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Public/Private Distinction in Islamic Jurisprudence: Reflection on Islamic Constitutionalism

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PUBLIC/PRIVATE DISTINCTION IN ISLAMIC JURISPRUDENCE: REFLECTION ON ISLAMIC CONSTITUTIONALISM

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Dedication

To My Parents and Saplings for the love they have generously given to me.

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Abstract

The study seeks to attract scholars' attention to the importance of normative theory in the process of constitutionalism in the Islamic world. The study argues that Islamic jurisprudence requires a state or a public authority to ensure the conformity of outward with Islamic norms. Accordingly, the preservation of Islamic norms is a central value controlling the dynamics of public/private distinction. Thus, the central value determines the meaning of limited government, and the study argues this central value in constitutional level defines people's liberties. Then, the study discusses the effect of the Islamic normative theory on the liberal-Islamic model of constitutionalism. The study focuses on what it calls the internalizing effect of an Islamic clause. The study addresses the feasibility of the liberal-Islamic model of constitutionalism regarding the normative theory of Islamic jurisprudence. The study mainly questions the capability of judicial review to fulfill its role within the model because its interpretation is subject to the internal rationale and central value of the Islamic normative theory. The study conducts a textual analysis of Islamic clauses, and it employs Carl Schmitt's concept of central Domain to examine the internalizing effect of an Islamic clause.

Introduction

This study engages in the discussion of Islamic constitutionalism. It approaches the question of Islamic constitutionalism in a different way by addressing preliminary questions. The study addresses the function of political authority to understand the meaning of limited government. The study directs the discussion of Islamic constitutionalism to acknowledge a normative political theory because understanding an Islamic political theory is a point of departure to other questions. The study deals with the Islamic political theory to understand the dynamics of public/private distinction. Therefore, the study assumes that it is not possible to understand the dynamics of public/private distinction without knowing what the public authority's main function is. The distinction represents the notion of constitutional government in a metaphorical sense. The normative theory influences reality.

The current literature of Islamic constitutionalism does not acknowledge the importance of a normative theory. The literature of Islamic constitutionalism is mostly written in English, and the most of it was written during and after the Arab spring. Within the literature, there are two main arguments. The first one treats Islamic constitutionaliztion as a threat to individual rights in a liberal perspective. Second, several scholars have argued that Islamic constitutionaliztion does not constitute a threat to individual rights, but instead it supports constitutionalism and democratization. The advocates of Islamic constitutionalism underscore the Islamic belief in limited government as a consensual position. The consensual position represents the possibility to generate a liberal narrative within Islamic law. The problem with this position is that in both liberal and Islamic law, limited government is a façade for deep-rooted values. This appears in the role of

constitutional court within the liberal-Islamic model. Advocates of the model argue that liberal values can be fulfilled where a constitution incorporates Islamic clause by enabling constitutional courts to generate a moderate interpretation of Islamic law. This argument does not take into account the effect of tacit values on the judicial interpretation. Tacit value(s) is/are mainly brought by an Islamic clause. Put simply, the Islamic clause internalizes the normative political theory.

The literature of Islamic constitutionalism has been influenced by a tendency to test compatibility of Islamic law with liberal values. Therefore, the literature has not been focused on deep normative questions. The literature has been taking a wrong direction to study the Islamic jurisprudence because this direction subjects Islamic law to external reference points. To illustrate, this direction focuses on comparing the tip of the iceberg to another the tip of the iceberg without trying to what is below the tip. This direction is clearer in opponents of Islamic constitutionalism. The main question which have directed the studies of Islamic constitutionalism is "Is Islamic law compatible with liberalism or Democracy?" Instead, the studies of Islamic constitutionalism should focus more on the philosophical questions within Islamic jurisprudence. The most important of these questions are individual rights and state's main purpose, which this study takes. The new direction allows for critical evaluation and understanding of the meaning of limited government and protection of individual rights in Islamic jurisprudence.

The study approaches the two questions of individual rights and state's main purpose through the public/private distinction. The study asserts that the two questions can be summarized in one question, which is the question of public power. To illustrate, individual rights are rights protected from infringement by anyone, including a state. The

public/private distinction is metaphorical space of power and restrictions. The study finds it a great analytical tool to address the two questions. The distinction is a liberal concept that finds its root on the belief in natural rights. The study positions this foreign concept in Islamic jurisprudence to observe the dynamics of public/private distinction's boundaries in Islamic jurisprudence.

The study does not compare a liberal distinction to an Islamic one, but instead the study uses the distinction to present the questions in metaphorical sense. Through studying the public/private distinction in Islamic jurisprudence, the study focuses on finding a central value and its internal rationale.

The study depends on sources of the doctrine of commanding the right and forbidding the wrong to analyze the Islamic distinction. The doctrine of commanding the right and forbidding the wrong provides a rich source for normative political theory. The doctrine forms the understanding of people's duty toward each other and the public authority's main purpose. The doctrine is a central belief in Islamic culture, and it has its political and societal applications.

The study focuses on a political normative theory in Islamic jurisprudence where Muslim scholars have debated questions regarding the nature of public authority and political legitimacy. Accordingly, the study concerns with Islamic scholars' understanding and perception of society, and the role which they assign to a public authority in creating and maintaining a Muslim community. The study is aware of the gap between the history of Islamic culture and Islamic jurisprudence. Islamic history is a practical window where Muslims, politically and socially, have been acting under different factors, theory is among them. On the other hand, Islamic jurisprudence is an abstract which tells Muslims how they

should act and behave. This is to say the study prioritize theory over other factors because a theory is always in a continuous struggle to position itself in reality. This is applicable to Islamic political theory, too. To illustrate, the struggle of theory represents its attempts to situate itself in the reality. A clear example in the Islamic world is the demand of Islamic constitutions and ruling in accordance with Islamic norms currently and historically.

Before stating the study's thesis statement, the study should respond to possible assumptions a reader may have, and it should create a common language by defining some concepts. First, the study does not intend to compere Islamic law or political theory to a liberal theory. Even if Chapter one seems to be a comparative exercise at first glance, it is not. The study addresses the liberal public/private distinction not to compare, but it explains the meaning of the public/private distinction in its original environment. The study seeks in Section one in Chapter one, to explain the effect of central values and internal rationales on the public/private distinction. Then, the study employs abstract of knowledge to explain the Islamic public/private distinction's central value. However, the overall conclusion of Chapter one is to investigate the liberal-Islamic model of constitutionalism.

The study does not aim to incriminate or justify Islam as a religion or jurisprudence. The study is merely an attempt to inform the discussion of Islamic constitutionalism by describing an Islamic political theory. Thus, the study deals with questions of relevance of Islamic constitutionalism. These questions are not recognized by the literature of Islamic constitutionalism. Also, this study does not support or deny the compatibility/possibility of democracy with Islamic jurisprudence because that is a different question. Most importantly, the study employs Carl Schmitt's concept of central domain, and it should

attract a reader’s attention to that. The study uses Carl Schmitt's central domain concept divorced from his other work.

There are two integral concepts to this study in addition to the analytical tools. First, a central value is the fundamental belief or idea of any philosophy. The central value defines a whole system of belief, and anything comes in on a secondary level ought to serve the central value or at least be subject to it. For example, the study asserts freedom as the central value of liberalism. Accordingly, a liberal system of thought cannot abend freedom because that is the essence of liberalism. Also, the central value should be accompanied by supportive beliefs. Internal rationale is the logic which is created to protect and promote a central value. For example, in liberal thoughts, creating means of restrictions of public power is for the protection of individual rights.

The study, in chapter three, uses Islamic constitutionalism and Islamic constitutionaliztion many times. Islamic constitutionalism is the field of study. Islamic constitutionaliztion is the process of incorporating Islamic law into a constitution. the study uses internalization to describe a normative incorporation of Islamic jurisprudence.

Thesis Statement:

Regarding an Islamic political theory, the study argues that Islamic jurisprudence requires a political authority to preserve religion. This forms the central value of Islamic public/private distinction. The central value, this study asserts, generates its internal rationale. The internal rationale demands a positive role of a state in ensuring people's conformity with Islamic rules and norms. The internal rationale does not require a state to maintain that on internal-personal level, but just the outward level. However, that does not

mean Islamic jurisprudence has not put limits on public power. The Islamic jurisprudence acknowledges explicitly and implicitly the notion of limited government.

In constitutional design context, the study employs argument one to question the feasibility of the liberal-Islamic model of constitutionalism by showing that the model does not acknowledge the effect of the internalization of Islamic normative theory. The internalization of Islamic normative theory is an inevitable result of Islamic constitutionaliztion. The study continues to argue about the effect of this internalization on the cornerstone of the model (judicial review). The study asserts that Islamic constitutionaliztion affects the interpretation of other constitutional clauses. The effect depends on the level of internalization, which depends on the wording of an Islamic clause.

Outline:

The study is divided into three chapters and a conclusion in addition to this introduction. Chapter one attempts to deal with the normative political theory in Islamic jurisprudence. In chapter one, the study argues that Islamic jurisprudence requires a public authority to be committed to protect and enforce religious values, and that what the study considers as central value. Then, Chapter two consists of cases to illustrate the argument of chapter one. In Chapter two, the study examines three cases to highlights chapter one's point. In chapter three, the study moves to its second argument. In chapter three, the study mainly focuses on the liberal-Islamic model of constitutionalism and how this model is not informed by Islamic normative political theory. The study questions the model by raising the issue of having two different central values in a constitution. In the conclusion, the study addresses the recommendations and suggestions of Islamic constitutionalism.

In chapter one, the study's main aim is to define the nature of Islamic public authority to understand the central value of Islamic political theory. Chapter one is divided into three main sections. In section one, the study explains the public/private distinction in liberal thoughts. The study begins with the liberal distinction because it easier to understand the distinction in its origin. Also, the study articulates the central value and internal rationale of the liberal distinction. Then, Section two is about the public/private distinction. The study finds the roots of public/private distinction in the limited government belief which is articulated by Islamic scholars. In section two, the study reviews the previous attempts to define the distinction. Within the literature of the Islamic public/private distinction, the study distinguishes the goal of this study from the literature's goal. The study focuses on the dynamics of public/private distinction. On the other hand, the previous studies, generally, focus on the meaning of public/private's exact meaning in certain historical contexts. This section does not talk about the central value of the Islamic distinction, but it postpones that to Section Three. In the third section, the study introduces the doctrine of commanding the right. The study argues, in section three, that early Islamic scholars had agreed to make a public authority responsible for preserving religious values. Also, the doctrine illustrates the internal rationale.

Chapter Two presents three cases. The first two cases make up section one. The third case is Abu Zayd's case of apostasy. The cases illustrate two ideas. First, the existence of the theory of limited government was prior to the political arrangement, and that illustrates the importance of political institutions to translate normative theory into reality. Second, Abu Zayd's case underscores the existence of Chapter one's political theory. Abu

Zayd's case questions the possibility of imagining an Islamic public authority without a moral function as religion guardian.

In Chapter Three, the study discusses the literature of Islamic constitutionalism, which is divided into two camps. First, the opponents of Islamic constitutionalism assert the incompatibility of Islamic law with the norms of democracy or liberal democracy. Second, several studies have suggested that Islamic law is compatible with liberal norms, and the incorporation of Islamic law into a legal regime facilitates popular support and rule of law. Then, the study addresses the main argument of chapter three. The study exposes the liberal-Islamic model of constitutionalism to the conclusion of chapter one. The study conducts a textual analysis to explain the internalization effect of Islamic constitutionaliztion. The study concludes with explaining the effect of a normative central domain on a constitutional level via Carl Schmitt's concept of central domain.

Methodology:

This study is intended to be theoretical study of Islamic constitutionalism. Since the study argues that the discussion of Islamic constitutionalism should be aware of the normative of Islamic constitutionaliztion, Chapter one defines the central value and internal rationale which controls the dynamics of the public/private distinction. In approaching its argument, the study utilizes several analytical tools and theories. In chapter one, the study utilizes the public/private distinction to present the effect of a normative political theory on the boundaries of public/private distinction. The rationale of using the distinction rests in its ability to represent the equation of governmental-power/individual-autonomy. Put simply, seeing the question of political theory along individual rights is the main aim of using the distinction. The study suggests that the boundaries of public/private distinction

are determined by the political theory. The political theory positioning a central value and internal rationale influences the dynamics of public/private distinction. However, the study employs the doctrine of commanding the right and forbidding the wrong in its attempt to define the central value and the internal rationale of Islamic public/private distinction. The doctrine of commanding the right and forbidding the wrong creates a relationship between the public authority and the duty of commanding the right and forbidding the wrong. The analysis of rules of the doctrine reveals the internal rationale of the duty of commanding the right and forbidding the wrong.

In Chapter two, the study adopts a case study method to examine cases related to the Chapter one's normative argument. The study examines cases that heighten the importance of political arrangement. Also, the study devotes most of Chapter two for Abu Zayd's case of apostasy. The case provides a deep illustration of the effect of a normative theory on the outcomes of political institutions.

In chapter three, the study moves to more practical discourse by discussing the Islamic constitutionalism. Along the dialectical approach, the study employs two methods. First, the study runs a textual analysis of "Islamic clauses", and the textual analysis generates three categories of Islamic clauses. Each of these categories of Islamic clauses represents a level of centralization of Islamic political theory. The Islamic constitutionaliztion internalizes values into a constituent. In discussing the effect of such internalization, the study employs Carl Schmitt concept of central domain. The central domain represents the central value in a political theory.

Chapter one: The public private distinction

Introduction:

Chapter one argues that the dynamics of public/private distinction are controlled by the central value and the internal rationale. The central value can be found be knowing the main purpose of a government (political theory), and the internal rationale can be defined as procedural and normative elements that serve the central value. The main point of this chapter is to show that Islamic public/private distinction treats preservation and promotion of religious values as a central value. The study approaches its main argument through three sections. Section one defines and focuses on the concept of the public/private distinction. Section two moves to study the Islamic public/private distinction. the last section deals with the doctrine of commanding the right and forbidding the wrong.

In Section one, the study deals with the concept of the public/private distinction in its original environment (Liberalism). Section one includes several assertions in addition to the definition of the public/private distinction. First, the public/private distinction should be seen as metaphorical spaces of power and individual autonomy. Second, the public/private distinction evolved around a central value and an internal rationale. Third, the internal rationale may change, but it still serves the same central value. Fourth, a change in the internal rationale leads to a change in the dynamics of the public/private distinction.

In section two, the study focuses on the Islamic public/private distinction. The study begins by defining the origin of the public/private distinction in Islamic jurisprudence by articulating the idea of limited government in Islamic jurisprudence. The study argues that the limited government is enough to create the public/private spaces. Then, Section two introduces the institutional shortage in the Islamic history. The study argues that there were no political arrangements to translate the idea of limited government into reality. The

awareness of the importance of political arrangement have occurred until the 19th century what the study calls the first wave of Islamic constitutionalism. From that, the study argues the problem of public/private distinction is a structural not a theoretical one. The study postpones the discussion of Islamic central value and internal rationale until Section three.

In Section three, the study discusses the relevance of the doctrine of commanding the right and forbidding the wrong to the public/private distinction. The study argues that the Islamic jurisprudence tasks a government to preserve and promote religious values. The doctrine resembles the normative and procedural elements of the Islamic internal rationale. The doctrine as a theory requires a public authority to preserve a religious ecology by ensuring an external conformity with religious values.

