

# Religious Authority and Constitutional Order: A case study of the Conciliation and Arbitration Boards (CABs) of the Shia Imami Ismaili Community

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## Abstract

This paper discusses the interpretation of the Constitution of the Shia Imami Ismailis via the constitutionally established institutions of the Conciliation and Arbitration Boards (CABs). It views the Constitution as a variety of non-scriptural “religious text” and discusses the social and historical context of the community, the Constitution and the CABs. The paper argues that the structure and operation of the CABs are designed to balance diverse local and contextual factors within the tradition and doctrine of singular Imamat authority and that, in so doing, the interpretational system of the CABs demonstrates how religious texts may be understood in ways that accommodate plurality and community engagement while still preserving hierarchy and authority.

## Keywords

Ismaili; conciliation; arbitration; India

## 1. Introduction

Not all religious or sacred texts are scriptural. In the Muslim traditions, the text of the revealed scripture, the Qur’an, is foremost in authority and in legal weight, but other textual materials, which are non-scriptural, are also significant. The *hadiths*, which recount the sayings, opinions, and actions of the Prophet Muhammad, are next in importance. The *hadith* are now accessed through collected written volumes (i.e., the *sahih*). They are not scriptural texts but partake of sacredness, being derived from the Prophet and his close companions. The authority of the

*hadiths* may also derive from several Qur'anic injunctions to obey the Prophet.<sup>1</sup>

The present paper discusses a contemporary religious-legal text of the Shia Imami Ismail community (the "Ismailis"), the "Constitution of the Shia Imami Ismailis." The paper describes the social and historical context of the community and of the Constitution and explains the religious nature of the Constitution. The Ismaili Constitution has a religious character in two senses: (a) by being a constitution for a religiously-defined community, and (b) owing to the processes by which it was developed and promulgated, and to the authority that it explicitly invokes.

The paper proceeds to discuss how the Constitution is interpreted, focusing on the constitutionally established institution of the Conciliation and Arbitration Boards (CABs), which act as the primary legal bodies of the community. The paper argues that the structure and operation of the CABs is designed to balance diverse local and contextual factors with the tradition and doctrine of the singular Imam authority. The paper also shows that this system demonstrates how religious texts may be interpreted in ways that accommodate plurality and community engagement while still preserving hierarchy and authority.

## 2. Background of the community and the CAB system

The Ismailis are a diverse community within the Shia tradition of Islam. Its members belong to various ethno-geographic and linguistic traditions, including those of Arabia, Iran, Central Asia, Western China, and South Asia. Historically, they live across Asia, the Middle East, and sub-Saharan Africa, and in more recent decades have established significant communities in Europe and North America, with smaller communities in South-East Asia. The Ismailis may thus be viewed as a transnational community numbering in the several millions, with populations in some 25 countries. In common with all Muslims, the Ismailis affirm the *shahada* that there is no God but Allah, that the Prophet Muhammad is the last and final messenger of Allah, and that the Qur'an, Allah's final message to mankind, was revealed through him. Furthermore, in common with Shia Muslims, the Ismailis affirm that after the Prophet's death (in 632 CE), Ali b. Abi Talib (d. 661 CE), the Prophet's cousin and son-in-law, became the first Imam (spiritual

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<sup>1</sup> See, for example, Qur'an 5:92, 3:32, 3:132, 8:1, 47:33.

leader) of the Muslim community, and that this spiritual leadership (known as Imamat) continues thereafter by hereditary succession through Ali and his wife Fatima, the Prophet's daughter. Succession to Imamat, according to Shia doctrine and tradition, is by way of *Nass* (designation), and it is the absolute prerogative of the Imam of the time to appoint his successor from among any of his male descendants. The Shia Imami Ismailis affirm that His Highness Prince Karim Aga Khan is the current and forty-ninth hereditary Imam in lineal descent from Ali and Fatima. Thus, all Ismailis have a common allegiance to the living Imam.<sup>2</sup>

The 48th Imam, Sultan Mohammed Shah Aga Khan III (1877-1957), was able to organize the Ismailis using the modern mechanism of constitutions. The first Ismaili Constitution was promulgated in 1905 and applied to the community settled in East Africa. By this date, in addition to the older community in the sub-continent, there was a developing community of Indian Ismailis in several parts of East Africa, a region that was becoming an important base for the Ismailis. The Constitution of 1905 and its successors, applied to the different settlements of the community. Each constitution was thus defined territorially, outlining specific institutional arrangements in each of the centers.

