Caliphs, Jinns, and Sufi Shrines: The Protection of Cultural Heritage and Cultural Rights under Islamic Law

Eleni Polymenopoulou

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CALIPHS, JINNS, AND SUFI SHRINES: THE PROTECTION OF CULTURAL HERITAGE AND CULTURAL RIGHTS UNDER ISLAMIC LAW

Eleni Polymenopoulou

ABSTRACT

This Article examines the position of the Islamic legal tradition on arts and cultural heritage, including its pitfalls, and argues that a better understanding of Muslim state practice is needed to enhance the protection of cultural rights in the Muslim world. This can further facilitate collaboration between Muslim states and inter-governmental bodies working in the field of culture; implement better accountability mechanisms under international criminal law, as well as; to contribute to the fight against terrorism. In addition, the author submits that Islamic law is not necessarily an appropriate platform to enhance cultural rights and cultural heritage in the Muslim world. This is because of the nature of the Islamic legal tradition, which contains an extraordinary number of legal tools capable of setting aside obscure and anachronistic views in favor of modernization, yet is equally full of contradictions and ambiguities. The high complexity and diversity of possible solutions under Islamic law may inhibit the implementation of appropriate cultural policies on the protection of cultural heritage and the arts. The emphasis therefore should be on Muslim state practice, including in particular the practice of the rightly guided Caliphs whose palaces are evidence of tolerance and broadmindedness; contemporary Muslim state practice of those Muslim states that strive to promote cultural rights; and best practices initiated by Arab-Muslim organizations and institutions.

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INTRODUCTION

Twenty years have passed since the decision of the Taliban to demolish the
two giant Buddhhas of the Bamiyan valley.1 During these years, the protection
of cultural heritage and cultural rights has gained substantial momentum. The
damage of Syrian, Iraqi, and Libyan heritage by the Islamic State (ISIS) was
arguably a catalyst in making culture a matter of global security.2 Images and
videos of ISIS propaganda, such as those depicting militants demolishing
artifacts in the Mosul Museum;3 the explosion of ancient temples in Palmyra;4

1 Ernesto Ottone R., Commemorating 20 Years Since the Destruction of Two Buddhas of Bamiyan,
(referring to the Warsaw Recommendation on Recovery and Reconstruction of Cultural Heritage).
2 Waseem Ahmad Qureshi, The Protection of Cultural Heritage by International Law in Armed Conflict,
3 See, e.g., Kareem Shaheen, ISIS Fighters Destroy Ancient Artefacts at Mosul Museum, GUARDIAN
(Feb. 26, 2015, 4:26 PM), https://www.theguardian.com/world/2015/feb/26/isis-fighters-destroy-ancient-
artefacts-mosul-museum-iraq (featuring videos of ISIS militants destroying artifacts).
4 See ISIS Releases Images Showing Destruction of Palmyra Temple, NBC NEWS (Aug. 25, 2015),
https://www.nbcnews.com/nightly-news/video/isis-releases-images-showing-destruction-of-palmyra-temple-
512965187705.

Hence, cultural rights and cultural heritage are now part of the agenda not only of UNESCO (the U.N. specialized agency for culture, science, and the arts),\footnote{See Irina Georgieva Bokova, Terrorists Are Destroying Our Cultural Heritage: It’s Time to Fight Back, WORLD ECON. F. (Jan. 18, 2016), https://www.weforum.org/agenda/2016/01/terrorists-are-destroying-our-culture-heritage-it-s-time-to-fight-back. See generally Responding to Cultural Cleansing, Preventing Violent Extremism, U.N. EDUC. SCI. & CULTURAL ORG. [UNESCO], https://en.unesco.org/events/responding-cultural-cleansing-preventing-violent-extremism (last visited Sept. 6, 2021).} but also of the political bodies of the United Nations. In 2016, the U.N. Human Rights Council adopted a resolution on cultural rights (and the protection of cultural heritage) \textit{“[r]ecognizing that safeguarding the enjoyment of cultural rights may form a crucial part of the response to many current global challenges, including the scourge of terrorism” and “call[ing] upon all States to respect, promote and protect the right of everyone to take part in cultural life, including the ability to access and enjoy cultural heritage[.]”}\footnote{Human Rights Council Res. 33/20 (alternation in original) (requesting the U.N. High Commissioner for Human Rights “[t]o convene . . . a one-day intersessional seminar on ways to prevent, contain and/or mitigate the detrimental impact of the damage to or destruction of cultural heritage on the enjoyment of human rights, including cultural rights by all, and on best practices in this regard”).} In 2017, the U.N. High Commissioner on Human Rights organized a panel on cultural rights,\footnote{U.N. High Comm’r for Human Rights, Intersessional Seminar on Cultural Rights and the Protection of Cultural Heritage: Report of the United Nations High Commissioner for Human Rights, ¶ 1, U.N. Doc. A/HRC/37/29 (Dec. 27, 2017).} and the U.N. Security Council issued Resolution 2347 condemning the destruction and smuggling of cultural heritage by terrorist groups.\footnote{See S.C. Res. 2347, ¶ 1 (Mar. 24, 2017) (condemning the “destruction of cultural heritage . . . as well as the looting and smuggling of cultural property . . . by terrorist groups”; see also S.C. Res. 2199, ¶¶ 16–17, 23 (Feb. 12, 2015) (aiming at blocking ISIS, ISIL, ANF, and Al-Qaeda’s financial resources). Prior to issuing Resolution 2347, the Security Council had also issued a variety of resolutions on Mali and created the U.N. Multidimensional Integrated Stabilization Mission in Mali, aimed at the protection of heritage, among other things. See generally Qureshi, supra note 2, at 81; Lassana Cissé, The Ratification and Implementation of the (1999) Second Protocol of the 1954 Convention in Mali During Armed Conflict, in PROTECTING CULTURAL PROPERTY 82–86 (2020).}

At present, there is no doubt about the impact of these incidents on peace and security around the world, especially in the Middle East.\footnote{See generally MARINA LOSTAL ET AL., CULTURE UNDER FIRE: ARMED NON-STATE ACTORS AND CULTURAL HERITAGE IN WARTIME 13–26 (2018); Kristin Hauser, Culture Under Attack: The Destruction of Cultural Heritage by Non-State Armed Groups, 2 SANTANDER ART & CULTURE L. REV. 117, 118–41 (2015); Emma Cunliffe et al., The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations, 23 INT’L J. CULTURAL PROP. 1, 19–20 (2016) (relating to Da’esh).} The strategic use
of destroying and smuggling cultural heritage is also by now well documented.\textsuperscript{11} Also, it is well known that the smuggling of antiquities and subsequent art trade has been an essential aspect of ISIS financing.\textsuperscript{12} Muslim communities around the world condemn ISIS ideology as an “ideology of oppression[].”\textsuperscript{13} Even so, these incidents have kindled a negative, popular stereotype about the legitimacy of the arts in the Muslim world.\textsuperscript{14} The alleged hostile position of Islam toward the arts and cultural heritage creates confusing representations of Islam in the West, displacing the emphasis from other pervasive security issues as well as the fact that cultural terrorism in the Muslim world primarily targets Muslims themselves.\textsuperscript{15} Even worse, stereotypical readings of these incidents and violence perpetrated by extremists nourish the erroneous hypothesis of the supposed “clash of civilizations” suggested by Huntington shortly after the end of the Cold War.\textsuperscript{16} In turn, this exacerbates the rise of anti-Muslim sentiment, creating a backlash against Muslim minorities in the West. As a result, an inverse trend has emerged, especially within the United Nations, to fight Islamophobia and hateful representations of Islam. Last but not least, the violence perpetrated by \textit{jihadis}


\textsuperscript{12} Cf. Qureshi, supra note 2, at 68. In 2015, the U.S. State Department indicatively estimated that ISIS “took in at least $1.25 million from the sale of items looted from just one archaeological site[].” Isakhan, supra note 11, at 347 (noting that “[t]he funds generated from the looting of antiquities across Iraq and Syria were used by ISIS to finance its state, buy weapons and other equipment, carry out mass attacks on local communities, and strengthen its operational capacity to organize terrorist attacks across the world.”).


This Article suggests that a better understanding of the Sharia is needed to enhance the protection of cultural rights in the Muslim world. A better reading of the Sharia’s position on arts and cultural heritage, including its pitfalls, could contribute to inhibiting extremism in the cultural sphere and fostering collaboration with governmental and non-governmental entities in the Arab-Muslim world. The Sharia contains a number of elements that could be used to enhance the protection of heritage and enable Muslim countries to assume a better role in fostering and safeguarding arts and culture. At the same time, however, a number of contradictions and the fear of extremist interpretations inhibit international courts and tribunals from referring to Sharia-law sources and their extremely rich jurisprudence when dealing with cultural matters. Thus, emphasis should also be placed on Muslim state practice. For example, the practice of the arts during the great Caliphs’ rule of the Muslim world, as will be discussed below, is especially revealing with respect to artistic freedom. In addition, modern Muslim state practice shows extraordinary engagement with all aspects of arts and cultural life, substantial contributions for the enhancement of cultural heritage at the international level, and expansion of cultural tourism and booming art markets. This is the case even for strict Sharia-compliant states such as Saudi Arabia, which is briefly studied in this Article as an example.

In terms of structure, this Article is split into four parts. Part I offers a brief overview of the underpinning elements and principles of Islamic law, detailing its richness, flexibility, and diversity. This general overview may be helpful to the reader who is not familiar with Islamic law, as it details the multiplicity of tools available to contemporary Muslim jurists who face matters related to art, cultural rights, and cultural heritage. Part II provides an examination of the sources of Islamic law, specifically in relation to arts and cultural heritage, referring to concepts and principles that could be relevant in controversies involving the destruction of cultural heritage. In this section, this Article emphasizes the highly complex dialectic between divine sources and human reasoning in Islamic thought, and contrasts both with the practice of the first Caliphs regarding the preservation of cultural heritage. Part III explains that this complex dialectic may be precisely one of the reasons why international bodies

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17 Due to space and language limitations, this section does not aim to provide an exhaustive analysis of the Islamic jurisprudence on cultural heritage, nor detail human-rights or humanitarian-law rules from the perspective of the Sharia. Rather, it aims to establish the astonishing amount of diversity of views, teachings, and schools of Islamic law (which are at times contradictory).
are generally hesitant to refer to Islamic law in the context of international dispute settlement, including disputes pertinent to cultural-rights violations and the destruction of heritage. This part does highlight, however, that taking Islamic law into greater account may have certain benefits for a more effective protection of arts and cultural heritage in the Muslim world, especially in terms of dialogue with Non-State Actors (NSAs). In Part IV, this Article provides alternatives in approaching the Muslim perspective on cultural-heritage law that is based primarily on state practice in matters related to artistic freedom and cultural rights, drawing particularly from the practice of Gulf States, especially Qatar and the Kingdom of Saudi Arabia. This Article concludes that it is important for Muslim writers and organizations to oppose the extremist, fanatic, and archaic interpretations of Islam, and that it is equally important for international bodies and agencies such as UNESCO to refer to modern Muslim state practice.