I) Public private distinction in Liberal thoughts

This section attempts to establish five propositions. To begin with, the public private is a model represents state's power as public and individuals' freedoms as private. Second, every legal public private distinction has a central value which influences his dynamics and defines a state's purpose, and a public sphere is a metaphorical space for a state's action, and this public power is justified by a public interest. Third, a key point to define or understand the public/private distinction is to investigate a state's purpose because at the end, a central value can be found by defining a state's function, and thus a state is just an apparatus to achieve that end. Fourth, a public sphere of a communication is an equivalent of legal private space. Fourth, the private sphere, where an individual practices his private power, initially, is protected until it violates a public interest, and in this case a governmental regulation and intervention is justified. Fifth, the study, by defining and

explaining the public private as a liberal model, does not aim to compare the theory of public private distinction as a liberal model to an Islamic one, but it seeks to sharpen a reader's understanding of the model before employing the model to understand the question of individual rights. In addition, the study attacks the liberal-Islamic constitutionalism by contrasting the central value of each model.

The study introduces the distinction of the public/private distinction and its origin. In defining the distinction, the study makes sure to distinguish between a public sphere as a sphere of communication and the public sphere as a justified governmental space. Then, the study explains the public and private powers. After that, the study reflects on the state's function as a determinant of the dynamics of public private boundaries in classical liberalism and modern liberalism.

A) Definition of Public/private:

The origin of the distinction can be found in John Locke's second treatise as what he described as natural rights.[1] The natural rights can be seen in what the American's declaration of independence sets as unalienable rights. These rights are protected from governmental encroachment.[2] Also, the public/private distinction is created to draw a clear line between public, constitutional, criminal, and administrative law and private contracts and torts. In a public law, a state has the upper hand, but in private law, everyone is empowered equally.

[1] Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 UNIV. PA. LAW REV. 1423 (1982).
[2] *Id.*

To define a public/private distinction, it is easy to define each word separately. A public sphere is a sphere where government is allowed to exercise its public power[3]. A public power is a power used to defend a public interest. On the other hand, a private sphere is a sphere of private power or action. In a private sphere, an individual is protected from a governmental encroachment.

Another approach is what Starr utilizes to underscores liberties powers. Starr argues that the discipline is meant to make government public as much as possible, and it secures certain rights to be private and protected.[4] In his argument, a government is public via mass democracy.[5] He describes people's claims for private spaces as putting limits on the public power. For example, a private house is protected from unreasonable search.[6] In addition, the privatization of religion is a value translated in the separation of church and state. That separation results in freedom of conscience.[7]

Also, the public/private distinction has a different meaning. A public sphere in accordance with Habermas, means a sphere of public communication.[8] In other words, a public sphere is a sphere of public discussion or public opinion. A public sphere in this sense needs to be free from state's influence to function as a platform for public expression. A private as opposite to this public is a sphere where an individual is free from governmental and social interference. A careful look to the public sphere as a sphere of

[3] PAUL R. VERKUIL, *Public Law Limitations on Privatization of Government Functions* (2005), https://papers.ssrn.com/abstract=681517 (last visited Sep 16, 2019).
[4] PAUL STARR, FREEDOM'S POWER: THE TRUE FORCE OF LIBERALISM 54 (2007).
[5] *Id.* at 56.
[6] *Id.* at 56.
[7] *Id.* at 61.
[8] JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (2015).

communication could lead a reader to assume that a public sphere is just a collective private sphere. In the same sense, Starr argues that freedom of speech and association are necessary to form newspapers and associations, which he assumes are there to protect civil liberty and to establish a civil society.[9] A civil society evolves out of a public sphere in a "sociological" sense which finds its basis within a legal private sphere protected from a governmental intrusion. The public sphere as a sphere of communication is necessary for a civil society.[10] This point is related to the study's discussion of the previous studies of Islamic distinction.

However, a private sphere does not enjoy an absolute protection from governmental powers. A government may interfere with a private to protect or promote a public interest.[11] For example, eminent domain justifies governmental encroachment of private property in favor of public interest. However, a governmental cross from public into private should be subject to careful scrutiny to ensure that a government does not use a public mean to achieve a private end.[12] An interest may delineate the line between the public and the private, but it is not an easy task because the line between public and private is ambiguous.

The distinction of public private has been under attack by several schools of thoughts.[13] The distinction seems to be limiting a government power in promoting gender

[9] STARR, *supra* note 4 at 75.
[10] PETER LASSMAN, POLITICS AND SOCIAL THEORY (2011), http://ebookcentral.proquest.com/lib/iub-ebooks/detail.action?docID=692948 (last visited Sep 29, 2019); PATRICK O'MAHONY, THE CONTEMPORARY THEORY OF THE PUBLIC SPHERE (Revised Paperback Edition ed. 2019).
[11] VERKUIL, *supra* note 3 at 403.
[12] STARR, *supra* note 4 at 55.
[13] Richard S Kay, *The State Action Doctrine, the Public/Private Distinction, and the Independence of Constitutional Law.*, 10 CONST. COMMENT. 33.

equality.[14] The challenge to the distinction goes beyond gender equality whenever inequality in general is caused by limited role of government in promoting equality.

B) The central value and State's function:

The public private distinction, this study argues, is emerged to protect a central value. In the liberal public private distinction, the individual's liberty is the central value which generates the internal rationale. The study assumes that to understand a public/ private distinction the first step is to find the central value. Thus, the study believes that the main value confined in the distinction is individual's freedoms. Put simply, a central value influences the dynamics of the public/private distinction. Also, the dynamics of the liberal public private can be seen in the positions of classical and modern liberalism. Classical liberalism calls for negative, neutral role for a state. On the other hand, a modern liberalism calls for a positive role for a state. The study reflects on the positions to explain the influence of the central value.

a) Central value:

the American declaration of independence and the French declaration of rights state all political institutions are empowered to preserve and secure people's liberties. Also, if a government infringes people's liberties, people should have the right to overthrow a government. Put simply, people's freedom is a central value, and a government, to be legitimate, should protect and preserve that right. This influences the dynamics of the public/private distinction. A state is created as an apparatus to enable people to practice their rights. Accordingly, whenever a state becomes destructive, it loses its legitimacy

[14] Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STANFORD LAW REV. 1–45, 25 (1992).

because it could not protect the central value. The central value determines not just a state legitimacy, but also, it influences the internal rationale which is translated into public private dynamics. A clear example of the influences of a central domain is the different imagination of state's role in classical liberalism and modern liberalism.

Both classical and modern liberalism underscore people's freedoms in different ways. While classical liberalism advocates for negative government, the modern liberalism calls for more positive role. They both do that in favor of protecting the central values.

b) Classical Liberalism:

The classical liberalism is centered around individual liberty. The internal rationale of it is that a government is the biggest threat to individual liberties. Therefore, the classical liberalism attempts to reduce the governmental role. Classical liberalism assumes that private association such as family, market and social clubs should be self-governed.[15] Also, classical liberalism treats property rights as the most important, and secures them from governmental intrusion.[16] The classical liberalism believes a government's main purpose is to secure individual liberties and properties, and from that the internal rationale of classical liberalism places a strict limitation on the government's ability to either infringe or to regulate an owner's utilization of his property. In addition, the employment of property rights as natural rights in John Smith's economic analysis gives the theory of classical liberalism its practical dimension.[17] Along economic freedom, classical liberalism

[15] Thomas G. West, *The Constitutionalism of the Founders versus Modern Liberalism*, 6 NEXUS - J. OPIN. 75–100 (2001).
[16] STARR, *supra* note 4 at 66–77.
[17] *Id.* at 66–67.

advocates other liberties such as freedom of religion, but the property right is the most significant one.

c) Modern liberalism:

Modern liberalism is a reaction to the shortages of classical liberalism. The modern liberalism calls for a positive government to create the minimum requirements of condition of liberty.[18] The modern liberalism suggests that a government intervention is needed to control and regulate private corporate powers, and that includes regulation of labor relation. The modern liberalism can be seen in the governmental regulations of the New Deal. The modern liberalism believes that private power should be restrained in order to protect private power in addition to restraining public power.[19] Put simply, the modern liberalism pushes the line of public/private distinction by empowering the state to regulate the private in order to protect freedom and promote individual conditions.

Examining modern and classical liberalism reveals that even with the shift from neutral to positive role of a state, individuals' freedoms have been central to liberal thoughts. The central value has been served or protected in classical and modern liberalism. Put simply, modern and classical liberalism have employed two distinguished internal rationales. The shift from classical liberalism to modern liberalism was a reaction to the changes surrounding the central value. The state as public power, at the age of multi-

[18] *Id.* at 85–116.
[19] *Id.* at 85–116.

national corporation, is not the only power threaten the private, but also the private powers become an evident threat to the private.[20]

C) Supreme Court Decisions and the classical and modern liberalism:

The change in theory from classical liberalism to modern liberalism has its effect on the public policy and the function of a state. This change or effect can be seen clearly in several Supreme Court decisions. The Supreme Court decision reflects the shift in presumption of government role in protecting individual rights. The classical liberal approach is demonstrated in the court decision of 19th and early 20th century. The shift from a classical approach, which seeks a limited role of government, has been under attack since the beginning of 20th century, but it took a while to be demonstrated in the Court's decisions. Modern liberalism, as stated above, emphasizes a public interest in regulating economic rights because of its adverse effect on individual rights in the long run. The idea here is to say that a change in the values or ideas that working with an institutional arrangement determines the outputs of that arrangement. To illustrate, the difference between 19th century and 20th century did not occur to the institutional arrangement, but it happened to the internal rationale controlling the system, which was a result of values change.

This is more relevant to our discussion of liberal-Islamic constitutionalism in chapter three where the study emphasizes the shortage of the proposal of judicial review as corner stone of the liberal-Islamic model. However, for the purpose of this chapter, the

[20] Horwitz, *supra* note 1.

Supreme Court decisions demonstrate, in practical setting, the effect of an internal rationale on the public/private boundaries.

At the end of this section, it will be more clear how individual freedom was the most important things for both liberalism sides, but the change occurred in prioritizing civil right over economic freedoms, which changed the function of the government from being neutral to be more involved in controlling the market, and this is what the study calls the internal rationale. During the 19th century, the internal rationale used to be less governmental involvement in the private association and the market. On the other hand, the 20th century witnessed a change in the theory and demanded governmental involvement to regulate private sphere, namely market, to protect the public interest in the central value "people's freedoms", and this is the new rationale.

The shift is clear in two ways where Court's decisions demonstrate more space for governmental intervention. The first group of cases is the cases of economic freedoms and the second group is the role of government in supporting disadvantaged groups. In the first group of cases, the Supreme Court overruled its previous decisions to be consistent with the new rationale, and in the second one, the Court supported governmental intervention in private sphere to protect disadvantaged groups.

The effect of modern liberalism is not limited to the judiciary, but it appears more in the public policy of the federal government. However, the study focuses on the Judiciary, namely the Supreme Court, to illustrate the effect of values and internal rationale on the dynamics of the public private distinction and because of its relevance to the study's

discussion of judicial review's role within a liberal-Islamic constitutionalism as an institutional arrangement.

Economic Freedoms:

One of the aspects of governmental interference into the market is labor regulation, which aims to set minimum rights for labor. One of the famous decisions regarding labor rights is the *Lochner* case. The Supreme Court in *Lochner* held that the states' statutes which regulated work hours for bakeries as unconstitutional because a state could not interfere in regulating private matters. This decision was influenced by the fact that a contract was considered a private matter in which a state did not have an interest to regulate. During that era, the Supreme Court protected freedom of contracts and property rights from government regulation, and most of the governmental regulations fell victim to constitutional scrutiny.[21] In the same context, the Supreme Court decided in *Dartmouth College* that a state legislature did not have the right to interfere in a contractual relation between private actors. The primary purpose of these decisions was to free businesses from regulatory laws.[22] However, the emergence of legal realism in the 1920s demanded a new understanding of the distinction between the public and private[23]. The realist argument was that instead of deciding cases in the abstract, the court should consider the conditions surrounding a case[24]. To illustrate, the court assumed in *Lochner* the existence of free will of both parties regardless of their financial capacity. According to the realist, this understanding exposes workforce to an unfair condition. Along with that, the New Deal

[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] VERKUIL, *supra* note 3.

called for more governmental intrusion in the economy and changed the concept of private market by departing from a long-established non-interventionist political tradition.[25] The New Deal represents the conflict between a free private interest and regulated private interest. To illustrate, the purpose of the new era is to regulate the self-interest which, almost, was free from a governmental check, and now the state is imposing more regulatory power over big corporates to protect people[26]. The way the Supreme Court has dealt with the freedom of the market and the new deal cases reflects a significant factor in determining the boundaries of public/private which is the purpose of the state. The purpose of the state is a factor can be extracted from these decisions. In other words, the state in the post-*Lochner* is there to protect the public interest from self-interest, and it does so by ensuring more efficient distribution of resources. The state is a mean to archive an end, and it makes sense to be empowered to reach its end, or not to be restricted in a way which will lead to its failure.

Social Justice and Public Policy:

The norm of classical liberalism is to reduce the size of the public influence as much as possible, and it gives people their self-autonomy because the classical liberalism believes government is the biggest threat to individual rights. On the other hand, modern liberalism has a different internal rationale. The modern liberalism adheres to a large role for the government in social and economic life. The empowerment of government to regulate the economic sphere was discussed in the previous section. Therefore, in this

[25] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 1780–1860 (1992).
[26]Horwitz, *supra* note 1.

section, the study focuses on the Supreme Court decisions on the role of government in social policy.

Before that, defining the meaning of social policy and what it encompasses is necessary to understand the role the government is restricted to by classical liberalism, and empowered to by modern liberalism. In this context, social policy means the use of positive governmental action to deal with social issues such as racial and gender equality. The study focuses on the Supreme Court decisions where the Court supports or strikes down a public policy which encompass a government intervention in order to promote public interest "racial and gender equality".

Racial Equality:

In the civil right cases, the Supreme Court held that the Constitution did not empower Congress to regulate private action by outlawing racial discrimination. This position could be interpreted to mean that a government shall grant people their negative rights, but it is not tasked with the promotion of individual rights. This was the norm during the 19th century. For example, the Supreme Court in its decision in the civil rights cases held that government was not empowered to prohibit discrimination by private parties, and the Court decided that by distinguishing between private and public action.[27] In another case, the Court decided that segregation on public transportation did not constitute a violation of the Equal Protection Clause as long it is separate but equal.[28]

[27] Civil Rights Cases, 109 U.S. 3 (1883)
[28] Plessy v. Ferguson, 163 U.S. 537 (1896)

However, this changed during the next century when the federal government took on the duty to protect black people. At that time the government was promoting of racial equality. In another case, the Supreme Court held that a university may allocate seats to disadvantaged groups in order to promote racial equality and diversity.[29] The Supreme Court decisions were consistent with state or federal government public policy.