The 1905 iteration of the constitution was reformulated into several different versions; 1925, 1937, 1946, 1962, and 1977. Apparently there was also a revision in 1954, at least for the community in Africa.<sup>3</sup> Moreover, minor amendments were made in 1964, although these did not result in the promulgation of new revised constitution.<sup>4</sup> As governing documents, the constitutions stipulated the organisation of various institutional bodies, hierarchies, and structures to accommodate the needs of the communities to which they related, and were designed to provide an institutional framework to support members of the community as it developed commercially, educationally, socially, and professionally. Later, when a significant number of members of the community left Africa for Europe and North America, in the 1960s and early 1970s, the lessons learned from these earlier constitutions proved useful and ushered in the 1977 constitution.<sup>5</sup>

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<sup>2</sup> See <http://www.theismaili.org/cms/16/The-Ismaili-Community>.

<sup>3</sup> On this, see J.N.D. Anderson, "The Ismaili Khojas of East Africa: a new Constitution and Personal Law for the Community", 1 (1) *Middle Eastern Studies* (1964), 21.

<sup>4</sup> See *The Constitution, Rules and Regulations of His Highness the Aga Khan Shia Imam Ismailia Councils of Africa* (1954) and *The Constitution of the Shia Imami Ismailis in Europe, Canada and the United States of America* (1977).

<sup>5</sup> See Mohamed Jindani, "Dispute Resolution in the Shia Ismaili School in Islamic Law: A Case for Legal Pluralism in the United Kingdom", 12 *Yearbook of Islamic and Middle Eastern Law* (2005-2006), 141-150 at 147.

Some of constitutions included prefatory statements pertaining to the status of the Prophet Muhammad and the Ismaili Imams, which grounded the documents in forms of authority both shared with other Muslims and uniquely relevant to the Ismaili communities. Most important for present purposes were the procedural rules for institutions of the community designed to settle disputes between community members. Over time, these institutions developed into tribunals, which were community-based dispute resolution institutions.

As the modern constitutions arose in the absence of an Ismaili state or government, they were designed for the *internal* organization and administration of the community rather than for competing with the “laws of the land of abode” in which Ismailis lived. When personal law was enacted, it was internally oriented and stipulated, for example, the rites of marriage to be performed in a community context, with awareness to the fact that other procedures may also be required by state authorities. Finally, the constitutions affirmed and articulated the role and authority of the Ismaili Imam within the legal structure of the community. For example, the appointment of key institutional office holders was the prerogative of the Imam, and certain omnibus clauses in the constitutions addressed the authority of the Imam.

The development of law by constitutions represents for the Ismaili community a distinctive form of Muslim law. When it was first employed, the constitutional form was novel even for the Ismaili community.<sup>6</sup> At the same time, the constitutional form was a useful way of accommodating evolving institutional bodies for the community by amendments or by the promulgation of revised constitutions. Beyond its practical value, the constitution also represented an enhanced ability of the Ismaili Imam, from the late 19th century onward, to structure community affairs in an explicit manner, something which had not always been possible in the history of the Imam. Novel and different though the legal form may have been even in the context of the Ismaili tradition, the constitutional form also rested on, and developed language for the articulation of ancient principles stemming from the Shia doctrine and belief, and from the Ismaili interpretation of Islam, in particular by providing a contemporary articulation of the role and authority of the Imam.