I. EXPLORING THE NATURE AND DIVERSITY OF THE ISLAMIC LEGAL TRADITION

The Sharia encompasses the totality of human life. It consists of a body of detailed rules that lead Muslims on the path to God. Most of these rules are laid down in the Qur’an, which literally means the Word of God, as revealed to Prophet Muhammad. The Qur’an therefore is the primary source of the Sharia—the revelation starts with the imperative ‘ikra,’ which means “to read.” The Qur’an describes itself as a “guidance” for humankind and is itself a piece of literature. It contains a number of stories and parables of theological nature that have been revealed to the Prophet. Amidst these stories, which are primarily of a theological nature, one may also be able to deduce rules of normative content. These rules are generally split into two categories. The first, ibadat, refers to Muslims’ duties vis-à-vis the community and God (praying, fasting, pilgrimage, etc.) as well as aspects of daily life as precise as greetings, ritual observances, and hygiene. The second, mu’amalat, refers to transactions and other legal issues common in both civil and common law within areas such as family law.

18 The term occurs only once in the Qur’an, designating a “divinely appointed path.” Qur’an 45:18 (“Now We have set you O Prophet on the Way of faith [Shari’a]. So follow it . . . .”) (alteration in original); see Abdullah Saeed, Human Rights and Islam: An Introduction to Key Debates Between Islamic Law and International Human Rights Law (2018).
19 Qur’an 2:185.
21 Id.
inheritance, contracts, criminal law, and legal procedure. From over 6000 verses of the Qur’an, only about 200 possess a purely legal content, including rules about jihad (jus ad bellum) and the use of armed force (jus in bello). Both types of rules follow the values of Islam, dividing conduct into six categories: (1) forbidden (haram); (2) obligatory (wajib); (3) permitted (mubah); (4) recommended (muhtasab); (5) disapproved (makruh); and (6) reprimandable, or indifferent/of no legal interest.

The second source of the Sharia is the Sunna. The Sunna is based on the exemplary nature of the Prophet’s life—what he did, said, or approved. It includes the traditions, sayings, and deeds of the Prophet (hadiths), arguably also narrations about the Prophet and his companions (al akhbar), and Islamic traditions reported by the companions of the Prophet (al athaar). Six major hadith collections were compiled in the third century after the Hijrah, which remain canonical for Sunni Muslims. The soundness and validity of a hadith is based on the concept of consensus of the Muslim ummah. There is a long and heated debate over the authenticity of hadiths and a variety of theories on transmission of hadiths have been developed.

Islamic law, however, is not confined, nor is it based solely upon the divine Sharia. Early jurists who lived in the first centuries after the Prophet in the Arabian Peninsula developed a highly complex and sophisticated Islamic jurisprudence known as the fiqh. The fiqh is based not only on the revealed
sources (Quranic verses and Prophetic traditions), but also on individual human reasoning (ra’y) and non-revealed sources. The non-revealed sources include both methodological tools and juristic principles (usul al fiqh). Assuming that Islamic law is a tree, and the fiqh its branches, the usul therefore is the “roots” of jurisprudence.31 The principles of the usul “rank[] the sources of law, their interaction, interpretation and application”32 and function as legal formulas conferring authority to offer legal reasoning. Thus, the methodology of the usul may give rise to several varieties of construction including the following: ijma (consensus of opinion), qiyas (analogical deduction/reasoning by analogy), istihsan (juristic preference),34 istislah (presumption of continuity), maslaha (valid ways to serve the public interest).35

The more weight one grants to the fiqh and the usul, the more possible it will be for teachers, judges, muftis, and imams to use human ability to reason and expand further on contemporary matters with a view toward finding plausible solutions. A good illustration of this is the ijma, which is also considered the third source of Islamic law in Sunni jurisprudence.36 The exact legal value of the ijma is the object of heated debates among Islamic law scholars. Some authors emphasize the role of the ijma as acceptable customary practice and eventually also give more space to jurists to minimize the effect of isolated and conservative traditions.37 In fact, even in medieval years, there were authors praising the significance of the ijma as human legal reasoning; for example, al-Qarafi (7 AH–13 CE) presumed that the ijma prevailed even over the Qur’an and the Sunna.38 In contrast, Kamali, one of the most influential scholars on the usul, argues that “[s]overeignty in Islam is the prerogative of Almighty God alone[,]” that ijma

31 MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 12 (3d ed. 2005); see also HALLAQ, supra note 25, at 16, 22–27. See generally WALL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNĪ ÜŞÜL AL-FIQH (1999); Emon, supra note 26, at 58; BASSIOUNI, supra note 23, at 49–50.

32 BASSIOUNI, supra note 23, at 40.

33 Qiyas are secondary compared to the primary sources and are generally acceptable insofar as they are compliant with Islamic fundamental precepts. See KAMALI, supra note 31, at 197–203, 286 (“Notwithstanding the absence of a clear authority for qiyās in the Qur’ān, the ‘ulamā’ of the four Sunni schools and the Zaydi Shī‘ah have validated qiyās and quoted several Qur’ānic passages in support of their views.”).

34 Id. at 16–17.

35 BASSIOUNI, supra note 23, at 23, 72, 88–89.

36 GLENN, supra note 29, at 199–200 (noting this may appear awkward in the eyes of the Western jurist).

37 COULSON, supra note 23, at 72, 88–89.

38 Ahmad Hasan, The Argument for the Authority of Ijmā, 10 ISLAMIC STUD. 39, 39 (1971).
can never override the Qur’an and the Sunna,\(^{39}\) and that the difference between revealed and non-revealed sources is precisely that “[t]he legislative organ of an Islamic state . . . cannot abrogate the Qur’an or the Sunnah[.]”\(^ {40}\) Another example is istihsan (juristic preference), which is accepted primarily by Hanafis and Hanbalis, and essentially denotes the ability of the jurist to depart from an existing law, enabling the jurist to prefer one solution over another when he or she feels that the result will be unfair.\(^ {41}\) This principle of Islamic law effectively functions in much the same way as the common law concept of equity.\(^ {42}\)

In addition, the fiqh seldom provides solutions based on the Qur’an or the Sunna alone, as legal rules in the Qur’an are applied differently in the context of civil and criminal law: as either torts or criminal offenses.\(^ {43}\) Furthermore, in the context of public international law analogies may also be found between customary law and the Sunna. This is true in respect to treaties concluded between Muslims or non-Muslims as well as the authority of juristic opinions, commentaries, and “utterances . . . of the Caliphs[,]” some of which have been cited by reference to Article 38 of the Statute of the International Court of Justice (ICJ).\(^ {44}\)

Thus, to formulate a legal opinion (fatwa) on a certain matter, contemporary Muslim jurists (fuqaha), judges (qadis), muftis, and imams may refer not only to the revealed sources, but also largely to the fiqh. In its early years of formation following the Prophet Muhammad’s death, the fiqh was also influenced by factors external to Islam and incorporated a variety of elements of Talmudic, Roman, Roman Provincial, Byzantine Canon, Persian Sassanian, and Arab tribal

\(^{39}\) Kamali, supra note 31, at 16–17 (“[A]though it may abrogate a law which is based on maslahah or istihsan . . . [i]s subservient to divine revelation and can never overrule the explicit injunctions of the Qur’an and Sunnah.”).

\(^ {40}\) Id. at 16.

\(^ {41}\) See id. at 233–34.


\(^ {43}\) Coulson refers to the examples of drinking wine and the prohibition of usury. See Coulson, supra note 23, at 12–13. Both are considered forbidden (haram) under Islamic law in the same terms. See id. Among the two, only the first became a criminal offense originally punishable by flogging. Id. The other remained a purely civil matter, giving rise to an illegal transaction or an illegal contract. See id.

and customary laws. Throughout the first three centuries after the Hegira and until the recording of the hadiths, most of what constituted the corpus of Islamic law were circumscribed by reference to the traditions of the Prophet and the practice of his companions. Traditionalists, however, insisted that the primary sources (i.e., the Qur'an and the Sunna) prevailed and saw references to personal reasoning as unnecessary. This triggered an opposite reaction; namely, the fabrication of a number of pseudo-hadiths. In fact, from about 5000 in total, only six collections of hadiths have been considered sound.

Moreover, the proliferation of legal teaching circles allowed for the development and consolidation of the so-called “schools of thought” of Islam. These were formed by eminent jurists who refined legal reasoning in the early years of Islam. Four major schools of thought (madhabs) in Sunni Islam were formed under the rule of the Ummayad dynasty, taking their names from their founders. These jurists articulated a remarkably detailed theory of law that was based on the “marriage[,]” as stipulated by Hallaq, between reason and revelation. Given the absence of centralization in legal doctrine after the first four Caliphs, the schools and varieties of legal doctrines flourished.

II. CULTURAL HERITAGE AND THE ARTS UNDER THE SHARIA: A BRIEF OVERVIEW

A. Does the Sharia Contain Any Provisions on Arts and Cultural Heritage?

The Holy Qur’an does not contain any reference concerning the prohibition

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45 Bassiouni, supra note 23, at 8 (noting theological conservatives insisted on “rigid literalism in interpretation”); Badr, supra note 20, at 190–98; Coulson, supra note 23, at 50–51 (noting the school of Kufa, Iraq [i.e., a Hanafi school] was geographically more open and morally more receptive to foreign legal influences); see also Esposito, supra note 26, at 55–56; Glenn, supra note 29, at 180–81; Ilias Bantekas, Land Rights in Nineteenth-Century Ottoman State Succession Treaties, 26 EUR. J. INT’L L. 652–53 (2015).

