

A REVISIT TO ISLAMIC INTER-POLITY LEGAL THEORY

*Salar Abbasi**

Abstract: This article delves into the jurisprudential and legal theory aspects of the religion of Islam in regard to inter-polity laws and relations. The conceptualisation of Islamic inter-polity commands and laws follows a bright line criterion, for it clearly defines non-Muslim polities and people, categorises them, and commands Islamic polity's approach in regard to non-Muslims in unequivocal terms. The approach of this article is neither polemic nor protectionist; though it indeed is critical. To recognise veneration of an ideology is not tantamount to discrediting or hampering critical explorations about it, and Islam is not an exception. The concern of this article is to shed light on fundamental pillars upon which Islam's inter-polity commands are formed and textually reinforced as being legally unquestionable and intrinsically legitimate. The discourses through which the Islamic inter-polity legal theory is scrutinised; in this piece, are the following: intrinsic legitimacy of the territorial and ideological expansionism of Islam, and Islam's 'group identity' politics in its private and public laws under the notion of 'Ummah' or Islamic community.

A. INTRODUCTION

1. *An overview of the European perception of Islam*

The primitive history of the European interpretations of Islamic laws and jurisprudence was primarily polemic and tainting, and minimally based upon toleration, and very rarely, veneration. The polemic literature took place with the religious intention to bolster Christianity and defeat the ideological surge of Islam in Europe.¹ As Michael Frassetto emphasises, the history of the interpenetration of Islam and Christianity is primarily based upon hostile

*Alexander von Humboldt post-Doctoral Fellow at Ludwig Maximilian University of Munich, Faculty of Law, 'Leopold-Wenger-Institut für Rechtsgeschichte'. Visiting Professor of Law at Universidade Catolica Portuguesa, Lisbon and Porto Faculty of Law. Ph.D (Universidade Catolica Portuguesa), M.A. in Law (University of Isfahan, Iran), B.A. in Law (Urmia University, Iran).

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¹ See Noel Malcolm, *Useful Enemies: Islam and the Ottoman Empire in Western Political Thought, 1450-1750* (OUP 2019) 30-57.

interactions, polemic, and warfare.² The inter-polity outbreak of Islam had not been tangibly felt until its invasion of ancient Persia in the mid-seventh century which paved the way for a later clash of ideologies between Muslims and Christians through Byzantium.³ From the beginning, Byzantine theologians tried to confront Islamic surge, and '[they] constructed detailed refutations of Islam, out of which some account of Muslim belief and practice necessarily emerged'.⁴ Given this, the initial encounter of Christian theologians and religious scholars with Islam was aimed at tainting concepts of Islam and seriously questioning its credibility.⁵ Such a confrontational approach prevailed throughout centuries in the Levant,⁶ and Spain as well. However, Byzantium, and later Southern Europe, did not manage to fully intercept the Muslims' inter-polity conquests and territorial expansionism.⁷ Islam had promised its commanders and soldiers victory irrespective of the result of the war, or whether or not they were killed on the battlefield if they participate in holy wars of Islam with non-Islamic polities; if they were killed, they would have uninhibited access to women, foods, drinks, and nature in paradise,⁸ and if they survived wars, they were legally and morally entitled to claim ownership over booties from conquests,⁹ and increase their wealth.¹⁰

Such territorial and military expansionism had largely been chaperoned with the spread of the religion of Islam among people of conquered lands. Therefore, Christian theologians had to constantly flesh out refutational arguments against Islam.¹¹ These refutations were mostly predicated on Prophet Mohammad's personality, depicting him as an 'impostor' religious leader who lies and deceives his people for his greed for political and military power.¹² Among these, the claim on Prophet Mohammad's political aspirations remained more convincing among Christian theologians at the time. To put it in Noel Malcolm's terms:

² See Michael Frassetto, *Christians and Muslims in the Middle Ages: From Muhammad to Dante* (Lexington Books 2020). See also Nora Berend, 'Christians and Muslims in the Middle Ages: From Muhammad by Michael Frassetto' (2022) 33(1) *Journal of Islamic Studies* 111, 112.

³ See Albert Hourani, *A history of the Arab peoples: Updated edition* (Faber & Faber, 2013).

⁴ Malcolm (n 1), 30.

⁵ See *ibid.*

⁶ Eastern Mediterranean region of the Western Asia.

⁷ See Maurits Beger, *A Brief history of Islam in Europe: Thirteen Centuries of Creed, Conflict and Coexistence* (Leiden University Press 2014).

⁸ For instance, in various verses in Quran, true believers of Islam are promised of women in the heaven: *Sura Baqara* (verse 25), *Sura Toor* (verse 20), *Sura Vaghe-e* (verses 22-23), *Sura Rahman* (verse 58), among many others.

⁹ *Koran, Sura Al-Anfal*, Verse 69: 'So consume what you have taken of war booty [as being] lawful and good, and fear Allah. Indeed, Allah is Forgiving and Merciful'.

¹⁰ See Fred Donner, *The Early Islamic Conquests*, vol 1017 (Princeton University Press 2014).

¹¹ See Malcolm (n 1).

¹² See Malcolm (n 1), 32.

[T]he dominant idea, from Byzantine writers such as John of Damascus and Niketas onwards, was that [Prophet Mohammad] was driven by personal ambition of a more or less political kind: it was known, from the Koran itself, that he gathered a large popular following, becoming a military and political leader, so it was assumed that his actions in proclaiming a new religion had all been aimed at winning the obedience of the people.¹³

Christian theologians started learning and translating Quran in the beginning of the 12th century into Latin at the request of the Abbot of Cluny, Peter the Venerable, that is believed to be the first Latin translation of the Quran.¹⁴ The majority of the medieval and early modern interpretations afterwards portrayed Islam as the religion of ‘sword’, violence, and severe punishments for questioning it, with logical argumentation at the margin.¹⁵ However, rarely did some basically neutral interpretations emerge, especially by authors who visited and lived with Muslims of the Ottoman Empire, praising certain virtues in Islam mostly of social aspects, such as respecting and helping the poor, collective worship, sobriety in social manners, and social brotherhood¹⁶ The accounts of historical figures like Johann Schiltberger (1380-1440) and Gregory of Hungary (1422-1502), who experienced living with Ottoman Muslims and venerated Islam, together with adumbration of the Ottoman Empire as a world military power, catalysed the need for the adoption of the ‘toleration’ approach toward Islam in Europe. The toleration approach, to a large extent, was the product of economic, commercial, and military revival motives, which gradually, mostly in recent centuries, became a building block for a more profound interpenetration of Islam and Christianity.¹⁷ However, it is worth noting that European Christian power-holders used various tactics to cope with the Islamic influence of the Ottoman Empire in Europe. For instance, in a letter addressed by Pius II to Sultan Mehmet in 1461, the Pope invited the Sultan to convert to Christianity, and in return, benefit from the official European recognition of his rule over the Greeks and the East. It was addressed by Pius II that if Imam becomes a Christian, ‘we (Christian power-holder religious aristocrats) will call you (Imam) ruler over the Greeks and the East; what you now hold by force and injustice, you will rightfully possess’.¹⁸

¹³ *ibid.* Also, see Adel Theodor Khoury, *Polémique Byzantine Contre l’Islam: VIIIe-XIIIe s.*, cited in Malcolm.

