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Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions

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CONSTITUTIONAL ISLAMIZATION AND HUMAN RIGHTS:
THE SURPRISING ORIGIN AND SPREAD OF ISLAMIC
SUPREMACY IN CONSTITUTIONS

Dawood I. Ahmed and Tom Ginsburg

THE LAW SCHOOL
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Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions

DAWOOD I. AHMED & TOM GINSBURG*

The events of the Arab Spring and recent military coup in Egypt have highlighted the central importance of the constitutional treatment of Islam. Many constitutions in the Muslim world incorporate clauses that make Islamic law supreme or provide that laws repugnant to Islam will be void. The prevalence and impact of these “Islamic supremacy clauses” is of immense importance for constitutional design — not just for Muslim countries but also for U.S. foreign policy in the region, which became engaged in the issue during constitution-writing in Afghanistan and Iraq. However, to date, there has been no systematic or empirical examination of these clauses. Many questions remain unexplored: Where did these clauses originate? How have they spread? Are they anti-democratic impositions? What determines their adoption in national constitutions?

This Article fills this gap. Relying on an original dataset based on the coding of all national constitutions since 1789 and case studies from four countries — Iran, Afghanistan, Egypt, and Iraq — it traces the origin and adoption of Islamic supremacy clauses since their first appearance in Iran in 1907. We

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make three major, counterintuitive claims: First, we argue that the repugnancy clause — the most robust form of Islamic supremacy clause — originates in British colonial law, and indeed, that all forms of Islamic supremacy are more prevalent in former British colonies than in other states in the region. Second, we argue that in many cases, these clauses are not only popularly demanded, but are also first introduced into their respective jurisdictions during moments of liberalization and modernization. Third, contrary to the claims of those who assume that the constitutional incorporation of Islam will be antithetical to human rights, we demonstrate that almost every instance of “Constitutional Islamization” is accompanied by an expansion, and not a reduction, in rights provided by the constitution. Indeed, constitutions which incorporate Islamic supremacy clauses are even more rights-heavy than constitutions of other Muslim countries which do not incorporate these clauses. We explain the incidence of this surprising relationship using the logic of coalitional politics.

These findings have significant normative implications. On a broader level, our work supports the view of scholars who argue that the constitutional incorporation of Islam is not only compatible with the constitutional incorporation of basic principles of liberal democracy, but that more democracy in the Muslim world may mean more Islam in the public sphere; in fact, we find that more democratic countries are not necessarily any less likely to adopt Islamic supremacy clauses. Our findings also suggest that outsiders monitoring constitution-making in majority Muslim countries who argue for the exclusion of Islamic clauses are focused on a straw man; not only are these clauses popular, but they are nearly always accompanied by a set of rights provisions that could advance basic values of liberal democracy. We accordingly suggest that constitutional advisors should focus more attention on the basic political structures of the constitution, including the design of constitutional courts and other bodies that will engage in interpretation, than on the Islamic provisions themselves.

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INTRODUCTION

As night follows day, the wave of popular revolutions in the Arab world in 2011 has been followed by a wave of constitution-making exercises. At the time of this writing, Morocco and Jordan have amended their constitutions in ways designed to preserve their monarchies; Egypt adopted a new constitution in December 2012 that was replaced by a new military-backed constitution in January 2014; Libya is working on a new

constitution; the Tunisian constitution is entering the final stage of approval and Yemen is in the midst of a preconstitutional “National Dialogue” that will hopefully lead to a constitution in 2014.¹ Each of these constitution-making situations is very different, involving local politics and various international actors. Throughout each of these processes, one issue has been consistently confronted: the status of Islam. Will new popularly elected governments be constrained by Islamic law? Will courts be able to set aside laws if incompatible with Sharia? If so, which version of Sharia will dominate? Islam has been a major issue of political debate in all constitution-making processes launched to date. In fact, more than two years after the commencement of the Arab Spring, the coup in Egypt has once again reminded us that the political stakes of resolving the issue of Islam in the constitution remain very high.

These issues not only concern the region; outside actors have also devoted enormous attention to the question of whether constitutions are entrenching Islamic law. In the case of the Arab Spring, foreign governments that assumed that democratization would bring secular parties to power were disappointed. Some commentators even skeptically began to refer to the Arab Spring as the “Islamist Spring” as it became apparent that the establishment of “secular” democracy was unlikely in the Arab Spring countries.² A few years ago, the status of Islam had similarly been a major issue for US foreign policy in the process of producing the Iraqi and Afghan constitutions.³ With regards to Iraq, Senator Richard Lugar went so far as to publicly state that the United States could not accept “a popularly elected theocracy” while one scholar dismissingly referred to the newly written constitutions of both countries — due to

1. *Yemen Begins Dialogue Over New Constitution*, AL JAZEERA (Mar. 18, 2013, 10:56), <http://www.aljazeera.com/news/middleeast/2013/03/20133189339321602.html> (describing UN-backed constitutional dialogues in Yemen).

2. See Heather Maher, *Muslim Protests: Has Obama Helped Bring on an Anti-U.S. Islamist Spring?*, ATLANTIC (Sept. 23, 2012, 2:30 PM), <http://www.theatlantic.com/international/archive/2012/09/muslim-protests-has-obama-helped-bring-on-an-anti-us-islamist-spring/262731/> (discussing Obama’s role in Islamist Spring); see also David Rohde, *The Islamist Spring*, REUTERS (Apr. 5, 2012, 8:50 PM), <http://blogs.reuters.com/david-rohde/2012/04/05/the-islamist-spring/> (explaining that secular parties split and Islamists took control of politics in Tunisia and Egypt); see generally JOHN R. BRADLEY, *AFTER THE ARAB SPRING: HOW ISLAMISTS HIJACKED THE MIDDLE EAST REVOLTS* (2012) (arguing that democracy introduced by Arab Spring ultimately benefited Islamists).

3. LARRY DIAMOND, *SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ* 49 (2005) (quoting Noah Feldman’s description of the Bush administration’s involvement in Iraqi constitution, “[a]ny democratically elected Iraqi government is unlikely to be secular, and unlikely to be pro-Israel. And frankly, moderately unlikely to be pro-American.”); J. Alexander Thier, *Big Tent, Small Tent: The Making of a Constitution in Afghanistan*, in *FRAMING THE STATE IN TIMES OF TRANSITION* 535, 543–45 (Laurel E Miller ed., 2010) (discussing UN and U.S. involvement in Afghani constitution making process).

their incorporation of Islamic law — as impositions of “theocracy.”⁴ For these critics, the choice between Islam and democracy is a zero-sum game. A constitution, then, would have to make a choice between the two.

We begin with a different assumption. Simply because many of the Arab states were dictatorships does not imply any essentialist connection between Islam and democracy, nor as we show, is the constitutional incorporation of Islamic law in constitutions necessarily antithetical to human rights and democracy. In fact, a recurrent slogan of the protestors in the Arab Spring was “*ash-shabyuridisqat an-nizam*,” translated as “*the people want the fall of the regime*.”⁵ The protestors in the Arab Spring certainly wanted democracy and rights.⁶ Yet, in contrast to outside observers who feared Islam, many of them did not want a version of democracy that would marginalize religion. In other words, the protestors did not desire secular government, which is often associated in popular imagination not with freedom, but rather, with repression, colonialism and an assault on Islam.⁷ Indeed, the idea of secularism is sometimes assumed to be unacceptable to many Muslims, even if some elites in the region desired it.⁸ On the other hand, for many Muslims, Islam acts as a language of contestation against injustice and subjugation.

Since confronting the European nation-state system in the nineteenth century, the Islamic world has continually wrestled with a nuanced relationship between religious norms and core ideas of modern constitutionalism. Confronted with a pervasive European orientalism that viewed the Ottoman Empire as the embodiment of despotism,⁹ reformers and conservatives alike struggled to integrate religious modes of governance into a modern form. Beginning with Tunisia in 1861, states in

4. John O. Voll, *Islam and Democracy: Is Modernization a Barrier?*, 1 RELIGION COMPASS 170, 171 (2007) (quoting Richard Lugar); see also Hannibal Travis, *Freedom or Theocracy?: Constitutionalism in Afghanistan or Iraq*, 3 NW. U. J. INT'L HUM. RTS. 1 (2005) (arguing that Islamic constitutionalism cannot be democratic and that incorporating Islam in the constitution will necessarily be antithetical to human rights).

5. *The Arab Awakening*, AL JAZEERA (Feb. 20, 2012, 7:26), <http://www.aljazeera.com/programmes/general/2011/04/20114483425914466.html> (series of films documenting the Arab Awakening).

6. See Jordan J. Paust, *International Law, Dignity, Democracy, and the Arab Spring*, 46 CORNELL INT'L L.J. 1 (2013) (describing how participants in the Arab Spring embrace human rights concepts of human dignity, democracy, and self-determination).

7. TARIQ RAMADAN, *ISLAM AND THE ARAB AWAKENING* 83 (2012) (reductive readings of Islam and the role of Islam in resisting colonialism).

8. Khaled Abou El Fadl, *The Centrality of Shari'ah to Government and Constitutionalism in Islam*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 35, 55–56 (Rainer Grote & Tilmann J. Röder eds., 2012) (discussing the unviability of secularism in Muslim countries because of its symbolism as a Western intellectual invasion among other reasons).

9. See generally Ash Çırakman, *From Tyranny to Despotism: The Enlightenment's Unenlightened Image of the Turks*, 33 INT'L J. MIDDLE E. STUD. 49 (2001) (describing the tendency of European writers to describe the Ottoman government as despotic and tyrannical).

the Islamic world adopted the *form* of Western constitutions.¹⁰ Yet these states also sought to render political authority accountable to Islamic law in an attempt to develop an Islamic constitutionalist system.¹¹ To balance the twin goals of adhering to constitutionalism and Islam, modern practices were carefully framed as Islamic idiom and presented as modest organizational tools.¹² Since then, the status of Islamic law, and specifically, its relationship with man-made law produced by political institutions established by constitutions, remains a central issue of constitutional design in the Muslim world. As a kind of “natural,” higher law preceding the establishment of individual states, Islam is — and has been sometimes — thought of in the Muslim world as a means to constrain and limit temporal authority.¹³ Indeed, according to the doctrine of *Siyasa Sharia* which had an “enormous impact on the political philosophy of the Ottoman state,”¹⁴ to ensure that the laws were considered legitimate,

th[e] ruler would have to consult with classical Islamic jurists and . . . ensure two things: . . . edicts must not require Muslims to perform acts that these jurists deemed forbidden . . . [and did] not cause general harm to society by impeding the goals that Islamic jurists accepted as goals of the law.¹⁵

10. See MALIKA ZEGHAL, SACRED POLITICS: THE STATE AND ISLAM IN THE CONTEMPORARY MIDDLE EAST (forthcoming 2015); Intissar Kherigi, *Al Jazeera: Tunisia: The Calm After the Storm*, COUNCIL ON FOREIGN RELATIONS (Nov. 28, 2011), <http://www.cfr.org/tunisia/al-jazeera-tunisia-calm-after-storm/p26744> (discussing that 150 years after signing the Arab world’s first constitution in 1861, Tunisia finally has an independent, elected body to draw up a new constitution).

11. See NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 20 (2002) (examining treatise on government by leading Tunisian politician of the constitutional period Khayr al-Din al-Tunisi, who wrote about the importance of restraining state power and ruler accountability); cf. FOURTH DRAFT OF CONSTITUTION OF TUNISIA 2013 (on file with authors) (example of constitution without any provision on Islamic law).

12. See Nathan J. Brown & Adel Omar Sherif, *Inscribing the Islamic Shari’a in Arab Constitutional Law*, in ISLAMIC LAW AND THE CHALLENGES OF MODERNITY 55, 59 (Yvonne Yazbeck Haddad & Barbara Freyer Stowasser eds., 2004) (using the examples of Tunisia and the Ottoman constitutions to illustrate the reframing of Islamic vocabulary to fit constitutional practices).

13. See NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE 2 (2008) (discussing the increasing tendency for governments in majority-Muslim countries to declare themselves Islamic and apply Sharia); see generally ANWAR M. EMON, ISLAMIC NATURAL LAW THEORIES (2010) (discussing the existence of and debates about natural law concepts in the Muslim world).

14. Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari’a Threaten Human Rights? How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT’L L. REV. 379, 404–05 (2006).