46 Esposito, supra note 26, at 110 (discussing conflicting views between the Ahkharis and the Usulis).

47 Hallaq, supra note 25, at 16–17. Among these, the most reliable are al-Bukhari’s and Al Muslim’s.

48 By chronological order, these include the following: Imam Abu Hanifa who lived and taught in Kufah, Iraq; Imam Malik al-Asbahi who lived in Madinah, Saudi Arabia; Imam ash-Shafi from Egypt who formulated the theory of the usul; and Imam Abu Abdullah Ibn Hanbal ash-Shaybani who taught in Baghdad. See Bassiouni, supra note 23, at 45–48; Kamali, supra note 31, at 13–14; Hallaq, supra note 25, at 33; Coulson, supra note 23, at 89–90 (noting that, although these are the same usul as were laid down by Imam al-Shafi, the composite structure of the classical legal theory is fundamentally different from ash-Shafi’s scheme); Esposito, supra note 26, at 109.


50 Bassiouni, supra note 23, at 256.
of images and the creation of icons or sculptures.\(^{51}\) Furthermore, there is nothing in the *Qur’an* specifically relating to cultural heritage. Fatimah Alshehaby argues that the protection of cultural objects belonging to ancient civilizations could be deduced from a verse stating: “Travel throughout the land and see how He originated the creation, then Allah will bring it into being one more time. Surely Allah is Most Capable of everything.”\(^{52}\) Furthermore, the Sharia embraces the concept of beauty. In fact, the term *beauty* is encountered manifold in the *Qur’an*\(^{53}\) and penetrates the entire logic of arts and culture in the Arab-Muslim world.\(^{54}\) For example, according to a well-known *hadith* narrated by Muhammad al-Bukhari, when the Angel Gabriel came to Prophet Muhammad, He is alleged to have said that “God is Beautiful, and He loves beauty[,]”\(^{55}\) and according to another He is also alleged to have said that “God has inscribed beauty upon all things.”\(^{56}\) Islamic art, too, is astonishingly beautiful, as any visitor of the Taj Mahal will testify. Generally hinged upon the quasi-sacred role of the Word (*kalam*), it conveys the message of God and is deeply entrenched in spirituality. This might explain why Islam is generally viewed as a “culture of the Word” (or a culture of calligraphy), rather than a “culture of the ‘image[,]’”\(^{57}\)

This said, the concept of beauty in the sense of the Sharia has significant pitfalls. Firstly, it remains a metaphysical concept bound to the notion of “Truth”

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\(^{51}\) Fatimah Alshehaby, *Cultural Heritage Protection in Islamic Tradition*, 27 INT’L J. CULTURAL PROP. 291, 297 (2020) (“[T]here is no reference to the concept of cultural heritage in Islamic law, but there are several verses that indicate principles that confer protections, such as human dignity and respect for diversity, knowledge, and development.”); al-Alwani, *supra* note 27, at 6 (noting that “[w]hen we read the Holy Qur’an—the only constitutive source of legislation in Islam—we will not find within it a single text that directly addresses the question of whether making or possessing ‘pictures’ and ‘images’ is prohibited”); Modj-ta-ba Sadria, *Figural Representation in Islamic Art*, 20 MIDDLE E. STUD. 99, 101 (1984) (noting, however, that the emphasis on ornamental representations of Islamic art denotes a lack of division between the sacred and the profane); K.A.C. Creswell, *The Lawfulness of Painting in Early Islam*, 11/12 ARS ISLAMICA 159, 159–166 (1946).

\(^{52}\) *Qur’an* 29:20; see Alshehaby, *supra* note 51, at 298.


\(^{54}\) Alshehaby, *supra* note 51, at 296 (referring to Jami’ al-Tirmidhi); see also Ogunnaike, *supra* note 53 (“Is the reward for ḫidān anything other than ḫidān?”) (referring to *Qur’an* 55:60); cf. Muhammad al-Ghazali, *Reflections on Islamic View of Art and Literature*, 35 ISLAMIC STUD. 425, 428 (1996) (finding that manifestations of art and literature in Islam “affirm the Infinite Beauty and Absolute Truth and point to the eternal source of all beauty and truth”).


\(^{56}\) Ogunnaike, *supra* note 53.

\(^{57}\) al-Alwani, *supra* note 27, ¶ 1–3 (“The Arabs, who became the first carriers of the message of Islam, valued the Word more than images and statues.”); id. ¶ 4 (“The Word—in the view of Arabs and Muslims—is the medium most capable of expressing the culture’s inner characteristics; for its meanings are agreed upon by linguists.”).
of Islam, containing several limitations. For example, Muhammad al-Ghazali finds that “literary or artistic expressions focus their appeal on the baser instincts and lower passions of man and lead, of necessity, to the distortion of healthy human nature and to the decadence of culture,” all of which are rejected in Islam “[w]ithout any reservation.” Secondly, cultural property or arts that incite idolatry or that constitute expressions of infidelity are not necessarily beautiful, let alone require preservation under principles of Islamic law. Thirdly, various hadiths relating to the permissibility of images and visual representation (i.e., consequently also visual arts) generally add to the complexity of the matter. Some of these hadiths aim to emphasize that arts and entertainment might distract from Muslim duties of prayer, while others may be linked to the hostility toward anything that could be seen as imitating God. It is narrated, for example, that when Prophet Muhammad was ill his wives came to see him and told him about paintings they had seen in a church in Abyssinia (present-day Ethiopia). Rather than sharing their enthusiasm, the Prophet admonished them in the following words: “If any religious man dies amongst those people they would build a place of worship at his grave and make these pictures in it. They will be the worst creature in the sight of Allah on the Day of Resurrection.” Additionally, according to another, Prophet Muhammad allegedly cursed the image makers in their attempts to imitate God’s act of creation, and he said, “On the Day of Judgement the punishment of hell will be meted out to the painter, and he will be called upon to breathe life into the forms that he has fashioned; but he cannot breathe life into anything.” It is noteworthy that most of these hadiths are considered generally as non-authentic. Similar hadiths concerning

58 al-Ghazali, supra note 54, at 431 (“[T]here is the eternal beauty that is real and there is a transient beauty which is merely contingent.”).
59 Id. at 432.
60 al-Alwani, supra note 27, at 21.
61 Creswell, supra note 51, at 165 (“[A]s a predisposing psychological basis for the hostility to painting, there was the feeling . . . that the maker of an image or a painting in some way transfers part of the personality of the subject to the image or painting, and in so doing acquires magical powers over the person reproduced.”).
62 Book 8, No. 419, in 1 SAHIH AL BUKHARI (narrated by Aysa); Book 23, No. 425, in 2 SAHIH AL BUKHARI (narrated by Aysa); see also JAMAL J. ELIAS, AISHA’S CUSHION: RELIGIOUS ART, PERCEPTION, AND PRACTICE IN ISLAM (2012).
63 THOMAS W. ARNOLD, PAINTING IN ISLAM: A STUDY OF THE PLACE OF PICTORIAL ART IN MUSLIM CULTURE 5 (1965); see Book 48, Chapter 113, No. 5363, in 6 SUNAN AN-NASA’I (narrated by Ibn ‘Umar) (“The makers of these images will be punished on the Day of Resurrection, and it will be said to them: ‘Breathe life into that which you have created.’”); see also Creswell, supra note 51, at 162 (referring to Vol. 2, Book 41 and Vol. 4, Book 106 of Sahih Al Bukhari); cf. Department of Islamic Art, Figural Representation in Islamic Art, METRO. MUSEUM ART (Oct. 2001), https://www.metmuseum.org/toah/hd/figs/hd_figs.htm (noting the Qur’an “uses the Arabic term musawwir (“maker of forms,” or artist) as an epithet for God”).
64 Muhammad Al-Atawneh, Leisure and Entertainment (Malāḥī) in Contemporary Islamic Legal Thought: Music and the Audio Visual Media, 19 ISLAMIC L. & SOC’y 397, 401–02 (2012); Alshehaby, supra note 51, at 302.
the prohibition of music are also reported, but equally suffer from weak transmission.65 As a result of these ambiguities, more elements and concepts are needed for an understanding of the conditions under which the intentional destruction of infidels’ cultural heritage is justified.

B. Does the Sharia Contain Any Provisions on the Destruction of Infidel Cultural Heritage?

The first element underlying the discussion on non-Muslim heritage is the general presumption of a certain dichotomy under the Sharia between what is known as the abode of Islam (dar al-Islam) and the abode of unbelief (dar al-kufr).66 This distinction between Muslims and non-Muslims also entails a second discussion on the validity and limitations of jihad under Islamic law. Jihad (which means to “exert,” “strive,” “struggle”) is sometimes referred to as the sixth pillar of Islam and is generally divided into violent and non-violent categories.67 Yet the very concept of jihad is one of the aspects of Islamic law that has given rise to tensions and abuse more than any other, both within the Arab-Muslim world and the West. Jihad is commonly understood as concomitant with the concept of warfare and the establishment of Muslim rule against non-Muslims.68 As such, it underpins virtually all discussions on the rise of militant Islam and the treatment of non-Muslim minorities in Muslim lands.69 According to a popular misconception, the dar-al-Islam is the only proper way to live under the guidance of the Sharia, while the lands of disbelief must be ultimately conquered through jihad.70 A detailed examination of jihad falls outside the scope of this study. For the purposes of this Article, the division itself might have been true in the early years of Islam, albeit even then it was widely

65 Al-Atawneh, supra note 64, at 407.
66 See, e.g., M.M. Slaughter, The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech, 79 VA. L. REV. 153, 174 (1993) (“In modern times, and despite the fact that they are sovereign states, Islamic nations share a common identity united through submission to Muslim practice and law. This expresses itself in the legal notion of the dar-al-Islam (house of Islam) and constitutes itself by the contrast with the disbelievers, the dar-al-harb (house of war, land outside Islam) . . . .”) (alteration in original).
69 See generally WHAT EVERYONE NEEDS TO KNOW ABOUT ISLAM, supra note 68; UNHOLY WAR, supra note 68; Abou El Fadl, supra note 68, at 141.
debated and significantly nuanced. As pointed out by various authors already, “jihad does not include offensive warfare but only permits self-defense . . . the faith is not intended to be spread by force[,]” and jihad is “justified only when non-Muslims threaten Muslims or interfere with their religious practice.”