Gender Equality:

In several cases, the Supreme Court held the promotion of gender equality was a valid public interest. For example, the Supreme Court found a California state law forbidding sexual discrimination to be constitutional.[30] Therefore, the Court held that in the case of women membership in Rotary club, the Court found the law did not affect the freedom of association[31]. Put simply, the state law, in this case, regulates the right of freedom of association in favor of gender equality. If this case was exposed to the internal rationale of 19th century it will be against the norm to allow government to regulate private association.[32] The presumption during the 19th century was to believe private association enjoys the right to self-governance, but this right currently is subject to governmental regulation in favor of social justice.[33]

Conclusion:

The public/private distinction represents metaphorical spaces of authority/freedom. A government is empowered to deal with the public and its power is limited by private

[29] Fisher v. University of Texas
[30] Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).
[31] Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).
[32] West, *supra* note 15 at 75.
[33] *Id.* at 75.

spaces of freedom. The boundaries of public/private distinctions are controlled by an internal rationale, and the internal rationale is influenced by a central value. In liberal thought, freedom is the central value, and that is the norm for classical and modern liberalisms. However, the internal rationale of the modern liberalism is different from the classical one. Since modern liberalism calls for a bigger role of government to regulate private freedom and interest, that expands public power in favor of protecting and promoting freedoms. Accordingly, the change in the internal rationale was a result of the change in state's function or vice versa.

The study does not anticipate a private mirror of the central value on the political reality because it believes there is always a possibility of error in applying a theory on the real world. In addition, the study argues that a central value would find itself marginalized by an instantaneous central value, which is usually generated at moment of rage or ignorance.

II) Public Private in Islamic jurisprudence:

Introduction:

This section is devoted to the main subject of our study. This section points out the origin of a public and private distinction in Islamic jurisprudence. Then, the study reflects on the literature of Islamic public and private distinctions. Mainly, the study seeks to distinguish its method and scope of public and private from previous studies. While previous studies have been, mostly, limited to a certain Islamic period, this study does not limit itself to historical period, but it employs the logic of the doctrine of commanding the right and forbidding the wrong to define the central value of Islamic public private distinction.

A) **Public/private** distinctions **in Islamic jurisprudence:**

The public/private distinction exists within Islamic jurisprudence in the belief of a limited government. To illustrate, the Islamic scholars believe a government shall not enjoy an absolute power, and they, in theory, make sure a ruler would be limited. By limiting a ruler or a government, the Islamic jurisprudence acknowledges the existence of a public space for governmental action and a private space free from governmental intrusion.

However, the theoretical efforts have not been accompanied by an institutional arrangement to translate the value of limited government into the reality of Islamic culture. The study discusses this in the coming sections and chapters. It begins with discussing the value of limited government in Islamic jurisprudence. The discussion of the value is conducted on two levels: first the theoretical level where the study explains the limits on a ruler's power. Second, the study deals with the absence of an institutional arrangement and its consequences for the implementation of the value. The study believes that an absence of an institutional arrangement affects the presence, but that does not mean a value will be demolished from the jurisprudence or from the public consciousness. Also, the study highlights the importance of an institutional arrangement to a political value. Put simply, an institutional arrangement is just a mean to an end, and that end is a value.

This analysis of limited government in Islamic jurisprudence is related to the discussion of Islamic constitutionalism in general which will be the subject of chapter three discussions. Also, the discussion of the absence of institutional arrangement to translate the limited government is related to the study's postulate about the influence of values on

the outcomes of political institutions, and this is discussed in liberal thought and its effects on the U.S. Supreme Court's decisions. Moreover, the study discusses the influence of political value in its discussion to the central value effect on constitutional typology of Islamic clauses in chapter three.

a) Theoretical limits on Islamic Government:

Islamic scholars recognize certain limits on an Islamic government. There are three main limits on a government: Islamic principles, public interest, and people's private rights. These limits are not developed well because the lack of their practical implementation. However, as a matter of theory they represent the meaning of limited public power. To illustrate, the first one requires a government to not violate an Islamic law, and the second one assumes that government shall act out of the public interest, not private ones. The third one is to respect people's rights, and this includes not imposing restrictions on their right to follow whatever of Islamic schools of interpretation. The right of people to choose among the existing schools encompasses a limit on government's attempt to enforce certain school of interpretation or to limit the choices. The third one is more problematic and has not been developed enough, especially in a modern context.

The problem of the people's rights emerges from the possible conflict between public and private interests. Nowadays, for the purpose of the public interest it seems governments around the Islamic world have demolished the private interest.[34] The positivism and codification of laws in the Islamic world limits people's right to choose their own school of interpretation by imposing certain rules have been chosen by

[34] IBRĀHĪM AL-BAYYŪMĪ GHĀNIM, MĪRĀTH AL-ISTIBDĀD 177–178 (2018).

democratic or non-democratic means. Also, people's rights include everything that has not been forbidden, thus a government regulation where government prevents people from acting in their own space, shall protect or promote compelling public interest. For example, traffic laws are necessary to organize the transportation even if it regulates an individual movement. On the other hand, private property, marriages and other personal rights are more complicated. This will be discussed within our discussion of the doctrine of commanding the right and forbidding the wrong. For now, these three limits constitute an Islamic public/private distinction.

b. Absence of Islamic institutional arrangement:

The absence of Islamic political arrangement is the main cause of the failure to implementation, and it is the shortage of what someone may call an Islamic constitutional theory. The study is not concerned about the reasons of this ignorance, but it is concerned with the consequences of such absence. The study calls the absence of Islamic political arrangement the Islamic constitutional crisis because of its effects on the Islamic history. This constitutional crisis is two fold. First, the political legitimacy crisis which means the lack of political means to ensure people consent to be governed, and that is more related to succession process, and that is not subject to the following discussion. Second, the lack of institutional arrangement to enforce the limits on a ruler, and that is a question of constitutional design more than a political legitimacy, and it is the main subject of the following discussions.

To distinguish the political legitimacy dimension from the constitutional one, in the political legitimacy crisis, there was not an agreement from the beginning between a ruler

and people, thus people did not know from the beginning know that they would be under an absolute discretionary power. On the other hand, the constitutional design question represents the attempt to ensure a ruler's commitment to certain values which are agreed upon. The political legitimacy question is discussed in the Bay'ah. The second one scattered in different theories, but as it has been discussed before, it is part of Islamic public policy.

In describing the lack of institutional arrangement, Mohammad Alshinqiti, in his recent book, argues that the Islam's fundamental crisis is a constitutional one because Islamic political values have not been translated into Islamic reality.[35] He continues to argue by employing Huntington and Fukuyama institutional analysis.[36] Alshinqiti argues that the Muslims sacrifice political legitimacy and political institutional development in order to save a government as a necessity. Christen Lange argues that this position is influenced by the collective awareness of civil wars between Muslims over the political leadership at the first century of Islam.[37] Alshinqiti puts it simply by saying that the failure of creating political institution results in failure of translating an ethical-religious commitment to be a legal commitment.[38] Khayr Al-Din (1820-1890) argues that leaving a ruler to govern without institutional means of limitations and depending on his ethical conscience is an realistic approach. Khayr Al-Din was one of few people who demanded a change in the constitutional order, and he also participated in writing the first modern

[35] MUḤAMMAD IBN AL-MUKHTĀR SHINQĪṬĪ, AL-AZMAH AL-DUSTŪRĪYAH FĪ AL-ḤAḌĀRAH AL-ISLĀMĪYAH : MIN AL-FITNAH AL-KUBRÁ ILÁ AL-RABĪʿ AL-ʿARABĪ 14 (2018).
[36] *Id.* at 29–78.
[37] CHRISTIAN LANGE, PUBLIC VIOLENCE IN ISLAMIC SOCIETIES: POWER, DISCIPLINE, AND THE CONSTRUCTION OF THE PUBLIC SPHERE, 7TH-19TH CENTURIES CE: POWER, DISCIPLINE, AND THE CONSTRUCTION OF THE PUBLIC SPHERE, 7TH-19TH CENTURIES CE 2–3 (2009).
[38] MUḤAMMAD IBN AL-MUKHTĀR SHINQĪṬĪ, *supra* note 35 at 35.

Islamic constitution.[39] Khayr Al-Din's writings about the constitutional government highlights how late Islamic world realized the importance of institutional restrictions. Also, his work is part of the first wave of Islamic constitutionalism where there have been several scholars advocating the idea of a limited and constitutional government around the Islamic world.

The consequences of the absence of this political arrangement is absence of reconciliation on individual level and with other nations, and that is due to the conflict between the religious and ethical values and the reality.[40] Also, the study attributes the lack of theoretical development as a result of the lack of institutional arrangement. To illustrate, the idea of limited government did not find it is wat to the reality, and that have prevented it from being tested in reality. Before moving to the next point, the study should point out the difference between a limited government and constitutional government. The limited government, in this study, refers to the theory of not granting a ruler an absolute power. A constitutional government means the process of creating institutional arrangement.

The study will discuss the central value of public private and state's function in Islamic jurisprudence in its discussion to the doctrine of commanding the right and forbidding the wrong. In chapter two, the study presents several cases to illustrate the lack of a political institution. In chapter three, the study describes the first wave of Islamic constitutionalism for the purpose of showing the first intellectual and political attempt for realizing the value of limited government via a constitutional arrangement.

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[39] NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 19–20 (2002).
[40] MUḤAMMAD IBN AL-MUKHTĀR SHINQĪṬĪ, *supra* note 35 at 37–38.

B) Previous studies of public/private distinctions Islamic jurisprudence:

The public/private distinction has been subject to a decent number of studies in the previous twenty years. The study situates its approach of studying of the public private distinction by explaining the different approach that it takes to define the public and private spaces. The study does not bother with where the lines of public/private meet, but it attempts to define the central value that controls the dynamics of distinction. by doing that, the study attempts to use this analysis to investigate the meaning of limited government in Islamic jurisprudence. The studies of public/private distinctions in Islamic context can be divided into two groups. First, the sociological studies of Islamic public and private spheres, and these studies focus more on the public as sphere of communication free from state intervention. The sociological studies' purpose is to learn more about the interaction between political authority and its subject in an Islamic context. Second, the jurisprudential studies of public private attempt to define public/private distinctions by reflecting on legal norms and their implementation in historical context. The purpose of the jurisprudential exercise is to understand the factors that draw the lines between what is public from what is private.

Thus, the study begins by reviewing the literature of sociological studies of public private distinction. in browsing the literature, the study extracts the definition of public and private adopted by these studies, and then, this study explains the purpose of the sociological approach to distinction. In addition, the study examines the methods of these studies. Then, the study reflects on the jurisprudential studies' definition, purpose and methods. Finally, the study compares and contrasts its definition, purpose and method.

Starting with sociological studies, the study explains the difference between the legal and sociological concepts of public spheres , and also, it connects the public concept of sociology to the legal private sphere. The sociological studies adopt Jürgen Habermas's definition[41]. The purpose of sociological studies is more about proving the existence of spheres where public discussion occurrs away from state intervention. Thus, they focus on Islamic scholars' role in influencing and shaping Islam. However, this purpose extends to include scholars' role in resisting a public authority in what can be described as a civil society[42], or highlights Scholars' role in influencing public policies.[43] Sociological authors usually use historical sources to study the role of Islamic Scholars in a public sphere. For example, Nimrod Hurvitz reflects on the *mihna* to study the autonomy of Islamic scholars. However, the sociological studies do not limit themselves to a certain period.

This study treats the Habermas' public as part of the legal private sphere because the shared point between legal private and Habermas' public is independent from governmental intrusion. In addition, the study does not limit its scope of study to a certain historical moment. The main difference between the sociological studies and this study is in the goal. While the sociological studies are more about proving the existence of public sphere and examining the role of Islamic scholars within that public sphere, this study's aim is to explain the forces controlling the dynamics of a public/private distinction from a constitutional point of view. Also, the sociological studies focus on the practice more than

[41] See; MIRIAM HOEXTER, SHMUEL N. EISENSTADT & NEHEMIA LEVTZION, PUBLIC SPHERE IN MUSLIM SOCIETIES 17 (2002).
[42] *Id.* at 9.
[43] e.g; MEIR HATINA, "ULAMA", POLITICS, AND THE PUBLIC SPHERE: AN EGYPTIAN PERSPECTIVE (2010).

focusing on the rules because they more about studying societies than legal norms. This study reflects more on the norms public/private distinction than the practice.

On the other hand, the jurisprudential studies mostly reduce the private to privacy. Most of the studies have not explicitly said that, but the way they have been seeking to define and study that private sphere is more related to defining public and private spaces.[44] Reviewing the literature reveals that the challenge of studying public private begins with distinguishing what is public from what is private. That can be seen in every study that tries to highlight the changing nature of an Islamic public/private distinction.

Regarding methods, the jurisprudential studies bind themselves to legal norms and application in time and context. That allows a study to reflect on the possible outcome of norms, but at the same time it complicates the issue because it requires a contextual reading of the public/private distinction. For example, Messick examines private property system in premodern Yemen. Messick attempts to define a private sphere via private property system in Yemen. Also, Mottahedeh and Stilt, in their analysis of a treatise of *Muhtasib*, suggest that the boundaries of public/private differ from situation to another because of the "Relational standing" of a situation's participants.[45] In both examples, authors employ certain aspects of Islamic law to define or to understand the boundaries of public and private, and they limit their study to certain a space and time. The study believes these limitations complicate the task of explaining the public/private distinction because they

[44] Roy Mottahedeh & Kristen Stilt, *Public and Private as Viewed through the Work of the Muhtasib*, 70 SOC. RES. INT. Q. 735–748 (2003).
[45] *Id.* at 737.

prevent us from seeing the full picture. Instead the study focuses more in the state's main purpose as generator of public interest.

The studies of public/private distinctions have mostly employed the doctrine of commanding the right and forbidding the wrong in studying public/private boundaries.[46] The doctrine resembles a rich source of legal norms. In addition, the doctrine provides a good source for actual events where a *muhtasib* has carried out the doctrine. These chronicles document that the doctrine implications were a great source of studying legal norms in reality.[47] The employment of the doctrine to study the public private is usually accompanied with emphasis on restrictions over public authority.[48] The restrictions are discussed in the study's discussion of the doctrine of commanding the right and forbidding the wrong.

In contrast, the study does not attempt to define the exact lines of the public/ private distinction. Instead, it seeks to understand the dynamics controlling them. Accordingly, the study examines the doctrinal rules of commanding the right and forbidding the wrong to focus mainly on two things. First, a state's duty to implement the doctrine, and second, the restorations on the state in carrying out its duty. Therefore, the study defines a public space as space of empowerment and the interest of state, and defines a private space as forbidden and protected from governmental intrusion. In that sense, a government may expand its

[46] See; Mohsen Kadivar, *An Introduction to the Public and Private Debate in Islam*, 70 SOC. RES. INT. Q. 659–680 (2003); Mottahedeh and Stilt, *supra* note 44; Frank E Vogel, *The Public and Private in Saudi Arabia: Restrictions on the Powers of Committees for Ordering the Good and Forbidding the Evil*, SOC. RES. 21.
[47] KRISTEN STILT, ISLAMIC LAW IN ACTION: AUTHORITY, DISCRETION, AND EVERYDAY EXPERIENCES IN MAMLUK EGYPT 8 (2012), http://dx.doi.org/10.1093/acprof:oso/9780199602438.001.0001 (last visited Sep 21, 2019).
[48] Vogel, *supra* note 46 at 755.

public territory on the expanse of private, but its action would be subject to scrutiny. Focusing on the question of the dynamics more than the boundaries is helpful to deal with the question of individual rights and limited government.

III) Commanding the right and forbidding the wrong:

The study discussed in section one how a central value and an internal rationale are important to understand the dynamics of public/private distinctions. Therefore, the study employs the doctrine of commanding the right and forbidding the wrong to reveal the central value of Islamic public/private distinction. Mainly, the study argues in this section that the central value of an Islamic public/private distinction is preserving and promoting religious values, and the internal rationale requires a state to create and maintain an environment where laws and public policy command an external conformity with religious values. By referring to external conformity, the internal rationale excludes internal believes, thoughts and actions that occurred in private places.

