Prime Minister Gordon Brown once remarked: 'In establishing the rule of law, the first five centuries are always the hardest.'

<sup>22</sup> Emon, Anver M. (2015). *Shari'a and the Rule of Law: Preserving the Realm*. In: Robin Griffith-Jones and Mark Hill (eds), *Magna Carta, Religion, and the Rule of Law*. Cambridge: Cambridge University Press.

<sup>23</sup> Hillman, Arye L. (2007). Economic Security Consequences of Supreme Values. *Public Choice* 131(3):259–80.



*universalizable* rules increases certainty as to what behaviour is permitted, what is prohibited, and what types of behaviour can, thus, be expected. Delineated such, the rule of law is an individualistic concept as it takes the multitude of individuals and their aspirations as its starting point. In Islamic thought, however, the notion of *umma* occupies a central place. It is often described as all Muslims becoming a homogenous union in which the interests of the community take precedence over those of the individual. Concepts that claim precedence of the community over the individual lend themselves to crude applications of utilitarian notions in which a small number of individuals might need to be sacrificed for the benefit of the larger group.

Such thinking, however, can find itself in conflict with the notion of basic human rights that any individual enjoys vis-à-vis everybody else in society.<sup>24</sup> It rather constitutes the exact opposite of individualism.<sup>25</sup> To make things worse, a separation from the *umma* is condemned harshly in the *Qur'an* and is often branded as apostasy, which can be sanctioned by death. If an important starting point of Islamic thinking is collectivist and the rule of law is fundamentally based on individualism, then the two will prove difficult to reconcile.

Important Islamic thinkers use the notion of the 'rule of God' – as opposed to the rule of law. This concept is often described by *hakimiyyatu* according to which God alone can be sovereign.<sup>26</sup> Qutb<sup>27</sup> draws on it within the context of 'There is no god except Allah' (*La ilaha illa'llah*), reminding his readers that Islam literally means submission to God alone. According to Qutb, this implies that nobody but God has the authority of legislation. Referring to Jews and Christians he writes: 'They neither accept the rule of God nor do they consider God's commandments as the only valid basis of all laws; on the contrary, they have established assemblies of men which have absolute power to legislate laws, thus usurping the right which belongs to God alone'.<sup>28</sup> This position is encountered frequently among proponents of a traditionalist Islam: the idea that an assembly of men could sit together and deliberate on the rules according to which the community ought to live together strikes them as claiming a competence that is God's alone. Confronted with the prevalence of such mindsets, democracy is unlikely to prosper. Nevertheless, it is understandable that such arguments find support in

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<sup>24</sup> Tibi, Bassam (2002). *The Challenge of Fundamentalism: Political Islam and the New World Disorder*. Berkeley et al.: University of California Press. p.44.

<sup>25</sup> Sagy, Shifra, Emda Orr, Dan Bar-On and Elia Awwad (2001). Individualism and Collectivism in Two Conflicted Societies Comparing Israeli-Jewish and Palestinian-Arab High School Students. *Youth & Society* 33(1):3–30.

<sup>26</sup> The idea of a rule of God on earth has amazing similarities with the communist belief in the ability to create paradise on earth in that we do not need to wait for an afterlife to live in a wealthy and just society. In both cases, there are those who are already enlightened and know the right path. Their enlightened status gives them the right to fight those with the 'false conscience' to cite a term used by Marxists. In Marxism – as in Islam – individual freedom is, hence, subordinated to the common good

<sup>27</sup> Qutb, Sayyid (2005). *Milestones: Studies in Islam and the Middle East*. Majalla.

<sup>28</sup> *Ibid.*, p.53.

societies where citizens have learned to consider despotism the normal state of politics and are sceptical of the intentions of all law-makers.<sup>29</sup>

Here we are concerned with the rule of law – and not with democracy. It was shown above that the divine origin of Islamic law constitutes a problem as it makes the *Shari'a* incapable of adapting to the potentially time-variant traits required by the rule of law. Some mechanism to modify Islamic Law is, hence, necessary. This implies that citizens need to have the sovereignty to choose the basic rules according to which interactions are to be structured in their society. This does not necessarily mean that sovereignty needs to be ‘with the people;’ it could also be ‘with parliament’ or ‘with the king.’ It does, however, need to be with someone who is able to adapt the law to changing circumstances.