Consequently, the destruction of cultural and religious heritage can never be justified under jihad. In fact, Islamic law affords substantial protection to religious art, monuments, and sites, including during armed conflict. Such protection stems directly from the Qur’an, as various scholars have explained elsewhere. In addition, Prophet Muhammad appears to have been tolerant with religious and cultural treasures. It is narrated in this respect that when he conquered Mecca, he smashed idols and icons in the Kaaba yet spared an icon of the Holy Virgin enlacing Jesus (it is said that the Prophet “[held] his hands over it for protection while the others were effaced”).

Likewise, the concept of safeguarding cultural heritage was present among Prophet Muhammad’s companions and the first Caliphs, even at the time of the expansion of Islam through jihad. For example, prior to the bombing of the Buddhas, a delegation from the Organization of the Islamic Cooperation (OIC) (the main inter-governmental organization of Muslim-majority states based in Jeddah, Saudi Arabia) travelled to Afghanistan. The OIC, along with religious

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71 Abou El Fadl, supra note 68, at 146 (noting some Muslim jurists have gone as far as arguing that Muslims may not reside in non-Muslim lands under any circumstances); The Concept of Jihad, supra note 24, at 431 (noting that jihad has been a specific military doctrine, developed under the reign of the Abbasids and the Umayyads, related specifically to fighting and warfare, and yet “a permanent state of war between Muslim and non-Muslim communities did not necessarily call for the military form of jihad”); see also Noor Mohammad, The Doctrine of Jihad: An Introduction, 3 J.L. & RELIGION 381, 392 (1985) (citing Khadduri, supra note 44, at 64–66); Bantekas, supra note 45, at 375 (citing Khadduri, supra note 44) (noting that today it is widely accepted that a third category of lands is possible—the territory of peace (dar-al-sulh)); Bennoune, supra note 24, at 614–15 (citing Khadduri, supra note 44).

72 Bennoune, supra note 24, at 617.


74 Sadria, supra note 51, at 99; JAMES NOYES, THE POLITICS OF ICONOCLASM: RELIGION, VIOLENCE, AND THE CULTURE OF IMAGE-BREAKING IN CHRISTIANITY AND ISLAM 73 (2012) (referring to a picture of Jesus in Kabbala that was not spared); see also Anis Ahmad, Islam and Cultural Heritage, in DOHA PROCEEDINGS, supra note 74, at 50; Abd-ur-Razzak Guesoumi, Islam and World Heritage, in DOHA PROCEEDINGS, supra note 74, at 60.

leaders and representatives from Egypt, Pakistan, and other Muslim countries attempted to persuade the Taliban not to proceed with this act. Following the bombing, and under the auspices of the Emir of the State of Qatar, the Doha Conference was organized. During the conference, religious authorities (ulemas) from various Muslim countries came to the conclusion that “the preservation of the human cultural heritage derives from its appreciation of innate human values and from respect for peoples’ beliefs.” For example, Dr. Hamid Al-Ansari, Dean of the Faculty of Sharia, Law, and Islamic Studies at the University of Qatar, detailed the accommodation of the cultural heritage of different nations and peoples, pointing to the fact that “[i]n numerous verses of the Qur’ân, attention is . . . drawn to the act of meditating on the antiquities and heritage of those from the past in order to learn lessons . . . since human history is a chain of interrelated events, regardless of religion, nation or culture.” Likewise, the Imam Dr. Yusuf al-Qaradâwi reiterated the practice of the companions of Prophet Muhammad in his statement advising the Taliban to review the decision to destroy the Buddhas, indicating that when Muslims conquered Afghanistan in the first century after the Hijrah, they “left [the Buddhas and other] archaeological remains intact.”

Another relevant discussion is the eventual prohibition of idolatry in the Sharia. The Sharia generally proscribes polytheism and idolatry (shirk). Shirk was considered a serious offense and was punished by stoning, at least in the early years of Islam. This conception of shirk is deduced from the first pillar of Islam and the shahada (and the belief in Oneness, or the tawhid) as well as from Quranic verses and the hadith tradition (i.e., Prophet Muhammad’s deeds and sayings). This is also why certain Islamic doctrines specifically prohibit the
visitation of tombs (ziyara). Mohamed Badar and Noelle Higgins, for example, note that “the Wahhabis have consistently denounced the veneration of saints due to its overtones of polytheism, going so far as to destroy these shrines in the 19th century.” According to them, the prohibition “stems partly from the lack of Quranic sources and partly from ambiguous Prophetic Traditions (hadiths) which intermittently condemn and advocate ziayarat al-qubur (visitation of graves).”

At the same time, however, the appreciation of art in general (i.e., outside the context of idolatry, paganism, and jihad) is present in the Qur’an. The most relevant narration is the Quranic version of the parable of the Biblical figure of King Solomon. In these chapters, Solomon is presented as being granted armies of jinn, humans, and birds to make for him a crystal palace. The jinns made him statues, along with sanctuaries, cooking pots, and other things, and the Queen of Sheba later visited the palace. The making of sculptures and religious devotion appear to co-exist harmoniously in this passage. As Mustansir

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85 Mohamed Elewa Badar & Noelle Higgins, Discussion Interrupted: The Destruction and Protection of Cultural Property Under International Law and Islamic Law - The Case of Prosecutor v. Al Mahdi, 17 INT’L CRIM. L. REV. 486, 500–02 (2017). According to Badar and Higgins, the Wahhabis have accepted the legitimacy of destroying tombs, even including the tombs of the son of Ali (Ali was the son of the Prophet and fourth Caliph) and Husayn ibn Ali (whose tomb was destroyed in the late-nineteenth century). Id.

86 Id.

87 Id.

88 QUR’AN 27:1–93; QUR’AN 34:1–54.

89 QUR’AN 27:17–19 (“Solomon’s forces of jinn, humans, and birds were rallied for him, perfectly organized. And when they came across a valley of ants, an ant warned, ‘O ants! Go quickly into your homes so Solomon and his armies do not crush you, unknowingly.’ So Solomon smiled in amusement at her words, and prayed, ‘My Lord! Inspire me to always be thankful for Your favours which You have blessed me and my parents with, and to do good deeds that please you. Admit me, by Your mercy, into the company of Your righteous servants.’”) (alteration in original); QUR’AN 34:12 (“And to Solomon We subjected the wind: its morning stride was a month’s journey and so was its evening stride. And We caused a stream of molten copper to flow for him, and We subjected some of the jinn to work under him by His Will. And whoever of them deviated from Our command, We made them taste the torment of the blaze.”) (alteration in original); see also al-Alwani, supra note 27, at 6 (presenting Solomon as possessing mystic powers over the jinns and “thankful to the Almighty for this power”); Al-Ansari, supra note 74, at 32 (“[T]he Qur’ân refers to the graces that God bestowed on His Prophet Solomon, for whom statues of glass, copper and marble depicting living beings were made. In this context, no longer associated with worship, statues are considered to be God-given graces for which He should receive thanks.”).

90 QUR’AN 34:13 (“They made for him whatever he desired of sanctuaries, statues, basins as large as reservoirs, and cooking pots fixed into the ground. We ordered: ‘Work gratefully, O family of David!’ Only a few of My servants are truly grateful.”) (alteration in original).

91 QUR’AN 27:44 (“Then she was told, ‘Enter the palace.’ But when she saw the hall, she thought it was a body of water, so she bared her legs. Solomon said: ‘It is just a palace paved with crystal.’ At last she declared, ‘My Lord! I have certainly wronged my soul. Now I fully submit myself along with Solomon to Allah, the Lord of all worlds.’”) (alteration in original); see Mustansir Mir, The Queen of Sheba’s Conversion in Q. 27:44: A Problem Examined, 9 J. QUR’ANIC STUD. 43, 43–56 (2007) (discussing the Quranic and Biblical accounts of the story of Solomon and the Queen of Sheba).
Mir explains, the deep devotion of Solomon to God did not prevent him from being interested in the arts, nor from enjoying the marvelous palace the jinns built for him.92

This particular story of the Qur’an has been a starting point for the development of Islamic mystic philosophy. Both the Brethren of Purity (an early Muslim fraternity of philosophers active in Iraq in the ninth to tenth centuries) and the Sufis (under the lead of Ibn al Safi) elevated the role of poetic imagination in the Islamic legal tradition. For example, in the Brethren’s Rasā’il (Epistles), which is inspired by the Qur’an, Solomon is represented as both a King and a Prophet; having medical knowledge, magical powers,93 and extraordinary capacities, such as formulating magical circles to capture the jinns that ran away from him;94 speaking the language of birds;95 and overseeing the competition between human beings and jinns in bringing back the throne of Queen Sheba.96

C. Early Muslim State Practice on Arts and the Preservation of Heritage

In the same way that sources of Islamic law can be seen as equivalent to those of public international law,97 the practice of the early Caliphs on matters related to the preservation of heritage and the arts may be viewed as evidence of state practice. Historical evidence of Islam’s position on iconoclasm, for example, shows that the edict issued by the Byzantine emperor Leo on the destruction of images (726 CE) was not influenced by similar practice of the leaders of the Muslim world.98 According to K.A.C. Creswell, “the prohibition against painting did not exist in early Islam, but . . . grew up gradually, partly as a result of the inherent temperamental dislike of Semitic races for

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92 Mir, supra note 87, at 49.
93 See Jules Janssens, The Ikhwān as-Safāʾ on King-Prophet Solomon, in THE FIGURE OF SOLOMON IN JEWISH, CHRISTIAN AND ISLAMIC TRADITION 241–53 (Joseph Verheyden ed., 2012) (discussing the representation of King Solomon by Ikhwān as-Safāʾ [translated as “the Brethren of Purity”]; see also Suzanne Pinckney Stetkevych, Solomon and Mythic Kingship in the Arab-Islamic Tradition: Qaṣīdah, Qurʾān and Qiṣṣa al-Anbiyā’, 48 J. ARABIC LIT. 1, 1–37 (2017); al-Alwani, supra note 27, at 6, ¶¶ 7–8.
94 Janssens, supra note 89, at 248–49.
95 Id. at 250.
96 Id. at 226–27.
97 Bennoune, supra note 24, at 25.
98 Creswell, supra note 51, at 161–64 (first referring to treaties written by John, Patriarch of Damascus, in which Muslims are excluded from those who are considered iconoclasts; then referring to treaties written by Theodore Abū Kurra, bishop of Harran, in which Muslims are included “among the people opposed to painting”; then quoting Michael the Syrian; and then referring to another treaty by Tarasius who “remarked that the accusers of the Christians had in their destruction of images [sic] imitated the Jews, Pagans, Samaritans, Manichaean, and Phantasisti [or Theopaschites]”).
representational art, partly because of the influence of important Jewish converts, and partly because of the fear of magic.  