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<sup>6</sup> On the operation of state constitutions in the Muslim world, see Ramier Grote and Tilmann J. Roder, *Constitutionalism in Islamic Countries: between upheaval and continuity* (2012).

A new Ismaili Constitution was promulgated in 1986, which provided a single text for all Ismaili (Shia Imami) communities worldwide. Entitled “The Constitution of the Shia Imami Muslims,” and amended (but not re-issued as a new document) by the execution of a constitutional instrument in 1998, this constitution is not territorially limited. The text begins with a relatively short but symbolically very rich Preamble consisting of a series of recitals in which the fundamental tenets of Ismaili Islam are expounded. The Preamble states as follows:

- (A) The Shia Imami Ismaili Muslims affirm the *Shahadah*, “La ilaha illa-llah, Muhammadur Rasuli-llah,” the Tawhid therein and that the Holy Prophet Muhammad (S.A.S.) is the last and final Prophet of Allah. Islam, as revealed in the Holy Quran, is the final message of Allah to mankind, and is universal and eternal. The Holy Prophet (S.A.S.) through the divine revelation from Allah prescribed rules governing spiritual and temporal matters.
- (B) In accordance with Shia doctrine, tradition, and interpretation of history, the Holy Prophet (S.A.S.) designated and appointed his cousin and son-in-law Hazrat Mawlana Ali Amiru-l-Mu’minin (A.S.), to be the first Imam to continue the Ta’wil and Ta’lim of Allah’s final message and to guide the murids, and proclaimed that the Imam should continue by heredity through Hazrat Mawlana Ali (A.S.) and his daughter Hazrat Bibi Fatima az-Zahra, Khatun-i-Jannat (A.S.).
- (C) Succession to Imam is by way of *Nass*, it being the absolute prerogative of the Imam of the time to appoint his successor from amongst any of his male descendants whether they be sons or remoter issue.

As will be clearly recognised by anyone familiar with Muslim thought and history, Recital A espouses tenets of belief shared by all Muslims. Recital (B) moves from this general Muslim framework to a specifically Shia perspective, centered on the concept and role of the Imam. This is reinforced by the invocation of succession by way of *Nass*, a principle of long provenance in the Ismaili tradition and more generally in Shia thought. To this conceptual framework the Preamble adds the context of history:

...the Imams of the Ismaili Muslims have ruled over different territories and peoples in various areas of the world at different periods of history and, in accordance with the needs of the time, have given rules of conduct and constitutions...<sup>7</sup>

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<sup>7</sup> For this and the above quotation, see *The Constitution of the Shia Imami Ismaili Muslims* (1998).

Finally, the Preamble also declares that “...the Imam enjoys full authority of governance over and in respect of all religious and Jamati matters of the Ismaili Muslims.” As with the development of institutional forms, in several other respects the principles stated in the Preamble build upon the earlier constitutions.

The 1986 Constitution was promulgated by “ordination,” under the signature and seal of the Imam and with the following language:

In exercise of the said recited authority vested in me as Hazar Imam, I, SHAH KARIM AL HUSANI AGA KHAN, am pleased to ordain AND DO HEREBY ORDAIN that the Shia Imami Ismaili Muslims, in whatever place they may be, shall at all times be bound and governed by this Constitution according to its tenor.

ORDAINED under the Sign Manual and Seal of Mawlana Hazar Imam Shah Karim al Hussaini His Highness Prince Aga Khan, the Forty-Ninth Imam of the Shia Imami Ismaili Muslims.

The Constitution is therefore inextricably linked to the authority of Aga Khan as Imam of the Ismailis.