15. *Id.*

That is, governments had the power to make and apply laws, as long as they did not violate Sharia and were in the public interest.¹⁶ In light of the existence of such constraints upon government, scholars of Islam explicitly recognized the congruence between Sharia and natural law;¹⁷ some even argued that Sharia had certain features that might make it more constitutionalist than a positive, man-made constitutional order.¹⁸ Thus, while Islam and Islamic law conjure up negative connotations in the West, for Muslims, Islamic law continues to “invoke[] the core idea of law in terms that resonate deeply with the Islamic past.”¹⁹

We come then to the central problem. Modern constitutions establish law-making processes, but where does Islam stand in relation to these processes? More specifically, what is to be done with an act of legislation that contravenes Islamic law? As we shall see, there have been a number of different solutions as constitution makers in Muslim countries sought to maintain fidelity to religion whilst embracing modern constitutionalism. We focus special attention on a popular solution: what we call Islamic “supremacy” clauses — or clauses in constitutions that privilege the status of Islamic law by providing that Islam will either be “a” or “the” source of law or that any laws that are contrary to Islam will be void, or even both. The latter, which are called “repugnancy clauses,” were first introduced in Iran in 1907 and have since been utilized in over a dozen constitutions since. Constitutional language that refers to Islamic law as “the” or “a” source of law was first introduced in Syria in 1950 and has been found in some thirty-eight constitutions.²⁰ What the repugnancy and source of law clauses have in common is that both seek to articulate the normative superiority of Islamic law or norms over the “mere” man-made law of the legislative process. The effect of such provisions then, according to Nathan Brown and Adel Omar Sherif, is “to imply a very different basis for the legal order [where] [r]ather than the constitution sanctioning Islam . . . the shari’a itself stands prior to the positive legal order — including, potentially and by implication, the constitution itself.”²¹ Islam, in this constitutional order, then seeks to provide an additional source of limitations on earthly authority. This set of higher law limitations has

16. JAN MICHIEL OTTO, *SHARIA AND NATIONAL LAW IN MUSLIM COUNTRIES: TENSIONS AND OPPORTUNITIES FOR DUTCH AND EU FOREIGN POLICY* 11 (2008).

17. See FELDMAN, *supra* note 13, at 108 (discussing the debate about the analogy between Islamic Sharia and either constitutional law or natural law).

18. See *id.* at 170 (discussing the idea that Sharia is more constitutionalist than anything a constituent assembly could create).

19. *Id.* at 6.

20. See Clark B. Lombardi, *Constitutional Provisions Making Sharia “A” or “The” Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?*, 28 AM. U. INT’L L. REV. 733, 743–46 (2013).

21. Brown & Sherif, *supra* note 1212, at 63.

obvious similarities with the core motivating idea of modern constitutionalism and judicial review.²²

Inclusion of these Islamic supremacy clauses — a phenomenon sometimes referred to as “Constitutional Islamization”²³ — has remained a major source of anxiety and fear around the constitutions of the Arab Spring countries. With regard to the recently suspended Egyptian Constitution, for example, much ink was spilt within and outside the country about the risks of incorporating an Islamic supremacy clause in the new constitution.²⁴ Much of the commentary regarding the new constitution narrowly focused on the treatment of Islam, to the detriment of other substantive issues.²⁵ Indeed, soon after it became apparent that a new constitution would be written in Egypt after the coup overthrowing President Morsi, some observers were once again swift to refocus attention on the issue of Islam in the constitution.²⁶ Yet the constitution drafted by the largely secular military regime retains exactly the same clause.²⁷ Just a few years earlier, similar sentiments were also apparent concerning the incorporation of Islam into the Afghan and Iraqi constitutions.

The anxiety seems to stem from the prevalent — and now, rather old — assumption that a constitution that incorporates Islam cannot

22. See Tom Ginsburg et al., *When to Overthrow Your Government: The Right to Resist in the World's Constitutions*, 60 UCLA L. REV. 1184, 1184–1260 (2013). Although the focus is on Islam, the article notes similar clauses do exist in other contexts. Chapter 2, Article 9 of the current Sri Lankan constitution entitled “Buddhism” states: “The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana, while assuring to all religions the rights [to freedom of belief and worship] granted by Articles 10 and 14(1)(e).” CONSTITUTION OF SRI LANKA Dec. 20, 2000, ch. 2, art. 9. Nevertheless, the idea of normative superiority of religion over positive law seems to be associated almost exclusively with Muslim majority countries.

23. See, e.g., Li Ann-Thio, *Constitutionalism in Illiberal Polities*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 133, 141 (Michel Rosenfeld & András Sajó eds., 2012) (discussing Egypt’s “constitutional Islamization” clause incorporating “principles of Islamic sharia” as “principal source of legislation”); Lombardi & Brown, *supra* note 14, at 381 (discussing growing popularity of constitutional Islamization).

24. Robert Satloff & Eric Trager, *Egypt's Theocratic Future: The Constitutional Crisis and U.S. Policy*, WASHINGTON INSTITUTE (Dec. 3, 2012), <http://www.washingtoninstitute.org/policy-analysis/view/egypts-theocratic-future-the-constitutional-crisis-and-u.s.-policy> (discussing how the constitution promotes a theocratic future); Sara Labib, *Constitutional Highway to Theocracy*, OPEN DEMOCRACY (Dec. 13, 2012), <http://www.opendemocracy.net/sara-labib/constitutional-highway-to-theocracy> (arguing Egypt’s constitutional draft should be rejected because it promotes a religious state).

25. *Egypt's Constitution: An Endless Debate over Religion's Role*, ECONOMIST, Oct. 6, 2012, at 71, available at <http://www.economist.com/node/21564249> (exploring debate over role of religion in Egypt’s constitution).

26. Isobel Coleman, *Will Egypt's Muslim Brotherhood Survive?*, CNN (July 5, 2013 6:33 AM), <http://www.cnn.com/2013/07/04/opinion/coleman-muslim-brotherhood> (discussing that Islam is the main issue in the constitutional drafting).

27. DRAFT CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT 2013, art. 2.

provide for democracy and human rights. Western constitutionalist thought has generally tended to view the Islamic world as the “antithesis of constitutional government.”²⁸ Scholars including Samuel Huntington claimed that not only is “Islam” a violent religion, but that “Islamic civilization” was destined to “clash” with “Western civilization” in the name of authoritarian politics.²⁹ As Ran Hirschl reminds us, “[l]ike early writings about the postcolonial world that tended to view postcolonial countries as a homogeneous bloc, populist academic and media accounts in the West tend to portray the spread of religious fundamentalism in the developing world as a near-monolithic, ever-accelerating, and all-encompassing phenomenon.”³⁰ This narrative has penetrated not only academic but also policy thinking in the United States and Europe. The House of Lords in the United Kingdom recently stated that Sharia was “wholly incompatible” with human rights legislation.³¹ A number of U.S. states have also attempted to enact laws that forbid state courts from considering Islamic law when deciding cases.³² Similarly, during the drafting of the Iraqi Constitution, there was much discomfort within Washington about the possible inclusion of Islamic law in the Iraqi Constitution.³³ As Voll notes, “[i]mplicit in all of these responses is an assumption that an ‘Islamic’ state, even if democratically established, would be transformed into an illiberal and undemocratic ‘theocracy.’”³⁴

To be sure, the concern is not completely misplaced. Self-proclaimed Islamic governments do have the potential to be undemocratic and oppressive, as the experiences of Iran since 1979 and Afghanistan under the Taliban demonstrate. However, there is already a large literature discussing whether or not Islamic law is in tension with human rights and

28. See BROWN, *supra* note 11, at 107 (discussing the perceived incompatibility of Islamic world and constitutionalism by Western scholars, such as Montesquieu).

29. Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22 (explaining the hypothesis that civilizations based on concrete cultural differences will be at the center of global political clashes); SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 14 (1996) (predicting that civilizations based on concrete cultural differences will be at the center of global political clashes).

30. RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 6 (2010).

31. Afua Hirsch, *Sharia Law Incompatible with Human Rights Legislation, Lords Say*, GUARDIAN (Oct. 23, 2008, 11:29 AM), <http://www.guardian.co.uk/world/2008/oct/23/religion-islam>.

32. *Oklahoma Sharia Law Blocked by Federal Judge*, HUFFINGTON POST (May 25, 2011, 7:10 PM), http://www.huffingtonpost.com/2010/11/08/oklahoma-sharia-law-struck-down-_n_780632.html (discussing legal debate around Oklahoma’s attempt at banning state courts from considering Islamic law when deciding cases). Thirteen U.S. States have introduced bills to circumvent the application of Sharia. See Zaid Jilani, *At Least 13 States Have Introduced Bills Guarding Against Non-Existent Threat of Sharia Law*, THINK PROGRESS (Feb. 8, 2011, 1:52 PM), <http://thinkprogress.org/politics/2011/02/08/142590/sharia-states/?mobile=nc>.

33. L. PAUL BREMER III, *MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE* 224 (2006) (discussion of Iraqi constitutional process and role of Grand Ayatollah Sistani).

34. Voll, *supra* note 4, at 171.

democracy.³⁵ Also, in comparative constitutional law scholarship, scholars have described how courts have moderated this potential tension, specifically focusing on the “benign” judicial interpretation of Islamic supremacy clauses.³⁶ For example, Nathan Brown and Clark Lombardi, citing the example of Egypt, suggest that constitutions that incorporate Islam may not in fact threaten human rights since a progressive judiciary can interpret laws in a progressively compatible way.³⁷ Similarly, Ran Hirschl has written extensively about how judges across the Muslim world have “contained” the potential illiberal effects of incorporating religion within constitutions — or “constitutional theocracy.”³⁸ On the other hand, Intisar Rabb has critiqued some of these arguments.

In all this scholarly debate though, we identified a lacuna; surprisingly, we find that there is relatively little literature explaining the origins and spread of the Islamic supremacy clauses themselves.³⁹ In particular, there is no account as to why we observe variation throughout the Islamic world regarding whether or not the constitution is Islamized or how or why the clauses proliferated. Most importantly, despite the stereotypical and popular perception of the supposed incompatibility of a constitutional design that incorporates both Islam and human rights, there has been little

35. See ANN ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* (4th ed. 2007) (critically appraises modern human rights schemes that are advanced as “Islamic” by governments of Muslim countries and reviews them in the context of Islamic law and challenges the popular perception of the incompatibility of Islam with human rights); ABDULAZIZ SACHEDINA, *ISLAM AND THE CHALLENGE OF HUMAN RIGHTS* (2009) (arguing that Islam is essentially compatible with human rights); SAYED KHATAB & GARY D. BOUMA, *DEMOCRACY IN ISLAM* (2007) (argues in favor of the compatibility of democracy with Islam); see generally JOHN L. ESPOSITO & JOHN O. VOLL, *ISLAM AND DEMOCRACY* (1996) (discussing democratization within the Islamic heritage using case studies).

36. See generally CLARK LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARĪʿA INTO EGYPTIAN CONSTITUTIONAL LAW* (2006); Baudouin Dupret, *A Return to the Shariab? Egyptian Judges and Referring to Islam*, in *MODERNIZING ISLAM: RELIGION IN THE PUBLIC SPHERE IN EUROPE AND THE MIDDLE EAST* 125 (John L. Esposito & François Burgat eds., 2003).

37. Lombardi & Brown, *supra* note 14 (using Egypt as a case study to examine the difficulties courts face in interpreting Constitutional Islamization and the effects on human rights and the economy); Clark B. Lombardi, *Designing Islamic Constitutions: Past Trends and Options for a Democratic Future*, 11 *INT’L J. CONST. L.* 615, 627 (2013) (Iraqi Supreme Court finds clauses nonjusticiable); see also Lombardi, *supra* note 20.

38. HIRSCHL, *supra* note 30 (arguing that encompassing religion in constitutionalism, i.e. “constitutional theocracy,” has allowed opponents of theocracy to maintain order through religious rhetoric without an actual theocracy).