In fact, almost all arts appear to have been embraced by the Great Caliphs of the Umayyad (661–760 CE) and the Abbasid dynasties (749–1248 CE), the Safavids in Persia (fifteenth century), and the Mughals in India (sixteenth century). This is primarily evidenced by the marvelous iconography found in the Umayyad Caliphs’ palaces; in particular, the murals of the Ummayad’s palaces in Qusayr Amrah in Jordan, those in Qasr al-Hayr al-Ghari in Syria, and those found in the Abbasid palatine complex of Samarra in Iraq. Modj-ta-ba Sadria writes: “[T]he monarchs were known to have their palaces painted with representational art. They commissioned miniatures for their manuscripts and even portraits which they kept hidden from critical eyes in separate rooms or in their closely guarded haram.”

Among the most impressive of such works belonging to the early years of Islamic art are arguably the variations of the so-called Shāh-namā (the Book of Kings) and the Fāl-namā (the Book of Omens), which includes episodes from Qisas al-Anbiya (Tales of the Prophets) in which initial texts date from 732 AD. There were also a few illustrated manuscripts narrating poems, romantic tales, and love stories, such as the tale of Bayad wa Riyad produced in Medieval Andalusia. Extraordinary collections of these manuscripts are presently

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99 Id. at 166.


103 Supra note 51, at 101 (citing ARNOLD, supra note 63, at 47).


exhibited in collections around the world. Prophet Muhammad also appears in many of these manuscripts, and like other prophets that appear in Islamic iconography, he is usually surrounded by a circular flame halo. However, contrary to other prophets whose faces are visible in depictions, and arguably because of the “invisibility of [P]rophetic beauty[,]” Prophet Muhammad’s face is likely to be blurred or covered by a veil. In some cases, his entire head or his body is covered by a golden aureole, while in other manuscripts dating from the eighteenth and nineteenth centuries he is represented by a flame.

It was the Caliphs, therefore, who strove to preserve existing cultural treasures, and it is largely thanks to the Caliphs that the arts of the Book, especially calligraphy, illumination, and miniature, have flourished throughout


109 See Gruber, supra note 108, at 230 (noting that “[l]uminous paintings adopt the metaphorical language of the golden aureole to convey the Prophet’s sacred, primordial, and creative light, called the ‘light of Muhammad’” and “herald the Prophet as a cosmic entity freed from temporal boundaries and corporeal limitations[,]” id. at 230 fig.1 (illustrating the Prophet Muhammad’s ascension in an anthology of Persian poetry); S. BRENT PLATE, *BLASPHEMY: ART THAT OFFENDS* 94–95 (2006) (featuring an illustration of Prophet Muhammad before the Kaaba from the *Siyer-i Nebi* [a fourteenth-century Ottoman epic poem narrating the life of Prophet Muhammad] as well as an illustration of the Prophet’s ascension from Nizami Ganjavi’s *Khamsa*); see also MILSTEIN ET AL., supra note 105, at XXXII [Ms. K.] (illustrating a prophet [most probably Muhammad] in a mosque; THE ARTS OF ISLAM, supra note 105, at 274 discussing the *Siyer-i Nebi*); id. at 275 fig.320 (showing the Prophet Muhammad visiting the Kaaba); id. at 277 fig.322 (showing the Prophet’s miraculous journey from Mecca to the Al-Aqsa Mosque); Sevgi Kutluay, *Siyer-i Nebi* (‘Biography of the Prophet’), MUSEUM WITH NO FRONTIERS: DISCOVER ISLAMIC ART, https://islamicart.museumwnf.org/database_item.php?id=object;JSL;tr;Mus091;30;en&cp (last visited Nov. 4, 2021).

110 See MILSTEIN ET AL., supra note 105, at XXXII [Ms. T-4.] (illustrating Muhammad’s return from the Mira); id. at XXXIII [Ms. T-5.] (illustrating soldiers presenting to Muhammad the severed head of Abu Jahl); id. at IX [Ms. B.] (illustrating Muhammad on the Mira); id. at XLII (illustrating a monk recognizing Muhammad’s prophetic nature); id. at XII [Ms. C.] (illustrating Muhammad praying in the Masjid al-Aqsa); see also B.W. ROBINSON ET AL., *ISLAMIC PAINTING AND THE ARTS OF THE BOOK* 168, 216 (1976).


112 al-Alwani, supra note 27, at 5–6.
the centuries. Furthermore, the Caliphs engaged in extensive discussions on the protection of peoples of different faith, buildings of worship, and artifacts of different religions. Likewise, in the sphere of music al-Ghazali asserts that there are no authentic traditions specifically banning music but rather that “music was practiced during the lifetime of the Prophet.” To claim that cultural treasures are not protected under the Sharia, therefore, is contrary to Islamic practice throughout the centuries. As Dr. Abd-ur-Razzak Guessoum notes at the Doha Conference of the Ulamas, “if statues were prohibited by Islam, the scholars of al-Azhar would not have allowed Abu Simbel in southern Egypt’s Nubia, the treasure of Tutankhamun or the solar barques to be saved.”

D. To Refer or Not to Refer to the Sharia?

1. Hesitation to Refer to the Sharia

International bodies are generally hesitant to refer to Islamic law, its sources, and applicable fiqh, and they are equally hesitant to clarify the extent to which they are willing and able to consider Islamic law, even in cases involving disputes between Muslim states or involving Muslim individuals. The best example of such lost opportunity is arguably the Al Mahdi case. Al Mahdi was tried by the International Criminal Court (ICC) and charged under Article Eight, Section 2(e)(iv) of the ICC statute to nine years of imprisonment for planning and overseeing the attacks against mausolea and mosques in Timbuktu, Mali.


115 Al-Atawneh, supra note 64, at 402; see also Lois Ibsen al Faruqi, Music, Musicians and Muslim Law, 17 ASIAN MUSIC 3, 9 (1985) (noting a general “apprehension of the effects that music could have on Muslim society in general, on its individual members and even on the performance of Islamic religious duties”) (referring to Ibn Taymiyyah (1966)).

116 Guessoum, supra note 75, at 60, 62.

117 See supra text accompanying note 44.

This case has already attracted a lot of commentary as it was the first time that an indictment for war crimes was solely based on attacks against cultural heritage. The fact that the crimes were committed under religious motives was never disputed. Al Mahdi was himself a *jihadi*, recognized as “the most competent and prominent person in Timbuktu when it came to being knowledgeable in religious matters[,]” according to the prosecutor’s charges. He was a member of the local Tuareg *jihadi* organization, Ansar Dine (an organization collaborating with the local Al-Qaeda branch), and appointed head of the local morality brigade (*Hisbah*). The attacks he oversaw against religious sites in Timbuktu were justified under the banner of the Sharia. As the documents of the ICC proceedings reveal, Al Mahdi conducted research on the permissibility of mausolea under Islamic law and even “wrote the sermon on the[ir] destruction . . . which was read at the Friday prayer, on the eve of the launch of the attack.” He provided a response to journalists explaining the necessity of the attacks by reference to religious ignorance and the prohibition of idolatry and heresy. From a procedural perspective, surely the fact that the defendant pled to the charges from the outset did not allow for more extensive elaboration of Islamic law. As Badar and Higgins have argued, however, the

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120 This was recognized by the Chamber of the ICC in the *Al Mahdi* judgment. Al Mahdi Judgment, supra note 119, ¶ 9 (“Mr Al Mahdi has a thorough knowledge of the Koran and gave lectures as an expert on religious matters.”); id. ¶ 31 (noting Ansar Dine established “a local government, which included an Islamic tribunal, an Islamic police force, a media commission and a morality brigade[,]” and that the *Hisbah* planned and executed the destruction of the monuments in collaboration with the AQIM).

121 See Al Mahdi Charges, supra note 119, ¶ 45; Al Mahdi Judgment, supra note 119, ¶ 9 (“Mr Al Mahdi has a thorough knowledge of the Koran and gave lectures as an expert on religious matters.”); id. ¶ 31 (noting Ansar Dine established “a local government, which included an Islamic tribunal, an Islamic police force, a media commission and a morality brigade[,]” and that the *Hisbah* planned and executed the destruction of the monuments in collaboration with the AQIM).

122 See Al Mahdi Charges, supra note 119, ¶¶ 3, 5; Al Mahdi Judgment, supra note 119, ¶ 31.

123 See Al Mahdi Charges, supra note 119, ¶¶ 19–20; Al Mahdi Judgment, supra note 119, ¶ 37.

124 Al Mahdi Charges, supra note 119, ¶ 20; Al Mahdi Judgment, supra note 119, ¶ 38 (“What you see here is one of the ways of eradicating superstition, heresy and all things or subterfuge which can lead to idolatry.”).