In the main argument, the study establishes several points related to the discussion. First, the doctrine of commanding the right and forbidding the wrong has political and social levels. The political level represents the interaction between public and private spaces. To illustrate, the doctrine on the political level is not employed just to make sure people in public places are confirmed with religious values, but also people may use the doctrine to ensure that a public authority is ruling in accordance with Islamic principles. Second, Islamic scholars have put certain limits on practice of the doctrine, and that is to say the doctrine is related to the limited government as it is related to the study of the public/private distinction. Third, the doctrine is rooted in the Islamic culture and jurisprudence, and it still exist in some of the legal regimes of Islamic countries.

This section is divided into two sub-sections. the first sub-section attempts to define the doctrine to lay the ground for the discussion on the second subsection. Section one begins with the origin of the doctrine and the source of the commitment. Then, Section one divides the doctrine into two levels. The first level is the political level on which the study focuses. The second level is the social level of the doctrine which the study does not consider relevant to the discussion of public/private distinction. On the political level, the study stresses that the doctrine can be used by states to ensure people's compliance, or it can be used by people to hold a government accountable (confronting a state).

A) The Doctrine's origin and levels:

The doctrine can be defined as a religious duty where a Muslim encourages coreligionist(s) to follow the Islamic principles, and he prevents or advises him whenever he commits a sin. The duty of commanding the right and forbidding the wrong is derived from several Quranic verses.[49] Islamic scholars have defined the doctrine in different ways.[50] However, they agree that the doctrine can be practiced by an individual and the government. An individual should command a right and forbid the wrong either before another individual or a public authority. However, the individual's practice of the doctrine shall not involve violence.[51] When an individual confronts his another individual, this

[49] The doctrine of commanding the right and forbidding the wrong can be found in eight Quranic verses: (Qur'an 3:104, Q3:110, Q3:114, Q7:157, Q9:71, Q9:112, Q22:41, Q31:17)
[50] See; IBN TAYMIYYAH, HISBAH FI AL-ISLAM, AW, WAZIFAT AL-HUKUMAH AL-ISLAMIYAH (Dar al-Kotob al-Ilmiyah ed. 1992). ABU AL-HASAN AL-MAWARDI, AL-AHKAM AL-SULTANYYAH 315-339 (Dar Ibn Qutaibah 1st ed. 1989). AL-JWAINI, Al-Ghyathi: Ghyath AlUmam fi Eltyath AlDhulam 176 (1980).
[51] MICHAEL COOK, COMMANDING RIGHT AND FORBIDDING WRONG IN ISLAMIC THOUGHT 185.

represent the social level of the doctrine. On the other hand, when an individual confronts a public authority, this is a part of the political level. The other part of the political level is the state usage of coercive power or public policy to command and forbid. The study focuses on the political level, and it does not deal with the social level.[52]

Before diving into the political level, the analysis requires the study to define the meaning of "commanding the right" and "forbidding the wrong".[53] The right encompasses almost everything that god asks Muslims to do explicitly. [54] The duty of commanding the right is not a duty until people abend god's order. In some contexts, commanding a right entails advancing a common good. For example, encouraging people to donate their money or time. The common good here is distinguished from the "right". The common good encompasses everything that advances human life and is not forbidden by god. Therefore, the difference is that right is what god asks people to do, and common good is explicit duty over Muslims, but it advances their public or individual interest.[55]

On the other hand, the wrong is what god asked Muslims to abstain from. [56] Since Islamic jurisprudence encompasses different schools of interpretation, Islamic scholars define a wrong as what all schools came to define as wrong. Put simply, if an act is subject to jurisprudential reasoning (*Ijtihad*), a public authority shall not forbid that action.[57] The reason of this is twofold. First, Islamic scholars believe people have the right to choose

[52] The social level is relevant to a sociological analysis of public sphere as a sphere of communication.
[53] MUHAMMAD IBN AL-UKHŪWAH, MAʿĀLIM AL-QURBAH FĪ A.HKĀM AL-.HISBAH 24 (1976).
[54] *Id*.
[55] For a critical analysis of the common good meaning see Abdullah Alaoudh, *Religious Institutions in the Constitutional Orders of the Postrevolution Arab Countries: Egypt as a Case Study*, 2017.
[56] MUHAMMAD IBN AL-UKHŪWAH, *supra* note 53 at 24.
[57] IBN TAYMIYAH, AL-FATAWA AL-KUBRA v6/96 (1988).

whatever interpretation they please as long as it does not violate Islamic principles. Accordingly, forbidding the act deprives people from their right to choose. Second, the Islamic scholars do not give a public authority a power to produce a superior interpretation.[58] The public authority interpretation could be a result of its own reasoning, or it could be a choice from the existing interpretations. The scholars do not endorse a public authority because they believe a ruler shall not be treated differently from other scholars, and if he wants to participate in process of ijtihad, his opinions and interpretations should be equal to other scholars.[59]

a) The political level of the Doctrine

In this section, the study discusses the power which the state enjoys in enforcing the doctrine. Historically, an Islamic public authority has practiced its role in commanding and forbidding through the institution of hisba. The *hisba* institution consists of the Islamic rules to perform the doctrine of commanding the right and forbidding the wrong. *Hisba* as an institution can be found in two types of sources: Manuals, which are written to direct a *Muhtasib*'s work, and the treatises, which cover the doctrine in general and focus on state duty to command or forbid an action. The study focuses on the *hisba* as theory because the study looks for abstract rules, not historical application. *Hisba* personnel is limited to a *Muhtasib*.

[58] SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHĀB AL-DĪN AL-QARĀFĪ 71 (1996).
[59] for a critical discussion to people's right to choose see; Asifa Quraishi-Landes, *Islamic Constitutionalism: Not Secular, Not Theocratic, Not Impossible*, 16 RUTGERS J. LAW RELIG. 553–579 (2014). Asifa argues that central positivism deprives people from their right to follow whatever interpretation they want. In her study, she calls for a consideration of a structural reform.

A *Muhtasib* is a common face of *hisba*. The *Muhtasib*, in premodern Islamic societies, is charged with enforcing moral and market rules. The study discussed in its review of the literature on public and private spheres how the previous studies have focused on the work of *Muhtasib*. A *Muhtasib* is guided in his work by the manuals of *hisba*.[60] However, the doctrine is not limited to the work of *Muhtasib*, but it also includes any act of a public authority seeking to enforce the forbiddance of a wrong. Especially now, most of the tasks of *Muhtasib* have been delegated to other governmental bodies.

The enforcement of the doctrine is an obligatory duty on public authority. Islamic jurisprudence demands a public authority to enforce commanding the right and forbidding a wrong.[61] For Islamic jurisprudence, the enforcement of the doctrine is an integral function which a public authority is required to perform. This duty is different from an individual duty. To illustrate, not every individual is required to command and forbid, only those who are well informed and physically capable to perform are so required. On the other hand, a public authority is required because the public authority enjoys power prima facie.[62]

b) Confronting a State:

The doctrine represents a justification and duty on individuals to direct their public authority. The study uses the word "direct" instead of "command" or "forbid" because the interaction between the public authority and people shall not be limited to commanding a right and forbidding a wrong, but it also includes a public interest. Accordingly, the

[60] See MUHAMMAD IBN AL-UKHŪWAH, *supra* note 53.
[61] IBN TAYMIYYAH, *supra* note 50.
[62] See COOK, *supra* note 51 at 165–192.

doctrine, theoretically, empowers people to hold their rulers accountable to their public interest and most important Islamic principles. To illustrate, while the religious values are central to the function of public authority, people's interest comes second. That takes us back to the difference between commanding right and "common good". People command right to make sure the government does not abend core values of Islamic jurisprudence, and they command common good to advance their public interest.

The doctrine in contemporary literature has been seen as a base for some rights. For example, the doctrine establishes people's right to freedom of speech by allowing them to articulate their complaints. For instance, Mohamed Abdelkarim argues that the doctrine of commanding the right and forbidding the wrong represents an attempt to deprive a public authority from its power of despotism[63]. His reasoning is that the doctrine ensures government accountability. In addition, the doctrine does not treat this as a negative right, but it treats it as duty. Thus, the practice of the doctrine by individual is a collective duty.[64] The doctrine as a right and duty on a Muslim individual strengthens the importance of the doctrine to influence the interaction between people and public authority. For example, Mohammed Alawa wrote a book to address some issues regarding religious institutions (specifically Al-Azhar), and his book, initially, was written out of his duty of commanding the right and forbidding the wrong.[65]

The study considers this short introduction enough to lay the ground for the following discussion of the relevance of the doctrine to the distinction. The study notices

[63] The book
[64] Collectve duty:
[65] His book

that the doctrine is much more complicated, and it is social and political dimensions are relevant to several constitutional topics.[66]

B) The doctrine and the public private distinction:

The study intends in this subsection to explain how the doctrine is relevant to our study to the public private distinction. The study argument here is threefold. First, the doctrine indicates religion to be the central value of an Islamic public/private distinction. Also, the doctrine generates an internal rationale where public authority(ies) is reasonable to make sure people in their daily lives are confirmed with Islamic norms. Second, the doctrine as a theory is aware of the idea of a limited government, so it imposes limitations on public authority in regard to enforcing the doctrine. In addition, the doctrine empowers individuals to hold public authorities accountable. Thus, the doctrine by empowering individuals and limiting state creates an active environment where public is for everyone, and private is respected and protected sphere. Third, the doctrine still occupies a significant presence in Islamic legal regime and thoughts. This presence indicates the influence that the doctrine still plays.

The central Value and Internal Rationale:

If the doctrine is a means to ensure the conformity of a social façade with Islamic norms, then the doctrine supposes that a state's main purpose is to preserve and promote Islamic values. Actually, Islamic scholars define the preservation of Islamic norms or values as a core objective of a state. For instance, Ibn Taymiyyah in his definition of the

[66] Civil society for example, collective interest vs individual interest.

doctrine established a relationship between the doctrine and a public authority. Ibn Taymiyyah pictured a public authority as a guardian, and he continued by saying that any form of guardianship, including political, is meant for commanding the right and forbidding the wrong.[67] In addition to Ibn Taymiyyah, Almawrdi defined an Islamic public authority as a"[s]et for the succession of the prophet in guarding religion and world politics." Accordingly, in the Islamic political theory, a state is empowered to preserve and promote the central value. This empowerment enlarges the public sphere for governmental intervention in favor of a public interest (central value). More importantly, Ibn Taymiyyah's argument deals with public authority as means to execute the duty of commanding the right and forbidding the wrong. The doctrine empowers the state to ensure people's conformity and protects and creates the proper ecology, and that is what the study assumes to be the internal rationale. A careful reading of the doctrine suggests that the doctrine concerns the outward society, and it attempts to create an atmosphere where sins and wrongs are deterred. The doctrine influences this rationale in social and political levels.

Therefore, the doctrine clearly states the central value and the internal rationale which control the dynamics of the public/private distinction. Thus, the central value and the internal rationale influences the meaning of limited government and individual rights.

The doctrine and public/ private interaction:

Along with its ability to reflect the central value of a public/private distinction, the doctrine puts limits on public authority's practice of its duty, and it empowers people by allowing them to hold their rulers accountable. The restrictions are about the theoretical

[67] IBN TAYMIYYAH, *supra* note 50 at 11.

presence of the belief of limited government within Islamic jurisprudence. The scholars justified certain restrictions on a public authority' performance of the doctrine. For example, preventing a public authority from imposing a selected opinion over people is to protect people's right to choose their own interpretation and to prevent a state monopoly over the process of religious reasoning (Ijtihad).

On the other hand, the doctrine empowers people by justifying their rights to command and forbid a public authority. This empowerment allows a private actor to engage in public affairs. The study does not suggest that means public participation, but it means a public authority does not enjoy a monopoly over defining the "common good"[68]. This empowerment is just a theoretical justification, and it has not been accompanied by an institutional arrangement. This empowerment serves the internal rationale by keeping people able to make sure that public authority acts in accordance with Islamic norms.

The continues presence:

The doctrine is not just a premodern theological idea, but it also still influences current thinking in Islamic world. The continued presence of the doctrine is important because it justifies the utilization of the doctrine to examine the public/private distinction. The presence of the doctrine can be seen on legal and political levels. On a legal level, the doctrine of commanding right and forbidding the wrong excite explicitly in several Islamic countries.[69] The creation of governmental agencies to perform the doctrine is an example of an explicit presence. For example, in Kano, Nigeria, hisba has been established to deal

[68] Back to the…
[69] Mottahedeh and Stilt, *supra* note 44.

with regulation of morality.[70] In addition, the Iranian constitution incorporates the doctrine as constitutional principle.[71] The influence of the doctrine over the legal system is not limited to the explicit examples, but it also includes implicit influence, and that will be discussed in Chapter two discussion of Abu Zayd's case. On the political level, the doctrine still forms the base of most of the Islamic opposition movements in the Islamic world. The doctrine forms their point of departure and justifies their rights to engage in public affairs.

[70] Rasheed Oyewole Olaniyi, *Hisbah and Sharia Law Enforcement in Metropolitan Kano*, 57 AFR. TODAY 71–96 (2011).
[71] Iranian constitution article 8.

IV) Chapter one Conclusion:

Chapter one provides a normative analysis of the Islamic public/private distinction which allows for better understanding to the notion of Islamic limited government and the nature of public authority. Chapter one begins by defining the public/private distinction, and it relates the distinction to the analysis of limited government by subscribing public to government power and private to individual's autonomy. Thus, the distinction represents the dynamics of government power and individual rights. Then, the study moves to explains the origin of Islamic public/private by revealing that Islamic scholars have underscores the importance of limited government. However, the theoretical restrictions on governmental or public authority have not been accompanied with a political institutional arrangement. Later, the analysis attracts a reader to the central value and the internal rationale of Islamic public/private distinction. The central value and the internal rationale influencing the dynamics of public/private boundaries. the central value of an Islamic public/private is the promotion and persevering of religious values. The study finds the central value by reflecting on how Islamic scholars have conceived a public authority's purpose. The writing of early and late scholars is showing that the public authority is tasked to carrying out the duty of commanding the right and forbidding the wrong. Accordingly, the theorizing around of the doctrine represents the internal rationale of Islamic public/private. The internal rationale demands a public authority to ensure people's outward conformity with Islamic norms. The analysis, along that, touches on the political theory in Islamic jurisprudence.

Chapter Two: Cases

This chapter attempts to present the argument of chapter one in real word context instead of in the abstract. In section one, the study presents cases related to the concept of limited government in Islamic jurisprudence. The study focuses on the issue of institutional arrangement to translate the notion of limited government. Also, the study focuses on the doctrine's role in empowering or justifying an individual right to command and forbid in face of a political authority.

In section two, the study presents a legal case from Egypt. The study examines a case of an Egyptian Scholar who was separated from his wife because the court found that he has committed an act of apostasy. The case involves legal issues related to the study's arguments. First, the case deals with a question of the individual's rights to bring a legal action out of their duty to command right and forbid the wrong. While the court answers this issue and justifies people's right, the court's opinion articulates the central value that is preserving religious values. Second, the court supported its opinion with article two of Egyptian (Islamic clause). The main point the study aims to present in the case of Abu Zayd is that the Islamic clause functions as a means to internalize the Islamic central value. This internalization of the central value impacts the limit of constitutional protection. Put simply, the Islamic clause defines the limits of constitutional protection.