39. But see Lombardi, *supra* note 34; BROWN, *supra* note 11, at 107–10, 161–93 (tracing historiography of idea that the origin of Western constitutionalism lies in Christianity and the history of the role of Sharia in Middle Eastern governance); FELDMAN, *supra* note 13, at 103–40 (exploring the emergence of modern Islamism and its constitutional proposals); see generally Lombardi, *supra* note 20 (description of Sharia clauses as a source of legislation); Jan Michiel Otto, *Sharia and Law in a Bird’s-Eye View: Reform, Moderation and Ambiguity*, in *DELICATE DEBATES ON ISLAM* 73 (Jan Michiel Otto & Hannah Mason eds., 2011) (examining the changing role of Sharia over time in twelve Muslim countries).

empirical investigation of how the incidence of Islamic supremacy clauses in a constitution *actually* co-relates with the provision of rights, if at all, in constitutions worldwide. This gap exists despite the fact that the “Muslim world’s enthusiasm for enacting these ‘constitutional Islamization’ clauses shows no sign of abating;”⁴⁰ even constitutions written under substantial foreign influence, such as the Afghan and Iraqi Constitutions, contain Islamic supremacy clauses, as does the current Constitution of Egypt, produced by a military regime that has violently suppressed Islamists. In our view then, it remains crucial to understand the historical origin and spread of Constitutional Islamization. Since constitution writing is as much a political, as legal, process, we must carefully understand the socio-political dynamic behind these clauses. To quote John Burgess, “[t]he formation of a constitution seldom proceeds according to the existing forms of law. Historical and revolutionary forces are the more prominent and important factors in the work These cannot be dealt with through juristic methods.”⁴¹

This Article seeks to fill this gap. Relying on a unique dataset based on the coding of all national constitutions since 1789 and case studies of constitution writing from four countries, it traces the development of Islamic supremacy clauses within the constitutions of Muslim-majority countries, since their first appearance in Iran in 1907. By tracing *when* constitutions first incorporated Islam, or Sharia, as a constraint on law-making or as a source of law, we also aim to explain *why* constitutions did so. Important as it is, our concern in this Article is *not* how the clauses operate in practice, nor their effects, but rather how they came about.

We make three major, counter-intuitive claims. First, we show that the repugnancy clause — the most robust form of Islamic supremacy clause — has its origins in British colonial law, and indeed, that all forms of Islamic supremacy are more prevalent in former British colonies than in other states in the region. Second, we show that in some cases, these clauses were first introduced into their respective jurisdictions by liberalizing or modernizing regimes that sought to legitimate themselves or co-opt opposition to modernization — or, in other words, legitimate reform. These clauses, thus, contrary to popular assumption, are not generally the outcome of “impositions of theocracy,” but carefully negotiated and bargained provisions, adopted in a spirit of compromise, that may help legitimate the road to political modernization. Indeed, our arguments suggest that, adopting a hasty detour in this road by attempting to marginalize the role of Islam in the constitutional sphere, may lower the

40. See Lombardi & Brown, *supra* note 14, at 381.

41. JOHN WILLIAM BURGESS, 1 POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 90 (1893).

legitimacy, and thus potentially undermine the success, of progressive constitutional reform in some Muslim countries.⁴² Third, and most importantly, contrary to the claims of those who skeptically see the incorporation of Islam in a constitution as antithetical to the adoption of constitutional rights, we empirically show that constitutions which incorporated Islamic supremacy clauses were accompanied by *more* human rights and are indeed even *more* rights-heavy when compared to constitutions of other comparable jurisdictions which did not incorporate these clauses. Further, constitutions that adopt Islamic supremacy are even more rights-intensive than their immediate predecessor constitutions. We also found that democracies are no less likely to adopt Islamic supremacy clauses as compared to authoritarian states.⁴³ Thus, instead of being antithetical to the constitutional entrenchment of rights, this Article demonstrates that Constitutional Islamization accompanies formal rights. In this sense, Constitutional Islamization is “as modern as the internal combustion engine,” to paraphrase an important description of rights.⁴⁴ Indeed, our findings suggest that it is all the more important for constitutional designers to focus more attention on the design and architecture of courts and bodies that will be interpreting the rights and Islam provisions in the constitution, rather than the provision themselves.⁴⁵

42. See Michael M. J. Fischer, *Islam and the Revolt of the Petit Bourgeoisie*, 111 DAEDALUS 101, 105 (1982) (discussing the struggle over Islam in formulas of legitimacy in major Muslim countries); see BINNAZ TOPRAK, *ISLAM AND POLITICAL DEVELOPMENT IN TURKEY* 35–58 (1981) (discussing how, under Mustafa Kemal Atatürk, Turkey underwent one of the most comprehensive programs of reform and secularization ever seen in the Muslim world). Yet, its 1924 Constitution initially declared Islam as the state religion. The goal was similar: it was believed that the immediate adoption of a secular, modern constitution may be too ambitious; the provision allowed for an accommodated and gradual compromise so that people and elite could be gradually “socialized” to alternate modes of governance. The state religion provision was removed from the Constitution in 1924. See generally Clark B. Lombardi, *Can Islamizing a Legal System Ever Help Promote Liberal Democracy?: A View from Pakistan*, 7 U. ST. THOMAS L.J. 649 (2010) (discussing how Islamization of laws can sometimes help facilitate the liberal rule of law in some countries).

43. We acknowledge that in order to make a more determinative claim about how the clauses affect the realization of democracy in practice, we will need to critically observe and analyze their effects and how the rights and Islam provisions interact. Certainly, it may be that the rights provisions may be under-enforced in practice, which may cut against the claim that they are compatible with the basic principles of liberal democracy. However, the same could be assumed of the Islamic supremacy clauses, and in fact, for other clauses in a constitution. Nevertheless, all we argue is that the co-occurrence of rights in a constitution, alongside Islamic supremacy clauses, is a starting point in terms of empowering downstream decision makers to interpret and enforce the constitution in a way that may be compatible with liberal democracy.

44. Kenneth Minogue, *The History of the Idea of Human Rights*, in *THE HUMAN RIGHTS READER* 3, 3 (Walter Laqueur & Barry Rubin eds., 1979).

45. These will include analysis of design options concerning the mechanisms of judicial appointment, the role of jurists and religious scholars in legal decision-making, standing rules to challenge laws, qualifications of judges and so forth. We intend to tackle this question in future work.

To comprehensively trace the historical origins and adoption of Islamic supremacy clauses, our analysis also draws on case studies of Constitutional Islamization in constitutions from Afghanistan, Egypt, Iran and Iraq. In these case studies, we find that, often, constitutions that are drafted in more democratic settings or in response to democratic sentiment, e.g. after a popular revolution or where the existing regime needs to obtain popular support, tend to undergo Constitutional Islamization to a greater degree. Similarly, most constitutions that are the first to “Islamize” in any given country also contain many liberal features, in that they grant more rights and impose more constraints on government. We can therefore predict that in many cases, greater democracy in the Muslim world may lead to greater constitutional enactment of rights, but it will also most likely also lead to greater Constitutional Islamization — the two will often go hand in hand and indeed may be linked. As Professors Esposito and Voll write, “the processes of democratization and Islamic resurgence have become complementary forces in many countries.”⁴⁶ Indeed, our findings suggest that authoritarian states are *no more likely* to adopt Islamic supremacy clauses than are democratic states; as such it questions popular assumptions about the link between Islam and authoritarianism.

We explain the incidence of this surprising relationship using the logic of coalitional politics. Many situations of Islamization occur when the existing political regime is under pressure to expand the base of input into governance. In majority Muslim countries, these impulses — even if they do not lead to full democracy as conventionally defined — will tend to produce demands for Islamization. At the same time, there are often other political forces at work that seek modernization, either in the form of liberal democracy or in terms of limited constitutional government.⁴⁷ Sometimes these groups will overlap, as both rights and Islamization may be seen as complementary tools to constrain rulers. But even if these two groups do not overlap, they will often form a coalition that spurs political reform. Once reform begins, the two groups will have to negotiate the terms of future governance, which in turn may lead to a new consensus memorialized in a constitutional text. In this bargaining process, each side may wish to constrain the other by demanding that the interests most dear to it are protected.⁴⁸ Liberals may want rights, and religiously inclined

46. ESPOSITO & VOLL, *supra* note 35, at 16.

47. The definition of “liberal democracy” is of course contested and subject to debate. For our purposes, we take the basic principles of liberal democracy as being constitutional recognition of basic features of constitutionalism — limits on governments, separation of powers and the provision of basic rights and civil liberties.

48. See generally Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997) (describing this logic as the “rationality of fear”).

groups may want Islam. If each gets what it wants, the new constitution will contain both — rights and an Islamic supremacy clause.

Our analysis is consistent with the views of those who have suggested that Muslim majority nations will likely not modernize in a Western direction. According to Huntington, for example, a re-affirmation of Islam in contemporary times should not be perceived as a rejection of modernity; rather it steers and sets course for modernization; that is, it becomes a case of “Islamizing modernity” rather than “modernizing” Islam.⁴⁹ In his view, an emphasis on Islam is a rejection of the “secular, relativistic” values that people in the Muslim world associate with the West; a means of declaring cultural independence and saying “[w]e will be modern but we won’t be [like] you.”⁵⁰ It is true that poll results which show “liberty and freedom of speech” as amongst some of the values that Muslims admire most about the West, also show that Muslims disapprove of the perceived “promiscuity and moral decay” of the West.⁵¹ An emphasis on Islam in constitutions then could also be interpreted as an assertion of indigenous cultural and nationalist authenticity in a post-colonial order.⁵² Indeed, to paraphrase one book on Islam and modernity “globalization . . . push[ing] societies toward . . . legal norms . . . based largely on Western notions [has resulted in] local populations . . . asserting their rights to determine their own laws and to maintain their own traditions.”⁵³ Amid the tumult of regime change, it then seems to be true that constitution-makers would selectively borrow tools from the West, but their borrowing would be refracted through their own beliefs and would follow their own trajectory.⁵⁴ Of course, this does not mean that Islam would be all that determines the scope for constitutionalism for Muslim masses; social, political and economic factors play an important part too. Nevertheless, some Muslims may view political ideas, including constitutionalism, as somewhat lacking in legitimacy, if such ideas are perceived as incompatible with the normative values of Islam.⁵⁵

This Article proceeds in four parts. Part I provides some basic descriptive facts about the role of Islam in modern constitutions: it conceptualizes Constitutional Islamization and charts its proliferation and

49. HUNTINGTON, *supra* note 29, at 96.

50. *Id.* at 101.

51. DALIA MOGAHED, GALLUP CTR. FOR MUSLIM STUDIES, ISLAM AND DEMOCRACY 3 (2006).

52. *See* SAMI ZUBAIDA, LAW AND POWER IN THE ISLAMIC WORLD 175 (2005) (arguing that Sharia is advocated for because of cultural nationalism and quest for authenticity).

53. Brown & Sherif, *supra* note 12 at 1.

54. *See* David Brooks, *Huntington’s Clash Revisited*, N.Y. TIMES, March 4, 2011, at A27, available at http://www.nytimes.com/2011/03/04/opinion/04brooks.html?_r=0.

55. *See* ABDULLAHI AHMED AN-NA’IM, AFRICAN CONSTITUTIONALISM AND THE ROLE OF ISLAM 9 (2006) (discussing factors influencing Muslim views of constitutionalism including whether constitution is consistent with Sharia).

trajectory. Rather surprisingly, we show that the repugnancy clause is of colonial origin, representing an adoption of a British institution. Part II contains a new empirical analysis. On the basis of this analysis, we show that Islamic supremacy clauses are more prevalent in former British colonies, and are more likely to occur when the percentage of Muslims in the population is higher. Counter-intuitively, we also go on to demonstrate that human rights provisions co-occur with Islamization — that is, we find that constitutions that contain Islamic supremacy clauses also contain more rights — and suggest that coalitional dynamics are responsible for this phenomenon. To better understand the mechanisms at work, Part III sets out case studies of Constitutional Islamization in four states: Iran, Afghanistan, Egypt and Iraq. Part IV concludes with implications of the analysis.

I. ISLAM AND SHARIA IN NATIONAL CONSTITUTIONS

In the past century, religion seems to have witnessed a marked resurgence in law and government.⁵⁶ This revival has been witnessed across the globe, in regions spreading “from central and southeast Asia to north and sub-Saharan Africa and the Middle East.”⁵⁷ In the case of Muslim countries, beginning in the 1970s, widespread calls for the implementation of Islamic law were observed.⁵⁸ In terms of constitutional design, while a number of constitutions historically contained a state religion clause, constitutions in Muslim-majority countries privileged religion more robustly.⁵⁹ Many Muslim countries, including Saudi Arabia, Kuwait, Bahrain, Yemen and the United Arab Emirates adopted constitutions that entrenched Islam or Islamic law (Sharia) as “a source,” “a primary source” or “the primary source” for legislation. For example, the Egyptian Constitution has since 1980 provided that “[t]he principles of Islamic law are the chief source of legislation.”⁶⁰ Similarly, the Iraqi Constitution states that “Islam . . . is a foundation source of legislation.”⁶¹ Some of these constitutions went even further and provided for so called “repugnancy clauses.” In Pakistan, Afghanistan, Iran, and Iraq, for

56. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2007).