¹⁴ See Thomas E Burman, ‘Tafsīr and Translation: Traditional Arabic Qur’ān Exegesis and the Latin Qur’āns of Robert of Ketton and Mark of Toledo’ (1998) 73(3) *Speculum* 703. Also, see Malcolm (n 1), Chapter II.

¹⁵ For such an interpretation, see, for instance, Joannes Boemus, *Omnium Gentium Mores, Leges & Ritus* (Excudebat Ioannes Barbous 1735), cited in Malcolm (n 1), 34.

¹⁶ See Norman Daniel, *Islam and the West: The Making of an Image* (Oneworld 1993).

¹⁷ See for instance, Maribel Fierro, ‘Spanish Scholarship on Islamic Law’ (1995) 2 *Islamic Law and Society* 43.

¹⁸ Pius II, *Epistola*, 12–13, cited in Malcolm.

From the inter-polity relations perspective, European ‘exclusionism’ toward the Ottoman Empire was the main approach to hinder expansions of Islam in Europe. Following the medieval view of Christianity in regards to Islam, which rose out of the hostile and belligerent encounter of Islam and Christianity particularly in Crusades wars,¹⁹ Islam and Islamic state remain conceptually outside of the zone of the European community of nations—before and after the Treaty of Westphalia in 1648.²⁰ However, this exclusion was moderated through the inclusion of the Ottomans in the Concert of Europe in 1856, which was still subject to foreign capitulatory rights²¹ that were not abolished until 1924.²² The modern history of the Western interpretations of Islamic laws and jurisprudence has to a considerable extent been based upon international and socio-political inclusion of Muslims, and veneration of Islam and its religious rituals in public particularly under the umbrella principle of equality of all human kinds of any race and religion in the Universal Declaration of Human Rights (1948).²³ This has contributed greatly to the progress toward a more inclusive and humane world order and politics.

2. *The main approach of the article*

From the news of the happenings in the world, it is quite clear that there is ongoing disaccord and contradiction between norms and commands of *Sharia* law and those of modern international law and relations. Human rights concerns in the Islamic Republic of Iran,²⁴ women’s right in Saudi Arabia,²⁵ serious humane and human rights concerns in Afghanistan after Taliban regime took over the country, are indicative of the Islamic struggle to function in line with liberal, democratic and certain universal human rights principles,²⁶ although some authors might be more optimistic in this regard.²⁷ While it makes sense to seek pragmatic solutions to balance the interests of the Islamic states, and convince or compel them to conform, at least to a defined degree, to universal and transnational norms and human rights principles in cases of contradiction with those of Islam, the question is whether such a compromise would

¹⁹ See Jonathan Philips, ‘The Crusades: A Complete History’ (2015) 64 History Today.

²⁰ See Majid Khadduri, ‘Islam and the Modern Law of Nations’ (1956) 50 American Journal of International Law 358, 362.

²¹ See for instance, Paul J Magnarella, ‘East Meets West: The Reception of West European Law in the Ottoman Empire and the Modern Turkish Republic’ (1993) 2 Journal of International Law and Practice 281.

²² See Khadduri (n 20), 367.

²³ Universal Declaration of Human Rights, 1948. See for instance, Preamble and Article 2.

²⁴ See Kenneth Katzman, *Iran: Politics, Human Rights, and US Policy* (Congressional Research Service Washington United States 2017).

²⁵ See Sifa Mtango, ‘A State of Oppression-Women’s Rights in Saudi Arabia’ (2004) 5 Asia-Pacific Journal on Human Rights and the Law 49.

²⁶ See for instance, Khadduri (n 20), 367.

²⁷ See for instance, David L. Johnston, ‘Islam and Human Rights: A Growing Rapprochement?’ (2015) 74 American Journal of Economics and Sociology 113.

be everlasting²⁸ and conceptually legitimate from the perspective of the Islamic state. This article aims at delving into the legal theory aspects of *Sharia* law in regard to inter-polity laws and relations in order to reveal certain dynamics of the juxtaposition of *Sharia* law with non-Islamic counterparts on the international plane—from the perspective of the Islamic state. In other words, the main concern of this article is to shed light on fundamental pillars upon which Islam's inter-polity commands are formed and textually reinforced as being legally unquestionable and intrinsically legitimate.

Islamophobia, in any form and to any degree, is appalling, divisive, and parcel of an anti-humane political mandate. However, this does not connote the remonstrance of any substantial and critical scrutiny of experts—Muslim or non-Muslim—about Islamic commands and rules with or without reference to the West. To recognise veneration of an ideology is not tantamount to discrediting or hampering critical explorations about it, and Islam is not an exception. This article revisits certain technicalities of the Islamic inter-polity legal theory in order to shed light on deep-seated conceptual incongruence between legal theories of two very different spectrums; Islamic and modern international. En route to this, in Part B, the intrinsic legitimacy of Islamic commands in regard to territorial and ideological expansionism is discussed. In Part C, the notion of *Ummah* as the theoretical backbone of the Islamic 'group identity' politics in inter-polity laws is reconsidered. And in Part E, the conclusive remarks of the article is put forth.

B. INTRINSIC LEGITIMACY OF EXPANSIONISM IN ISLAM

The word 'Islam' in the Arabic language connotes absolute submission or surrender to the will and command of God.²⁹ In this definition contains two grounding maxims of Islam; first, Islamic rules—whether perceived through the explicit wording of Quran or other resources of interpretation—are the will of God; and second, human beings should submit themselves, without any degree of hesitation or question, to the will of God. In Islam, rules and commands are deemed inherently legitimate.³⁰ Quranic verses are believed, by Muslims, to be the direct wording of God, and therefore, absolutely unquestionable.

1. The situation of rational reasoning and wisdom in Islamic jurisprudence

²⁸ For a discussion on the 'temporality' of the inter-polity agreements of the Islamic states with international counterparts, see Khadduri (n 20).

²⁹ For a more detailed discussion about the meaning of 'Islam', See Karen Armstrong, 'The True, Peaceful Face of Islam' *Time Magazine* (United States, 1 Oct 2001) 23.

³⁰ See Noel James Coulson, *A History of Islamic Law* (Routledge 2017). See also, Joseph Schacht, 'Islamic Law in Contemporary States' (1959) 8 *American Journal of Comparative Law* 133.

Here the position of rational reasoning and human wisdom (*Aql*) is of critical importance in understanding Islamic legal theory, and *Sharia* law in general. Rational reasoning (*Aql*) in Islam never amounts to the degree of the absolute credibility of the will of God, and it is valid—as an interpretive resource of the rules of Islam—only if it does not contradict Quran and *Sunnah* (the words, behaviours, and practices of Muhammad the prophet), which are the first two major resources of Islamic rules and commands in the hierarchy of resources in Islamic jurisprudence; and *Ijmaa* (consensus among Muslim elites on a particular matter).³¹ It has been argued by some scholars that since *Aql* is a jurisprudential resource of *Sharia* law, it is therefore indicative of the credibility of common sense and rational reasoning in Islam.³² However, it is crucial to note that, as mentioned earlier, *Aql* remains the inhibited jurisprudential resource, and its applicability is subject to its accordance with Quran and *Sunna*.