I) Cases of institutional arrangement

In this section, the study presents two historical cases where the doctrine of commanding the right and forbidding the wrong was employed in the face of a political authority. The cases illustrate two points. First, the absence of institutional arrangement to ensure the enforcement of limited government. The first case presents that clearly where an individual is powerless to practice what he believed is his duty due to lack of power. Second, the study focuses on the second case to show how the doctrine is used to hold a ruler accountable.

Cases:

(1)

In his book, Michael Cook starts with the story of the goldsmith who confronted one of the most important leaders of the Abbasid[72] revolution. The story did not end well for the goldsmith. The goldsmith acted out of his intention to forbid a wrong. The story as it is written in his book is as follows:

"In the year 131/748f. the rebellion which was to overthrow the Umayyad dynasty had already been launched. The Abbasid army was advancing on Iraq, while the architect of the revolution, Abu Muslim (d. 137/755), remained in Marw, effectively ruling Khurasan. His exercise of his power was nevertheless challenged if only morally by a local goldsmith (saigh), one Abu Ishaq Ibrahim ibn Maymun. This goldsmith went into the presence of

[72] The Abbasid Revolution refers to the overthrow of the Umayyad Caliphate, and initiated the rule of the Abbasid dynasty.

Abu Muslim and addressed him in these words: 'I see nothing more meritorious I can undertake in God's behalf than to wage holy war against you. Since I lack the strength to do it with my hand, I will do it with my tongue. But God will see me, and in Him I hate you.' Abu ¯ Muslim killed him. Centuries later, his tomb was still known and visited in the 'inner city' of Marw"[73]

The story reflects that the goldsmith felt he was obligated to forbid Abu Muslim from leading a revolution. The goldsmith was also aware of his lack of power to change anything in reality, but he decided to take an ethical position. The lack of power was due to lack of institutional arrangement. The discussion between the goldsmith and Abu Hanifa before his appearance in front of Abu Muslim illustrates that Abu Hanifa agreed with the goldsmith in his right to forbid the wrong. However, Abu Hanifa took a pragmatic approach by considering possible consequences. Abu Hanifa believed that the goldsmith is exposing himself to death by confronting Abu Muslim, and he would not achieve anything. Abu Hanifa was aware the gold smith's suicidal mission. Abu Hanifa did not say anything about creating an institutional arrangement to make it possible to confront a ruler, but he, implicitly, pointed out to the problem of solely actions. The ethical position taken by the goldsmith lacks Abu Hanifa's pragmatic approach to the issue of forbidding the wrong. The issue of enforcing the doctrine on a political level represents the issue of limited government translation into reality.

Also, the case touches on the issue of theory realization. From the narrative above, the doctrine and the limited government do not seem to be a disputable in abstract, but the

[73] Michael, Cook, *Commanding Right and Forbidding Wrong in Islamic Thought*, p3 (2001).

problem is that the distance between reality and abstract has not been bridged. In this historical context, the problem was the lack of acknowledgement that an ethical commitment, by ruler or ruled, is not enough for the realization of limited government.

(2)

An interesting narrative, from the first Islamic century, tells a story of Salman Al-Farsi (companion of the prophet) and Omar (The second Caliphate). In the story, Omar distributed cloths to the Muslims. Later, Omar stood up to preach, and said "oh people listen and obey". At that moment, Salman stood up and said "we do not". Omar asked him "why?" Salman answered by questioning him "you [Omar] gave each of us one cloth, and you are wearing two". Omar explained to him by saying the additional cloth is my son's cloth, and he called upon his son to confirm that. When Salman was convinced, he said "now, we hear and obey"[74].

This story was mentioned in several books and Islamic sources, but all these sources lack a credible reference to the source of the story. However, the study concerns the acceptance of the story in several studies of Islamic studies.

This story involves three elements. First, an individual voluntary believes that there is something wrong. Second, an action is carried out by the individual to stop or question the existence of a wrong. The third element is a political leader who is accused or assumed to be a wrongdoer. This story did not involve the sad ending of the first one, but instead it

[74] IBN AL QAYYIM AL JAWZIYYAH, Aʻlām al-muwaqqiʻīn ʻan rabb al-ʻālamīn 33 (2016).

seems that Omar was committed to the idea of being accountable to people. This case resembles a clear empowerment to people to hole a government accountable.

The most important is the commentary of Abu Hanifa because he had the chance to meet and discuss the issue with the goldsmith personally. Abu Hanifa thought that the man has the right to do so, but he advised him to not do it because of the possible consequences of the action. This position is kind of a gray position where it says you can, but you must not. In several other sources, Abu Hanifa stressed the same position by saying that this is not an individual duty, but it is a group of people. However, most of the sources have presented Abu Hanifa opinions in regard to commanding the right and forbidding the wrong as a way of overthrow a ruler which is not our focus on this study.

On the other hand, Al-Ghazali in his writing, thought differently in regard to this pattern. He believed in everyone should have the right to challenge a named political authority. He bases his position on the fact it is a duty not just right of all the Muslims to command the right and to forbid the wrong, His opinion has wide influence on the current Islamic scholars.

II) Abu Zayd's Case of Apostasy:[75]

In 1996, the Egyptian court of cassation reviewed the case of Professor Nasr Abu Zayd where plaintiffs demanded the nullification of Abu Zayd's marriage from Ibtihal Younis because he was an apostate. The plaintiffs brought the case as result of Abu Zayd's academic work. They accused him of committing an explicit apostasy in his works. In Egypt, apostasy affect apostate personal statues, and its effect extends to include inheritance and marriage. Therefore, in Abu Zayd's case, the plaintiffs sought to separate him from his wife because a Muslim woman shall not be married to a non- Muslims man. To illustrate, according to plaintiffs Abu Zayd was apostate who was still married to a Muslim woman, thus the court should declare their marriage void.

This case is important to the study's purpose in several respects. First and the most, the case involved freedom of belief and freedom of expression. One of the case's issues was the question of whether the court should be allowed to investigate an individual belief or faith, and the other question was should all opinions be granted the constitutional protection of freedom of speech, or is freedom of expression is limited, and if it so , what is it limited by? Second, the plaintiffs were granted standing rights based on their right to command the right and to forbid the wrong. Third, the case was litigated before the cassation court as the superior court in the Egyptian legal system. To illustrate, the case has been reviewed by the cassation court, and its questions were subject to the court's review, thus the case represents the logic and reasoning of the judiciary. Fourth, the case was almost free from political influence. Since the case's parties were not representing a

[75] The study find the courts verdicts in Al-Awa's book; see MUHAMMAD AL-AWA, AL-HAQQ FI AL-TA'BIR.

political struggle between the government and a political opposition, and Abu Zayd was not a politician. Accordingly, the court's independence from a political influence is not questionable. However, the case was subject to public opinions during the litigation process and until now it appears from time to time. Fifth, the case received the attention and comments from several intellectuals, but the study focuses on Mohammad Salim Al-Awa because he is a legal scholar and Islamist. Al-Awa wrote a book presenting in that book his opinion in the case and the controversy around it. Last, the case involved applying article two of the Egyptian constitution.

The study presents a summary of the case. The study focuses mainly on the reasoning of the Appeal court, and the comments of the Court of Cassation's comments in responding to the parties' objections. The study presents the summary by focusing on the two main issues: standing rights and constitutional protection. The court's conclusion is twofold. First, commanding the right and forbidding the wrong allows individual and the state to interfere into private sphere to protect a public interest. Second, the constitutional protection of freedom of expression and belief shall be understood within an Islamic framework according to article two of the Egyptian constitution. Then, the study presents Al-Awa opinion regarding the case. Al-Awa asserts the validity of the court's reasoning. Also, his comments illustrate the internal rationale which controlled the case. At the end of this section, the study reflects more on the case and its relation to the dynamics of the public/ private distinction.

The case:

In 1996, the Egyptian court of Cassation found Abu Zayd's published works constituted an explicit act of apostasy. Declaring someone as apostate means that they are

not Muslim anymore. Accordingly, the Court of Appeal ruled Abu Zayd's and his wife marriage to be void as legal consequence of apostasy, and the Court of Cassation affirmed the decision of the Court of Appeal.

The case was brought before the lower family court by a group of people which were described in the media as Islamists. The case was brought in reaction to Abu Zayd's works. Abu Zayd published several books about Islamic interpretation. In his books, he was arguing mostly about interpreting Quran in a modern contextual way. They were demanding a nullification of the marriage of Nasr Abu Zayd and his wife, Ibtihal Younis. They based their demand on the fact that Abu Zayd's works, and therefore Abu Zayd himself, were not Muslim anymore, and because Muslim women cannot be married to non-Muslims, their marriage should be voided. In this case, the plaintiffs believed that Abu Zayd's opinions declared his apostasy. Therefore, the court in order to decide whether to separate them or not, had to discuss a preliminary question regarding proving his apostasy. The plaintiffs based their right to sue on the doctrine of *hisbah*.

Procedurally, in January 1994 the lower court rejected the case, stating that plaintiffs did not have a direct interest. However, in July 1995, a Court of Appeals reversed the lower court decision in favor of plaintiffs, and the court of Cassation affirmed the court of appeal's ruling in August 1996.

Summary of Court Decision and Reasoning:

Since the lower court rejected the case because the plaintiffs lacked standing, the Court of Appeals and of Cassation had to review two main questions. First, do plaintiffs have standing to bring the case, which the lower court ruled no. If the plaintiffs have

standing, then the courts have to discuss the second question. Second, the court had to investigate whether Abu Zayd has committed an act of apostasy or not, and if he committed an act of apostasy, the court had to declare his marriage void. The study mainly presents the opinion of Court of Appeals followed by the Cassation court's comments as it responded to objections submitted by both parties.

Plaintiffs' Standing Rights:

The lower court rejected the case because it found that plaintiffs did not have standing. However, the two upper courts reversed the lower court's decision regarding this issue, and they granted plaintiffs standing in the case. The court of Cassation found that plaintiffs enjoyed standing in this case because the rules that govern *hisba* cases allow individuals to bring cases that involve public interest or a violation of public policy. In addition, the Court of Appeals defines a *hisba* case as a complaint regarding God's right, and the court went on to say that every violation of God's right is a violation of public policy and it is in the public interest to protect God's rights. Accordingly, the Court said the plaintiffs enjoyed standing because they were defending a public interest. The Court of Appeals defines the public interest here to be "forbidding a manifest wrong and commanding a right." To illustrate, the wrong the court believes is enough to grant plaintiffs standing to sue is a marriage between non-Muslim man and a Muslim woman, which is not a valid marriage according to Islamic law. Accordingly, the court enjoys authority to review plaintiffs' claim. The study alerts a reader to the employment of public policy and God's right to justify plaintiffs' standing rights.

Before the court of Cassation, the defendant submitted an objection over the reasoning of the Court of Appeals. The objection states that *hisba* or commanding right

and forbidding wrong shall be limited to the state, and it shall not be practiced by individuals. Therefore, the court of appeals was mistaken by granting standing to plaintiffs in this case.

Court of Cassation responded to the defendant's objection by supporting the Court of Appeal's position. The Court of Cassation stated an individual enjoys the right of bringing a case to the court in order to protect a public interest, and this right gives him the right to stand in the case as a plaintiff. In addition, the court said commanding the right and forbidding the wrong is a duty over every individual, who is capable of commanding and forbidding. It seems clear from that sentence, the court considers commanding the right and forbidding the wrong not just as a religious duty, but also, the court considers it to be a civic duty. Moreover, treating the duty as a civic duty allows people to bring the judiciary or any state's institution to protect public values as valid public interest.

Investigating Abu Zayd's works:

The defendant argued before the Court of Appeals that an individual's faith is a matter a state or a court should not investigate because it is between God and an individual as long as the individual does not provoke that explicitly. The defendant's argument was based on his right of freedom of faith and freedom of speech. The court responded by explaining the meaning of freedom of faith and freedom of speech in accordance with article 2 (Islamic clause).

The court responded by saying that the question of whether the defendant is an apostate or is not is a preliminary question to investigate the validity of defendant's marriage, thus the court enjoys the authority to search defendant's faith. Also, the court

used "crime" to describe act of apostasy, and the court used this point as entry to respond to defendant's points regarding freedom to belief. The court distinguished between apostasy as a crime and the right to freedom of belief by saying that apostasy is a crime which involves materialistic elements including an act of denial of God's words and his prophet. On the other hand, the freedom of belief encompasses an individual's relationship with his God, and this creed shall not be investigated as long as it remains between an individual and his god as spiritual matter. Put simply, the court treats freedom of belief as private matter as long as it does not take place in public in sociological sense. Accordingly, the court limits the constitutional protection. At the same time, this definition of freedom of belief corresponds with the definition of the Supreme Constitutional Court of Egypt.[76]

The court explains two ways to prove someone's apostasy. First, an explicit statement (verbal or written) in which a Muslim provokes his belief in Islam. Second, any act or statement indicates, certainly, an apostasy. Also, the court says an apostasy action could be proven by all the means of evidence in criminal law.

Therefore, the court reviewed four of Abu Zayd's books, and found Abo Zayd had committed apostasy. Thus, the court ruled in favor of plaintiffs and declared Abu Zayd's marriage to be void. The court based its decision on the fact that Abu Zayd denied several Islamic certainties. For example, the court found Abu Zayd guilty of denying the Quran to be god's words, and he asks for changing inheritance law to ensure gender equality. The court concluded by saying that Abu Zayd's actions violated the constitution in its article 2, and the defendant trespassing on Islam was an attack on the state itself. The court of appeals

[76] The case n0 17 of year 4

considered article two of the constitution to be a corner stone of public policy, and because of that the court defines constitutional rights in accordance with article two.

The defendant filed a petition to the Court of Cassation to review the court of appeal's decision. In the defendant's petition, the defendant stated an individual faith shall not be subject to governmental investigation in accordance to article 47, which grants constitutional protection to freedom of belief, and Abu Zayd's books contain his opinions which shall be protected by article 40 as freedom of expression. Therefore, the appellate court's decision violated the fundamental rights of the defendant.

The Court of Cassation responded by saying that freedom of belief encompasses an individual's right to practice his rituals, and most importantly, prevents the state from forcing him to abandoning his belief. However, the court argued that the apostasy rules do not violate the constitutional protection to freedom of belief because its application is limited to Muslims, and being a Muslim supposes a prior consent to apostasy rules. The study directs a reader's attention to the possibility to have duality in applying legal rules where the applicable law would be determined by a person's faith.

Regarding freedom of expression, the court said not all opinions are protected by freedom of expression. There are, the court continued, opinions that violate Islamic principles, and because of that they shall not be granted a constitutional protection. To illustrate, the court considered article 2 as framework forming state's public policy, and all the constitutional rights shall not be used to infringe article two. The court of appeal and court of cassation demonstrate this idea when they talk about how infringement of Islamic principles or goals is at the end is infringement to the state itself.