The notion of the rule of God on earth is also difficult to reconcile with the concept of the nation state. Ever since the Westphalian peace, we have come to think of societies as state societies and social order as state order.<sup>30</sup> Accordingly, a group of individuals – usually inhabiting a defined territory – agrees on a set of rules. This practice is conceptually incompatible with the ideals of Islam. In the words of Qutb:<sup>31</sup>

“A Muslim has no country except that part of the earth where the *Shari'a* of God is established and human relationships are based on the foundation of relationship with God; a Muslim has no nationality except his belief [...] a Muslim has no relatives except those who share the belief in God, and thus a bond is established between him and other Believers through their relationship with God.”

The notion of the nation state has a number of important implications that are at a right angle to Muslim thinking. One example concerns *fatwas*, legal opinions pronounced by (often self-declared) experts in Islamic law. At times, they contain far-reaching judgments and even calls for killing people (e.g., the infamous *fatwa* against Salman Rushdie). *Fatwas* undermine the concept of the nation state to the degree that some Muslims feel it is their duty to privately enforce such judicial opinions.<sup>32</sup> Kuran argues that the consequence of Islam’s rejection of the nation state concept is its continued reliance on tribalism;<sup>33</sup> if society is not delimited by geographical borders, but defined based on religious brotherhood, religious equality becomes inconceivable. While non-Muslims may be given basic rights, they will not be allowed into important political offices and any role in the administration, the military command, or the judiciary must be duly limited.

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<sup>29</sup> Brown, Nathan J. (1999). Islamic Constitutionalism in Theory and Practice. In: Eugene Cotran and Adel O. Sherif (eds), *Democracy, the Rule of Law and Islam*. The Hague et al.: Kluwer.

<sup>30</sup> Beck, Ulrich (2000). *What is Globalization?* Cambridge: Polity Press. p.23.

<sup>31</sup> Sayyid (n 27) p.81.

<sup>32</sup> Many Muslim legal scholars date the beginning of the demise of the Islamic legal tradition and the leading role of the jurists with the imposition of the nation state concept by colonial powers, and in particular the United Kingdom (Abou El Fadl, Khaled M. (2005). *The Great Theft: Wrestling Islam from the Extremists*. New York: Harper. p.35 and Hallaq, Wael B. (2009). *An Introduction to Islamic Law*. Cambridge: Cambridge University Press. p.2 are just two examples). See also Mukand and Rodrik (n 12).

<sup>33</sup> Kuran (n 18).

The notion that the nation state facilitates the implementation of the rule of law is, however, not shared by all scholars. With a view to its development in Europe, Fukuyama<sup>34</sup> claims that the rule of law was ‘embedded in European society even before the advent not just of democracy and accountable government, but of the modern state-building process itself.’ He goes on to say: ‘We should admit to ourselves that we have very little historical experience in successfully constructing a rule of law in societies where this pattern is reversed and where a strong state precedes law.’ Interestingly, Fukuyama does not claim that the rule of law had been implemented anywhere before the advent of the nation state but simply that it had been ‘embedded’. Moreover, a full-fledged implementation of the concept as we currently define it would have been impossible without the presence of the nation state. After all, a constitutionally entrenched separation of powers between an executive, a legislature, and an independent judiciary is the most established institutional mechanism to safeguard the rule of law.

To sum this section up, we have presented some aspects of Islamic law that comply with the formal traits of the rule of law according to Fuller. We have further shown that Islamic law sanctifies certain inequalities which are incompatible with the rule of law. It should be pointed out that we have elsewhere analysed the contents of an Islamic model constitution and arrived at very similar points of conflict.<sup>35</sup> The absence of a generally accepted mechanism to modify parts of Islamic law was argued to be the most relevant factor inhibiting a greater congruence between the rule of law and Islam. Finally, some factors that might be conducive to the rule of law are conspicuously absent in Islamic doctrine. Nowhere in this section have we made reference to the last one of Fuller’s criteria, namely that laws must be congruent with the behaviour of public officials. This will be dealt with in the next section.

## THE RULE OF LAW AND THE REALITY OF ISLAMIC NATION STATES

So far, we have focused on the conceptual compatibility between the rule of law and the Islamic ideal of a social order. This is important to understand why Islam has the potential to undermine the rule of law, but it does not answer the question whether Muslim societies actually have a deficit when it comes to implementing the rule of law in practice. We have addressed this question in previous research.<sup>36</sup>

The challenge in evaluating whether countries under the influence of political Islam are less likely characterized by the rule of law is twofold. First, one has to be able to measure the influence of political Islam. Previous studies on the compatibility of Islam and democracy<sup>37</sup> simply rely on the share of Muslims in a country’s population as a very crude proxy for the importance of Islam. Gouda and Potrafke<sup>38</sup> instead rely on a *de jure* measure of the role of Islam in a country’s constitution. In our earlier work, we

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<sup>34</sup> Fukuyama (n 11). pp.33–44.