Given this, common sense and rational reasoning, under Islamic jurisprudence, appear as an auxiliary resource, and function merely in the case of the lack of certainty in a given jurisprudential inquiry, in Quran and *Sunna*, and yet again in this case it should not contradict with other rules and maxims already elicited through Quran and *Sunna*. This is a maxim in Islamic judicial review that a Muslim judge under an Islamic state should find the decree of the case brought before him from within the hierarchy of resources under Islamic law. First, he should seek for it in the explicit wording of Quran, and if not found, then *Sunnah* through various resources like *Hadith* (the collected narrations of traditions of the Prophet Mohammad based on his words and deeds),³³ and if not found, then *Ijmaa* (consensus among Muslim elites on a particular matter), and if not found, then *Aql* or rational reasoning of the Muslim judge (*Qadhi*).³⁴ And yet again, as mentioned earlier, the Muslim judge should necessarily note that his rational reasoning should not be in contradiction with any Islamic command and maxim reverberated in Quran, *Sunnah*, and *Ijmaa*.³⁵

Quran itself is quite explicit and clear in cases in which a given Islamic maxim or command might appear, to some, questionable by rational judgment. It responds, for instance in verse 216 of the *Sura Al-Baqara*: ‘Warfare has been prescribed for you, though it is repulsive

³¹ See Ahmad Hasan, ‘The Sources of “Fiqh”: A General Survey’ (1990) 29 *Islamic studies* 109.

³² See for instance, Aguswan Rasyid and others, ‘What AL-Quran Say About’ *Aql*’ (2020) 7 *European Journal of Molecular and Clinical Medicine* 228. Also, see Hasan (n 31).

³³ For work on *Hadith*, see Jonathan AC Brown, *Hadith: Muhammad’s Legacy in the Medieval and Modern World* (Simon and Schuster 2017).

³⁴ For a detailed discussion on auxiliary resources such as Qiyas, Ijtihad, Istihsan, Istidlal, Isislah, Istidlal, See Farooq A Hassan, ‘The Sources of Islamic Law’ (1982) 76 *American Society of International Law Proceedings* 65.

³⁵ See A-Shaikh Hurr-al-Amoli, *Wasail O-Shia-Volume 27* (in Arabic).

to you. Yet it may be that you dislike something, which is good for you, and it may be that you love something, which is bad for you, and Allah knows and you do not know'.³⁶ The last statement in this verse—God knows and you do not know—is the supernatural grounding for the direct command of God upon human beings to ‘surrender’ unquestionably and unwaveringly to Islam even when doubt is cast in mind.³⁷ Quran’s explicit wording (*Nass* in Arabic) connotes a theological statement which is absolutely, substantively, and unquestionably right.³⁸ And this is—in addition to the *Sunnah*—where rational reasoning falls short of credibility. For example, the rules about inheritance and hierarchy of heirs (*Irs*)³⁹ and retaliation in kind or retributive revenge⁴⁰ (*qisas*)⁴¹ are among rules that are explicitly elaborated in Quran’s wording (*Nass*), and no rethink, question, or doubt is permitted in such *Nasses*.

Utterance of any rational scepticism, by a Muslim, on the principal groundings of Islam (Pillars of Islam) and Quran has been criminalised under Islamic criminal law from the very advent of Islam for the crime of heresy. In addition to the public utterance of the Muslim, his or her public demeanour indicating his or her disbelief and exit from the religion of Islam forms the *actus reus*⁴² of the crime of heresy in Islam. This crime is called *Irtidad* (heresy) under Islamic law literally meaning apostasy or abjuration from the religion of Islam. The five pillars of Islam are, according to the *Sunni* faith: the profession or an oath of belief in Islam (*shahada*), prayer (*salat*), alms (zakat), fasting (*sawm*), pilgrimage (*hajj*). And according to the *Shia* faith: monotheism or belief in the oneness of God (*towhid*), belief in the inherent legitimacy of God’s justice (*adl*), prophethood (*Nubuwwat*), succession to Muhammad (*imamat*), and belief in the day of resurrection (*Ma’ad*). The *Nass* (the explicit wording) of these pillars are primarily conceptualised in Quran, and any Muslim casting doubt on credibility of Quran publicly—or pertinaciously in a private gathering—will be subject to a criminal trial under a given Islamic state for the crime of heresy.

³⁶ Quran, *Sura Al-Baqara*, verse 216.

³⁷ Other example of such a statement in Koran is: *Sura Ale-Emran*, verse 232: ‘You are the very ones who argue about that of which you have knowledge. But why do you argue about that of which you have no knowledge? And Allah knows and you do not know.’

³⁸ See in general, Fikret Karcic, ‘Textual Analysis in Islamic Studies: A Short Historical and Comparative Survey’ (2006) 45 *Islamic studies* 191.

³⁹ Quran, *Sura Nisa*, verses 11, 12, 19, 176, and *Sura Baqara*, verse 233.

⁴⁰ See MuDIN CSL_CITATAwwā, *Punishment in Islamic Law: A Comparative Study* (American Trust Publications 1982).

⁴¹ Quran, *Sura Baqara*, verse 179.

⁴² The core element of criminal liability is some form of prohibited conduct. Usually this prohibited conduct is reflected in a wrongful act. Identifying an act is therefore a key task for the prosecution. See for instance, in William Wilson, *Criminal Law* (Pearson UK 2014).

The categorisation of crimes under Islamic law is formulated based upon the sort of punishment perpetrator would receive.⁴³ *Hadd* punishments are those of which their degree, sort, and administration are explicitly ascertained in *Fiqh* (Islamic jurisprudence) or the Quran itself, and the judge of Islamic law (*Qadhi*) has no room to verdict flexibly unless it is allowed in the very definition of a *Hadd* crime and its punishment explicitly in the Quran or *Fiqh*, and the judge should verdict as it is envisaged in *Fiqh* or Quran.⁴⁴ It is believed, by Muslims, that *Hadd* crimes are to a very large extent and primarily crimes against God, and they are important to the degree to which God itself has criminalised and envisaged the punishment for it either in the *Nass* (explicit wording) of the Quran, or these crimes are inferable by the Muslim elite (*Faqih*) from within the jurisprudence of Islam (*Fiqh*). As a result, orally questioning the integrity of the *Nass* of Quran in public or demonstrating apostasy or abjuration from Islam in public demeanour is a grave crime under Islamic law that brings about the death penalty.

2. Expansionism of Islam: an unquestionable obligation?

The inquiry follows: does expansionism of Islam—by any means and in any form—hold a *Nass*-oriented absolute obligation in Quran and under Islamic law? If the answer is yes, then no rationale could refute that, and any abjuration from it equals a violation of Quranic *Nass*. This provides the Muslim elites, Imams, preachers in Mosques, believers of Islam with robust conceptual means to rely on the intrinsic legitimacy and unquestionability of the *Nass*, and that the necessity to expand Islam is the explicit *Nass*, and any disobedience—in words or behaviour—from it is a particular sort of crime by which the perpetrator would be sentenced before an Islamic trial for the crime of heresy or apostasy from Islam.

In response to the inquiry above, there are two explicit verses in Quran that specify and decode the main mission of Islam and its prophet, which is to expand the religion of Islam to a degree where it encompasses and prevails over other religions of other territories. This mission, which is a basic pillar of Islamic inter-polity relations ideology, is reiterated twice in Quran with the exact same wording; In the verse 33 of the *Sura Tawbah* and verse 9 of the *Sura Saf* of Quran, it maintains: ‘It is He [God] has sent His Apostle (Prophet Mohammad) with the guidance and religion of truth that he would make it prevail over all religions, though the polytheists [disciples of other religions] should be averse’.⁴⁵ Given this text, one of the intrinsically legitimate reasons—from an Islamic inter-polity law perspective—to ignite a war

⁴³ See in general, Mohammad Hashim Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation* (OUP 2019).