III) Chapter Two Conclusion:

In this case, the courts' reasoning shows several points related to our analysis of public/private dynamics. The courts' treatment of the question of plaintiffs' standing right by establishing a connection between god's right and public interest suggests that when a public interest is defined as a god's right, it is not easy to imagine the state to not be involved in regulating moral and religious aspects of people. The courts identify the doctrine of commanding the right and forbidding the wrong as a means to allow people to defend a public interest, in this case a religious interest. In addition, the rationale here requires a state to be active and responsive to protect people's interest in wider sense to include religious, moral, and economic interests. This logic is pressing on the conscious of the court and the plaintiffs because it is not just a legal or civic duty, but it is more about their religious duty. To illustrate, the Court of Cassation answered the defendant when the defendant argued that commanding the right and forbidding the wrong is a state duty, and shall not be exercised by individuals, the court responded by saying that the duty is communal duty on every Muslim. Accordingly, the study asserts that it is not possible to see the state, in this context, without an ethical function and being an apparatus in political ethical project of preserving religious or ethical values. This point appears in the study's discussion of the first wave of Islamic constitutionalism. The intellectuals and politicians, in Islamic world, believed that a political reform is needed to restore the social order in accordance with Islamic norms. Also, the study asserts the importance of this case as an evidence of values' impact on political institutions, and this forms the basis of the study's attack on the liberal-Islamic model of constitutionalism because the liberal-Islamic model

does not acknowledge the internal rationale of Islamic limited government. The internal rationale is where Islamic jurisprudence requires a state to preserve religion by regulating public actions in order to make the social outer correspond with the Islamic norms.

This case takes us back to the point which the study mentions about the doctrine of commanding the right and forbidding the wrong, where a state's role in regulating moral and religious affairs is one to keep people in accordance with the norm, at least in their outer lives. The court explicitly adopts this position when it asserts the university role in preventing a publication of such opinions.

Chapter three: Islamic Constitutionalism

Intro:

The main aim of this chapter is to reflect on the liberal-Islamic model of constitutionalism. The chapter presents the literature of Islamic constitutionalism divided into two waves. The first wave occurred during the 19th century and explains the role of state and the relation of limited government. In the first wave, the limited government was a mean to ensure state righteous governance. The first wave ended with rise of nationalism movement in the Arab world and the other Islamic countries. In 2011, the Arab spring initiated the second wave of Islamic constitutionalism. The second wave concerned with different question than the first wave. While the first wave was not questioning the presence of Islam in politics, the second wave concerns that presence. The literature of Islamic constitutionalism in the second wave can be summed in one thing: the compatibility of Islam with democratization process. Because of this different question, the word constitutionalism here means incorruption of an Islamic clause.

Within the literature, there are two positions. The first is the anti-Islamic constitutionaliztion. The opponents of Islamic constitutionalism argue that Islamic law is not compatible with liberal democratic values, and it creates discrimination against women and religious minorities. The second position suggests that Islamic constitutionaliztion serves liberal and democratic ends. Also, as response to the opponents' fears of Islamic constitutionalism, the advocates of Islamic constitutionalism give central role to constitutional courts to prevent radical interpretation of Islamic clause. This what the study calls the liberal-Islamic model of constitutionalism. The liberal-Islamic model is built

around the belief in limited government, which both liberal and Islamic scholars share. This is what the study calls the consensual project.

In this chapter, the study questions the feasibility of this model of constitutionalism because it seems it does not acknowledge the fact that limited government in Islamic jurisprudence is meant to be for rationalization of governance. In addition, the study emphasizes the conclusion of chapter one, which asserts the central value of Islamic public/private. Put simply, the study perceives Islamic constitutionaliztion to be a process of internalization. Generally, Islamic constitutionaliztion internalizes an Islamic central value and an internal rationale. However, the level of internalization depends on a wording of an Islamic constitutionaliztion (Islamic clause). The study argues that the internalization of an Islamic central value and internal rationale affects the interpretation of the constitution.

The study advances the argument by dividing this chapter into two main sections. Section one deals with the first and second waves of constitutionalism. The study presents the purpose of a limited government in the Islamic first wave of constitutionalism, and it argues that constitutionalism was meant to rationalize a government, not to protect freedoms. Then, the study moves to deal with the literature of the second wave of Islamic constitutionalism. In the literature of second wave, the study begins with the anti-constitutionalization literature. The anti-constitutionalization explains the concerns which the advocates of Islamic constitutionalization respond to in their model of constitutionalism. After that, the study discusses the argument of advocates of Islamic constitutionalization and its relevance to democracy.

In section two, the study deals with the liberal-Islamic model of constitutionalism. The study starts by introducing the elements of the model: Islamic clause, individual rights clauses and judicial review. Then, the study moves to engage in a textual analysis of Islamic clauses to distinguish the internalization effect of each type of Islamic clauses. After that, the study utilizes Carl Schmitt's concept of central domain as an analytical tool to explain the effect of incorporation of an Islamic clause on the meaning of a constitution in whole.

I) Islamic Constitutionalism

A) First Wave of Islamic constitutionalism:

This section deals with the political reform in Islamic countries during the 19th century. The study presents attempts of political reform for two reasons. First, the study argues that the early perception of early Islamic reform had influenced the reformers' thinking. Second, the political reforms attempted to establish an accountable government, and that was the moment of realization of the notion of limited government. To render this study accessible, the study examines first the historical context of the constitutional reforms in the Islamic world. The historical context articulated the motivations of reform and the conditions which surrounded the attempts.

The study does not seek to define the causes that led to the failure of the constitutionalism of first wave. Instead, the study tries to understand the motives and ideas which influenced the Islamic constitutionalism. Therefore, after the historical introduction, the study examines the literature of prominent scholars of the 19th century and their ideas about the state and a limited government.

a) Historical context:

During the 19th century, the Islamic world witnessed its first constitution in a modern sense. The constitution of Tunisia was the first constitution to promulgated in the Islamic world, and it was followed by an Ottoman constitution and an Egyptian constitution. The writing of these documents was meant to strengthen polities and to ensure accountability. The early constitutions did not live for a long time. However, they illustrated an intention to create a limited government by creating a political framework. The political framework resembled creating assemblies and councils to scrutinize government's work.[77]

Before the 19th century, the Islamic world did not have a constitution in its legal regime.[78] The explanation of that can be seen in the assumption Islamic law is based on the divine texts (Quran and prophetical sayings).[79] However, the Islamic world realized the need for a constitution by acknowledging that the Islamic divine texts did not say that much about political framework.[80] The divine law is enough to provide the principles (normative), but it does not articulate a political framework. The 19th century witnessed the moment of realization of a political framework. The need of political framework was demonstrated in the deficiency of political authorities in Islamic world. Therefore, the solution of this inefficiency was to create a political system where a government is under scrutiny. In the following paragraphs, the study discusses in detail the context in which

[77] See; BROWN, *supra* note 39 at 15–34.
[78] L. ALI KHAN & HISHAM M. RAMADAN, CONTEMPORARY IJTIHAD: LIMITS AND CONTROVERSIES 113–114 (2011).
[79] *Id.* at 113–114.
[80] KHAN AND RAMADAN, *supra* note 78.

these documents had been written. The study focuses on the Tunisian constitution of 1861, the Ottoman constitution of 1876, and the Egyptian constitution of 1882.

In 1861, Tunisia promulgated the first constitution in the Islamic world. The aim of the constitution was to establish a strong centralized government and powerful army.[81] The document took around three years, and it was written while Tunisia was subject to European political influence. The constitution used Islamic terminology to refer to the state's institution. The constitution highlights the limited role of the monarch (*bey*), and it created political institutions. For instance, the grand council was created to ensure that a government would act in accordance with the law. The constitution seemed to limit individual rights to dignity and equality, and it said nothing about freedom of expression. However, the drafters of it paid more attention to regulating governmental actions, especially spending. At the end, the constitution did not live for that long. In 1864, the constitution was reevoked by the Tunisian monarch.

The second constitution in Islamic world was the Ottoman constitution of 1876. The constitution was promulgated in a similar context to the Tunisian constitution, and it was written to strengthen the state. The Ottoman empire faced an internal struggle cause by several revolts in Balkans and fiscal problems. All these problems came with being subject to European pressure because the military was not capable to save guard the empire.

The last constitution was the Egyptian constitution of 1882. It was written in a different context, but under shared circumstances. The constitution of 1882 was written during the Urabi revolt. Nathen Brown argues that the constitution of 1882 established

[81] BROWN, *supra* note 39 at 16.

strong constitutionalism compared to the other two documents.[82] This difference can be understood as the result of a direct struggle between the military and the royal interest which led to different allocation of power. However, the constitution was a victim of foreign interference when the British supported the royal interest, and the constitution became just history.

The historical context revels that the Islamic polities were not doing great, and the political reforms were attempts to save them. The constitutions introduced the idea of political institution to scrutinize state's functions, but at the same time says a little about normative principles that govern the relation between rulers and people. The weaknesses of Islamic polities were not noticed just on a political level, but on the intellectual level, there was a discussion about it. The intellectual says more about the normative rules.

b) Islamic Constitutionalism: intellectual writings

In an attempt to understand causes of the situation of Islamic world, there were two trends that dominated the Islamic world, or specifically here the Arab world. The first approach attributes the situation to a fundamentally political calling for up-down reform. The second approach focuses on the social order, and it called for down-up reform via education. The most influential writers of the political reform were Khayr al-Din's and Gamal al-Din's Al-Afghani. The second approach did not play a strong rule in forming the awareness of constitutional government or political life, so we limit our focus to the advocates of political reform.

[82] *Id.* at 28.

The 19th century witnessed the emergence of an Islamic literature concerned with political questions. The literature was motivated by the situation in the Islamic world, or as most of the scholars of that period phrase it, the situation of the Islamic nation. The literature was trying to find an answer to the problems of Muslims. In reading the literature of the Islamic intellectuals, the study focuses on two things. First, the study deals with their understanding of political authority (state) as means to get the nation out of the darkness. Second, the study seeks to understand their discussion of limited government in their writing and its relevance to their goal.

Khayr al-Din argued that a good government is central to social and religious reform.[83] Also, he said the worst thing a government may enjoy as an absolute power, so a government should be restrained.[84] Khayr al-Din relied heavily on Islamic history and the doctrine of commanding right and forbidding wrong. He focuses on people employing of the doctrine to confront their rulers, but he did not mention the ruler employing of the doctrine to advance religious values[85]. Khayr al-Din moved from the historical moment to deal with the contemporary problem of absolutism by introducing institutional arrangement. He argued that the European parliamentary experience should be imported as solution to absolutism. Khayr al-Din's considered parliaments to be a modern invention to practice *Shura* (consultation) and commanding and forbidding.[86] Put simply, he believed a good governance would result in a good society, and the absolutism leads to corruption, which can be dealt with via restraining the government. He suggests that Muslims should

[83] KHAYR AL-DĪN TŪNISĪ, AQWAM AL-MASĀLIK FĪ MA'RIFAT AḤWĀL AL-MAMĀLIK 11–75 (1868).
[84] *Id.* at 11–75.
[85] *Id*.
[86] BROWN, *supra* note 39 at 20.

look to the European experience, and they should import their institutional arrangement to realize a limited government.

The three ideas in Khayr al-Din's thoughts, limited government, European experience, and rule of government, appeared in every intellectual's writing in the 19th century.[87] For example, Al-Tahtawi pointed out the importance of the European experience not just in constitutionalism, but also in the nation building process in Europe.[88] Al-Tahtawi and Khayr al-Din's were exposed to the European culture during their travels.[89] They tried to transfer that experience to the Islamic world by finding roots for European concepts in Islamic history and jurisprudence. They emphasize the rule of Islamic scholars in restraining a government, and how a ruler's actions shall not constitute a violation of Islamic law. However, Al-Tahtawi gave more attention in his practical life to education and schooling system in Egypt.[90] On the other hand, Khayr Al-Din's was involved in the drafting the Tunisian constitution of 1861.[91]

Gamal Al-Din's agreed with Khayr al-Din's on the importance of limited government, but Gamal was more active out of the official circle of power.[92] To illustrate, Khayr al-Din's worked along the political elite of Tunisia to draft the first constitution, and when he was removed from his political positions, he just spent the time writing his book. On the other hand, Gamal refused to be a part of any political reform where his ideas were not welcomed. For example, he established a journal with his student Mohammad Abdu to

[87] See; ALBERT HOURANI, ARABIC THOUGHT IN THE LIBERAL AGE 1798-1939 (1983).
[88] *Id.* at 69.
[89] *Id.*
[90] HOURANI, *supra* note 87.
[91] BROWN, *supra* note 39 at 19–20.
[92] HOURANI, *supra* note 87 at 105–120.

discuss and publishing his political ideas. Gamal believed in a revolutionary path which did not end up being followed by his student Mohammad Abdu, who changed his view to focus on education. Despite their political life, they both agreed about the importance of a limited government as a step to resolve the Islamic world problems.

Abd al-Rahman Al-Kawakibi completes the circle of the 19th century scholars who discussed the effect of despotism on the Islamic societies.[93] At the end of the 19th century and the beginning of 20th, Al-Kawakibi wrote a book in which he discussed the nature of despotism on politics, religion, society and knowledge. His ideas correspond with Khayr al-Din's in the importance of limited government and the rule of a state in advancing people's lives. He believed that getting rid of despotism needed time and work from bottom-up.[94] Put simply, while he believed despotism to be the main cause of the Islamic world problems, he believed the process of replacing despotism with a limited government started gradually from bottom-up.[95] The Islamic influence on political thoughts ended with the rise of nationalism in the Islamic world especially in the Arab world (pan-Arabism).

The literature of 19th century reveals three things. First, the intellectual found in the European experience a possible solution for their political decay. Accordingly, they tried to position the European political institution in Islamic environment, and to ensure a deep rotted positioning, they, theoretically, connected those institutions to Islamic history. Second, it is clear the main concern was to restore a strong political authority capable to protect Islamic world because of that probably individual rights was not central to the

[93] ABD AL-RAḤMĀN KAWĀKIBĪ, ṬABĀ'I‘ AL-ISTIBDĀD WA-MAṢĀRI‘ AL-ISTI‘BĀD (2003).
[94] *Id.* at 140.
[95] ABD AL-RAḤMĀN KAWĀKIBĪ, *supra* note 93.

literature. Third, the literature does not seem to be concerned with a public authority role in commanding and forbidding the wrong, and that may be read as a sign to a change in public authority nature. However, the study suggests that the ethical and social aspects did not occupy the intellectuals' minds because the political decay of a polities was more relevant.

B) Islamic constitutionalism Second Wave:

The second wave of Islamic constitutionalism is hard to trace to its beginning, but the most important moment is the Arab-spring because it brought the question of Islam in politics to the center of scholarly attention. However, there were a decent number of scholarly work that were written before the Arab-spring.[96] That means the second wave is not limited to the literature of post Arab-spring. Generally, the literature of the second wave is going around a question of the compatibility of Islamic law or Islam in general with democracy and liberalism. During and after the Arab-spring, the literature concerned the impact of Islamic constitutionaliztion on the democratization process of certain countries. The literature of Arab-spring is an extension of the previous literature, so this study treats the literature as one unit without distinguishing between post- or pre-Arab spring literature. The study divides the literature into two groups. First, the study deals with the anti-Islamic constitutionaliztion. Then, the study presents the advocates of Islamic constitutionaliztion argument.

a) The anti-Islamic constitutionalization:

The opponents of Islamic constitutionalization argue that the incorporation of Islamic law would have negative impacts on rule of law and fundamental rights and by

[96] See; Nathan J. Brown & Clark B. Lombardi, *The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996) Translation*, 21 AM. UNIV. INT. LAW REV. 437–460 (2005); Azizah Y. al-Hibri, *Islamic Constitutionalism and the Concept of Democracy Topical Article*, 24 CASE WEST. RESERVE J. INT. LAW 1–28 (1992); Khaled Abou El Fadl, *Constitutionalism and the Islamic Sunni Legacy*, UCLA J. ISLAM. EAST. LAW 67–102 (2001).

default on the process of establishing a democratic regime. The opponents focus on the incompatibility of Islamic norms with liberal and democratic values, and along that they highlights the discriminatory consequences on religious groups and women's rights. The purpose of reflecting on the anti-constitutionaliztion literature is to understand the argument of liberal-Islamic constitutionalism. In addition to that, the second wave in general and specifically anti-constitutionaliztion illustrates an attempt to compare Islamic law to liberal or western ideas, but it does not seek to understand Islamic law internally.