Personal law is addressed in Article 15 of the Constitution:

- 15.1 In this Article the term “Personal law” shall mean the rules governing the personal relationship of an individual to others in the society in which he lives, and shall include, but without limitation, rules in relation to birth, infancy, marriage (including prohibited degrees of consanguinity, affinity or fosterage, and marriage with non-Ismailis), mehr, nullity, restitution of conjugal rights, divorce (including iddat and maintenance), care and guardianship, legitimacy, succession and apostasy.
- 15.2 Subject as provided in Article 15.4, the personal law applicable to Ismailis shall be such personal law as has evolved within the Shia Imami Ismaili School of Thought of Islam.
- 15.3 Mawlana Hazar Imam [i.e., the Aga Khan] has the sole right to interpret the personal law evolved within the Shia Imami Ismaili School of Thought of Islam.

Note the distinction between the allegiance of Ismailis to their place of domicile and to their religious authority. This is stipulated in Article 15.4:

- 15.4 To the extent that the territory of domicile or residence of any Ismaili does not recognize and apply or allow the application of the personal law of Ismailis, he shall be governed in that territory by such personal law as is applicable to him under the law of that territory.<sup>8</sup>

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<sup>8</sup> *Ibid.*

This neatly contextualizes the reality of contemporary Ismaili law as separate from state law and as fundamentally non-state law. Thus, Ismaili law is not intended to compete or replace the Ismailis' obligations to the laws of their land of abode. Rather, Ismaili law is conceived within the framework of a community operating internationally and resident in many different states. The Constitution also provides for locally variable "Rules and Regulations" for each of the important centers of the community, which range from areas of traditional and historical settlement such as the sub-continent, East Africa, Syria, and Central Asia to areas of more recent location in North America, Western Europe, and South-East Asia.

The constitutions address several aspects of social governance for the Ismaili communities, including health, education, and economic development. Of particular importance for our present discussion is that the dispute resolution tribunals which existed in the institutional structure of the communities in the past were replaced in 1986 by the Conciliation and Arbitration Boards (CABs). Although these boards have generally the same mandate as the former tribunals, they operate within a broad network of local, regional, national boards and of an international board. The CABs function as community-based dispute resolution institutions within the Ismaili communities and exist in most countries of significant Ismaili settlement.<sup>9</sup>

According to Article 13.5 of the 1986 Constitution:

Each National Conciliation and Arbitration Board shall upon the application of any Ismaili assist him to settle any differences or disputes with another party residing in the area of jurisdiction of the National Conciliation and Arbitration Board in relation to any of the matters mentioned in article 13.1(a).

Article 13.1(a) provides that the CAB is:

... to assist in the conciliation process between parties in differences or disputes arising from commercial, business and other civil liability matters, including those relating to matrimony, children of marriage, matrimonial property, and testate and intestate succession.

The CAB system has recently been under judicial consideration in the UK Supreme Court in its decision in *Jivraj v Hashwani* [2011] UKSC 40. In this case, the International CAB (ICAB) acted as an intervener, and its chairman, Mr. Noordin Nanji, submitted a witness statement discussing the development, structure, and role of the CAB system. Mr. Nanji wrote:

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<sup>9</sup> Preceding the CABs were the Tribunals, and before them the Administrative Councils.

- 3.1 Ismailis have, throughout their history, maintained a tradition of resolving individual disputes and differences through an entirely voluntary process of mediation, conciliation and arbitration within the community.
- 3.2 ... The [CAB] system operates in 17 jurisdictions around the world. In some countries, notably India and Kenya, the decisions of such boards, particularly in matrimonial and personal law matters, though reviewable by the courts, are recognised by the law.
- 3.3 ... The Constitution also established an International Conciliation and Arbitration Board, ICAB.<sup>10</sup>
- 3.4 All disputes between parties in the same region are brought before the local board. Cases involving disputes between Ismailis residing in different national jurisdictions are dealt with either by the International Board or by the National Boards local to the parties in co-operation with each other.
- 3.5 The International Board deals with disputes that are international in scope. It also acts as an appeal board for appeals from arbitration decisions of any National Board worldwide. A decision on appeal by ICAB is final, conclusive and binding upon all the parties, provided that they have voluntarily submitted earlier to be so bound.
- 3.6 In addition to its casework, ICAB coordinates the global system, developing policies and programmes and identifying and sharing best practices across the CAB System.
- 3.7 The primary objective of the CAB System is to assist Ismailis to resolve disputes in an equitable, speedy, confidential, cost effective, amicable and constructive manner *and in an environment that is culturally sensitive*... Moreover, the Boards, whether arbitrating or mediating, are required to operate in accordance with applicable local laws. In arbitrating any dispute, a panel appointed by one of the Boards will apply the national laws applicable to the relevant dispute, *not any "religious" law*.<sup>11</sup>
- 3.8 In light of these objectives, the CAB system is guided by the following principles:
  - (a) before mediating or arbitrating on any dispute, the Board must first be satisfied that the parties to the dispute have come to the Board voluntarily and of their own free will...