⁴⁴ Erika S Fairchild and Harry R Dammer, *Comparative Criminal Justice Systems Belmont* (Wadsworth Publishing 2000) 41.

⁴⁵ Aliqoli Qarai, *The Qur’an: With a Phrase-by-Phrase English Translation* (Islamic College Press 2004).

by a Muslim state against a non-Islamic territory could be to make Islam prevail over other religions of other territories even if the people of that territory combat against it.

It is quite crucial to note that there is a chain of verses in Quran supporting such an inter-political normative maxim which is, as mentioned above, explicitly commanded in verses 33 of the *Sura Tawbah* and 9 of the *Sura Saf* of Quran. In verse 29 of the *Sura Tawbah* of Quran, it maintains:

[You Muslims] Fight those who do not have faith in Allah [including Jews and Christians] nor believe in the Last Day, nor forbid what Allah and His Apostle have forbidden, nor practice the true religion [Islam], from among those who were given the Book [Jews and Christians], until they pay the tribute out of hand [*Jizyah*], degraded.

In this verse, Muslims are unequivocally commanded to take up sword against non-Muslims—those who were given the Book as in the Jews and the Christians—for the reason of not being and not willing to be a Muslim, unless these non-Muslims pay a portion of their yearly income as a particular tax to the Islamic state (*Jizyah*). And here the theoretical grounding of the legal institution of *Jizyah* is put forth as well. *Jizyah* is a tax paid by non-Muslim Book holders living under the Islamic state (*dhimmis*). In return for this tax, non-Muslim tax-payers are entitled to expect ‘protection, the right to continue practising their religion, and exemption from military service.’⁴⁶ *Jizyah* is a tax defined not on a particular good, land, or service; instead, it is primarily predicated on the ideology or faith of the citizens under the Islamic state.

Protectionists interpret *Jizyah* as a legal institution ensuring the survival of non-Muslims under an Islamic state,⁴⁷ but this argument is conceptually baseless. Based on verse 29 of the *Sura Tawbah* of Quran, disciples of other religions are inferior in the religion-based hierarchical classification of citizens under the Islamic state, and under such a harsh group identity politics of Islam—which will be discussed later in this article—they are subjected to pay *Jizyah* as a compensation for their “intrinsic inferiority”. It is important to note that the revelation of verse 29 of the *Sura Tawbah* upon Prophet Mohammad showed the Prophet’s intention to wage war against the Roman Empire. The reason behind the revelation of this verse (*Asbab ol-Nozul*) was to reveal the religious duty of the Islamic state and its Muslim community (*Ummah*) during wars against Book-holders. Shortly after the revelation of this verse, the *Tabuk* incident took place, which gathered Muslims from all over Mecca to wage a war against

⁴⁶ Jonathan AC Brown, ‘Jizyah’ in the [Oxford] Encyclopedia of Islam and Law, Oxford Islamic Studies Online.

⁴⁷ See for instance, Samaneh Khalilifar and Mohammad Mahmoudpour, ‘The Effect of Jizyah on Zoroastrian Survival and Military Immunity’ (2018) 2 Historical Study of War 69.

the Romans.⁴⁸ It was based upon verse 29 of the *Sura Tawbah* that Prophet Mohammad forced participation of all Muslims in the war to the effect that it is the word of God, and therefore, disobedience of it equals to waging a war against God and his Apostle.⁴⁹

In another verse, Quran specifies and obligates Muslims' duty in regard to non-Muslims who are not Book-holders and they are either atheists or follow paganism which are called *Mushrek* meaning they worship material pagans, not *Allah*. In verse 5 of the *Sura Tawbah*, it maintains: '[B]ut when the forbidden months are passed (over), then fight and slay the Pagans wherever ye find them, and seize them, beleaguer them, and lie in wait for them in every stratagem (of war); but if they repent, and establish regular prayers and practice regular charity (*zakat*), then open the way for them: for Allah is Oft-forgiving, Most Merciful.'⁵⁰ There are four months in which killing of any human being is forbidden under Islam (*haram*). These four months are *Ziqaa'da*, *Zihajja*, *Moharram*, and *Rajab*. Quran obligates Muslims to fight *Mushreks* wherever they find them except in these four months (*Aman* months).

Other important Quranic texts specifying, delimiting, and obligating the approach of the Muslim community toward non-Muslim communities, and also Muslims, who actively commit insurgency or belligerency toward the Islamic state are verses 89 to 91 of the *Sura Nisaa* of Quran. Verse 89 of *Sura Nisaa* maintains: 'They desire that you should disbelieve as they have disbelieved, so that you might be (all) alike; therefore take not from among them friends until they fly (their homes) in Allah's way; but if they turn back, then seize them and kill them wherever you find them, and take not from among them a friend or a helper'.⁵¹ This verse starts with discovering the 'hostile' approach and intention of those in the community of non-Muslims trying to deceive Muslims to commit apostasy, and goes on with shedding light on the importance of the priority of having them converted to Islam (this group is called *Munafeqin*). If Muslims see these non-Muslims on the opposite run—confronting the path of Islam—they are entitled and obligated, under a number of Quranic verses including verse 89 of the *Sura Nisaa*, to wage war and kill.

Verse 90 of the *Sura Nisaa* introduces another group of non-Muslims exempt from the fight and execution commands in Islam. These people are the ones submitting and taking refuge to the Islamic state, and manifesting no hostility toward Muslims, utterly emancipating

⁴⁸ For more details about the Tabuk incident, see Alimohammad Valvi and Somayeh Bakhshizadeh, 'Reviewing Prophet Mohammad's Incentive in Regard with the Preparation of Tabuk Battle' (2017) 18 *History of Islam* 1.

⁴⁹ See Abu Ali Fadhl ibn Hasan Tabarsi known as Sheikh Tabarsi, *Majmaa'-ol-Bayan fi Tafsire-el-Quran-Volume II*, *Sura Tawbah* (in Arabic).

⁵⁰ Qarai (n 45).

⁵¹ *ibid*.

themselves from the people of their origin and their hostile approach toward Muslims. Verse 90 of the *Sura Nisaa* states that:

‘[E]xcepting those who join a people between whom and you there is a treaty, or such as come to you with hearts reluctant to fight you, or to fight their own people. Had Allah wished, He would have imposed them upon you, and then they would have surely fought you. So if they keep out of your way and do not fight you, and offer you peace, then Allah does not allow you any course [of action] against them.’⁵²

The subsequent verse (verse 91 of the *Sura Nisaa*) reaffirms the religious duty of Muslims to wage war and kill those trying to interfere, deceive, and ultimately weaken the Islamic state. Verse 91 of the *Sura Nisaa* maintains:

‘[Y]ou will find others who wish to obtain security from you and [to] obtain security from their people. Every time they are returned to [the influence of] disbelief, they fall back into it. So if they do not withdraw from you or offer you peace or restrain their hands, then seize them and kill them wherever you overtake them. And those - We have made for you against them a clear authorization.’⁵³

In the latter statement of verse 91 of *Sura Nisaa*, ‘clear and complete authorization’ (*Sultan-an Mubina*) is bestowed on Muslims over the blood, booties, and residues of the killed non-Muslim in the battle between Muslims non-Muslims. There has been no doubt cast on the meaning of the *Sultan-an Mubina* among the Sunni and Shia religious elites (*Fuqaha*), and they have all unanimously interpreted *Sultan-an Mubina* in the latter part of the verse 91 of the *Sura Nisaa* as ‘clear and complete authorization of Muslims over existence and wealth of the defeated non-Muslim’.⁵⁴