125 See Press Release, ICC, *Al Mahdi Case: Accused Makes an Admission of Guilt at Trial Opening* (Aug. 22, 2016), https://www.icc-cpi.int/test-query1. The defense team, however, is reported to have said the acts reflected a “clash between two world views” and were “part of a broader struggle over the meaning of Islam.” Badar & Higgins, supra note 82, at 488 (noting the trial was truncated due to the guilty plea). But see Gerstenblith, supra note 120, at 387 (noting, however, that the ICC prosecutor found “this case [was] not about determining who was right or wrong from a religious point of view”).
Chamber could have opted for a more elaborate discussion on the Islamic law standpoint, while the experts could have shed light on the broader question of targeting cultural property by Islamic fundamentalists.126

At least three possible reasons can be advanced for this hesitation. The first may be the complexity of Islamic law. The rich and diverse literature of the Sharia creates a variety of problems. For one, the lack of uniformity in legal solutions necessarily leads to disunity in the formulation and application of the law, which is especially visible in criminal matters.127 Likewise, the “fluidity of . . . concepts, techniques and structures” in Islamic law may lead to judicial instability128 as well as legal uncertainty, while the existence of strict hierarchies in assessing which category encompasses particular conduct (haram, permissible, neutral, etc.) may also compel jurists to resort to legal tricks to remain within the ambit of formally permissible legal conduct.129 It is no wonder that Article 1(1) of the 1980 Rome Convention130 does not generally encompass “Islamic law” even though it is the highest law of most Muslim-majority legal systems because of its indeterminate status131 and because in recent years Islamic finance instruments have been governed by both Islamic and English law.132 In addition, while the fiqh is flexible enough to embrace novel approaches to contemporary matters,133 the Islamic legal tradition is embroiled in fervent debates as to the extent one can revise the fiqh in a manner that allows scholars to impede the effects of modernization.

Islamic law contains sufficient tools (usul) that are accepted by all schools and could allow, eventually, modernisation. While all these tools are sanctioned

126 Badar & Higgins, supra note 82, at 512–13, 515.
128 G LENN, supra note 29, at 210.
129 Id. at 212–13.
133 Cf. HALLAQ, supra note 25, at 115–16 (discussing Islamic law in the age of nation-states, arguing that “the fact of the matter is that even this sphere of law underwent structural and fundamental changes that ultimately resulted in its being severed from both the substance of classical religious law and the methodology by which this law had operated”).
under one or more schools and doctrines, they are deeply contradictory—as in the case of the ability to extract rules by imitating traditions and adherence to established authority (taqlid), and in the case of the opposite ability to engage in novel individual reasoning (ijtihad) that allows for constructive reform. Even in the case of those who agree on at least the permissibility of ijtihad, jurists disagree over the qualifications of those who are actually competent to practice it (i.e., the qualifications of the mujtahid). Principles such as the preservation of the public interest (istislah/maslaha), for example, confer substantial discretion to jurists and may be used as arguments either in favor of or against the need to safeguard cultural heritage.

A second reason may be the fact that any debates on cultural heritage law and limits of acceptable artistic creativity under Islamic law are necessarily concomitant with tensions under international human rights legal standards. Freedom of speech is the obvious area of tension as it affects creative freedom. Indicatively, the Cairo Declaration on Human Rights in Islam, drafted under the auspices of the OIC in 1993, provides that expression is acceptable insofar as it remains within the Sharia’s ambit. These limitations, in turn, are much broader than what is acceptable today under international human rights standards given the persistence of offenses such as blasphemy and apostasy under Islamic law. There are other areas where tensions exist, especially in relation to gender

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134 See ESPOSITO, supra note 26, at 261–62.
135 HALLAQ, supra note 25, at 27 (providing that ijtihad is the process of reasoning in the case of Quranic and Prophetic statements with “inferences, both linguistic and legal” as a “best guess of what . . . might be the law pertaining to a particular case[,]” and noting that “Islamic law is . . . overwhelmingly the result of ijtihad”); see ANVER M. EMON, ISLAMIC NATURAL LAW THEORIES 12 (2010) (defining ijtihad as “renewed interpretation, on matters already addressed by historical precedent”); see also GLENN, supra note 29, at 213; BASSIOUNI, supra note 23, at 26–27. See generally TAHÁ JÁBR AL-ALWÁNI, ISLAMIC THOUGHT: AN APPROACH TO REFORM 11 (2006); ABDULLAH AHMED AN-NA’IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW (1990); TARIQ RAMADAN, RADICAL REFORM 22 (2009).
136 See ESPOSITO, supra note 26, at 258–59; see also F.E. Vogel, The Closing of the Door of Ijtihad and the Application of the Law, 10 AM. J. ISLAMIC SOC. SCIS. 396 (1993) (discussing the “closing” of the doors to ijtihad in the twelfth century CE).
138 Cf. Alshehaby, supra note 51, at 300 (referring to Araki); Araki, supra note 73, at 34, 45 (“[T]he items which are obligatory to protect and forbidden to neglect include useful antiquities of major moral or material benefit that are conventionally held to be in the public interest in view of the overall benefits they bring.”).
139 Cairo Declaration on Human Rights in Islam art. 22, adopted Aug. 5, 1990, http://hrlibrary.umn.edu/instree/cairodeclaration.html (“Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari’a. . . . Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari’a.”).
140 See Anver M. Emon, On the Pope, Cartoons, and Apostates: Shari’a 2006, 22 J.L. & RELIGION 303, 303–21 (2007); Intisar A. Rabb, Negotiating Speech in Islamic Law and Politics: Flipped Traditions of
and women’s rights, minorities, non-discrimination, and equality. Generally speaking, women artists, minority artists, and other vulnerable groups suffer from persistent types of discrimination in the Muslim world precisely because of questions of incompatibility between the states’ constitutional laws (providing for equality and non-discrimination) and interpretations of Islamic law that view women as inferior. For example, male-guardianship laws in several Gulf countries, although relaxed in some areas, significantly affect women artists’ right to receive education in the arts or become professional artists, curators, musicians, or actresses as official approval by their guardian is still formally needed. It is still difficult today for women to receive fine arts education, open galleries, practice the arts, or send their applications to a film contest if their guardian disagrees, further affecting women’s ability to perform. Impeding women and vulnerable groups from taking part in cultural life, even on cultural or religious grounds, is therefore a breach of standards set forth by International Covenant on Economic, Social and Cultural Rights. These laws, however, are increasingly open to discussion and debate and seen as backwards even within Muslim societies.

A third issue that adds to the complexity may be conflicting interpretations, which are not restricted to the spheres of conflicting doctrines and schools of thought. With respect to Muslim minority rights, problems related to hierarchy and co-existence between conflicting Islamic rules and state laws unavoidably will exist in modern Muslim states as well as non-Muslim states. Furthermore, problems of hierarchy and co-existence may also arise when Muslim laws are applied in parallel with tribal or customary laws. These problems are especially

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visible in Western Africa, central Asia, and South Asia, where local traditions maintain their validity. For example, in *Al-Mahdi*, at the time of the commission of the crimes, tribal laws were also applicable in Mali.

Moreover, the application of the Sharia in Muslim states has been set aside in many cases by the transplant of European laws, whether through colonialism or self-imposed processes. For Muslim minorities living in Europe, in particular, the application of the Sharia is mostly optional, even for personal matters. The pure classical version of the Sharia as formed during the times of Prophet Muhammad therefore cannot and does not exist in the context of a modern (Muslim) state. Religious laws, in practice, always interact with state laws to varying degrees. Even official Sharia-compliant states, as is the case with Saudi Arabia and Qatar, have adopted elaborate civil codes and common law principles in commercial matters.

A fourth reason for which references are held to a minimum may also be the problem of fundamentalism and the confusion between mainstream and non-

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145 Glenn, supra note 29, at 211.
146 Marina Lostal, Expert Report – Reparations Phase: The Prosecutor v. Ahmad Al Faqi Al Mahdi: ICC-01/12-01/15 33 (May 3, 2017); see also Lostal, supra note 120, at 50 (noting Timbuktu is sometimes called the “City of the 333 (Sufi) Saints” and that “[i]t was the so-called ‘idolatrous’ nature of these mausoleums and mosques that led to the destruction of several of them between May and July 2012”).
147 Coulson, supra note 23, at 149. A concrete example is Section 377 of The Indian Penal Code that makes “unnatural intercourses” a criminal offense. The Indian Penal Code, 1860, § 377.
150 See generally Islamic Law and International Human Rights Law, supra note 26, at 52–81; Baderin, supra note 142, at 38; Bassiouni, supra note 23, at 81.
151 See Ilias Bantekas & Ahmed Al Ahmed, The Contract Law of Qatar (forthcoming 2022) (showing that Qatar contract law is not only predicated on the civil law tradition, but is also moving away from its Egyptian influences).
152 Emon, supra note 26, at 68 (“Islamic law today is immersed within a complex, bureaucratic state system, in which Islamic law is a partial source, if even that, for legal systems that are primarily based on European models of civil law and governance.”); Bassiouni, supra note 23, at 81 (discussing the secularization of modern Muslim states); Eleni Polymenopoulou, Human Rights in the Six Arab States of the Gulf Cooperation Council (GCC): From Vision to Reality, 3 INT’L COMPAR., POL’Y & ETHICS L. REV. 929, 953 (2020) (discussing the “[e]mergence of a [p]arallel [[legal] system]” in the countries of the GCC and noting that the legal system of Gulf States as a whole is not governed by the Sharia); Ilias Bantekas, Transplanting the Unidroit Contract Principles into the Qatar Financial Center: A Fresh Paradigm for Wholesale Legal Transplants?, 26 UNIF. L. REV. 1, 6 (2021).
mainstream approaches of Islamic law. Hadiths on the prohibition of the arts, for example, have been used by conservative movements within Islam to maintain prohibitions of arts and music on purely religious grounds. An example is the religious edict issued by Mullah Omar (i.e., edict allowing destruction of the Bamiyan Buddhas). In addition to the extreme violence and brutality inflicted upon religious minorities, such as Shi’as, Christians, and Yazidis, ISIS, Al-Qaeda, and other jihadi organizations have not spared the right to education nor the right to participate in cultural life in a broader sense. It has been reported, for instance, that in 2014 militants requested schools in Mosul to stop teaching music and the arts and that ISIS also restricted music in weddings, musical events, and traditional ceremonies in Syria. Branches of ISIS in Africa and South Asia also showed themselves capable of targeting culture, including the demolition of Sufi shrines in Timbuktu (as in the case of Ansar Dine) and the closing down of the once-renowned Festival du Desert. In Nigeria, cultural lifestyles have been affected because of extreme instability, insecurity, and displacements in the areas controlled by Boko Haram. In Mogadishu, Somalia, Al-Shabab has banned all radio stations from playing music and has mandated the cultivation and display of beards by men; in Peshawar, Pakistan, music is largely seen as forbidden under the Sharia, and


154 Mohamed Elewa Badar, The Road to Genocide: The Propaganda Machine of the Self-Declared Islamic State (IS), 16 INT’L CRIM. L. REV. 361, 361–411 (2016) (noting that ISIS and other jihadi have been spreading hateful propaganda about the sanctioning of shirk under the Sharia, as well as the practice of takfir—the excommunication of a person as a disbeliever, or ‘kafir’—under the goal of eliminating other religious groups); Mohamed Badar et al., The Radical Application of the Islamist Concept of Takfir, 31 ARAB L.Q. 134, 134–62 (2017).