Democratic Values and Individual rights:

Democratic values mean, in this context, rule of law, separation of power, and judicial independence. In regard to these three concepts, some studies have asserted that Islamic law does not recognize such a principle, and moreover, it theorizes the opposite. Moamen Gouda, for example, argues that the concept of separation of powers is not deeply rooted in the Islamic jurisprudence, and he says so by studying Al-Azhar's constitution (1978),[97] which was issued as a model to Islamic countries which may seek to adopt it.[98] Gouda underscores the absence of separation of power from the constitution as evidence to his assertation.[99] Moreover, he examines the powers vested in a ruler, and he finds a ruler (*imam*) enjoys a tremendous power comparing to the ones vested in both the judiciary and legislative branches.[100] He focuses on the possibility of *imam's* alteration to decisions made by other branches. His fear stems from Article 47 which required a ruler to have knowledge

[97] For translated text: MOAMEN GOUDA, *The 1978 Al-Azhar's Project for an Islamic Constitution* (2011), https://papers.ssrn.com/abstract=2437590.
[98] Moamen Gouda, *Islamic Constitutionalism and Rule of Law: A Constitutional Economics Perspective*, 67 (2012).
[99] *Id.* at 67.
[100] *Id.* at 68.

of Islamic jurisprudence. In regard to *imam* powers, Abdullahi An-Na'im acknowledges the lack of historical Islamic precedents of in restricting a ruler, but he acknowledges that a ruler is supposed to be limited by Islam.[101] Here, the point is that may cross the lines between public and private by employing his explicit or implicit powers. Put more accurately, Gouda is afraid of the power of the ruler to redefine the boundaries of public and private, and An-Na'im is afraid that historical experience may justify such practices.

Regarding individual rights, the opponents of Islamic constitutionalism underscore the adversarial impact of Islamic law on individual rights. For example, An-Na'im states that a separation between state and Islam is required to ensure people's beliefs are a voluntary practice and not as a conformity with a positive law.[102] An-Na'im believes this is against freedom of belief. Another issue of Islamic constitutionalism is freedom of speech, which the study mentions in its discussion of Abu Zayd's case.

Equality of non-Muslims and women's rights:

An integral issue of Islamic constitutionalism is the influence of Islamic law's incorporation to women's rights and the rights of non-Muslims. Authors argue that the Islamic constitutionaliztion creates unequal status of non-Muslims and women. The status of non-Muslims is problematic since the concept which covers their status in Islamic law is the concept of *dhimmi* rules, which is a set of rules that govern affairs of non-Muslims.[103] Equal rights should be based on citizenship, which requires state to treat each citizen

[101] Abdullahi Ahmed An-Na'im, *Religion, the State, and Constitutionalism in Islamic and Comparative Perspectives Constitutional Law Symposium: Global Perspectives on Religion, the State, and the Constitutionalism*, 57 DRAKE LAW REV. 829–850, 838 (2008).
[102] *Id.* at 840.
[103] ANVER M. EMON, RELIGIOUS PLURALISM AND ISLAMIC LAW: DHIMMIS AND OTHERS IN THE EMPIRE OF LAW (2012).

equally regardless of his faith.[104] Nimer Sultany points out that an adoption of Islamic clause in a constitution will cause a discriminatory treatment of non-Muslims, and it affects state neutrality. He also responds to the argument that highlights the tolerance of Islamic rules by saying that tolerance would not be needed if there is equality.[105] In the same context, An-Na'im supports such a view by pointing to the denial of basic citizenship of non-Muslims. Gouda, in his analysis to Al-Azhar's constitution, notices the absence of non-Muslims in that constitution.[106] Also, Sultany argues that the discrimination may attempt to undermine political rights of non-Muslims because of their beliefs.[107]

With respect to women's rights, opponents of Islamic constitutionalization stress its impact on gender equality. The Islamic constitutionalization has been perceived as a corner stone for the patriarchal system. The scholars raise issues of limiting women's professional choices by assigning these positions exclusively to males. For example, certain legal and juristic sources do not allow women to fill a judge position or presidency.[108] Also, there is the issue of unequal inheritance which was a subject of recent debate in the Islamic world after Tunisia passed a law granting women equal rights in inheritance as their male counterparts.

[104] An-Na'im, *supra* note 101 at 841.
[105] Nimer Sultany, *Religion and Constitutionalism: Lessons from American and Islamic Constitutionalism*, 28 EMORY INT. LAW REV. 345–424, 396 (2014).
[106] Moamen Gouda, *Islamic Constitutionalism and Rule of Law: A Constitutional Economics Perspective*, 66 (2012).
[107] Sultany, *supra* note 105 at 410.
[108] Gouda, *supra* note 98 at 72.

b) The advocating Islamic constitutionalization:

In this section, the study turns to the other side of the debate over the incorporation of Islamic clause. The study reviews the arguments of the supporters of Islamic constitutionalization. In advocating Islamic constitutionaliztion, supporters argue that Islamic constitutionalization is an inevitable choice. The invertibility of Islamic constitutionalization, they believe, comes from being a demand from the majority. Second, the advocates of Islamic constitutionalization stress the possibility of a consensual project based on their shared belief in limited government. That what the study calls the liberal-Islamic model of constitutionalism, see following section. Accordingly, the study discusses, first, the Islamic constitutionalism as a demand of the majority, and second, limited government as a shared belief.

Islamic constitutionalization as Majority demand:

In most of the Islamic world and specifically the Arab world, the Islamist[109] movements are capable of mobilizing people in politics. That makes them part of the political struggle which should be governed by a constitution.[110] The strength of Islamists can be seen in their role in the opposition before the Arab spring and their rise to be a governor party during the Arab spring. In countries like Iraq, Afghanistan and Egypt, the Islamic movement's ability to garner votes makes the issue of Islam and a constitution a pressing issue. While the Islamic movements are capable of garnering votes, it would be in the interest of a new constitution to acknowledge their demand to incorporate Islamic

[109] For definition see; Noah Feldman, *Islamic Constitutionalism in Context: A Typology and a Warning Islamic Law and Constitutional Liberty: Keynote Address*, 7 UNIV. ST THOMAS LAW J. 436–451, 441 (2009).
[110] *Id.* at 441.

clause. That is what is called a negotiated clause. Nimar Sultani calls this the pragmatic approach where a constitutional drafter incorporates an Islamic clause to guarantee an Islamist's support.[111] Popular support can be seen as legitimacy issue. Put simply, when a constitution does not enjoy majority support, it is legitimacy which a constitution should ensure is questionable.

The supporters of Islamic constitutionalization can be divided into two groups. First a pragmatic advocate seeks to acknowledge the Islamist's demand to ensure popular support to the new constitution. Second, an advocate believes that Islamic constitutionalization is important for a liberal democracy not only because of popular support, but also because of the possible compatibility between Islamic norms and liberal rights.[112]

. Islamic constitutionalization seems to offer more than just negotiation and support to a constitutional reform. It is also a base of a liberal-Islamic model of constitutionalism. The argument here is that liberal and Islamic models have shared values which can be combined in together in order to modernize the Islamic political scene. Political modernization in that sense does not cost Muslims to lose their Islamic identity. For example, the Islamic scholars have argued for a limited government, but this position has been joined with a lack of legal or political constitutionalism.[113] The liberal task here is to introduce its model of legal and political constitutionalism (judicial review- political participation). To analogize, in Islamic jurisprudence, liberal or modern political concepts

[111] Sultany, *supra* note 105.
[112] *Id.*
[113] El Fadl, *supra* note 96.

is the first step to introduce the modern means to the end of establishing constitutionalism. For example, Azizah says that the Bay'ah stands as an analogy to political participation because both require public participation in the process related to political practice.[114] Accordingly, the notion of rule by people can be found in the practice of Bay'ah. Put simply, Clark Lombardi suggests that narratives from Islamic countries may suggest that Islamic law can help to establish constitutionalized government not to function just like liberal democracies, but to serve similar ends.[115]

[114] al-Hibri, *supra* note 96.
[115] Clark L, Islamic constitutionalism > liberalism page (221).

II) Consensual project: Liberal-Islamic Model of Constitutionalism:

This is the most important section in chapter three. In this section, the study introduces the liberal-Islamic model of constitutionalism. The study starts by introducing the main two elements of it. First, the advocates of Islamic constitutionalism suggest that inclusion of an Islamic clause allows for a basis of negotiation to add more liberal rights clauses (negotiated clauses). Second, the model highlights the importance of constitutional court to safeguard liberal rights from a possibility of a radical constitutional interpretation of Islamic clause. This implies that Islamic incorporation supported by the majority may go off track. Accordingly, a judicial review via a constitutional court is a fundamental piece of the liberal-Islamic model of constitutionalism. Then, the study moves to discuss this model by questioning its feasibility. The study textually analyzes Islamic clauses, it divides them to three types based on their possible effect on the dynamics of the public/private distinction. The one the study focuses on is the repugnancy clause. In section three, the study argues that Islamic constitutionaliztion internalizes a central value and an internal rationale by adding a repugnancy clause. The study employs Carl Schmitt's concept of "central domain."

Negotiated Clauses:

Seeing the Islamic constitutionalization as a negotiated clause can be seen in the increase of articles which grantee more individual rights in Islamic constitutions. To illustrate, Ahmed Dawood highlights how an incorporation of an Islamic clause is a compromise in order to achieve political modernization.[116] Also, he cautions us from trying to minimize the role of Islam in a constitutional court. In addition and in response to anti-Islamic constitutionalism, Ahmed argues that constitutions which incorporate supremacy Islamic clauses are accompanied by more rights than before the adoption of Islamic clause.[117] Ahmed's analysis points that the norm in the Islamic world where Islamization of a constitution has occurred is to support a new constitution enacted under democratic setting.[118] Ahmed's point is that the democratic process and constitution require liberals and Islamists to get together and reach an agreement to protect liberal rights and Islam. This agreement would be reflected in a constitution that incorporates both of their demands.

Constitutional Courts and Islamic constitutionalization:

The role of a constitutional court in the model of liberal-Islamic constitutionalism is to keep the balance between the liberal side and the Islamic side. The fears and concerns of anti-Islamic constitutionalization are dealt with by establishing a constitutional court which will ensure that an incorporation of an Islamic clause would not undermine

[116] Dawood I. Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions*, 54 VA. J. INT. LAW 615–696, 12 (2013).
[117] *Id.* at 12.
[118] *Id.* at 12.

minorities' or women's rights, and it prevents any attempt to apply extreme interpretations of Islamic opinion via a positive law.

Before diving into the role of a constitutional court, the study wants to shed light on the importance of constitutional interpretation in regards to Islamic constitutionalization. Abou El Fadl stresses the importance of interpretation in relation to constitutionalism. He says while Islamic jurists have not had political power to bind a government to their religious opinion, rulers have been capable of interpreting jurists' opinions in order to get desired results.[119] Abou El Fadl's point is more about the absence of an institutional arrangement to make sure that will not happen. Moreover, he suggests that the Islamic law is a divine law and that its interpretation provides a nexus to divine powers. However, in the context of Islamic constitutionalization, the fear is that to use Islamic law will exclude or undermine the rights of non-Muslims or even Muslims from different sects. Thus, the constitutional court plays the role of legal constitutionalism where the implication of Islamic law does not violate the liberal side of the so-called negotiated agreement.

The function of a constitutional court is two-fold. First, a constitutional court is tasked with bringing in results that overlap with the liberal-Islamic model. Second, a constitutional court functions to safeguard the liberal objects from a potential extreme implication of an Islamic clause. To illustrate, C. Lombardi argues that judges have successfully utilized Islamic principles to support and promote natural rights.[120] C. Lombardi's points support the liberal-Islamic model and the courts' function within it. He

[119] El Fadl, *supra* note 96 at 73.
[120] CONSTITUTIONALISM BEYOND LIBERALISM, 221 (Michael W. Dowdle & Michael Wilkinson eds., 2016).

continues by reflecting on Cornelius's experience where Cornelius believed that liberalization requires Islamization.[121] While C. Lombardi advocates for shared values, others seek to marginalize Islam through a process of judicial review which is the secularization effect of constitutional court.[122]

It seems that the model requires a structural interpretation of a constitution. In structural interpretation, a court interprets a clause (Islamic or rights) by reflecting on the meaning of a constitution as a whole.[123] Accordingly, a structural interpretation allows a court to interpret the Islamic clause in accordance with the main goal of the model, which is being supportive of liberal constitutionalism. However, the missing point here is that the model seems not to acknowledge the possible effect of a clause's wording in determining the constitutional interpretation. To illustrate, the Egyptian court in applying article two to interpret freedom of speech and freedom of belief used article two as a frame where the meaning of a constitutional clause shall not be contradictory to article two, and because of that the meaning and the protection for freedoms are determined by article two.[124] On the contrary, the court should interpret Article two in a way where it does not violate other constitutional protection, which is provided by other clauses.

The study argues that the Islamic liberal model of Islamic constitutionalism does not acknowledge the effect of a central value which, as Chapter one argues, determines the dynamics of the public/privates distinction. The effect of a central value on the meaning of the negotiated clause is clear in Abu Zayd's case where the court interpreted the freedom

[121] *Id.* at 221.
[122] Sultany, *supra* note 105 at 383–388.
[123] SOTIRIOS A. BARBER, CONSTITUTIONAL INTERPRETATION : THE BASIC 117 (2007).
[124] See Abu Zayd Case in Chapter two.

of speech to be limited by article 2 (Islamic clause). This lack of acknowledgment of the norm makes the model romantic. Before extending the study's argument, the study proceeds to Typology of clauses.

A. Typology of Islamic Clauses:

The study perceives Islamic constitutionaliztion, in general, as an internalization of the central value and the internal rationale. The incorporation of Islamic law into a constitution occurs in different fashions. Some constitutions incorporate Islamic law as the "main" or chief source of law. Others incorporate Islamic law as "a" source of law among other sources. Third, a constitution incorporates Islam to be state's religion without giving it any relative legal role. This section divides Islamic clauses to three main groups; central, non-central and religion identity. This typology of Islamic clauses is relevant to our analysis of the effect of an Islamic clause on the function of a constitutional court by applying Carl Schmitt's concept of central domain. In this section, the study starts with dealing the three groups of Islamic clauses. Then, the study takes look into the literature to see the current position of constitutionalists on the effect of wording of an Islamic clause.

The first group is the central Islamic incorporation. In this category of clauses, a drafter places Islamic law in the center of the constitution by making it either "the main" or the chief source of law.[125] For example, a repugnancy clause is a central clause where a constitution requires all law enacted by legislature to be consistent with Islamic principles or Islamic jurisprudence. This central incorporation places Islam as the dominant source

[125] EGYPT CONST. art. 2 (1971).

of law in the legal regime. Regarding the public/private's dynamics, this clause would internalize and centralize Islamic jurisprudence effect.