3. Three potential counterarguments

A protectionist scholar might raise three potential counterarguments that are worth addressing and responding here foremost. Firstly, each verse in Quran has a particular reason of revelation ‘*Asbab-e Nozul*’ or ‘*Shaa’n-e Nozul*’; meaning each verse was revealed following an important incident in the history of Islam.⁵⁵ Therefore, some might comment that the above-mentioned

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ See Abu Ali Fadhl ibn Hasan Tabarsi known as Sheikh Tabarsi, *Majmaa’-ol- Bayan fi Tafsire-el-Quran*, Volume 3, p. 3 (in Arabic). See also, Mohammad Bagher Mohaghegh, *Nemoone Bayanat dar Shaane Nozul Ayat* (In Farsi), English translation: *Sample Guidance in understanding the Reasons behind the revelation of the Quranic verses.*

⁵⁵ See Ali Dashti, Mehdi Akbarnejad and Mohammadreza Hosseininia, ‘The Role of Religious Presuppositions and Precomprehensions in Selecting Narratives Related to the Cause of Revelation (*Asbab Al-Nuzul*)’ (2019) 15 *Journal Studi Al-Qur’an* 155.

verses are each verdict of Quran on a given hostile tribe or polity in its relation to an Islamic state, as in verse 29 of the *Sura Tawbah* in which Prophet Mohammad was planning to wage war against the Roman Empire, and this verse was revealed upon Prophet Mohammad to ascertain the Quranic verdict regarding the Book-holders. This argument falls short of appearing as a jurisprudential justification for the arguably harsh approach of Islamic inter-polity laws in regard to non-Muslim polities. ‘*Asbabe Nozul*’ is by nature a critical explanation – exegetical – rather than a historiographical genre, and as such usually associated with verses that it explicates with general situations rather than specific events, without being limited to a given historical incident.⁵⁶ Based on this, Quranic rules and commands are deemed, among Muslim elites (*fuqaha*) and believers, relevant and effective for all times and races, even if their ‘*Asbabe Nozul*’ connotes a given historical incident. Thus the ‘*Asbabe Nozul*’ argument has no jurisprudential weight, and it is simply indicative of the reason of the revelation of a particular verse with respect to an incident without however restricting its relevance merely to that incident. This is called the ‘eternity, generality, and all-inclusiveness of Quranic laws and commands.’⁵⁷

The second set of counterarguments could be predicated on generic claims of peace in Islam. For instance, regarding the enemies of Islam, verse 61 of the *Sura Infal* of Quran maintains that: ‘[i]f they [enemies of Islam] incline toward peace [submit themselves to Islam and Islamic state], then you [too] incline toward it, and put your trust in Allah. Indeed He is the All-hearing, the All-knowing’.⁵⁸ In the verses mentioned above, Quran obligates the Islamic state to halt war and embrace peacefully in case a troop of enemies submit themselves to Islam and the Islamic state. Therefore, verse 61 of the *Sura Infal* does not contradict the verses expounded above, and it is a reiteration of an Islamic inter-polity maxim which commands stopping war and making peace with enemies who submit themselves to the Islamic state. In other words, if a given enemy of Islamic polity repents and submits itself to Islam, peace is the command of Quran. Thus, the fact that the entirety of verse 61 is commanding peace with repentance is not indicative of a conceptual incongruence with Quranic commands to wage ideological wars against Book-holders, *mushrekin*, and *munafeqin*.

⁵⁶ See Andrew Rippin, ‘The Exegetical Genre *Asbāb Al-Nuzūl*: A Bibliographical and Terminological Survey 1’ (1985) 48 *Bulletin of the School of Oriental and African Studies* 1.

⁵⁷ See Hossein Safareh, Majid Maaref, and Mansur Pahlavan M, ‘Interrogation of Quran’ (2010) 43 *Quranic Sciences and Tradition* 139. See also, Seyyed Zia’aldin Olyanasab and Laila Amiri, ‘The Reasons Why the Quran Is Eternally Fresh and New from the Point of View of Allamah Tabatabaie’ (2015) 2 *Biannual Journal of research in the interpretation of Quran* 131.

⁵⁸ Qarai (n 45).

The third counterargument that protectionists might put forth is the famous verse 256 of the *Sura Baqara* of Quran which maintains: '[t]here is no compulsion in religion: rectitude has become distinct from error. So one who disavows fake deities and has faith in Allah has held fast to the firmest handle for which there is no breaking; and Allah is all-hearing, all-knowing'.⁵⁹ Muslim elites (*Fuqaha*) unanimously agree upon the fact that this verse is a principle in the process of fosterage or educating mostly a youth non-Muslim.⁶⁰ The incipience of the verse begins with the word '*ikrah*' meaning reluctance leading to dislike or even grudge, in '*la Ikrah*'—no reluctance—in perceiving the religion of Islam. *Ikrah* connotes a psychological notion relating to the upbringing of youth. This verse emphasises an educational maxim in the process of convincing a young person in converting to or accepting Islam. The '*asbabe-Nozul*' or the revelation reason of this verse is regarding *Ab-ol-Hussain* of *Ansar* whose son had been deceived to accept Christianity through their interactions with Christian traders from *Sham*—current day Syria—and *Ab-ol-Hussain* wanted—in the upbringing process—his son to accept and convert to Islam by his force and compulsion. Following this incident, God revealed this verse upon Prophet Mohammad to remind the Muslim community, and in particular *Ab-ol-Hussain*, that through '*Ikrah*' his sons might deeply dislike Islam.⁶¹ Therefore, there is no conceptual contradiction between verse 256 of the *Sura Baqara* of Quran, and the ones obligating ideological expansionism of Islam, for the latter verses set the grounding for the Islamic inter-polity norms, and the former highlights a critical psychological fact in the upbringing of the non-Muslim youth by a Muslim guardian.

To summarise this section of the article, with reference to Islamic inter-polity laws and relations, there are two inherently—textually—legitimate maxims; first, the ideological expansion of Islam is a conceptually unmalleable tenet of Islamic inter-polity law, and second, the non-Muslim community of the world—in relation to the Muslim community—are divided into three categories: Book-holders, paganists (*mushrekin*), and those who make effort, by any means, to weaken Islamic state (*Munafeqin*). These groups share one common feature from the perspective of the Islamic state: their hostility toward Islam and the Islamic state is taken for granted. Therefore, they are all considered, according to Islamic inter-polity law, enemies of the Islamic state with different degrees of belligerency and hazard. The Book-holders (verse 29 of *Sura Tawbah*) are not subject to death, but to war with the purpose of convincing them

⁵⁹ *ibid.*

⁶⁰ Abu Ali Fadhl ibn Hasan Tabarsi known as Sheikh Tabarsi, *Majmaa'-ol-Bayan fi Tafsi-re-el-Quran-Volume 1*, 111. See also, Mohammad Bagher Mohaghegh (n 54), 95

⁶¹ See *ibid.*

to convert to Islam, or to pay *Jizya* if they happen to live under the Islamic state, because they are not worshipping pagans, and thus are deemed reconcilable. *Mushrekin* are the absolute ideological enemies of Islam, therefore, Muslims are obligated to kill them and intercept their ideological spread, unless they repent and convert to Islam (verse 5 of *Sura Tawbah*). The third group are the absolute ideological and practical enemies of Islam (*munafeqin*); practical in the sense that they intend to manifest their hostilities to the Islamic state by any means. Islam shows no mercy to this group, and Muslims are deemed to have absolute authorisation over *munafeqin*'s existence and wealth.