157 See Al Mahdi Charges, supra note 119, ¶ 34.


attacks on Sufi shrines and music occur regularly; and even in Karnataka, India, Suhana Syed, a female singer and winner of a music contest, received death threats and warnings by local imams for being “anti-Sharia[.]”

2. The Benefits of Referring to the Sharia

Judges and experts within international institutions who deal with accountability for cultural-rights violations and the destruction of heritage may be confronted with a dilemma. Should judges and experts refer to Islamic law in a case involving Muslim cultural heritage, Sharia-based motivations, or Muslim applicants? If they do, is it a good idea? This dilemma is even more prominent since the composition of international bodies is generally multi-cultural in that it includes international judges who represent all legal traditions, therefore encompassing the Muslim legal tradition. Moreover, the statutes of international courts and tribunals render Islamic law directly relevant to transnational adjudication. By way of illustration, the ICJ is bound to apply not only international treaties and customary law, but also “the general principles of law recognized by civilized nations.” The ICC statute also contains an explicit provision under which the Court is obliged to take into account all legal traditions of the world, especially those more pertinent in a particular case.

In matters specifically concerning Muslim heritage and Muslim populations, it is evident that references to Islamic law would also be pertinent. For example, such an eventuality might well arise in the examination of issues related to the destruction of Syrian and Iraqi heritage, and could include an examination of humanitarian law principles in Islamic jurisprudence. Relevant references

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164 Rome Statute of the International Criminal Court, art. 21(1) (“The Court shall apply: (a) In the first place, this Statute . . . ; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law . . . ; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world . . . .”); see Mohamed Elewa Badar, Islamic Law (Sharia) and the Jurisdiction of the International Criminal Court, 24 LEIDEN J. INT’L L. 411, 411–33 (2011); also EMILIA JUSTYNA POWELL, ISLAMIC LAW AND INTERNATIONAL LAW: PEACEFUL RESOLUTION OF DISPUTES 114 (2019).
166 Cf. Bassiouni, supra note 23, at 159, 251–52 (noting violations of IHL have been long recognized under
could also be pertinent even where the perpetrators are not Muslim, as in the example of the destruction of Palestinian heritage,\textsuperscript{167} the Bosnian Genocide during the war in the former Yugoslavia,\textsuperscript{168} and even the Khmer Rouge’s destruction of Cham cultural property in Cambodia.\textsuperscript{169} In these cases, references to Islamic law could be useful \textit{inter alia} in reinforcing the cultural and religious legitimacy of the claims in a spirit of inter-cultural and inter-religious dialogue.

A better understanding of Islamic law, therefore, could further facilitate better collaboration with Muslim countries and even communication with NSAs who are acting in the Muslim world and are not bound by humanitarian law—yet may be keen to act upon Islamic law.\textsuperscript{170} A better understanding of Islamic law could also be among the cultural factors to be considered in heritage management and safeguarding of heritage. In fact, following 9/11, religious and cultural sensibilities are increasingly taken into account, not only in military operations,\textsuperscript{171} but also in archaeological excavations and operations concerning the preservation or safeguarding of cultural heritage.\textsuperscript{172} Inversely, targeted


:\textsuperscript{170} See also Alex P. Schmid, \textit{Challenging the Narrative of the “Islamic State”}, 6 TERRORISM & COUNTER-TERRORISM STUD. (2015) (referring to the persuasive letter prepared by a group of 152 leading Islamic scholars and addressed to ISIS leader Abu Bakr al Baghdadi “outlining what they consider to be errors and violations of Islamic and international laws committed by the leaders and followers of ISIS”); \textit{cf.} Cockayne, supra note 167, at 614–15 (discussing interventions by Islamic delegates to clarify the concept of ‘combatant’ in discussions with PLO and Algerian groups); Alessandro Chechi, \textit{Non-State Actors and Cultural Heritage: Friends or Foes?}, 19 ANUARIO DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD AUTONOMA DE MADRID 457, 468–69 (2015) (noting the potentially positive role of NSAs in protecting cultural heritage).


:\textsuperscript{172} See Salam Al Quntar et al., \textit{Responding to a Cultural Heritage Crisis: The Example of the Safeguarding the Heritage of Syria and Iraq Project}, 78 NEAR E. ARCHAEOLOGY 154, 155 (2015) (“[T]he next stage in the archaeological engagement with cultural heritage . . . has embraced a more community-centered approach over the past two decades in sympathy with theoretical developments in human rights law . . . .”).
archaeologists, cultural experts, museum experts, and other “cultural heritage
defenders” 173 are seen as victims of cultural rights violations. Ultimately, an
approach that takes into account Islamic law could entail better and more
effective protection of cultural heritage and the arts in the Arab-Muslim world.

IV. LOOKING AT MODERN MUSLIM STATE PRACTICE

In Muslim-majority states, Sharia is a source of law. In Sharia-compliant
countries, in particular, Sharia is recognized in the state constitution as the
primary legal source. 174 This means that in certain matters, Sharia may, at least
in theory, set aside other rules (as is the case especially in personal and criminal
laws). Today, Muslim states following Sunni Islam generally adhere to one of
the four major schools of thought (Hanafi, Maliki, Shafi, or Hanbali), 175 and
Shiites generally adhere to other schools. 176 Adherence to an official school is
recognized either expressly or de facto as the official state doctrine. 177 In
practice, however, movements within Islam as well as local traditions, usages
(urf), and customs (adat) are also influential—for example, Wahhabism in Saudi
Arabia. 178 This means that jurists within a Muslim state are usually instructed to
resolve issues based on one school of thought, and that the courts, primarily in
personal matters, follow in principle the jurisprudence of a specific school. 179

173 See Bennoune supra note 15, ¶¶ 68–75.
174 See QATAR CONST. art. 1 (“Its religion is Islam and Sharia’s law shall be a main source of its
legislations.”); see also SUDAN CONST. art. 3(1) (“Sources of Legislation[,] Nationally enacted legislation . . .
shall have as its sources of legislation Islamic Sharia and the consensus of the people.”). Clark B. Lombardi,
Designing Islamic Constitutions: Past Trends and Options for a Democratic Future, 11 INT’L J. CONST. L. 615,
615–17 (2013) (discussing what he calls “Sharia Guarantee Clauses (SGCs)” in Muslim states’ constitutions and
noting that the principle that “state law should be consistent with sharia” has a long pedigree in Islamic political
thought); Polymenopoulou, supra note 153, at 934–37 (discussing Gulf States’ constitutions).
175 For example, Algeria follows the Maliki school, yet in some regions Ibadi Islam is applied. Emon,
supra note 26, at 59. Also, some Muslim states follow lesser-known schools—for instance, most Omanis adhere
to Ibadi Islam. Id.
176 For example, take the Twelvers, Jafaris, and Zayidis. See COULSON, supra note 23, at 103–19.
177 See generally COULSON, supra note 23, at 86, 88–89, 101 (discussing unity, diversity, and “mutual
tolerance” among the schools and referring to a ninth-century case, known as the House of the Elephant, in
which the outcome of litigation at each stage of the process depended on the affiliation of the qadi to one school
or another); Emon, supra note 26, at 62 (noting the authority of the qadi’s ruling in a case where the husband
and wife belonged to different schools).
178 ESPOSITO, supra note 26, at 119–20, 231; BASSIOUNI, supra note 23, at 46; see also Emon, supra note
26, at 67; Andrew M. Bennett, Islamic History & al-Qaeda: A Primer to Understanding the Rise of Islamist
to Salafi, in SAUDI ARABIA IN TRANSITION: INSIGHTS ON SOCIAL, POLITICAL, ECONOMIC AND RELIGIOUS
CHANGE 151–66 (Bernard Haykele et al. eds., 2015).
179 The Family Law, No. 22 of 2006, art. 3 (Qatar) (stating as an example that Courts shall apply Hanbali
Islamic law).
However, in matters related to arts and culture, at least in states that are more open to Western influences, the Sharia is usually side-lined. This is also presumably why some Muslim thinkers find that the entire sphere of culture and the arts in the Muslim world overemphasizes Western values, downplaying Islamic art and literature.\footnote{al-Ghazali, supra note 54, at 426 (noting, for example, that “[o]ften there seems to be a deliberate attempt on their part to deny or disregard the universal and perennial spirit animating the literary and artistic masterpieces produced by Muslims” and that “[m]uch is made of the non-Muslim sources or tools which might have been employed by Muslims in their artistic works”).} The complexity of the Sharia and the challenging task of accurately interpreting the fiqh (or eventually, arguing on the need to reform the fiqh) may be among the reasons that cultural policy makers generally refrain from referring to Sharia law. It may be for this reason that a modern, contemporary art scene is developing even in those countries specifying Sharia law as a source of law in their constitution. Qatar is arguably the best example of this evolution. The Qatar Fund for Development has been continuously supporting the UNESCO with substantial contributions.\footnote{See, e.g., The Qatar Fund for Development Boosts UNESCO’s Heritage Emergency Fund with US $2 Million Contribution, UNESCO (Mar. 2, 2018), https://whc.unesco.org/en/news/1791; Qatar Development Fund Boosts UNESCO Heritage Emergency Fund, UNESCO (Dec. 12, 2015), https://en.unesco.org/news/qatar-development-fund-boosts-unesco-heritage-emergency-fund; Qatar Hikes Contribution to Unesco, GULF TIMES (Oct. 6, 2016), https://www.gulf-times.com/story/516443/Qatar-hikes-contribution-to-unesco.} The UNESCO office, which serves as the “Cluster Office for Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates, Yemen[,]” is becoming increasingly more active, including in the field of promoting cultural diversity and preventing radicalization,\footnote{Gulf States & Yemen, UNESCO, https://en.unesco.org/fieldoffice/doha (last visited Sept. 7, 2021); see also Preventing Violent Extremism, UNESCO, https://en.unesco.org/preventingviolentextremism (last visited Sept. 7, 2021).} and a new law on the safeguarding of cultural heritage is currently being drafted.\footnote{QM, UCL Qatar to Develop New Cultural Heritage Law, GULF TIMES (Oct. 4, 2018), https://www.gulf-times.com/story/608233/QM-UCL-Qatar-to-develop-new-Cultural-Heritage-Law.} Saudi Arabia, where the government pours billions into the art economy,\footnote{Daniël Cabellic, The Creative Kingdom: Economic Reform and Art as a New Space of Islamic Critique in Saudi Arabia, 27 ZEITSCHRIFT FUR RELIGIONSWISSENSCHAFT 27, 29 (2019); see also Maha Abdullah Al Senan, The Worth of Art: The Future of the Art Market in Saudi Arabia, 4 INT’L DESIGN J. 193 (2018); Suzi Mirgani, Introduction: Art and Cultural Production in the GCC, 7 J. ARABIAN STUD. 1, 9 (2017).} has also been emphasizing the growth of its art sector and cooperation with cultural institutions and bodies around the world. One cannot but be astonished that conservative ulemas are advocating in favor of wholesale prohibitions against images and music in cities as modern as Jeddah and Riyadh, condemning provocative artists on blasphemy and apostasy charges,\footnote{Ben Hubbard, Artist’s Death Sentence Follows a String of Harsh Punishments in Saudi Arabia, N.Y.TIMES (Nov. 22, 2015), https://www.nytimes.com/2015/11/23/world/middleeast/saudi-artists-death-sentence-} at the same time that Saudi Arabia is leading other Gulf countries in...
boosting its entertainment sector and art market. Promotion of the arts in the Kingdom includes, for example, the proliferation of cultural and artistic events and festivals, including the Red Sea Festival; the outstanding growth of the film industry, including nominations at the Cannes;\textsuperscript{186} sensational contemporary art sold at astronomic prices at Christies Dubai;\textsuperscript{187} an upcoming scene of urban-style street art;\textsuperscript{188} and even modern feminist art,\textsuperscript{189} including graffiti by female artists.\textsuperscript{190} Furthermore, Saudi Arabia alone today has a variety of inscriptions in both the World Heritage list and the list for intangible cultural heritage, as well as a number of tentative nominations.\textsuperscript{191} These nominations include the murals in \textit{Qurayt Al-Faw} in Saudi Arabia (the large-dimension wall paintings and sculptures created in a style that presents important similarities with the Hellenistic tradition, and mosaics “most likely made by Christian artisans who had gained their skill working on the many mosaic programs adoring Byzantine churches in the eastern Mediterranean”).\textsuperscript{192}