57. Ran Hirschl, *The Theocratic Challenge to Constitution Drafting in Post-Conflict States*, 49 WM. & MARY L. REV. 1179, 1179 (2008).

58. ZUBAIDA, *supra* note 52 **Error! Bookmark not defined.**, at 1 (explaining the Islamic revival in the 1970s calling for application of Sharia in system of government).

59. *See, e.g.*, DANMARKS RIGES GRUNDLOV [CONSTITUTION] June 5, 1953, § 4 (Den.); *see also, e.g.*, STJÓRNARSKRÁ LÝÐVELDISINS ÍSLANDS [CONSTITUTION] June 17, 1944, art. 62 (Ice).

60. PROVISIONAL CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Mar. 30, 2011, art. 2; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Sept. 11, 1971, art. 2.

61. IRAQ CONSTITUTION Oct. 15, 2005, art. 2.

example, it is constitutionally forbidden to enact legislation that is antithetical to Islam. The Constitution of Pakistan requires that “no law shall be enacted which is repugnant to such injunctions.”⁶² The Afghan Constitution similarly demands that “no law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.”⁶³

While the Iranian/Persian Constitution introduced the repugnancy clause in 1907, the “source of law” clause, introduced by the Syrian Constitution in 1950, can sometimes serve as a functional equivalent. It, too, like the repugnancy clause, may allow courts to undertake an “Islamic judicial review,” as Professor Feldman labels it, the purpose of which will be “not merely to ensure [legislation’s] compliance with the constitution, but to *guarantee* that it does not violate Islamic law or values” and thus be fully consistent with it.⁶⁴ Thus, for example, the constitutions of Egypt and the United Arab Emirates do not contain repugnancy clauses; yet, the “source of law” clause has over time been interpreted to *create* a requirement that state law respect Sharia principles. That is, both types of clauses, to different degrees, can imply the supremacy — or at the very least — create a privileged space for Islam and Islamic law within the normative constitutional-legal order.⁶⁵ That is, while formulating a supremacy clause in the form of a repugnancy clause would arguably imply a more robust ability to challenge legislation on the basis of violation of a “superior” normative order grounded in Islam, the source of law clause, depending on the degree to which it entrenches Islam, that is, as “a” or “the” source could also potentially serve this function.⁶⁶ Indeed, as Professors Brown and Sherif opine, even simply privileging Islam as “a” source of law — the weakest formulation of a supremacy clauses — in the constitution means that it becomes possible for many to argue that Islam authoritatively forms the “fundamental legal framework.”⁶⁷ And this can be observed when comparing the experience of constitutional jurisprudence in three countries which have different constitutional formulations of an Islamic supremacy clause; for example, in Egypt, after President Sadat amended Article 2 of the constitution in 1980 so that principles of Sharia become “the” principal source of legislation, dozens of constitutional petitions were launched that challenged the “Islamic” constitutionality of a variety of laws including stipulations in the Egyptian

62. CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN Apr. 12, 1973, art. 227.

63. CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN Jan. 26, 2004, art. 3.

64. FELDMAN, *supra* note 13, at 121–22 (emphasis added).

65. Brown & Sherif, *supra* note 12, at 63 (citing examples of Arab constitutional texts which cite Sharia as a source of law, and the effect of these provisions).

66. *Id.*

67. *Id.*

civil code that required payment of interest on delinquent payments,⁶⁸ laws governing personal status issues of divorce, child custody and alimony and those regulating alcohol and gambling.⁶⁹ In contrast, in Kuwait, where Islam is only “a” major source of legislation, the constitutional provision has been invoked to defend laws that bar women from government positions⁷⁰ and to block the induction in parliament of female lawmakers who do not wear headscarves.⁷¹ In Pakistan, a country where the constitution does not provide that Islam will be a source of legislation, but rather makes all legislation that is repugnant to Islam void, we see almost identical lawsuits; invoking the repugnancy clause, petitioners have challenged the Islamic compatibility of interest and interestingly, even legislation that itself claims to establish Islamic law in some parts of the country.⁷² Ultimately then, while repugnancy and source of law clauses may vary in form, in substance, they empower the same kind of challenges to laws and regulations.⁷³

A. *The Colonial Origins of the Repugnancy Clause*

At the turn of the twentieth century, in 1906, Iran adopted its first constitution, which was soon followed by a supplementary constitution in

68. TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER* 107–10 (2007) (chronicling cases brought to the Supreme Constitutional Court by Moderate Islamists to challenge the secular foundations of the state, especially after the assassination of Sadat).

69. Tamir Moustafa, *The Islamist Trend in Egyptian Law*, 3 *POL. & RELIGION* 610, 620 (2010).

70. *Kuwait: Court Victory for Women’s Rights*, HUMAN RIGHTS WATCH (May 6, 2012), <http://www.hrw.org/news/2012/05/06/kuwait-court-victory-women-s-rights>.

71. See HIRSCHL, *supra* note 30, at 116 (describing debate over dress of female elected representatives that eventually made its way to Kuwait’s Constitutional Court, which ruled against the edict ordering female parliamentary representatives to wear a *hijab* on the basis that Sharia law is not adequately unified in its approach to headscarves).

72. *Id.* at 125, 126 (discussing Pakistani Supreme Court’s debate over Sharia related jurisprudence and the supremacy of federal legislation over provincial legislation and providing example of the Court’s block on attempted laws to enforce Islamic morality in the North-West Frontier Province).

73. To be sure, the argument here is not that the different formulations of supremacy clauses found in constitutions are identical in their jurisprudential effects; this will almost certainly not be the case. A clause stating that the principles of Sharia will be “a” primary source of legislation among other sources (as in Egypt 1971) will most likely lead to fewer successful challenges to legislation than a constitutional clause making the principles of Islamic law “the” sole primary source of legislation. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Sept. 11, 1971, art. 2. Similarly a clause making Islam “one of the basis of all the laws” will most likely have a milder impact than a clause declaring that “no law contrary to any tenet of Islam shall be enacted.” CONSTITUTION OF THE REPUBLIC OF MALDIVES Aug. 7, 2008, arts. 10.a, 10.b. Further, interestingly, some “a” source of law clauses have been interpreted as repugnancy clauses while conversely, some “the” source of law clauses have been explicitly declared non-justiciable; on this point, see *generally*, Lombardi, *supra* note 20. Thus, clearly, depending on the formulation of the clause and judicial interpretation in differing jurisdictions, these clauses will have differential impacts in terms of their effects. Accordingly, our definition of Islamic supremacy clauses only includes repugnancy clauses and those source of law clauses which make clear that Islam will, at the very least, be a major or basic source of law; it does not include clauses simply making Islam “a” source of law amongst other sources.

1907. Article 2 declared that “laws passed by [the National Assembly] must never to all ages be contrary to the sacred precepts of Islam and the laws laid down by the Prophet.”⁷⁴ This was the first repugnancy clause in the constitutional history of Muslim countries and it thus bears credit for introducing the very language of repugnancy that would migrate transnationally into future constitutions. An earlier episode of constitution-making, that of Tunisia in 1861, mentioned Islam but had no language purporting to limit lawmaking.⁷⁵ The idea that laws “repugnant to Islam” would be void and that a council of clergy would review laws to see whether and which laws should thus be void was, on its face, an Iranian innovation.⁷⁶

But where did the idea for Article 2 come from? While constitutional drafters in Iran borrowed much from the Belgian, French and Ottoman constitutions, none of these constitutions contained a clause in any way similar to Article 2. Professor Feldman has opined that it is likely that the idea of repugnancy came from colonial India where the British had implemented a similar repugnancy doctrine to constrain the application of domestic and customary laws which they may deem to be repugnant to British law or moral sentiment.⁷⁷ Interestingly, while Iran was not a British colony, this implies a narrative of constitutional ideas migrating across borders. The context here was that people in a number of British colonies applied customary and indigenous laws in some of their affairs. In India, for example, Hindus were permitted to apply Hindu law and Muslims opted for Islamic law to do with matters of marriage, divorce, inheritance and so forth. Both Hindu and Muslim judges assisted in the interpretation of their customary laws, laws that sat alongside British statutory laws.⁷⁸ Similarly, in Nigeria, positive state law coexisted with about 350 types of customary laws. The 1886 Charter of the Royal Niger Company provided that the customs and laws of the people in Nigeria must be respected and upheld.⁷⁹ However, respecting local customs and legislation created a paradox for the colonial power when these norms either clashed with the laws of England or, for one reason or another, were “morally” repugnant in their view. In the interests of colonial order, a hierarchy needed to be

74. QANUNI ASSAASSI IRAN [CONSTITUTION] 1906, art. 2 (Persia).

75. ZEGHAL, *supra* note 10.

76. BROWN, *supra* note 11, at 30. This council of clerics provision was effectively ignored throughout most of the history of the Iranian constitution.

77. FELDMAN, *supra* note 13, at 83 (stating that British judges applied Islamic and Hindu law when appropriate in colonial India).

78. *The British Empire in India*, LIBRARY OF CONGRESS, available at <http://www.saylor.org/site/wp-content/uploads/2011/01/The-British-Empire-in-India.pdf> (describing the structure of British colonial legal administration in India).

79. C. W. NEWBURY, BRITISH POLICY TOWARDS WEST AFRICA: SELECTED DOCUMENTS (1875–1914) 254 (1965).

established. Thus, the British implemented two types of repugnancy doctrines. First, the imperial government reserved the ability to disallow legislation in the colonies that were “repugnant to the laws of England.”⁸⁰ That is, legislation could be declared invalid if it was inconsistent with the law of England. This was the case, for example, in Australia, Canada and New Zealand. Second, and more importantly for present purposes, in other colonies and certainly throughout Africa, magistrates had the power to refuse the application of customary laws if, essentially, they offended “civilized standards.” This doctrine was justified on the basis that it would eradicate unjust customs.⁸¹

Although the specific wording of the clause varied between colonies,⁸² the gist was that customary laws were acceptable to the colonial administrators only if they were not repugnant to natural justice, equity and good conscience and if they were not incompatible either directly or by implication with any law for the time being in force.⁸³ This clause essentially implied that customary law would not be applied if it was contrary to natural justice or public policy — as interpreted by the imperial government.⁸⁴ It was thus a supreme normative constraint on the substantive norms and laws of the colonial subjects, leaving the British with wide discretion to decide “what should or should not be woven into the fabric of the law of the land.”⁸⁵ This general repugnancy proviso was common to all African colonies.⁸⁶ While most colonies repealed the doctrine after gaining independence, Nigeria still maintains it.⁸⁷ British

80. Damen Ward, *Legislation, Repugnancy and the Disallowance of Colonial Laws: The Legal Structure of Empire and Lloyd's Case (1844)*, 41 VICTORIA U. WELLINGTON L. REV. 381, 382 (2010); Claire Natoli, *Legal Independence in Australia*, 7 CROSS-SECTIONS 65, 66 (2011).

81. BONNY IBHAWOH, IMPERIALISM AND HUMAN RIGHTS: COLONIAL DISCOURSES OF RIGHTS AND LIBERTIES IN AFRICAN HISTORY 60 (2007).

82. See Gerald M. Caplan, *The Making of “Natural Justice” in British Africa: An Exercise in Comparative Law*, 13 J. PUB. L. 120, 120 (1964) (“exact wording of the clause varies from territory to territory”).

83. Bethel Chuks Uweru, *Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism*, 2 AFR. RES. REV. 286, 293 (2008); *id.* at 292 (“The repugnancy doctrine in Nigeria emerged from the decision in the case of *Eshugbaye Eleko v. Government of Nigeria*. (1931) In that case, Lord Atkin said: ‘The court cannot itself transform a barbarous custom into a milder one. If it stands in its barbarous character it must be rejected as repugnant to natural justice, equity and good conscience.’”).

84. IBHAWOH, *supra* note 81, at 59.

85. Caplan, *supra* note 82, at 120 (quoting N. M. Ollennu, *The Influence of English Law on West Africa*, 5 J. AFR. L. 21, 27 (1961)).