C. ISLAM'S 'GROUP IDENTITY POLITICS': REVISITING THE NOTION OF *UMMAH*

1. An overview of group identity politics

Group identity politics connotes a political agenda that is predicated on the identification and promotion of certain group's identifying factors, traits, or ideologies such as race, nationality, social class, and religion.⁶² Such political agenda explains clear policy preferences of public policy-makers and power-holders that are defined en route to the promotion of dignity and pursuit of interests of a particular group. The incontrovertible aftermath of group identity politics is the hierarchical classification of people based upon the identifying factor of the group positioned at the apex of the hierarchy. For instance, if the identifying factor of a group identity politics is a particular race in the hierarchy of the races, consequently, laws, public policies, and decisions should be made in line with the interests of the privileged race, even at the expense of implementing discriminatory measures against other 'inferior' races.⁶³ One of the known examples of such sort of group identity politics was Nazism, which led to the egregious bloodshed of millions in World War II, in particular, genocide against Jews.⁶⁴

The individual is the first encounter with group identity politics.⁶⁵ Group identity politics projects the maxim that individual's collective identity in a particular group or class is his or her most important identifying factor, to the degree to which he or she has the responsibility to advocate the political agenda classifying their group identity at the apex of the hierarchy of groups and classes in the society. Group identity politics is a form of political agenda in which ideologues hold power and determine public policies, and their basic approach is to empower a particular class of people in advance of the individual rights of citizens.

⁶² See Mary Bernstein, 'Identity Politics' (2005) 31 Annual review of Sociology 47.

⁶³ See for instance, Ashley Jardina, *White Identity Politics* (CUP 2019).

⁶⁴ See *ibid.*

⁶⁵ See Kristen Renwick Monroe, James Hankin and Renee Bukovchik Van Vechten, 'The Psychological Foundations of Identity Politics' (2000) 3 Annual Review of Political Science 419.

Group identity politics based upon religion or faith is even more pernicious, for it targets certain groups' collective faith, and deludes them with the belief that their faith or religion is legitimately, unquestionably, and systematically superior in comparison to other religions. Under such a political agenda, laws, public policies, and educational agenda⁶⁶ should also function in pace with the conceptual boundaries of the most 'superior' ideology, and disciples of that ideology would benefit from certain legitimated prerogatives merely for the sake of their "superior" religion. Countries with the Constitution based upon religion-oriented group identity politics have unequivocal provisions and principles engineering hierarchical classification of citizens based upon their religion.⁶⁷ In these cases, group identity politics tend to produce exceedingly accelerated short-term bigotry among the disciples of the "superior" religion, and at the same time, clandestine though deep-seated hostility among other "inferior" faiths or religions.⁶⁸

The subtle issue is that sometimes it is not easy to identify an ideological agenda—particularly when it is a religion—that is promoting certain group-oriented political goals. Since the political ends of a given religion are legitimated unquestionably and transcendently through holy verses, there could be an overwhelming sense of the necessity of veneration of it without however questioning its conceptual reasonableness, and also its congruence with social norms and realities of the present day. Under Islamic legal theory, the religion of Islam is the only provenance in which the historically first constitution of inherently legitimate law took place because they transcended directly from God, fleshed out in the never-changed Quran, and were interpreted through the science of Islamic jurisprudence (*Fiqh*) by Muslim elites (*Mujtahid*). Given this, if the political philosophy of Islam commands the Islamic state and its disciples to advocate and run its ideology-oriented group identity politics, this becomes a duty for the Islamic state and Muslims to abide by it.

2. Islam's group identity politics: the idea of Ummah

Ummah in Arabic refers to the notion of 'nation'. The term nation literally denotes the people living in a defined geography sharing a common national identity, and hence forming a country within specific geographic borders. However, in Islam, the Quranic term *Ummah* is defined

⁶⁶ See Geir Skeie, 'Citizenship, Identity Politics and Religious Education' in Hans-Günter Heimbrock, Christoph Th Scheilke, and Peter Schreiner (eds), *Towards religious competence: Diversity as a challenge for education in Europe* (LIT Verlag Münster 2001) 237.

⁶⁷ See for instance Articles 1, 2, and 3 of the Constitution of the Islamic Republic of Iran—among many examples as such—in which the primary function of the country is defined as promotion of an ideology—the religion of Islam. Constitution of the Islamic Republic of Iran, adopted by referendum on 2 and 3 December 1979.

⁶⁸ See for instance, Joshua Mitchell, *American Awakening: Identity Politics and Other Afflictions of Our Time* (Encounter Books 2022).

based on the ideological identity of Muslim believers—*Aqeedah*—with no geographically determined specification. Therefore, *Ummah* refers to the people who share the group identity of being a Muslim irrespective of the country they live in. Their mission is to be bound by Islamic commands wherever they are, and also, spread Islam in the world through ‘invitation’ (*da’awah*).⁶⁹

From a conceptual perspective, *Ummah* and what it takes to have a greater and stronger *Ummah* comes before and in advance of any legitimacy assessment of the ruling entity and people. In other words, people and the state are tools contributing to the ideological expansionism of Islam. Professor Gibb explains:

[T]he Head of the Umma [the Community of Muslims] is Allah, and Allah alone. His rule is immediate, and His commands, as revealed to Muhammad, embody the Law and Constitution of the umma. Since God is Himself the sole Legislator, there can be no room in Islamic political theory for legislation or legislative powers, whether enjoyed by a temporal ruler or by any kind of assembly. There can be no ‘sovereign state’, in the sense that the state has the right of enacting its own law, though it may have some freedom in determining its constitutional structure. The Law precedes the State, both logically and in terms of time; and the State exists for the sole purpose of maintaining and enforcing the Law.⁷⁰

The word *Ummah* in Quran—in singular or plural—denotes a group of people with the same ideology or religion, without any reference to the geography or polity within which they live. In verse 213 of the *Sura Baqara* of Quran, people of the world were called one *Ummah* until different religions were sent to them—by God—to divide them into different *Ummas* based upon different religions. It maintains:

Mankind were a single community; then Allah sent the prophets as bearers of good news and warners, and He sent down with them the Book with the truth, that it may judge between the people concerning that about which they differed, and none differed in it except those who had been given it, after the manifest proofs had come to them, out of envy among themselves. Then Allah guided those who had faith to the truth of what they differed in, by His will, and Allah guides whomever He wishes to a straight path.⁷¹

⁶⁹ See Khurram Murad, *Da’wah Among Non-Muslims in the West* (The Islamic Foundation 1986).

⁷⁰ Hamilton A Gibb, ‘Constitutional Organization’ in Majid Khadduri and Herbert J Liebesny (eds), *Law in the Middle East* (The Lawbook Exchange Ltd 2010) 3, cited in David A Funk, ‘Traditional Islamic Jurisprudence: Justifying Islamic Law and Government’ (1993) 20 Southern University Law Review 213.

⁷¹ Qarai (n 45).