It is equally important to look specifically for best practices by regional organizations in the Arab-Muslim world fostering the arts, culture, and letters. For example, the ALESCO (the equivalent of UNESCO in the Arab world and that aims at “\textit{[p]}roviding propitious conditions for the development of education, culture, sciences, the environment, and communication in the Arab World\textit{}”)\textsuperscript{193} hosted in December 2020 “a coordination meeting that brought together several directors of Arab film festivals and representatives of film institutions to discuss


\textsuperscript{187} Al Senan, supra note 185, at 193.


\textsuperscript{192} \textit{Islamic Art and Visual Culture: An Anthology of Sources} 1–6, 99 (D. Fairchild Ruggles ed., 2011).

\textsuperscript{193} In Brief, ARAB LEAGUE EDUC., CULTURAL & SCI. ORG. (Mar. 7, 2019), http://www.alecso.org/nsite/en/component/content/article/814-who-are-we-v2?catid=63&Itemid=220 (alteration in original).
strategies for mitigating the impact of the COVID-19 pandemic on the industry.”\footnote{Regional Perspectives | Arab States, UNESCO (May 1, 2021), https://en.unesco.org/news/regional-perspectives-arab-states-2.} Similarly, the Islamic World Educational, Scientific, and Cultural Organization (ICESCO) has been calling on the international community “to increase their coordination efforts” in the field of culture and the arts, with the aim of “develop[ing] a mutually agreed global artistic system on the role of art in building human civilization and spreading the values of peace.”\footnote{ICESCO Calls for Global Partnership in Islamic Art, ISLAMIC WORLD EDUC., SCI. & CULTURAL ORG. (Nov. 26, 2020), https://www.icesco.org/en/2020/11/26/icesco-calls-for-global-partnership-in-islamic-art.} The ICESCO has been an immense contributor to the preservation and safeguarding of heritage through the establishment of chairs in the fields of heritage, the arts, and literature,\footnote{AlMalik: ICESCO Works Toward Reviving Islamic Heritage of Sciences and Arts, ISLAMIC WORLD EDUC., SCI. & CULTURAL ORG. (Dec. 17, 2020), https://www.icesco.org/en/2020/12/17/almalik-icesco-works-toward-reviving-islamic-heritage-of-sciences-and-arts.} as well as the International Center for Arts, ICESCO’s Cultural and Academic Chairs.\footnote{Vision, Mission & Objectives, ISLAMIC WORLD EDUC., SCI. & CULTURAL ORG., https://www.icesco.org/en/vision-mission-objectives (last visited Sept. 7, 2021).} To this, one should add other best practices of Muslim states, including not only the ratification of the major UNESCO treaties on cultural heritage and a number of nominations to UNESCO lists by Arab-Muslim countries, but also their increasingly active participation in all spheres of UNESCO’s work.\footnote{World Heritage Comm., Rep. on Its Forty-Fourth Session, U.N. Doc. WHC/21/44.COM/10A (2021).}

CONCLUSION

Islamic law is based on immutable sources (the Qur’an and the Sunna) as well as an extremely diverse body of legal jurisprudence, known as the fiqh. An examination of the sources of Islamic law related to cultural heritage therefore does not stand without an examination of the relevant fiqh. Even so, neither of these sources provides a clear answer as to the permissibility of arts specifically under the Sharia. The Qur’an embraces the concept of beauty but does not provide any guidance on arts and the safeguarding of cultural monuments—save for religious sites. Prohibitions related to iconoclasm and idolatry could be relevant, but these have been unanimously rejected by the highest authorities of Muslim scholars. Furthermore, there is a rich body of hadiths that prohibit arts and music, yet these appear to be largely fabricated and, in any case, non-authentic. At the same time, the outstanding diversity of religious doctrines and schools of Islamic law has allowed for fierce disagreements and the development of contradictory movements within Islamic legal thinking.
International bodies have good reasons to also refer to Islamic law in matters related to arts, letters, and the safeguarding of cultural heritage. These references, however, should point not only to the Qur’an or the Sunna alone, but also to the fiqh and the practice of tolerance and diversity throughout the centuries of Islamic civilization. This approach of using diverse references has been followed by many religious authorities when arguing about free speech, culture, and cultural rights. By way of illustration, following the Danish cartoons controversy, in which cartoons depicting Prophet Muhammad as a terrorist were published in 2005 by the journal Jyllands-Posten, a group of Muslim scholars issued a statement on the cartoons. These scholars, however, did not seize the opportunity to refer in detail to Islamic law standards on freedom of speech, but rather confined themselves to a Quranic verse, which states that Muslims should “argue with them [polytheists/disbelievers] in the most courteous way[.]” State practice equally supports the hypothesis of tolerance and diversity in artistic expressions. A number of illustrated manuscripts and works of art, including representations of Prophet Muhammad, demonstrate that music and the arts have been practiced throughout Islamic history. Moreover, a number of murals demonstrate deep influences by Hellenistic and Byzantine art. In addition, the practice of the Caliphs and leaders of the Muslim world shows that funding for artists, musicians, and performers was available throughout the centuries. These findings could be useful in fostering collaboration between the UNESCO and other organizations working in the field of arts and culture, Muslim organizations, and NSAs based in the Muslim world.

Extremist views of the Sharia and the alleged Sharia practiced by terrorist organizations such as ISIS are rejected by the vast majority of Muslims as being contrary to the Islamic ethos, views, doctrines, teaching, and culture. The position of the most eminent religious leaders and even the OIC also crucially condemn extremism. The best example is the position of the OIC on the bombing of the two Buddhas of Bamiyan; the OIC attempted to persuade the Taliban not to proceed with this act using Islamic law arguments. Following the destruction of the statues, the Doha Conference of the uleimas on cultural heritage in Islam was organized, and once more the ulemas condemned the act, concluding that such destruction is prohibited under Islamic law.

Last but not least, Wahhabi doctrines and other movements that are hostile

199 Cf. Annex to the Doha Statement, in DOHA PROCEEDINGS, supra note 74, at 9–10 (highlighting the values of dialogue, tolerance, and diversity).
201 QUR’AN 16:125.
toward the arts and the letters also seem to be rejected *de facto* in the Muslim world—at least gradually. Even the Kingdom of Saudi Arabia is eager today to develop a modern and vibrant artistic and cultural scene and is especially active within the UNESCO as well as the AESCO and the ICESCO. What is clear, therefore, is that the main question in this context is not whether or not the arts are permissible. This question is beside the point. Rather, what is relevant is the relief of artists, performers, and cultural institutions from tight regulation imposed by state laws.\footnote{Cf. Ulaby, *supra* note 186, at 215 (finding, for example, that “larger vertically integrated multi-media companies have signed many singers in the region to exclusive contracts that tightly control what and where the artists can record”); Cubelic, *supra* note 185, at 38 (noting censorship is limiting creativity). See generally Matt I. Duffy, *Arab Media Regulations: Identifying Restraints on Freedom of the Press in the Laws of Six Arabian Peninsula Countries*, 4 BERKELEY J. MIDDLE E. & ISLAMIC L. 1, 6 (2014).} Questions related to the legitimacy of the arts and the need to safeguard cultural heritage, or even the veneration of shrines, should be examined in the context of the specific circumstances where they appear (as in the case where the Taliban exploded the two Buddhas or where Ansar Dine ruined the Sufi shrines) and should be isolated as acts of terrorism.