86. Pieter Bakker, *Indigenous Family Law in South Africa: From Colonial Repugnancy to Constitutional Repugnancy*, Paper Delivered at Law and Society Association Annual Meeting, Denver, CO (May 25–29, 2009).

87. E. A. Taiwo, *Repugnancy Clause and its Impact on Customary Law: Comparing the South African and Nigerian Positions — Some Lessons for Nigeria*, 34 J. JURID. SCI. 89, 91 (2009); Uweru, *supra* note 83, at 294 (“There is no known repugnancy case that has been decided on the basis of conflict with any other law. Rather, all repugnancy cases were decided by reference to the universal standard of morality which in human transactions is founded on what is ‘good, just and fair.’”).

colonial administrators viewed a number of laws — including Islamic law — followed by colonial peoples as “backward with the tendency to be repugnant.”⁸⁸ Some have even argued that the repugnancy clause served an important function since it eliminated gross injustices that were inherent in the application of customary law.⁸⁹ Accordingly, by invoking this repugnancy clause, customary rules related to slavery, trial by ordeal and human sacrifice were subjugated.⁹⁰ In this sense, the repugnancy doctrine motivated the creation of the supremacy clause. It is fair to say then that, as Leon Sheleff argues, this clause was not presented “merely, or even mainly, as being some sort of compromise between conflicting value-systems and their normative rulings, but as being an expression of minimum standards being applied as a qualification to the toleration being accorded (by recognition) to the basically unacceptable norms of ‘backward’ communities.”⁹¹ Of course, subjecting customary law to some imported moral standard mostly unknown and certainly alien to colonial people would presumably often have led to a state of uncertainty as to whether certain laws deemed to be valid previously would now conform to colonial notions of justice and fairness.⁹² Indeed, “in applying the repugnancy clause, the British reviewing judges . . . tended to smuggle in common law concepts under the cloak of natural justice.”⁹³ Thus, in pointing out that repugnancy was applied in an unpredictable, ad hoc fashion, Professor Mamdani argues that the purpose of the doctrine was primarily to reinforce colonial power.⁹⁴ The haphazard, selective application of native laws meant that rather than sustain a local past, the project of empire was assisted.⁹⁵

Considering the significant procedural and substantive similarities between Article 2 Islamic repugnancy and the British colonial imposition of the repugnancy doctrine, it seems quite likely that the repugnancy clause may have traveled from neighboring British India into Iran. The concept of repugnancy in British colonies mirrored quite well the idea of Islamic

88. Abdulkadir Hashim, *Coping with Conflicts: Colonial Policy Towards Muslim Personal Law in Kenya and Post-Colonial Court Practice*, in *MUSLIM FAMILY LAW IN SUB-SAHARAN AFRICA: COLONIAL LEGACIES AND POST-COLONIAL CHALLENGES* 221 (Shamil Jeppie et al. eds., 2010).

89. See T. OLAWALE ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 128 (1956) (ordinances banning witchcraft).

90. See IBHAWOH, *supra* note 81, at 61.

91. LEON SHELEFF, *THE FUTURE OF TRADITION: CUSTOMARY LAW, COMMON LAW AND LEGAL PLURALISM* 123 (2000).

92. IBHAWOH, *supra* note 81, at 61.

93. Caplan, *supra* note 82, at 132.

94. MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* 117 (1996).

95. See Ravit Reichman, *Undignified Details: The Colonial Subject of Law*, in *BLOOM'S MODERN CRITICAL INTERPRETATIONS: CHINUA ACHEBE'S THINGS FALL APART* 51, 56 (Harold Bloom ed., 2002).

repugnancy — that is, both clauses attempt to subject all laws to some higher normative test of supremacy either rooted in an a higher law, or in the case of the “moral” repugnancy clauses, to a “fair and just” type test. The difference, of course, is that while the colonial repugnancy clauses looked for morality in European standards of natural law and good conscience, the Iranian repugnancy clauses held Islam to be the source of morality. That is, while the British sought to make customary norms more “British,” in Muslim countries, it was modern constitutionalism that was to become more “Islamic.” Also, in Iran in particular, the intention was that it would be scholars, rather than civil judges as in the case of the British, who would assess the compatibility or incompatibility of laws with the repugnancy doctrine.⁹⁶

B. *The Spread of Islamic Supremacy Clauses*

This section introduces an empirical analysis of which states have adopted Constitutional Islamization in the form of Islamic supremacy clauses. This exercise requires data on which countries adopted the relevant clauses and when. To collect such data, we drew on data from the Comparative Constitutions Project, an effort to catalogue the formal contents of the world’s written constitutions since 1789.⁹⁷ We focused on constitutions from countries that have a Muslim population greater than fifty percent, according to the Association of Religious Data Archives.⁹⁸

To measure, we again draw on the Comparative Constitutions Project to create variables capturing whether a constitution has a repugnancy clause, or if not, whether it provides for a clause that declares the superiority of religious law.⁹⁹ We create two indicator variables that capture whether a constitution contains one of these forms of Constitutional Islamization. “REPUGNANCY” captures the existence of a repugnancy clause; the variable “ISLAMICITY” captures whether there is *either* a repugnancy clause or a source of law clause that makes it clear that Islamic law is superior. This included any constitution providing that religion is a “basis, main, major, or supreme source of law.” If religious law is merely “a” source of law and no other language emphasizing the role of religion or religious law is mentioned, this variable takes value zero. We find

96. *But see* AMIRHASSAN BOOZARI, *SHI’I JURISPRUDENCE AND CONSTITUTION: REVOLUTION IN IRAN* 159 (2011) (explaining that the Council idea never really took off until 1979).

97. *See* COMPARATIVE CONSTITUTIONS PROJECT, <http://comparativeconstitutionsproject.org> (last visited Mar. 29, 2014).

98. *See* ASSOCIATION OF RELIGION DATA ARCHIVES, <http://www.thearda.com> (last visited Mar. 29, 2014).

99. *See* COMPARATIVE CONSTITUTIONS PROJECT, *supra* note 97 (specifically, we drew on CCP survey variables RELLAW and RELLAWV. RELLAWV is a dummy variable capturing whether law contrary to religion is void; in other words, a repugnancy clause. This clause is found only in predominately Muslim countries).

sixteen instances of repugnancy clauses from six different countries; including source of law clauses in the broader definition of Islamicity produces thirty-eight constitutions from nineteen different countries.¹⁰⁰

Analysis of the data shows that Constitutional Islamization has spread rapidly to become a common feature in the constitutions of Muslim countries. Almost half of the constitutions of Muslim countries contain the “source of law” or “repugnancy clauses.” From 1907 to 1950, we see only two constitutions (in Iran/Persia and Afghanistan) containing such clauses.¹⁰¹ Then, after a hiatus of Constitutional Islamization, almost four decades later, in 1950, the newly drafted Syrian Constitution contained a clause specifying that “Islamic *fiqh* [traditional scholarly interpretations of Islamic law] shall be the chief source of legislation.”¹⁰² Subsequently, in the years between 1990 and 2012, we see a five-fold increase in the number of countries where the constitutions contain such clauses. This is a result of both the proliferation of new majority-Muslim countries and constitutional systems generally. In absolute terms, the number of Muslim countries with such constitutional provisions has continued to grow and today it stands at nineteen. Indeed, in the second part of the twentieth century, Constitutional Islamization clauses spread much more widely, and are now a staple feature of the constitutions of about forty percent of Muslim countries today.¹⁰³ In 2008, the Maldives became the latest nation to adopt Constitutional Islamization in its constitution. Egypt’s newly drafted 2012 Constitution also essentially reproduced the Islamic supremacy clause from its earlier, 1971 Constitution (as amended in 1980), which made the principles of Islamic law/Sharia, the principal source of legislation. It is likely that Libya’s permanent Constitution, which is currently being drafted, will also undergo Constitutional Islamization for the first time in the country’s history.

Figure 1: Number of Majority-Muslim countries with written constitutions & those with Constitutional Islamization clauses

100. *See infra* Table 1.

101. CONSTITUTION OF AFGHANISTAN Oct. 31, 1931, art. 65 (“Measures passed by the Council should not contravene the canons of the religion of Islam or the policy of the country”).

102. Lombardi, *supra* note 20, at 737 (alteration in original) (tracing history).

103. *The World’s Muslims: Religion, Politics and Society*, PEW RESEARCH: RELIGION & PUBLIC LIFE PROJECT (Apr. 30, 2013), <http://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-overview/> (saying that there are forty-nine countries with more than fifty percent Muslim population).

II. AN EMPIRICAL ANALYSIS OF CONSTITUTIONAL ISLAMIZATION

This part further analyzes the data on Constitutional Islamization. It tests empirically what determines whether a country will adopt Islamic supremacy clauses in its constitution and finds British colonial legacy and the number of Muslims in the population to be strong predictors. It also analyzes the relationship between Islamic supremacy clauses and rights in the constitution and, rather counterintuitively, finds a surprising co-occurrence between the two — that is, the incorporation of Islam in the constitution is accompanied by an increase in the number of rights in the constitution and the incidence of both are rising. It explores possible theoretical reasons for this relationship and argues that coalitional politics and “insurance” — where particular clauses adopted in the constitution reflected a kind of “insurance swap” between two sides, one side desiring protection for Islam and the other the provision of rights — are important reasons — to achieve a constitutional bargain. The net effect of these potentially contradicting clauses is to delegate balancing between the two to downstream decision makers — courts and legislators.

A. *The Determinants of Constitutional Islamization*

What determines the decision to adopt an Islamic supremacy clause? Our account of the origins of the clauses suggest that a British colonial legacy may be helpful. Colonial structures have enduring legacies on legal systems, long after the colonial power has packed up and moved home.¹⁰⁴ To test this proposition, we conduct a statistical analysis of factors predicting the adoption of supremacy clauses. Our dependent variable is Islamic supremacy; we include in separate analyses the narrower category of repugnancy clauses and the broader set that includes source of law clauses.

We are concerned with the factors that predict the onset of these clauses, that is, the time at which a country adopts a clause for the first time. The unit of analysis in the reported analysis is the country-year. Looking at onset makes sense because, as Table 1 below demonstrates, there is a good deal of stickiness in these clauses; once adopted, countries tend not to eliminate them.¹⁰⁵ We estimate a probit model where the dependent variable is a binary variable that captures whether or not a country has adopted a repugnancy or Islamic superiority clause in any given year. The variable takes a value of one for the first year a country’s

104. Daniel M. Klerman et al., *Legal Origin or Colonial History?*, 3 J. LEGAL ANALYSIS 379, 380 (2011).

105. Although they occasionally do. See INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF SUDAN July 6, 2005 (no repugnancy clause).

constitution contains Islamic superiority and zero for every year before. Every year after adoption falls out of the data.¹⁰⁶

As explanatory variables, we include a dummy variable that takes value one if the British were the last colonial power to colonize a country, and zero otherwise.¹⁰⁷ We also experimented with a similar variable for French colonialism. However, we find that no country in the French colonial tradition, has ever adopted Islamic repugnancy clause and so it was not useful in the statistical analysis of that dependent variable. To examine the effects of time, we include a variable for year, as well as wealth and level of democracy.¹⁰⁸ We also include a variable which captures the total number of countries with clauses in force in each year. This captures whether or not there is a trend, associated with the large literature on policy and institutional diffusion.¹⁰⁹ We restrict the analysis below to countries with more than fifty percent Muslim population.

106. We also ran a similar analysis with the constitution as the unit of analysis, in which we are predicting which constitutions have the clauses relative to those that do not. These results are substantially similar.

107. This is taken from the CEPII Database, variable Colonizer 1.

108. We use the Unified Democracy Score (UDS) measure, which aggregates other measures of democracy. See Daniel Pemstein et al., *Democratic Compromise: A Latent Variable Analysis of Ten Measures of Regime Type*, 18 POL. ANALYSIS 426, 428 (2010) (establishing the UDS measure).

109. See Zachary Elkins & Beth Simmons, *On Waves, Clusters, and Diffusion: A Conceptual Framework*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 33 (2005); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163 (2011).