This religion-based division of people is reflected in various verses and occasions in Quran, such as verse 143 of the *Sura Baqara* which makes it clear to Muslims (*Ummat ol-Islamia*) that they are selected as the exemplary or standard nation (*Ummatan vasata*) instead of Judaism. The revelation reason or (*asbabe nozul*) of this verse followed a struggle among Jews and a Muslim (*Ma'az ibn-Jabal*) in which the Jews claimed their religion was the standard one, and *Ma'az ibn-Jabal* argued the opposite advocating Islam as the standard or exemplary religion. Following this incident, verse 143 of the *Sura Baqara* was revealed upon Prophet Mohammad which explicitly selects the Islamic community (*Ummah*) as the standard nation, and their holy pilgrimage, *Ka'bah*, as the center and paramount pilgrimage (*Qiblah*).⁷² It maintains: 'Thus We have made you a middle nation that you may be witnesses to the people, and that the Apostle may be a witness to you. We did not appoint the *qiblah* you were following, but that We may ascertain those who follow the Apostle from those who turn back on their heels. It was indeed a hard thing except for those whom Allah has guided. And Allah would not let your prayers go to waste. Indeed Allah is most kind and merciful to mankind'.⁷³

The hierarchical classification of nations based upon their religion has unequivocally been endorsed as an unquestionable maxim in Quran. Verse 110 of *Sura Al-i-Imran* maintains: '[Y]ou are the best nation [ever] brought forth for mankind: you bid what is right and forbid what is wrong, and have faith in Allah. And if the People of the Book had believed, it would have been better for them. Among them [some] are faithful, but most of them are transgressors'.⁷⁴ According to this verse—among many other alike verses in Quran—mere Muslimness is an intrinsic criterion and reason for individual and social 'superiority' in comparison to disciples of other religions and ideologies living inside and outside territories of Islamic states. The social aspect of such 'superiority' is a grounding to permit Muslims and Islamic state to hold a social responsibility to question deeds and appearance of citizens of other religions, and preach them or in some cases force them to act and appear in line with Islamic principles and formulas. Verse 104 of the *Sura Al-i-Imran* maintains: 'There has to be a nation among you summoning to the good, bidding what is right, and forbidding what is wrong. It is they who are the felicitous'.⁷⁵

Emotive rhetoric in academic writings regarding Islamic law and history has to a large extent been predicated on Islam's victimhood in inter-polity relations, which remains aloof

⁷² For instance, Makarem Shirazi N, *Tafsir Nemooneh'-Volume 1* (Islamic Books House 1995) 131.

⁷³ Qarai (n 45).

⁷⁴ *ibid.*

⁷⁵ *ibid.*

from truly argumentative reasoning.⁷⁶ The idea of *Ummah* in Islam has been subject to emotive protectionist rhetoric. According to Protectionist literature, the idea of *Ummah* is defined and argued as Islam's all-inclusiveness or 'Universalism' that has been torn apart due to the rise of 'nationalism' since the late nineteenth century, and also the absorption of foreign cultures such as the philosophies of the Greeks, Persian and the Hindus.⁷⁷ However, Islam has its own account of nationalism which distinguishes, elects, and classifies Muslims as superior all around the world, and most importantly, defines such a maxim as a basis for the Islamic world political agenda. Such agenda, as explained in Part B of this article, commands the Islamic state to ignite wars against other territories with the purpose of expansion of Islam, and the history of Islamic inter-polity relations is evidenced by war-creation with the purpose of extinguishing the religion and cultural heritage of the target non-Muslim territory, and replacing it with those of Islam. For instance, there has survived a very limited amount of information about pre-Islamic Persian legal theory, since, after the invasion of Arab Muslims in Persia in the mid-seventh century AD, they eradicated—as part of the ideological expansion of Islam—the religious, cultural, societal heritages of pre-Islamic Persia⁷⁸ that were, to a considerable degree, based upon Zoroastrianism.⁷⁹ Given these, from a theoretical perspective, the idea of *Ummah* is basically a notion legitimising the systemic exclusion of both non-Muslims in Islamic polities, and Muslims in non-Islamic ones. Therefore, *Ummah* appears as a conceptual backbone for a legitimate exclusiveness based upon ideology under Islam, which obviously, has, by any stretch of imagination, no correlation with any definition or interpretation of 'universalism'.

⁷⁶ For such words, see Shabir Ahmed, *The Roots of Nationalism in the Muslim World* (Islamic Book Company 1996). See also, Farooq A Hassan, 'The Sources of Islamic Law' (1982) 76 Proceedings of the ASIL Annual Meeting 65.

⁷⁷ See Hasan (n 31).

⁷⁸ See Joseph Schacht, 'Foreign Elements in Ancient Islamic Law' (1950) 32 Journal of Comparative Legislation and International Law 9.

⁷⁹ Zoroastrianism is one of the oldest living religions in the world, going back to the 2nd millennium B.C.E. It was founded in ancient times by the prophet Zoroaster (Zarathushtra) and continued to be the dominant world religion during the Persian empires (559 BC to 651 AC). During the Sasanian Empire (224-651 AD) which was the last Persian dynasty before the arrival of Islam in Persia, Zoroastrianism became the official religion of the Sasanian Empire and the legitimizing foundation of their rule. The Zoroastrianism's creed has three pillars: good thoughts, good words, and good deeds. Current believers of Zoroastrianism mainly live in Iran, India, and North America.

D. CONCEPTUAL INCONGRUENCE BETWEEN THE ISLAMIC AND INTERNATIONAL LEGAL THEORIES

International law scholarship has dealt with the constitutive theories of international law through different schools of thought. Looking through the lens of the evolution of international legal theory, one comes across the transformation of the old legal formalism that defines law as a doctrinal science and gives law an axiomatic non-instrumental nature,⁸⁰ to the law-and-economics school that bases law on the single axiom of maximising choice.⁸¹ With another lens, one comes across the radical contextualist character of classic legal realism that considers law as a means to respond to practical real-life issues with the centrality of facts and empirical pieces of evidence.⁸² The conceptual influence of the latter has highlighted the role of minorities, non-dominant actors, rapid surge of non-governmental and hybrid organisations, and also the fierce growth of activism in the international plane under the umbrella principles of universal human rights and *jus cogens*,⁸³ particularly, after the dissolution of the Soviet Union. Given such a pluralisation of multilevel international law-making and norm-identification apparatuses, formal approaches to defining international law have proven to be theoretically contrary to the realistic necessities of international law.⁸⁴ Thus, ‘under the overarching influence of globalisation, traditional state-centric interpretations on international law appear to be dysfunctional’.⁸⁵ Given these, international law scholarship has moved toward theories that meet instant custom-formation, plurality, and the fluidity of international law.⁸⁶ However, international law scholar Jean d’Aspremont asserts that ‘the overall liberalisation of the ascertainment of international legal rules has resulted in contemporary scholarly debates in the field of international law turning more cacophonous’.⁸⁷ The actual pluralisation of

⁸⁰ See Victoria Nourse and Gregory Shaffer, ‘Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory’ (2009) 95 *Cornell Law Review* 61.

⁸¹ See Richard A. Posner, *Economic Analysis of Law* (Aspen Publishing 2014).

⁸² See in general, Salar Abbasi, *Democracy in International Law-Making: Principles from Persian Philosophy* (Routledge 2021), ch IV.

⁸³ Article 53 of the Vienna Convention on the Law of Treaties, ‘a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’ The VCLT was adopted on 23 May 1969, and opened for signature on 23 May 1969. The Convention entered into force on 27 January 1980.

⁸⁴ See Benedict Kingsbury and Megan Donaldson, ‘From Bilateralism to Publicness in International Law’, in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer (and Christoph Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011).