<sup>35</sup> Gutmann and Voigt (n 4). pp.351–80.

<sup>36</sup> Ibid

<sup>37</sup> Potrafke (n 3) pp.185–92.

<sup>38</sup> Gouda and Potrafke (n 5) pp.683–98.

went one step further and proposed an index that could give a more nuanced picture of the role of Islam in politics.<sup>39</sup> Our Islamic State Index (ISI) takes into account the share of Muslims in the population, whether Muslims constitute the majority of the population, whether Islam is the official state religion, as well as a country's membership in the Organisation of Islamic Cooperation (OIC). While this index is far from a precise measure of the influence of Islam on politics in a country, it is arguably more informative than a simple population share or an indicator for whether Islam is the source of legislation. Countries like Afghanistan, Algeria, Pakistan, and Saudi Arabia are measured close to the maximum of the ISI-scale, whereas Uzbekistan and Turkey, for example, have more moderate scores, despite sizable Muslim population shares.

When the measurement problem has been addressed satisfactorily, one can easily measure the statistical association between the indicator for Islam and another indicator for the rule of law. As the rule of law is multifaceted and its implementation might be found lacking in different respects, we have previously proposed to look at these aspects one by one instead of merely at an overall indicator.<sup>40</sup> Independent of this question, the second major challenge is to identify a causal effect of Islam on (aspects of) the rule of law and not just a statistical correlation. This is tricky because in reality Islamic countries might be very different from other countries with respect to their wealth, their climate, their natural resources or their historical experiences. All or any of these could be responsible for differences in the implementation of the rule of law and thus it is difficult to identify the singular effect of Islam itself. Unlike in a laboratory experiment, Islam cannot be randomly assigned to countries in order to study its consequences.

Therefore, we have tried to separate the effect of Islam on the rule of law from that of a country's income, education, ethnic fractionalization, colonial history, precipitation, oil wealth, and some more differences in their state and pre-state history.<sup>41</sup> Taking all these differences into account in a cross-country regression analysis, countries with a strong influence of Islam on politics lag behind in only two dimensions. They guarantee fewer rights for women and their judges are less independent. Other differences, for example in the quality of property rights protection or regarding the extent of parliamentary powers, are not statistically significant.

Aside from general tendencies that separate Muslim from non-Muslim societies, there are also a number of country cases that merit closer inspection. Saudi Arabia, for example, seems to contradict the expected predictability of a legal system based on divine law, indeed the kingdom's religious scholars have successfully prevented steps toward the codification of the law. The resulting uncertainty has pushed many litigants to use alternative mechanisms of dispute resolution and even for the state it is difficult to predict which laws will be regarded as legitimate and enforced by which judges.<sup>42</sup>

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<sup>39</sup> Gutmann and Voigt (n 4) pp.351–80.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Brown, Nathan J. (2012). *Why Won't Saudi Arabia Write Down its Laws?* Foreign Policy, January 23, 2012.

Iran exemplifies a constitutional order where political power is in no way legitimized by the people, but solely derived from God. The Iranian constitution pays only lip service to popular sovereignty and instead transfers political power directly to Islamic jurists.<sup>43</sup> The Iranian Council of Guardians may veto any legislation that would violate the *Shari'a* or the constitution.

In contrast, Egypt provides an example where the inequalities prescribed by Islamic law are mitigated due the creative interpretation of *Shari'a* by the country's Supreme Constitutional Court.<sup>44</sup> Political practice in Egypt was for a long time based on rather secular principles, despite *Shari'a* being constitutionally declared the principal source of legislation. This shows that potential conflict between Islam and the rule of law, as diagnosed in the previous section, might be absent where the interpretation of Islamic doctrine is not traditionalist and hence not literal. An attempt to change this for the case of Egypt was certainly among the prime reasons why the Morsi presidency ended prematurely.

All in all, we can conclude from this section that there are indeed systematic problems in Muslim societies when it comes to implementing the rule of law. These deficits in the rule of law are not surprising, given the number of potential points of conflict between Islamic doctrine and rule of law that we identified above. We find that Muslim societies are systematically lagging behind in the equal legal treatment of individuals from different social groups and that the influence of Islam on the organization of the state (specifically the judiciary) also does not favour the rule of law. Of course, behind these general statements hides considerable heterogeneity in Muslim societies' devotion to the rule of law.