Figure 2 Determinants of the Adoption of Islamic Supremacy Clauses
(Muslim majority countries only)

| Variables | (1) REPUGNANCY | (2) ISLAMICITY |
|-----------------|---------------------|----------------------|
| Year | 0.093 (0.12) | 0.09 (0.01) |
| GDP | -.00007 (.00006) | .00005 (.00002) |
| Democracy (UDS) | -0.06 (0.29) | -0.03 (0.29) |
| British Colony | 1.84*** (0.40) | 0.59 (0.36) |
| %Muslims | 4.73*** (1.79) | 6.32** (3.15) |
| Global total % | 74.74*** (27.88) | 168.37*** (45.64) |
| Constant | -27.17 (23.94) | -27.26 (24.15) |
| Observations | 1351 | 1136 |

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

The results are consistent with our expectations. Controlling for level of democracy, wealth and time, British colonial heritage is a predictor of repugnancy clauses; it is also associated with greater likelihood of superiority clauses more generally, though the result is just shy of statistical significance. In unreported analysis, we find that replacing British colonial heritage with French produces a statistically significant negative coefficient: French colonies are associated with less supremacy. In addition, and perhaps unsurprisingly, the higher the percentage of Muslims in the country's population, the more likely it is that a country will adopt a supremacy clause. This suggests that the clauses may be popularly demanded. We do not, however, find an effect for democracy. That is, more democratic countries are neither more nor less likely to adopt supremacy. This is a significant finding: contrary to popular assertions about the incompatibility of Islam with democracy; nondemocratic countries are not more likely to adopt Islamic supremacy clauses. We also find a result for global trends; the more countries that have repugnancy clauses or supremacy clauses, the more likely other countries are to adopt them.

B. *The Co-occurrence of Rights and Islamic Superiority*

We also observe, counterintuitively, that constitutions that undergo Constitutional Islamization also contain many rights. That is, constitutions that incorporate Islamic supremacy clauses also seem to contain, relative to a predecessor constitution and to the constitutions of other Muslim countries without Islamic supremacy clauses, a larger number of constraints on government.

Why would Islam go together with rights? There are three possibilities, none being mutually exclusive. One is that the same political forces that are pushing for Islamization are also pushing for more rights. That is, it may be that it the same group demands both rights and Islam because it associates both as indivisible and complementary. This is not surprising; Kristen Stilt writes that in the public consultations during the constitutional drafting process in Egypt in 1971, it seemed that some of those who desired to see Islam in the constitution associated incorporation as linked with the provision of rights.¹¹⁰ Rights to freedom of association and expression, for example, can help protect religious movements. We also know from polls that the majority of Muslims polled who desire that Islam be a source of legislation do so because they associate many positive rights with Islam — and these rights overlap with modern day human rights norms. For example, a majority polled believed that incorporating Islam as a source of law would mean the provision of justice for women, constraining government, a reduction in corruption, the protection of minorities, human rights and a fair judicial system. Even in secular Turkey, less than a third of Muslims who want Islamic law to be a source of legislation perceive it to limit personal freedom. Thus, it could very well be that the demands for rights and Islam are motivated by the same forces.¹¹¹

Alternatively, it could be that these are completely different groups that are both becoming more popular within the political sphere at the same time. That is, there may be Islamists who desire to see an Islamic supremacy clause inserted in the constitution but also completely unrelated liberal groups that wish to see the inclusion of rights. Their motivations may overlap; both groups might want more democracy and constraints on government as protection against an incumbent authoritarian regime, even

110. See generally Kristen Stilt, *Constitutions in Authoritarian Regimes: The Egyptian Constitution of 1971*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 111 (Tom Ginsburg & Alberto Simpser eds., 2014) (tracing history of constitution); cf. Clark B. Lombardi, *The Constitution as Agreement to Agree: The Social and Political Foundations (and Effects) of the 1971 Egyptian Constitution*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 398 (Denis J. Galligan & Mila Versteeg eds., 2013) (noting no necessary association between the demands for Islam and rights provisions during negotiations for the 1971 constitution).

111. Magali Rheault & Dalia Mogahed, *Many Turks, Iranians, Egyptians Link Sharia and Justice*, GALLUP WORLD (July 25, 2008), <http://www.gallup.com/poll/109072/many-turks-iranians-egyptians-link-sharia-justice.aspx>.

if they view the path to achieving this in ideologically different terms. One group might feel, as with the Muslim Brotherhood in Egypt, that “Islam is the solution” while another group, composed of non-Muslims or secularists, might favor a more rights-based approach. The parallel inclusion in the constitution of both Islam and rights may thus owe itself to different political forces, even with the same ultimate political agenda, operating concurrently. This is partly what happened in Egypt during the drafting of the 1971 constitution.

A third possibility is that the two are adopted together in a kind of coalitional process, in a spirit of compromise or with an understanding that these provisions would co-opt certain groups who may otherwise oppose the constitution. Suppose, in the context of Islam, that you have a constitutional bargain between secular liberals, an Islamist party, and the military. Any two of these groups can get together to adopt a constitution and impose it on the third group. The Islamic party insists on supremacy of Islam. The military prefers to control its own budget. The liberals want to have an extensive set of rights. None of them particularly trust each other. If the constitutional bargain is between a military and the Islamic party, there will be no rights but a supremacy clause. If the bargain is concluded between the military and the liberals there will be rights but no supremacy. And if between the Islamists and the liberals, there will be both. In this way, coalitional politics explain the co-occurrence of rights and Islam.

Beyond this simple coalitional story, there might be a need for what might be called “coalitional insurance.” The basic dynamic has been laid out in the context of South Africa, in which it has been argued that the particular set of rights adopted in the constitution reflected a kind of “insurance swap” between two sides to a political bargain.¹¹² In that negotiation, left-wing and right-wing factions both valued different rights: the left valued socioeconomic rights, like those to housing, while the right insisted on strong property protections. Since neither was sure it would control subsequent politics, both insisted on their preferred rights as a way of protecting their interests down the road. The net effect is to delegate policies to decisionmakers down the road, but in a way whereby those decisionmakers are constrained by a set of competing priorities. In this way, each faction in constitution-making has some protections for its core interests. In the case of Muslim countries, it may be that an insurance swap of such a sort would provide Islamists or religious clerics with an assurance that future progressive legislation that violates Islamic principles will be constitutionally invalidated. In exchange, they agree to the inclusion

112. Rosalind Dixon & Tom Ginsburg, *The South African Constitutional Court and Socio-Economic Rights as “Insurance Swaps,”* 4 CONST. CT. REV. 1, 4 (2011).

of certain rights in the constitution. The insurance swap allows parties that may potentially have competing or conflicting aims in Muslim countries to bargain in a more efficient way that provides more space for reaching a compromised outcome. That is, while during constitutional negotiations, the Islamists may not be inclined to agree to the inclusion of certain controversial rights such as, say, absolute freedom of speech, without limits to prevent — for example, blasphemy, and the secular liberals may similarly not be willing to agree to the *non-inclusion* of such a right, the Islamic supremacy clause, swapped against certain rights, then provides a means for both to reach an outcome that may be agreeable to both. That is, liberals can have, for example, a right to freedom of speech in the constitution as long as that right is subjugated to an Islamic supremacy clause which provides “insurance” that the right may not be used, for example, to insult Islamic beliefs. In the absence of such “insurance,” the Islamic parties may not agree to a free speech clause. In this sense, the insurance swap delegates the interpretation and reconciliation of the potentially contradictory right in relation to the Islamic supremacy clause to future legislators and perhaps, more importantly, to the courts. The clause then satisfies the Islamists because it guarantees that rights and laws won’t violate Islam and the provision of the desired right in the constitution then satisfies the secular liberals. Eventually, courts will need to maintain a balance between rights which may potentially conflict with Islam. And, as scholarship by Nathan Brown, Ran Hirschl and Clark Lombardi shows, it seems that courts in many Muslim countries have been doing precisely that — adopting progressive interpretations of rights while attempting to ensure fidelity to Islamic values. We will return to this theory in the case studies, but for now let us examine the relationship between rights and Islamic supremacy in modern constitutions.

Table 1 below provides such an analysis. We list the major constitutional events in countries that have adopted Islamic supremacy at some point, along with the number of rights in each national constitution. To capture Islamic supremacy clauses, we use two variables. As mentioned above, Constitutional Islamization takes two forms — repugnancy and source of law clauses and our variables capture both types of clauses. The table also indicates a good deal of “stickiness” in Constitutional Islamization clauses. Once adopted, they tend to endure through subsequent constitutions (although there are a few cases in which Islamization clauses are dropped). This stickiness is a general feature of constitutional design.¹¹³ In the case of Islamization clauses, we accordingly see only two countries in which they failed to be adopted in subsequent constitutions: Afghanistan, after the Soviet invasion in 1979, and the

113. ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 59 (2009).

Comoros, which briefly had a consultative role for the Ulama, or religious scholars, on legislation from 1996–2001.¹¹⁴ The number of rights is taken from the Comparative Constitutions Project (CCP), which has generated a list of 117 rights found in national constitutions since 1789.¹¹⁵ The table indicates the number from this list; we note that it is possible that there are other rights not tracked by the CCP that are of idiosyncratic importance. In the table below * indicates a repugnancy clause; + indicates a clause that stipulates that Islam is a or the basic, main, or supreme source of law.

Table 1: Number of Rights in Constitutions for countries that adopt superiority

| Country | Year | Number of Rights |
|-------------|----------------------|------------------|
| Afghanistan | 1923 | 15 |
| | 1931* | 11 |
| | 1933* (amendment) | 13 |
| | 1964* | 28 |
| | 1977* | 26 |
| | 1980 | 36 |
| | 1987* | 50 |
| | 1990* | 60 |
| | 2004* | 37 |
| Bahrain | 1973+ | 45 |
| | 2002+ | 45 |
| Comoros | 1975 | 8 |
| | 1978 | 24 |
| | 1980 | 28 |
| | 1987 | 23 |
| | 1992+ | 30 |
| | 1996+ ¹¹⁶ | 28 |
| | 2001+ | 23 |
| Egypt | 1923 | 28 |
| | 1930 | 24 |
| | 1953 | 3 |

114. CONSTITUTION OF THE FEDERAL ISLAMIC REPUBLIC OF THE COMOROS Oct. 30, 1996, art. 57 (“The Council of the Ulemas may, at its own initiative, in the form of recommendations, direct the attention of the Federal Assembly, the Government and the governors to reforms that appear to it as conforming [to] or contrary to the principles of Islam.”).

115. These are available in an online appendix.

116. The Comoros in 1996 introduced an Ulema Council that could make legislative recommendations if it felt that law was violating Islam. We do not count this as supremacy or repugnancy because the role is only advisory, but nevertheless include it in the table.

| | | |
|--------------|----------------------|----|
| | 1956 | 33 |
| | 1958 (UAE) | 10 |
| | 1964 | 31 |
| | 1971+ | 43 |
| | 1980+ | 43 |
| | 2011+ | 46 |
| Iran | 1906 | 1 |
| | 1907* | 48 |
| | 1979*+ | 45 |
| Iraq | 1925 | 23 |
| | 1964 | 28 |
| | 1970 | 34 |
| | 1990 | 33 |
| | 2004*+ | 44 |
| | 2005*+ | 52 |
| Kuwait | 1962+ | 39 |
| Libya | 1951 | 41 |
| | 1969 | 15 |
| | 2011+ | 24 |
| Maldives | 1968 | 15 |
| | 1998 | 18 |
| | 2008* | 72 |
| Mauritania | 1961 | 9 |
| | 1978 | 19 |
| | 1985+ | 0 |
| | 1991+ | 28 |
| Oman | 1996+ | 40 |
| Pakistan | 1956* | 26 |
| | 1962* ¹¹⁷ | 29 |
| | 1973* | 41 |
| | 2002* | 37 |
| | 2010 *(amendment) | 45 |
| Qatar | 1970+ | 0 |
| | 2003+ | 33 |
| Saudi Arabia | 1992+ | 13 |
| Somalia | 1960+ | 43 |
| | 1979 | 39 |

117. Pakistan 1962 is an ambiguous case. Although it contains a clear statement that no law may be repugnant to Islam, it also states that this principle cannot be the basis of a court challenge. PAKISTAN CONSTITUTION 1962, art. 6(2). As in the Comoros in 1996, the Constitution created an Advisory Council on Islamic Ideology, whose views on Islamicity could be solicited.

| | | |
|-------|------------|----|
| | 2004+ | 43 |
| Sudan | 1955 | 10 |
| | 1964 | 10 |
| | 1971 | 7 |
| | 1973+ | 46 |
| | 1985+ | 29 |
| | 1998*+ | 41 |
| | 2005+ | 49 |
| Syria | 1950+ | 38 |
| | 1953+ | 41 |
| | 1958 (UAE) | 10 |
| | 1964+ | 24 |
| | 1973+ | 29 |
| | 2012+ | 29 |
| UAE | 1971+ | 29 |
| Yemen | 1962+ | 22 |
| | 1970+ | 31 |
| | 1991+ | 33 |

Notably, constitutions which introduce some form of Islamic supremacy clauses are also associated with more rights. For countries which *had* a previous constitution and then introduced a superiority clause, all but two (Mauritania 1985 and Afghanistan 1931) featured more rights *after* adopting superiority than before.¹¹⁸ The average *increase* was 20.5 rights out of our list of 117 rights. The average constitution with some form of superiority had 35.8 rights (n=37), relative to 31.9 for those without (n=668). Islamic superiority is thus, quite surprisingly, associated with *more* constitutional rights.