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<sup>10</sup> In Article 12 of the Constitution.

<sup>11</sup> Emphasis added.



- (e) the system is available at no cost and therefore is highly accessible, including to those of limited financial means.

With respect to membership of the CABs, Mr Nanji's statement notes that all members are appointed by the Aga Khan for a three-year term, all members serve on a voluntary basis, and "membership typically is comprised of lawyers, social workers, accountants, businesspersons, other qualified professionals and senior community leaders."<sup>12</sup>

Mr. Nanji's statement further notes that "The experience of the Boards is that more than 99% of disputes referred to the Boards are dealt with by way of mediation or conciliation. It is only a handful of cases that are dealt with by way of arbitration."<sup>13</sup> Finally, he states that:

- 5.6 It is strongly felt within the community that one of the reasons for this high incidence of mediation and conciliation is the fact that the parties, and indeed the members of the community, have confidence that their rights will not be compromised and that a fair and equitable resolution of their disputes will be achieved through mediation and conciliation by the Boards. *Much of this faith and confidence rests on the fact that (a) the CAB system is constitutionally established by the hereditary Imam of the time, and thus embedded in the social fabric of the community and (b) the Board members and those they assist share an abiding religious commitment to the principles of brotherhood, fairness, justice and amicable resolution of disputes.*<sup>14</sup>

### 3. Understanding the Interpretation of the Constitution through the CABs

The CABs operate in an elaborate and hierarchical structure of international, national, regional, and, in some locations, sub-regional institutions. Almost all CAB members, and all members at the higher levels, are appointed by the Ismaili Imam, typically for three-year terms, but serving at the pleasure of the Imam. Moreover, the CABs are staffed significantly but not completely by legal personnel. This is in part because sufficient numbers of legally-trained staff are not always available, particularly in

<sup>12</sup> Witness statement, para. 4.1.

<sup>13</sup> Witness statement, para. 5.5.

<sup>14</sup> Emphasis added.

smaller communities, but also because a more diverse range of skills and experiences is useful in seeking settlements, including accounting, social work, entrepreneurship, and general business management. Thus, CABs are not structured as a court *per se*, although they enjoy legal, including disciplinary, authority and have an appeal mechanism. Rather, they are examples of what is now labeled alternative dispute resolution (ADR) structures or institutions, operating to provide mediation, negotiation, conciliation, and arbitration services.

Consistent with other types of ADR, the structure of the CABs and the skill set of its members have an interpretational effect as well. When dealing with matters in which conciliation is a viable option, the diverse staff of the CABs does not always think in strictly legal terms but applies ethical and other principled considerations for resolution of the conflict. One prominent legal-theoretical perspective regards interpretivism to be at the heart of law and of legal analysis proper, and sees law as resting on principles rather than rules.<sup>15</sup> The interpretivism of the CABs, however, is broader because the staff may be guided not only by legal considerations, as legal training and expertise are not the only skill set available.