⁸⁵ Salar Abbasi, ‘Egalitarian Multilateralism versus Particularism in Multilevel International Law-Making’ (2019) 28 *Journal of Transnational Law and Policy* 23.

⁸⁶ Salar Abbasi, ‘Democracy in International Law-Making: An Unfilled Lacuna’ in *New Zealand Yearbook of International Law-Volume: 14* (Brill Nijhoff 2018), 35.

⁸⁷ Jean d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2011) 3.

international law has dominated to the degree that he endorses that ‘international law is a complex phenomenon that can certainly not be reduced to formal ascertainment mechanisms. In particular, there is little doubt that formal law ascertainment does not suffice to describe the intricate phenomenon of the making of international law’.⁸⁸

Accordingly, custom in international law is also conceptually and intrinsically more of a social and less formulaic weight.⁸⁹ As for a theoretical view toward custom in international law, ‘conventional wisdom in international law holds that the international community has developed a set of definable rules through custom that nations must accept as law’.⁹⁰ Since international law itself lacks a common set of cultural and political backgrounds between its actors,⁹¹ there have been deep criticisms and serious inquiries on how one can identify valid international customary norms and apply them. In detail, in international law scholarship, customary law is deemed as an indeterminate theory of law, ‘not just because its application requires discretion, but because there is no common understanding of how to determine customary norms’.⁹²

It is based upon the above-mentioned identification of the very definition of law that some find law and custom as being inherently interpretable depending on instant societal necessities. Patomaki argues that:

[T]here are always at least some degrees of freedom for interpretation of both law and the relevant social realities. This kind of limited indeterminacy does not always pose any serious problems to the (legitimacy of the) rule of law when legislators, judges and citizens share understandings and values and more or less follow the same legitimate institutional procedures, at least to a sufficient degree.⁹³

Based on this argument, that some have argued that more informal forms of norm-creation, such as the formation of international custom through tacit consent, may sacrifice the values of determinacy at the expense of international social reforms.⁹⁴ This explains why ‘the

⁸⁸ *ibid*, 25.

⁸⁹ See Abbasi (n 85).

⁹⁰ Emily Kadens and Ernest A. Young, ‘How Customary Is Customary International Law’ (2012) 54 *William & Mary Law Review* 885.

⁹¹ See Abbasi (n 85), 151.

⁹² Nicole Roughan, ‘Democratic Custom v International Customary Law’ (2007) 38 *Victoria University of Wellington Law Review* 403, 409.

⁹³ Heikki Patomaki, ‘Rethinking Global Parliament: Beyond the Indeterminacy of International Law’ (2006) 13 *Widener Law Review* 375, 384.

⁹⁴ See Kadens and Young (n 90).

prospects for international custom must be assessed in light of actual experience, not just theory'.⁹⁵

Given the intrinsic realistic interpretability of the jurisprudence of international law, any textualised, axiomatic, and formalistic interpretations of its legal institutions would result in conceptual flaws and practical perplexity. For instance, the definition of the International Court of Justice about 'custom' in international law reflects the dominance of the orthodox approach in today's customary international law but with an explicit centrality of state practice in the wording of Article 38(b) of the ICJ Statute.⁹⁶ The ambiguity of the orthodox conception in regard to the notion of custom in international law provides room for self-interested interpretations on the notion of customary international law. This is why it has been argued that the general orthodox distinctions in mainstream international relations theory have brought about many conceptual flaws in various discourses in this particular field.⁹⁷ As mentioned above, one of the serious drawbacks of this conceptual ambiguity in international law is the notion of 'instant custom' remaining undefined and unregulated under international law. This flaw, in general, enhances the 'risks of counterproductive incentives whereby states may avoid engaging in desirable behaviours at all lest that behaviour come to be seen as legally binding upon them'.⁹⁸

The position of Islamic legal theory in this debate follows the basic jurisprudence of Islam which is the intrinsic and supernatural legitimacy of the Islamic commands reverberated in the very text of Islam in *Quran* and *Fiqhi* sources. As Shawamreh maintains: 'Islamic legal theory posits that law is divine in nature and in substance, and that there is a "right" answer for every imaginable question that is contained in the *Shari'a*.'⁹⁹ Given the two conceptual linchpins of the Islamic inter-polity legal theory elaborated in this piece—ideological

⁹⁵ *ibid*, 914.

⁹⁶ The Statute of the International Court of Justice, part of the Charter of the United Nations, defines the sources of international law in the following language: Article 38(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, June 26, 1945.

⁹⁷ See Alec Stone, 'What Is a Supranational Constitution? An Essay in International Relations Theory' (1994) 56 *The Review of Politics* 441.

⁹⁸ Kadens and Young (n 90), 910.

⁹⁹ Cynthia Shawamreh, 'Islamic Legal Theory and the Context of Islamist Movements' (2011) 2 *Notre Dame Journal of International & Comparative Law* 197, 197.

expansionism of Islam through territorial aggrandisement, and the group identity politics of *Ummah* or the Islamic community—it is clear that Islamic inter-polity legal theory is based upon textual axiomism, formalism in legal reasoning, hierarchical classification of Muslims and non-Muslims in inter-polity legal thought under terms such as ‘infidelity’ and ‘inferiority’ of external belief systems—ideological group identity politics of Islamic legal theory. Under these maxims, the ever-growing pragmatist surge of theories and approaches in shaping the structure of modern international law faces deep-seated conceptual incongruence with the jurisprudentially unmalleable textual axiomism and strict formalism of Islamic legal theory. To put it in Majid Khadduri’s terms,

‘In contrast with the modern law of nations, which presupposes the existence of a family of nations composed of states enjoying sovereign rights and equality of status, the law of Islam recognizes no other nation than its own. Similar to the law of ancient Rome and the law of medieval Christendom, the law of Islam was based on the theory of a universal state.’¹⁰⁰

E. CONCLUSION

Islamic inter-polity law is based upon textual axiomism and formalism in the sense that it is bound by certain constituted maxims in *Sharia* resources. Quran, as the primary resource of Islamic laws, contains unequivocal commands in regard to non-Islamic polities and their citizens whether they be Muslim or non-Muslim. All categories of non-Muslims; disciples of other religions or Book-holders (verse 29 of *Sura Tawbah*), paganists or *mushrekin* (verse 5 of *Sura Tawbah*), and political enemies of the Islamic state or *munafeqin* (verses 89-91 of *Sura Nisaa*) are defined and addressed in detail in the explicit wording of Quran. Any truly Islamic state is tasked by *Sharia* to design its inter-polity agenda under the umbrella maxims reverberated in these verses. According to the argument of this article, these verses are, in sum, the explicit indication of the intrinsic legitimacy of the territorial and ideological expansionism of Islam.

Group identity politics of the inter-polity political philosophy of Islam, which is disseminated through the idea of *Ummah*, is the other theoretical backbone of the inter-polity legal theory of Islam. This article has attempted to encourage the reader to rethink the discourse on *Ummah* through the lens of the literature on group identity politics. This article revisited certain technicalities of the Islamic inter-polity legal theory in order to shed light on the deep-

¹⁰⁰ Khadduri (n 20), 358.

seated conceptual incongruence between Islamic and modern international legal theories. Given the conceptual penetration of the pragmatist ideas in the structure and construction of modern international law, there flaunts a bold conceptual incongruence between the textual axiomism of Islamic legal theory and international legal theory.