C. *Multivariate analysis*

Of course it is possible that the correlation between rights and Islamization in the constitution is caused by something else, a “missing variable” that is independently affecting both types of provision. One possibility is time. We know that, as a general matter, the number of rights

118. The case of Comoros in 1978 is consistent as well. That Constitution introduced language to the effect that the country would “draw from Islam, the religion of the state, the permanent inspiration of the principles and rules that govern the State and its institutions.” COMOROS CONSTITUTION Oct. 1, 1978, pmbl. (unofficially translated from French by author). This language is not strong enough to count as a supremacy clause in our coding, but still represented a shift in Comoros law toward Islamization. It was accompanied by an increase of sixteen rights over the earlier 1975 document.

found in national constitutions has increased over time.¹¹⁹ Constitutions adopted later tend to have more rights, if only because the total number of rights has continued to expand, from “first generation” civil and political rights to second, third and even fourth generation rights.¹²⁰ We also note that the era after the adoption of the Universal Declaration of Human Rights in 1948 has corresponded with a rapid increase in national constitutional rights. Because, as we noted in Part I, the adoption of Islamic clauses tends to be a modern phenomenon, it is possible that the co-occurrence of the two phenomena is simply the result of time trends, and not the result of any direct relationship.

Another potential missing variable is British colonialism. Recall our earlier argument that British colonialism had an influence on the adoption of Islamic superiority clauses. But what if British colonialism also leads countries to adopt more rights in constitutions? If so, if we see a co-occurrence of rights and Islam, we may be simply observing two independent effects of British colonialism.¹²¹

To test for such possibilities requires a multivariate analysis, in which we can control for various factors to determine the independent contribution of each one. We analyze a dataset in which the unit of analysis is the constitution; the dataset contains 983 total documents, of which 161 are from majority Muslim countries. Our dependent variable in the following analyses is the number of rights found in any particular constitution from our list of 117. It ranges from zero to eighty-eight in our data. Our independent variables of interest are “Repugnancy,” which captures whether or not the constitution has a repugnancy clause, and “Islamicity” which includes constitutions both with repugnancy clauses and other forms of normative superiority as described in Part I. We also include as control variables the year the constitution was adopted, the level of democracy as measured by the Unified Democracy Score (UDS),¹²² whether the country is a former British colony, and, as a proxy for wealth,

119. Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61, 76–77 (2013) (“As one indicator, the nine constitutions written in 1947 contain an average of 17.6 rights, while the six written in 1949 contain at average of 31.0 rights”); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163 (2011).

120. Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETHERLANDS INT'L L. REV. 307 (1982) (third generation rights); LOUIS HENKIN ET AL., *HUMAN RIGHTS* 369 (2d ed. 2009) (fourth generation rights); BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

121. See Jerg Guttman & Stefan Voigt, *The Rule of Law and Constitutionalism in Muslim Countries* (unpublished manuscript) (on file with authors) (arguing that colonial history plays an important role in explaining variation in civil liberties across countries).

122. See James Melton et al., *Democracy Scores*, UNIFIED DEMOCRACY SCORES, <http://www.unified-democracy-scores.org/uds.html> (last updated Mar. 12, 2014).

energy consumption.¹²³ (Note that the number of observations in each regression is smaller than the entire dataset because not all of these control variables are available for each constitution.)

Because our dependent variable is “count data” in which the variable ranges from zero upward in integers, a Poisson regression is the appropriate statistical method. The table below reports the results in “incident rate ratios,” which can be interpreted as the shift in the odds that a constitution will contain an additional right. Any value greater than 1 indicates an increased probability associated with the factor in question, while a value less than 1 indicates a decreased probability. The values can be read as the increased probability associated with the particular variable in question. For example, for majority Muslim countries, a constitution with a repugnancy clause (column 3 in Figure 3) is predicted to have twelve percent more rights than one without. Each additional year is predicted to add one percent more rights.

Figure 3: Poisson regression predicting number of rights (odds ratios reported)

| VARIABLE | ALL COUNTRIES | | MAJORITY MUSLIM | |
|-----------------------|---------------------------|---------------------------|---------------------------|---------------------------|
| | (1) | (2) | (3) | (4) |
| Year | 1.04*** (0.0006) | 1.01*** (0.0006) | 1.01*** (0.001) | 1.02*** (0.001) |
| Democracy (UDS) | 1.18*** (0.016) | 1.17*** (0.016) | 1.13*** (0.047) | 1.13*** (0.047) |
| GDP | 1.00 (1.64e-06) | 1.00 (1.69e-06) | 1.00 (2.63e-06) | 1.00 (2.64e-06) |
| Former British Colony | .94*** (.018) | .95*** (0.19) | 1.18*** (.05) | 1.19*** (.05) |
| Repugnancy | .99 (0.05) | | 1.12** (0.06) | |
| Islamicity | | 0.90 (0.032) | | 1.02 (0.05) |
| Constant | 3.57e-11*** (4.50e-11) | 2.65e-11*** (1.55e-08) | 5.16e-12*** (1.45e-12) | 2.21e-12*** (6.21e-12) |
| Observations | 337 | 337 | 78 | 78 |

Standard errors in parentheses

123. This is a standard variable used in empirical analyses that extend before 1945, when GDP data began to be systematically collected. *See, e.g., ELKINS ET AL., supra* note 113, at 95.

*** $p < 0.01$, ** $p < 0.05$, * $p < 0.1$

As one can see, time *does* have an effect on the probability of the adoption of additional rights. Each additional year is predicted to increase the number of rights by roughly one percent. Democracy, too, has a positive effect, unsurprisingly, both within majority Muslim countries and the broader set of countries. An additional unit in the Unified Democracy Score is associated with between thirteen percent and eighteen percent more rights. The findings on British colonial heritage are interesting in light of our concern that it might be driving both rights and Islamic provisions. British colonial heritage is associated with five to six percent fewer rights in the full set of constitutions, but eighteen to nineteen percent *more* rights in majority Muslim countries. These results are statistically significant.¹²⁴

Our central variables of interest — the inclusion of Islamic repugnancy supremacy clauses — are not associated with increases in the number of rights when we look at the full sample of countries worldwide. However, a better and more meaningful comparison is with other countries which have a Muslim majority population. A country with few or no Muslims, after all, cannot be expected to have a constitutional provision stating that law contrary to Islam is void or that Islam will be a superior source of law. Nor are any other religions associated with constitutional clauses about religious superiority. Accordingly, when we restrict the analysis to constitutions adopted in countries with a Muslim population of more than fifty percent, we see that repugnancy clauses are in fact associated with more rights, *even* controlling for the effects of time, democracy, and British colonialism. We do not find the same effect for the broader category of Islamic supremacy clauses. But a constitution with a repugnancy clause can be expected to have twelve percent more rights. This is a significant and important finding: Islam repugnancy clauses and rights are not only compatible, but they are connected in constitutional design.

III. CASE STUDIES

To better understand the historical origins and cultural motivations for the adoption of Islamic supremacy clauses in national constitutions, it is important to trace the incidence of the initial adoption of Islamic supremacy clauses in the constitutions of Muslim majority states. For this

124. In unreported analysis, we included a variable for whether or not the constitutional system has some form of judicial review, on the theory that judicial review might be driving these constitutional choices. Although the judicial review variable is associated with more rights in all specifications, the results for our key variables were not substantially different from the analysis reported here.

purpose, we engaged in case studies of four countries: Iran, Afghanistan, Egypt and Iraq. These countries were selected because each adds something unique to our knowledge and understanding of the genesis of Constitutional Islamization. Afghanistan and Iran were two of the earliest constitutions in the Muslim world to adopt repugnancy clauses. While Egypt was not the first country in the Arab world to incorporate a strong supremacy clause in its constitution (Syria did so in 1950), the history of adoption is most well documented for Egypt. Iraq, of course, provides us with a recent and thus relatively well documented account of the insertion of the Islamic supremacy clause during constitution-making. Importantly, it also tells us how the dynamics of insertion played out in a constitutional setting of foreign occupation. As compared to Afghanistan, which was also under occupation at the time, Iraq was a more relevant case study because 2004 was the first time an Islamic supremacy clause was adopted in its constitution; on the other hand Afghanistan has had such a clause since 1931.

These case studies, when read together imply that the incorporation of Islamic supremacy clauses might be responding to popular, democratic sentiment and that they are often adopted in a spirit of compromise, during moments of political liberalization. These case studies show that the motivations for first incorporating Islamic supremacy clauses, on the part of constitution writers, depending on the context, may range, interestingly, from actually legitimating progressive rights and reform to co-opting political opposition or simply, legitimating the incumbent regime.

A. Iran

Iran has had two constitutions, both of which were adopted in the aftermath of popular revolutions in 1906 and 1979 and both of which contain strong form Islamic supremacy clauses. Iran's first constitution, that of 1906, adopted in the aftermath of the "Constitutional Revolution," was in fact the first constitution in world history to contain the most robust forum of Islamic supremacy clause — the repugnancy clause.¹²⁵

In August 1906, the Iranian monarch, Muzaffar al-Din Shah signed a proclamation for constitutional government. This declaration marked Iran's transition from absolutist monarchic to parliamentary government. The transition was not easily won; rather it came after months of incessant agitation by a cross-section of Iranian society; clergy, traders, peasants and merchants culminating in events which popularly came to be popularly known as the "Constitutional Revolution." One important outcome of that revolution was the promulgation of a constitution that recognized the

125. QANUNI ASSAASSI IRAN [CONSTITUTION] 1906, art. 2 (Persia).

people as the source of political power, contained numerous rights and set up a division of powers.¹²⁶

1. *The Prelude to the Revolution*

Much to the resentment of the country's inhabitants, during the course of the nineteenth century, Iran was becoming economically and militarily weaker. Reliance on cash crops, increasing export of raw materials and the growing rate of unemployment had contributed to this economic situation and also raised questions of modernization in parallel with debates about how to curb the impact of European commerce on Iran's economy.¹²⁷ Afary cites these transformations as being the root cause of the Constitutional Revolution.¹²⁸ Externally, too, Iran, had become significantly dependent on European powers — namely Britain and Russia. Rather than resist foreign domination, the monarchs of the Qajar dynasty had quite visibly succumbed to British and Russian pressure and by the late nineteenth century, Iran was essentially “a prisoner of imperial interests.”¹²⁹

As such, Britain and Russia, competing with each other, imposed upon Iran humiliating economic “concessions,” which were commercial agreements, the benefits of which were usually weighed in favor of the foreign power.¹³⁰ While such concessions, in the short-term brought in much needed revenue to the ailing economy, they were also often raised to finance ostentatious foreign trips of the Qajar monarchs and damaged local interests. In February 1891, when the Shah first made public news of a concession granted to the British for the tobacco industry, an alliance of secular reformers and religious dissidents, merchants and Shiite clerics, jointly opposed the concession. In December 1891 tobacco use all but halted when a prominent cleric issued a religious opinion (*fatwa*) that the

126. See ASGHAR SCHIRAZI, *THE CONSTITUTION OF IRAN: POLITICS AND THE STATE IN THE ISLAMIC REPUBLIC 19* (John O'Kane trans., 1997) (discussing Constitutional Revolution which produced the first Iranian constitution that separated judicial, executive, and legislative branches of government).

127. See JANET AFARY, *THE IRANIAN CONSTITUTIONAL REVOLUTION, 1906–1911: GRASSROOTS DEMOCRACY, SOCIAL DEMOCRACY AND THE ORIGINS OF FEMINISM 17* (1996) (detailing the origin of the Constitutional Revolution of 1906 in the structural and ideological transformations at the turn of the century, resulting from decades of economic change and damaging European influence).