The diversity of personnel has an additional meaning. CABs are deliberately local. Whereas in certain locations, where there is a significant community presence, as for example in Ontario, Canada, the local CABs may be quite busy, in other locations, where community membership is small, for example in South-East Asia, the local CABs are less busy. But the structure of the CABs is not such that cases from small jurisdictions are “heard” in larger jurisdictions, so that the few cases from SE Asia are not sent to be heard in Pakistan, where there is a larger community and a more elaborate CAB structure. Nor are the cases from various jurisdictions sent up to a national or the international CAB. The CAB in Bangladesh, for instance, deals with a much smaller community than the CAB in Pakistan or India, but it has the same jurisdictional authority and relates to the ICAB and to its sister institutions in the same way as its larger counterparts. First, this arrangement preserves the locality of CABs in two respects. It keeps the members in the first instance proximate and connected to the individuals in the community whom they serve, enabling them to draw upon local knowledge and connections in seeking amicable settlements. Second, and more important for our purposes, it allows the local CABs to interpret in a way that is mindful of the legal, cultural, and social norms of their milieu.

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<sup>15</sup> I refer to the thinking of Ronald Dworkin, expressed in his *Law's Empire* (1998).

As a hypothetical example, consider two Ismaili couples in the process of separating, one residing in Canada, the other in Bangladesh. There will likely be distinctly different legal norms in the two jurisdictions with respect to several issues such as the custody of children, the payment of *mahr* (i.e., dower),<sup>16</sup> the definition of joint property, etc., but there will also be distinct socio-cultural norms that may relate to the amount needed to reasonably support a former wife after divorce. The same differences apply in commercial matters. Forms of doing business, including contract formation and interpretation, may be subject to different norms in different jurisdictions: “We had a deal because we had independent counsel who drew up contracts that we signed in a lawyer’s office” vs. “We had a deal because one lawyer drafted a contract, which we both signed over lunch” vs. “We had a deal because we discussed the terms and shook hands on it in front of witnesses (without a lawyer, because after all family relations are involved).” According to Article 15.4 of the Constitution, Ismailis who reside in a territory that does not allow the application of Ismaili personal law are subject to the personal law of the territory of their abode. The local connection of the CABs allows these institutions to interpret Ismaili personal law with some sensitivity to what fits the local environment, in order to mitigate instances of conflict.<sup>17</sup> Moreover, Article 15.2 provides wide latitude for the understanding of Ismaili personal law as “such personal law as has evolved within the Shia Imami Ismaili School of Thought of Islam,” which also allows for local or regional color to be applied to the understanding of the law.

This locality may seem problematic in at least two respects. First, because it may lead to a general incoherence of personal law it can be understood differently in different contexts, and second, in the manner in which this diversity is reconciled with the authority of the Imam as a legal interpreter, as granted by Art. 15.3. These issues must be addressed at different levels. It is clear both in the explicit language of Article 15.3 and in Ismaili history and doctrine that *authoritative* pronouncement on the rules or principles of Ismaili law are the exclusive province of the Imam. Nevertheless, a level of local interpretation appears to have been delegated to the CABs, which although not dispositive, may still be employed in a particular case or

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<sup>16</sup> *Mahr* is a sum of money or item(s) of value that pass from the bridegroom to the bride, as required in Muslim marriage.

<sup>17</sup> The original British juries have a similar function, namely to bring local knowledge to bear not only in determining what had occurred but also, where necessary, in determining appropriate punishment, calibrated to the local context.

context. Indeed, although this practice may generate some diversity, it does not necessarily amount to incoherence. In the federal constitutional structure of Canada the provinces are independent within the jurisdictional competences granted to them by the constitution. As a result, precedent coming from one province may be persuasive but not binding on courts in another province. Technically, in any given province the law of another province is as much foreign law as the law of another country. This structure does not lead us to conclude, however, that Canadian law is incoherent because of the divergences between provinces. Rather, it is evidence of an acceptance in Canada of some diversity in jurisdiction. In the Canadian case, the overarching and appellate authority of the Supreme Court of Canada provides nation-wide norms. In the case of Ismaili law, in the hierarchical and appellate structure of the CAB system, the ICAB has a Supreme Court character, and its decisions are expected to have a type of precedential weight (although not *stare decisis*) in matters of personal law or constitutional interpretation. This Supreme Court-like status does not and cannot impinge upon Imamat authority, which remains unfettered and which is the ultimate source from which ICAB authority is derived. There is, however, an acceptance of the possibility of some plurality in how matters of personal law and commercial matters may be resolved, and this plurality is not seen as resulting in incoherence but rather as useful in adjusting settlements to local contexts.