## CONCLUSION AND OPEN QUESTIONS

Above, we have stated that it is by no means self-evident that all societies and political leaders favour an implementation of the rule of law, despite its many advantages. Muslims with a traditionalist interpretation of Islam might actually prefer the rule of God over the rule of law any day. Where these traditionalists are influential in politics, it is unlikely that the rule of law is a priority. This is, however, not necessarily a good description of what Muslim societies strive after.

Thus, our discussion of the social order in Islamic thinking can also be understood as a list of potential problems Muslim societies may face and have to come to terms with should they attempt to acquire the rule of law. The most important hurdle might be to accept that a timely interpretation of religious law is necessary to make it substantively compatible with a concept that did not exist during the early years of Islam. While it is true that women's rights in Islam were progressive relative to the status quo when Islamic law was first formulated, the equal treatment of men and women or Muslims and non-Muslims today cannot be reconciled with a literal

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<sup>43</sup> Brown, Nathan J., and Mara Revkin (2015). Islamic Law and Constitutions. In: Anver M. Emon and Rumea Ahmed (eds), *The Oxford Handbook of Islamic Law*. Published Online, Oxford University Press.

<sup>44</sup> Lombardi, Clark B. and Nathan J. Brown (2006). Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law. *American University International Law Review* 21:379–435.

interpretation of Islamic law that was created more than 1,000 years ago. More fundamentally, collectivist thinking, a rejection of the nation state concept, and the belief that societies lack the sovereignty to create their own basic laws are likely to doom to failure any effort to implement the rule of law. However, where these potential points of conflict are appropriately dealt with, Muslim societies should be as capable as any other of adopting the rule of law.

The empirical results we have summarized above show that societies where Islam plays a significant role in politics still lack behind in some dimensions of the rule of law. Specifically, the equal treatment of all members of society and the creation of an independent judiciary are less likely than in otherwise comparable societies not under the influence of Islam. This does not imply that Muslim countries will continually lag behind in the implementation of the rule of law. It should be noted that many Western societies have been, and indeed are still often, struggling with how to guarantee the rule of law. Nevertheless, it might be necessary for societies in which large parts of the population follow a religion that claims the privilege of dictating immutable rules for the political and legal organization of the state to carefully develop solutions for how to compromise between religious ideals and a social order preferred by the citizens of this society. One reason to be sceptical about the success of such efforts is that, as is the case for many other reforms, there are powerful political actors who stand to lose from them.

We have shown that neither Islamic thinking nor some of the policies of Muslim governments are easily reconcilable with the rule of law. It might be important to stress that the observed incompatibilities, of course, do not imply that other religions and their conceptions of a legal order are necessarily more compatible with the rule of law. A clearer separation between religion and state might, thus, benefit the rule of law not only in Muslim countries.

We want to use this last section to mention two issues that deserve closer scrutiny in the future. It has been pointed out<sup>45</sup> that Islamic law was created, administered, interpreted, and enforced largely outside state structures, which were created much later and imposed by European colonizers. Now, Islamic law is not unique in that respect; a large number of nation states explicitly allow for some interactions to be structured by traditional law.<sup>46</sup> There has even been a trend to explicitly refer to traditional law on the constitutional level. The potential problems regarding the rule of law that might arise as a consequence of such legal pluralism definitely deserve more scholarly attention.

Finally, after the experience of the Weimar Republic, the rule of the Nazis, and WWII, Germany established a democratic system that has been coined ‘militant democracy’, meaning that the government branches and, at least as a last resort, even the citizenry are given special powers to defend the liberal democratic order. It is interesting to reflect about the desirability or possibly even the necessity of installing something like a ‘militant rule of law’ in analogy. Should those aiming at destroying the rule of law enjoy the possibility of doing so by using some of those rights they wish to

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<sup>45</sup> Hallaq (n 32).

<sup>46</sup> Gutmann, Jerg and Stefan Voigt (2016). *Informal Law: Where and How Does It Work?* Mimeo.

destroy? Müller,<sup>47</sup> for example, argues that militant democracy has already been invoked in some European countries to protect secularism as an element of a broad conception of democracy; could this not be the same for Islamic societies wishing to adopt the rule of law?

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<sup>47</sup> Müller, Jan-Werner (2016). Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy. *Annual Review of Political Science* 19:249–65.