The Second group is a kind of clause that incorporates Islamic law to be one of other sources of law in a constitution. For example, the Iraqi Constitution of 2005 considers Islam to be "a" foundational source of law. A third type of the incorporation of Islamic law is the mere incorporation of Islam as the state's religion. The study considers the first group to be central one, and the second as non-central. The third group links the state's identity to Islam but does not imply any influence over a constitutional court decision. An example of the third one is the Tunisian constitution. Now the study can turn to review the position in scholarship regarding the wording effect on constitutional court decision.

To begin with, C. Lombardi suggests that at the beginning of adopting Islamic clauses, an Islamic clause did not intend to require a state to be barred from enacting laws that are inconsistent to Islamic principles, but this old understanding has changed.[126] He noticed that Islamic countries mostly consider the incorporation of an Islamic clause as "a" or "the" source of law as requiring a state to legislate in accordance with Islamic law. However, he implies that a wording would not matter more than the context and the factors surrounding a constitution.[127] Put simply, he gives more weight to the institutional and political context than the wording effect on a constitutional court's decision. That does not

[126] Clark B. Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State Note*, 37 COLUMBIA J. TRANSNATL. LAW 81–124 (1998).
[127] Clark B. Lombardi, *Constitutional Provisions Making Sharia a or the Chief Source of Legislation: Where Did They Come from - What Do They Mean - Do They Matter Symposium: The Impact of the Arab Spring throughout the Middle East & Northern Africa: Building the Rule of the Law and the Role of the International Community in Domestic Conflicts*, 28 AM. UNIV. INT. LAW REV. 733–774, 773 (2012).

mean he did not reflect on the question of the difference between making Islam the main source or a source. He says a government might try to incorporate a soft clause because such incorporation considers a non-central Islamization; although, it depends more on the context.[128]

On other hand, it seems generally the supporters and anti-Islamic reformers do not give much attention to the wording, either because there is no evidence or experience to test the hypothesis, or because they think it is less important than the political social context. Mayer in his study of the Islamic law says there is no correlation between the type of wording adopted by a constitution and the implication of Islamic rules.[129]

In short, the study argues that wording of an Islamic clause has an impact on a constitutional interpretation whether the interpretation is conducted by a constitutional court or by an ordinary court like Abu Zayd's case. The study asserts that a wording definitely would affect the role of a constitutional court to maintain the balance between Islamic clauses and other constitutional rights. The negotiated rights (negotiated clauses) are defined by an Islamic central clause, and the constitutional court interpretation is influenced by the Islamic clause. Accordingly, the study asserts that the liberal-Islamic model is questionable, but it may work if it more seriously considers the normative conclusion of chapter one. Also, it is possible to consider limiting the influence of an Islamic clause by adding strong wording to the negotiated clauses.

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[128] Clark B. Lombardi, Constitutional Provisions Making Sharia a or the Chief Source of Legislation: Where Did They Come from - What Do They Mean - Do They Matter, 28 Am. U. Int'l L. Rev. 733 (2013).

[129] Ann Elizabeth Mayer, *Law and Religion in the Muslim Middle East*, 35 AM. J. COMP. LAW 127–184, 138 (1987).

B) Carl Schmitt's Central domain

In this section, the study utilizes Carl Schmitt's concept of the central domain to analyze the results of the textual analysis, which was conducted in the previous section. Before that, the study introduces the Carl Schmitt's concept to make following analysis accessible to a reader. After that, the study incorporates the concept of the central domain into the analysis of the Islamic clauses. The study's aim in employing the concept of the central domain is twofold. First, the study argues that establishing the liberal-Islamic model of constitutionalism as a type of wording is important in the long run. Second, the study explains how the preservation of the religion as central value influences the dynamics of the public/private distinction by determining its internal rationale.

Carl Schmitt is a controversial scholar because of his anti-liberal work and his association with NAZI. Therefore, the employment of Carl Schmitt is limited to his essay " The Age of Neutralisations and Depoliticizations ", and it divorced from other work of Schmitt.

Some scholars believe his work to be important for liberal constitutional theory because it offers critical analysis of the liberal constitutionalism.[130] That makes his work, even if to someone who does not accept his conclusions, to be insightful and relevant to the study of a liberal constitution. Put simply, Carl Schmitt addresses questions which are usually ignored by liberal thinkers, and these questions have a normative nature.[131] The

[130] Carl Schmitt and the Paradox of Liberal Democracy, Mouffe, Chantal 21.
[131] Controversies over Carl Schmitt: A Review of Recent Literature," *The Journal of Modern History*, 77 (2): 357–87.

study finds his concept of the central domain to be relevant to the debate over Islamic constitutionalization, especially for the analysis of the effect of wording an Islamic clause. Since the study argues that the dynamics of the public/private distinction in liberal and Islamic jurisprudences is controlled by different central values and generates different internal rationales, the concept of the central domain is parallel to the central value. Therefore, Schmitt's concept makes the argument of this chapter more accessible. This chapter explicitly argues that liberal-Islamic model of constitutionalism is questionable because it unconsciously tries to have to central values and rationales. Also, the study argues implicitly that the liberal-Islamic model needs to acknowledge an understanding of the normative, specifically the factors that control the meaning of a limited government.

Carl Schmitt's Central Domain:

In his essay " The Age of Neutralisations and Depoliticizations," Carl Schmitt says: "If a domain of thought becomes central, then the problem of other domains are solved in terms of the central domain- they are considered secondary problems whose solutions follows as a matter of course only if the problems of the central domain are solved." Schmitt argues that there is always a central domain influence human understanding of their world. For example, within a central economic domain, progress is defined as economic progress. Also, this means the state's main task would be regulating or deregulating in favor of the economic progress.[132] A central domain, according to Schmitt, influences a state's behavior and priorities. In addition, Schmitt notes that any existential questions or issues would be subject to the logic of the current central domain. To illustrate, the existential question in

[132] Benjamin A. Schupmann, *Leviathan Run Aground: Carl Schmitt's State Theory and Militant Democracy*, 2015, 69-70 p.

the 16th century would be solved by theologians. Schmitt extends this to the central domain.[133] Accordingly, Carl Schmitt's concept of the central domain is critical to a state's function, and by default to the amount of power a state should have to serve its central domain.

Schmitt's concept is relevant to the study's discussion of the public/private distinction and the following discussion of the wording process of an Islamic clause as follows. The study, in examining the public/private distinction in both liberal and Islamic jurisprudence, concludes that each jurisprudence has a central value that influences the dynamics of the public/private distinction. In the Islamic jurisprudence and according to the reflection on the doctrine, the preservation of religion is central to a state's role. In addition, the 19th century literature stresses the positive role of a state in preserving religion. On the other hand, the liberal jurisprudence is centralized around people's freedoms, and the shift from classic liberalism to modern liberalism does not affect the central domain, but instead it affects the role of the state to play positive role in protecting freedoms. Put simply, a central domain or a value would influence the dynamics of the public/private distinction. This influence is the internal rationale.

According to Carl Schmitt's concept, a liberal-Islamic model of constitutionalism is impossible, but this study disagrees. While the study accepts Schmitt's insights, the study does not totally accept his conclusion. A constitution that incorporates liberal rights and Islamic clauses is a constitution with two central domains. This duality is the reason of

[133] Benjamin A. Schupmann, *Leviathan Run Aground: Carl Schmitt's State Theory and Militant Democracy*, 2015, http://search.proquest.com/pqdtglobal/docview/1640764232/abstract/19362208A4B4896PQ/1 (last visited Sep 7, 2019).

anti-constitutionalization of Islamic law because the possible tension between the liberal rights and Islamic clause is the source of their concerns. The supporters do not acknowledge the possibility of this conflict explicitly, but they do acknowledge the tension, implicitly, by underscoring constitutional courts' role in maintaining the harmony. The study takes it from here to argue the importance of the wording to ensure that a constitution would be able to serve its liberal end.

The study agrees that it is possible to have a constitution serving a liberal purpose, and at the same time, it incorporates an Islamic clause, but not by attempting to centralize Islamic and liberal concepts in one constitution. However, the study argues that the wording of an Islamic clause is a fundamental step toward realization of liberal-Islamic model of constitutionalism. The study assumes that a constitution drafter's choice between central Islamic clauses or non-central clauses will have an impact on the role of a constitutional court. A constitutional court itself as well as and its interpretation will be affected by the wording of Islamic clauses. The effect of the drafters' choice will be inevitable when Islamic law (a majority demand) comes to be in conflict with liberal values. At a moment of conflict, a constitutional court should be able to safeguard constitutional rights. However, the incorporation of a central Islamic clause would make it difficult, or impossible for the court to play its role of keeping the harmony between the liberal and Islamic clauses. That does not mean the wording is only important in regard to court function. The wording is a fundamental constitutional choice.

In other words, supporters of Islamic constitutionalism should be aware of the importance of wording choice and their effect on the liberal-Islamic model. There are three main types of Islamic constitutionalism. In brief, the central Islamization incorporates

Islamic law to be the main or supreme source of the legal regime. The non-central Islamization incorporates Islamic law to be one of the sources. The last one is the incorporation of Islam to be just a state's religion. Applying Schmitt's concept to them indicates that the central incorporation of Islamic law tends to put Islamic law superior to any element of a constitution. The non-central approach leaves the door open to all the possibilities, but it does not centralize or give a supreme role to Islamic law. The state religion clause seems to give less role of Islamic law in the legal regime than the other two models.

The study finds Schmitt's concept appeals more to the central role of Islamic clause. Therefore, the study argues that at in a moment of conflict between Islamic values and liberal rights, a constitution that places Islamic law to be supreme would put the constitutional court in front of one choice (Islamic principles). The moment of conflict is inevitable according to this study's analysis of the public/private distinction and Abu Zayd's case. The court's interpretation would be limited by the Islamic internal rationale and central value. In such a case, the court would find it impossible to establish an argument in favor of liberal end. The court ruling in favor of the Islamic internal rationale is a problem for the model in two ways. First, the court's main function within this model is to prevent contradictory interpretation. Second, since the Islamic clause represents a majority demand, the court turns to play the role of enforcer of the majority will instead of a counter majoritarian institution.

The study does not limit the influence of the wording of a clause to constitutional courts' role or function, but it asserts that the wording of an Islamic clause also influences philosophical debates about a constitution and formation of public policy. Noah Feldman

states that incorporation of Islamic law as a source of law will have a direct impact on the philosophical question about the nature of the state.[134] Feldman's point is that incorporating an Islamic clause, as the Islamist movements demand, subjects constitutional debates to Islamic values.[135] In addition, in the Arab world, the Islamic movement(s) may still enjoy the majority position, but they are not alone. Among Arab intellectuals and politicians, there are variety of ideological positions.[136] In that diverse context, with a central Islamic clause, the political arena is governed in accordance with the Islamic rationale.

Liberal-Islamic constitutionalists have incorporated Islamic law in different fashions, as categorized in the previous section. Most of the studies of Islamic constitutionalization do not say much about the effect of the wording of a clause on the harmony of the liberal and Islamic aspects. This study, through employing the central domain idea, suggests that wording serves to place one prior to the other, and this will affect a constitutional court's interpretation whenever there is tension between the liberal and Islamic one. A placement of liberal clauses as central clauses should be at the very interest of constitutional drafters because placing Islamic law as the central domain will have two unwanted results from a liberal democracy prospective. First, it may turn the constitutional court from a counter majoritarian institution to be enforcer of the majority. Second, the domination of Islamic law may lead to extreme or contradictory interpretations of Islamic law.

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[134] Feldman, *supra* note 109 at 444–446.
[135] *Id.* at 444–446.
[136] I distinguish between a Muslim and Islamic. The first encompass someone's religion, but not his political affiliation. The later is political.

IV) Chapter Three and Final Conclusion:

Chapter three questions the feasibility of the liberal-Islamic model of constitutionalism because of the internalization effect of an Islamic clause, which creates a tension between liberal and Islamic norms. The model is built upon the shared belief of limited government. Along with that, the model is supported by a constitutional court to ensure the harmony between the Islamic clause and the rest of the clauses. The study explains first how an Islamic constitutionalization internalizes a central Islamic value and internal rationale, which influences a constitutional interpretation. The study asserts that the wording of an Islamic clause determines the level of internalization, and it questions the feasibility of the model under a central Islamic clause more than other clauses. Then, the study discusses the effect of Islamic internalization in accordance with Carl Schmitt's concept of central domain. While the study believes the model of liberal-Islamic constitutionalism is not capable of achieving its promise, the study suggests two points to enhance the literature on Islamic constitutionalism.

The paper suggests two things related to the arguments and points of this study. First, the study of Islamic constitutionalism or constitutionalization should be directed more toward normative questions more than a mere comparison. Second, in constitutional design, the scholarship should give more weight to the wording of an Islamic clause considering its internalization effect.

The tendency of comparison in the literature of Islamic constitutionalism affects the possibility of a normative understanding of Islamic jurisprudence, which important to understand Islamic constitutionalism and constitutionalization. The comparison limits

constitutional design to liberal constitutionalism and its universal assumption. The rules of Islamic jurisprudence and the rules of liberal jurisprudence are products of reasoning and rationale. Thus, the comparison does not go beyond comparing the product of Islamic reasoning to liberal notions and norms to decide on its compatibility. Accordingly, this does not enrich the literature to be informative for a constitutional design process. Also, this does not allow for a better understanding of the production process and the reasoning that surrounds the process of making rules in Islamic jurisprudence.

A careful look at the 19th-century literature may support the study's argument against a comparison approach. A comparison may be suitable for sample questions, and it can be used in a pure comparative study. However, the comparison approach is not worth for normative questions of jurisprudence. The 19th century literature of Islamic constitutionalism summed the European experience of constitutionalism into political institutions, and it did not consider the metaphysics behind the political institutions. Probably, the 19th century literature was motivated by the lack of a mechanism to hold a ruler to the theoretical restrictions. Therefore, the literature followed a comparative method to position these institutions within the Islamic world. For example, scholars have made an analogy between premodern Islamic institutions and modern European institutions. That prevented Islamic schoolers from realizing, for example, the question of citizenship as a core concept to build a modern state. The dominance of comparison in Islamic constitutionalism literature stands in the way of building informative literature of Islamic constitutionalism, and this is not limited to English sources.

The second point the study wants to direct attention to is the wording of an Islamic clause. The study argues that the wording of an Islamic clause determines the

internalization level of Islamic normative theory. Along with that, the study assumes the dependence of the liberal-Islamic model on structuralist constitutional interpretation, and because of that, the wording is significant to create the base of a structuralist interpretation. The centralized clause, as explained by Carl Schmitt's concept of central domain, is not allowing for a structuralist interpretation. On the contrary, it frames the constitution with an Islamic normative and by saying that a constitutional clause is interpreted following the Islamic clause.

While the study acknowledges that it is not easy to change the wording of a clause from central to less than that, it believes there is something else that can be done to ensure a structuralist interpretation. In constitutional drafting, a drafter may add some clauses to control the effect of the Islamic clause. For example, a constitution may include a clause ensuring the equality of citizens regardless of gender or religion. A clause like that may minimize the risk of a centralized clause to the model. Another way, a drafter may consider, is to centralize individual rights explicitly in the preamble and whole constitution.