Note one other factor that is part of the contemporary Ismaili system and that has been implicit in the discussions above: the participation of the community in norm creation. It must be emphasized again that the authority to formulate norms of personal or other law rests exclusively with the Ismaili Imam. The CAB system, however, is not an *ulama* structure where normative authority resides only with religious-legal scholars or jurists, as is the case in other Muslim communities. The presence of a living Imam for the Ismailis obviates the need for the *ulama*. CAB personnel, by contrast, are lay people. Although they receive training of an increasingly sophisticated variety (presently administered by the ICAB) in both method and substance, they are not necessarily and not usually specialists in Ismaili law. Their training emphasizes the local context and local approaches to dispute settlement. Through lay involvement and contextualized training, the CAB structure provides for general community participation in normative interpretation.

The CAB structure and its operation in a hierarchical scheme that includes appellate review produce a balancing of different factors. Locality, by which the vast majority of cases are resolved, is balanced against

centralization in the organization of training, the potential for review, and the role of the national CABs and of ICAB as coordinators and providers of instruction. The CAB system balances community and Imamat authority by informally delegating many issues of interpretation, especially in the context of personal law, to be resolved by the community, taking account of local circumstances. This delegation is always non-authoritative, however, reserving for the Imam the capacity to define points of personal law or other aspects of constitutional interpretation, and indeed of constitutional amendment, in an authoritative manner. It would be too much to call the CAB system democratic: it would not make sense within the framework of Shia thought and history to subject the living Imam to democratic governance by the community. But the CAB structure allows for a participatory process in which the community is engaged both at the level of practice and of the norms of self-governance.

One of the emerging challenges that face some CABs is the challenge of specifics, that is, how to respond to the queries that arise from time to time in the context of actual cases or in the abstract, with regard to the Ismaili position on a given topic. Formally, this can only be expressed by the Imam or under his authority.<sup>18</sup> In practice, CABs seek guidance, but in the interim make their best efforts to develop solutions that are consistent with their understanding of Ismaili traditions and law, in accordance with the Constitution. In his message to the International Islamic Conference held in Amman, Jordan, in 2005 (better known for producing the “Amman Message”),<sup>19</sup> the Aga Khan stated: “Our [Ismaili] historical adherence is to the Jafari Madhhab and other Madhahib of close affinity, and it continues under the hereditary leadership of the Ismaili Imam of the Time.” This statement can provide some normative guidance, especially when read in a constitutional reference. In part, however, the challenge of specifics is the result of plurality. As noted, Ismaili communities live in diverse contexts, countries of Muslim majority and diasporic environments, highly urban settings and rural areas, as well as economically developed and developing countries. To allow a justice that is sensitive to these contexts means

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<sup>18</sup> This, too, is historically consistent and has precedent. The great medieval Ismaili works of law, the *D'a'im al-Islam* (“The Pillars of Islam”), by the Fatimid-era jurist and chief judge (*qadi al-qudat*), Qadi al-Nu'man, was produced at the behest of the Caliph-Imam al-Mu'izz and approved by him. It could not have been otherwise, as the Imam's imprimatur was what gave the work its Ismaili authority.

<sup>19</sup> His Highness the Aga Khan, “Message to the International Islamic Conference, Amman, Jordan, 4-6 July 2005”. Retrieved on 20 January 2013, [http://ammanmessage.com/index.php?option=com\\_content&task=view&id=22&Itemid=34](http://ammanmessage.com/index.php?option=com_content&task=view&id=22&Itemid=34).

necessarily to accept some diversity, and like all expressions of plurality, the “furry edges” of diversity have both positive and negative connotations. One of the accomplishments of the CAB system, however, is having developed a system of interpretation of religious texts that includes diversity.

#### 4. CABs, the interpretation of the Constitution, and legal theory

We have shown that CABs function to support a constitutional order but also to allow interpretive room *within* this order, as shaped by context (geographic, circumstantial, etc.). As noted above, the constitutional order of the Ismaili community is predicated on the fundamental notion of the authority of the Imam. This notion is presupposed, based on the Ismaili understanding of Islam, and it acts as the grounding for all of the legal norms and institutional structures of the community. Thus, we may regard the role of the Imam as the equivalent of a Kelsenian *Grundnorm*: presupposed and thoroughly foundational, as the core basic idea upon which everything else is built.<sup>20</sup> As the constitutional order and the CABs support this basic norm, they might be said to represent a “pure theory of law.” Indeed, Kelsen did suggest that the normative structure of law may be analogous with religion.<sup>21</sup> Like Kelsen’s *Grundnorm*, however, the full story of the community’s constitutional interpretation cannot be explained only by reference to its basic presupposition.

CABs play an interpretive role, grounded in the basic norm and in the other articles of the Constitution. The CAB activities contain an element of Ronald Dworkin’s legal theory not only in being interpretive moves but also in operating on the basis of principles that give rise to substantive decisions (in cases of arbitration) or serve to structure mediated settlements. These principles are derived from legal norms that are part of the community references (like the Amman Message or the historical texts of Ismaili law), from community practice, from the text of the Constitution, from guidance that may come from the Imam, and in time from the work-product of the CABs themselves. Moreover, the norms are locally conditioned by the social, economic, and cultural circumstances of the community and by the various national orders within which it exists.

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<sup>20</sup> Hans Kelsen, *The Pure Theory of Law*, M. Knight (trans.), (1960).

<sup>21</sup> See for a discussion of this point “Pure Theory of Law” in *The Stanford Encyclopedia of Philosophy* (2013). Retrieved on 20 January 2013. <http://plato.stanford.edu/entries/lawphil-theory/>.

Thus, the role of the CABs in constitutional interpretation is reflective of both a Kelsenian as well as Dworkian variety of legal theory and is illustrative of how they may exist symbiotically. The interpretation by the community needs the basic norm of Imamat authority expressed in the Constitutional text, but it also needs the capacity to apply that which flows from this norm in a principled manner and through institutional forms that meet practical community needs on the ground, in other words, to interpret and apply principles.

## 5. Conclusion

The CAB system is still developing. Since it formally came into existence, in 1986, the training of personnel has been strengthened, and it is increasingly becoming professionalized. With time and more cases to consider, its institutional capacity has been advanced through the development of individual, and more significantly, of institutional memory of past work: challenges faced and how they were addressed. At present, new research questions about the historical antecedents in general Muslim and Ismaili experience await exploration by CABs and the other institutions of the Ismaili community. Furthermore, CABs, and particularly ICAB, are tasked with producing more studies on specific legal issues for consideration by the Imam and guidance from him. It is possible, therefore, that in the future the manner in which CABs play an interpretive role will change and develop. With greater direction from the Imam, the CABs may take on a more consultative and implementation-oriented role. At the same time, it may be found appropriate for the CABs to take on a more robust normative role, in which they generate legally-normative texts, perhaps by way of issuing guidelines, generating case reports, or in some other manner. The history of CABs and CAB-like structures in Ismaili history, however, suggests that the institution will continue to play a role in the interpretation of the religious-legal tradition of the community and of its salient contemporary legal text, the Constitution. In this respect, the CABs demonstrate how authority and community can both affect the interpretation of a religious text.