128. *Id.* (detailing the origin of the Revolution in the structural and ideological transformations at the turn of the century, resulting from decades of economic change and damaging European influence).

129. Ali Gheissari, *Constitutional Rights and the Development of Civil Law in Iran, 1907–41*, in *IRAN'S CONSTITUTIONAL REVOLUTION: POPULAR POLITICS, CULTURAL TRANSFORMATIONS AND TRANSNATIONAL CONNECTIONS* 69, 71 (H. E. Chehabi & Vanessa Martin eds., 2010).

130. Nikki R. Keddie, *Iranian Revolutions in Comparative Perspective*, 88 *AM. HIST. REV.* 579, 580 (1983) (discussing the British tobacco concession in 1890 and the subsequent mass rebellion).

consumption of tobacco was un-Islamic.¹³¹ Eventually, left with no option and facing such strong cleric led resistance, in January 1892, the Shah terminated the concession and paid a hefty termination penalty. The event demonstrates quite vividly the weakness of the incumbent Qajar regime to resist both foreign domination and domestic unrest.

2. *The Constitutional Revolution*

In the next decade, resentment against the Qajar regime only intensified. In 1905 protests initiated by a coalition of forces that included radical members of secret societies, secular and religious reformers, orthodox clerics, merchants, shopkeepers and members of trade guilds erupted against the Shah.¹³² Opposition had galvanized against a government which was “not only tyrannical but was also engaged in selling the country to foreign imperialists”¹³³ as “[t]he country had become a semicolony [of the Europeans].”¹³⁴ External events, such as the Russian Revolution and victory of Japan in the 1904–05 Russo-Japanese War no doubt played a part in catalyzing opposition, too. While the Russian Revolution demonstrated that it would be possible to have “another and better form of government,” the Japanese victory symbolized the victory of a nonwhite nation armed with a constitution over a major European power without a constitution.¹³⁵ Indeed, the latter event is thought to have inspired a number of revolutions across Asian countries.¹³⁶

While some commentators ascribe the making of this paradoxical coalition — of clerics and revolutionaries — to the leadership of the clerics and a strong sense of justice in Shiite theological doctrines, others focus on various ideological and economic factors, such as contact with Western ideas of liberalism and democracy, that created a consensus amongst all segments of society that government authority must be

131. ZUBAIDA, *supra* note 52, at 185 (exploring the events of the tobacco concession to British company and subsequent successful boycott of tobacco monopoly because Mirza Hassan Shirazi, senior *mujtahid*, issued a *fatwa* banning use of tobacco on pain of “eternal damnation”).

132. AFARY, *supra* note 127, at 22 (explaining the origins of the coalition despite the long history of animosity between religious and secular reformers by examining the literature on diversity, economic factors, and ideological changes).

133. SAID AMIR ARJOMAND, *THE TURBAN FOR THE CROWN: THE ISLAMIC REVOLUTION IN IRAN* 79 (1989).

134. Shahrugh Akhavi, *Iran: Implementation of an Islamic State*, in *ISLAM IN ASIA: RELIGION, POLITICS, & SOCIETY* 27, 29 (John L. Esposito ed., 1987).

135. AFARY, *supra* note 127, at 37; *see also* Keddie, *supra* note 130, at 586 (noting that the only Asian constitutional government defeated the only major Western nonconstitutional government); *see also* NIKKI R. KEDDIE, *MODERN IRAN: ROOTS AND RESULTS OF REVOLUTION* 66 (2006) (discussing the revolutionary plans in Iran strengthened by the Russo-Japanese War and the Russian Revolution).

136. *See* Keddie, *supra* note 130, at 586.

controlled by a constitution and parliament.¹³⁷ Some reformers simply felt that an expression of constitutional ideas guised in religious rhetoric would be more effective or necessary perhaps in achieving revolutionary objectives.¹³⁸ Certainly, Iranian clerics have been described as the “prime movers” in the various opposition movements that formed against the Shah in this period.¹³⁹ As one scholar notes, “[o]ne remarkable feature of this revolution here . . . is that the priesthood have found themselves on the side of progress and reform.”¹⁴⁰ In fact, alliances between the religious leadership in Iran and modernizing political activists have been a recurring feature of Iranian history. Historians argue that the clerics doctrinal-religious based anti-tyrannical discourse greatly legitimated the cause of the revolution. For example, one well known jurist, Muhammad Husain Na’ini, invoked Islamic doctrine in support of the concept of liberty and equality, declaring that “liberty means people’s freedom from any type of capricious rule, unaccountability, and coercion by any powerful individual, even the king.”¹⁴¹ Another reformist cleric who was to become quite pivotal in the constitutionalist movement, Sayyid Muhammad Tabatabai, argued that the monarchical system of government was not sufficient for defending religion or ensuring just government. Such arguments no doubt facilitated the popularity of the revolutionary cause. Also, over the years, clerics in Iran had accumulated significant financial resources derived from the religious foundations and canonical taxes, which provided them with a financial base independent from the state.¹⁴² Further, the state had been adopting policies that were increasingly encroaching upon their interests; thus, their leadership and contribution to the cause should be viewed as at least partly born out of strategic considerations.¹⁴³

137. See AFARY, *supra* note 127, at 23 (examining several interpretations of the link between secular and religious reformers, the earlier emphasis on the implicit sense of justice in Shi’ite doctrine, and the more recent focus on economic and ideological factors); see also VANESSA MARTIN, *ISLAM AND MODERNISM: THE IRANIAN REVOLUTION OF 1906* 35 (1989) (arguing that ulama were responding to the government’s economic difficulties and the subsequent question of ulama legitimacy).

138. See AFARY, *supra* note 127, at 23 (discussing the religious dissidents strategy to guise constitutionalism in religious rhetoric); see also Mansoor Moaddel, *The Shi’i Ulama and the State in Iran* 15 *THEORY & SOC’Y* 519 (1986), *quoted in* AFARY, *supra* note 127, at 31 (arguing that the merchants called upon the ulama as a clever use of religion for secular and anti-imperialist ends).

139. MARTIN, *supra* note 137, at 1 (discussing the role of the ulama during the Constitutional Revolution, as “prime movers”).

140. *Id.* at 199 (quoting YAHYĀ DAULATĀBĀDĪ, 2 *HAYĀT-I YAHYĀ* 125).

141. BOOZARI, *supra* note 96, at 58; see Keddie, *supra* note 130, at 584 (discussing recurring alliances and coalitions between religious leadership and liberal or radical nationalist activists in Iranian history from 1890 to the present).

142. MARTIN, *supra* note 137, at 35 (discussing how ulama relied on the lack of centralization in Qajar political system to gain enough financial wealth so as to be independent of the state).

143. See Willem M. Floor, *The Revolutionary Character of the Iranian Ulama: Wishful Thinking or Reality?*, 12 *INT’L J. MIDDLE E. STUD.* 501, 502 (1980).

The central demand of this varied group of protestors in the Constitutional Revolution was for the rule of law and establishment of representative government. Since 1860 there had been a recurring demand amongst many Iranians for a House of Justice — *adalatkhana* — that would dispense justice in contrast to the arbitrary justice delivered by the Qajars. This is not surprising as the shah was an “absolute monarch” in whose “person were fused the three-fold functions of government, legislative, executive, and judicial. He was the pivot upon which turned the entire machinery of public life.”¹⁴⁴ Vanessa Martin argues that the absence of a written law in Iran meant that government was often

arbitrary and unsystematic. Many of the complaints of the merchants [thus] related to arbitrary taxation and to maladministration of the revenues One of the themes of the Constitutional Revolution, [was] that government be regulated by law . . . the cry for justice and law . . . illustrat[es] [how much less developed the Iranian system was].¹⁴⁵

These demands became more pronounced as some clerics openly pleaded for a House of Justice.¹⁴⁶ Soon, this limited demand morphed into calls for a parliament — a *Majlis* that would facilitate representative government.¹⁴⁷ Nevertheless, the ideological foundations of the idea for a parliament had its initial origins in the demand for a House of Justice.¹⁴⁸ In parallel, a constitution, or *mashrutiyyat*, also emerged as a demand.¹⁴⁹ One commentator writes that, in light of the demands being made, the “anti-despotic revolution [was] aimed at restricting the ruler’s power” and “unbridled tyranny of the Qājār dynasty’s monarchs”¹⁵⁰

144. Janet Afary, *Civil Liberties and the Making of Iran’s First Constitution*, 25 COMP. STUD. S. ASIA, AFR., MIDDLE E. 341, 342 (2005); see MARTIN, *supra* note 137, at 76 (discussing 1860 reorganization of the Ministry of Justice and ulama request for *adalatkhana*, or courts of justice); AFARY, *supra* note 127, at 57 (examining the public cry for *majles* that were “national” not “Islamic”).

145. MARTIN, *supra* note 137, at 10.

146. See *id.* at 88. Clerics would preach to large congregations demanding for a House of Justice. These actions were part of mounting agitation against the government.

147. See AFARY, *supra* note 127, at 57 (examining the rhetoric involved in the creation of *majilis* and the debates between nationalists and the religious government who wanted “Islamic majilis” versus “national majilis”); MANSOUR BONAKDARIAN, *BRITAIN AND THE IRANIAN CONSTITUTIONAL REVOLUTION OF 1906–1911* 56 (2006); MARTIN, *supra* note 137, at 97 (discussing ulama’s request for a *majles*, probably resulting from disagreements among the ulama about constitutionalism).

148. See Stephanie Cronin, *The Constitutional Revolution, Popular Politics, and State-Building in Iran*, in *IRAN’S CONSTITUTIONAL REVOLUTION: POPULAR POLITICS, CULTURAL TRANSFORMATIONS AND TRANSNATIONAL CONNECTIONS* 81, 89 (H. E. Chehabi & Vanessa Martin eds., 2010) (describing the roots of the parliamentary idea of a *majlis* in the early demands for a “House of Justice”).

149. Nikki Keddie & Mehrdad Amanat, *Iran under the Late Qājārs 1848–1922*, 7 THE CAMBRIDGE HISTORY OF IRAN 174, 203 (Peter Avery et al. eds., 1991).

150. BOOZARI, *supra* note 96, at 45.

Ultimately, the protestors sought to place limits on the monarchy and were concerned with ideas of popular sovereignty and justice, in accordance with religious norms, and were not really focused on secularism of personal liberties.¹⁵¹ Indeed, Islamic law had been frequently used as a language of protest and contestation against injustice and to demand accountability; hence it was not expected even during this popular revolution that a constitution would replace Islamic law — to the contrary, it would reinforce Islamic law.¹⁵²

3. *Iran's First Constitution*

On August 5, 1906, the monarch Mozaffar al-Din Shah finally capitulated and issued a proclamation for the formation of a Majlis or parliament and the drafting of a new constitution. Subsequently, elections were held and members of the Majlis were elected. Majlis members drafted a constitution which was ratified on December 30, 1906.¹⁵³ The Constitution, influenced by the French 1791 and the Belgian 1831 constitutions,¹⁵⁴ significantly reduced the monarch's absolute powers and made him duty-bound to uphold the constitution. Government ministers were now responsible to the Majlis. Equality before the law and personal freedoms were guaranteed, subject to some limitations, even for non-Muslims. The press was to be freer than ever before and the Majlis could, in contradistinction to the Shah, propose measures it considered to be conducive to the well-being of the government and the people.¹⁵⁵ Compulsory public education was also guaranteed. Keddie writes that the "intent [of the constitution] was to have a [true] constitutional monarchy."¹⁵⁶

4. *Coalitional Cracks*

However, soon after the constitution was ratified, shifting combinations of self-interest, idealism and groups attachments in the amorphous alliance

151. See Gheissari, *supra* note 129, at 73.

152. *Id.*

153. See AFARY, *supra* note 127, at 65 (ratification date).

154. See AFARY, *supra* note 127, at 67, 108 (concerning the Belgian constitution as the model for the Law and the Supplementary Law). This was a reasonable choice for the new constitutional movement in Iran, which had little experience with democratic politics. In their choice of the Belgian Constitution, we should also note that there appears to have been no substantial borrowing from the constitutions of the two Great Powers, Russia and Great Britain, or the United States. The choice of the Belgian Constitution as a model was evidently not accidental, nor was it simply dictated by existing circumstances. Rather, the decision seems to have been the product of a discerning and critical analysis of Western constitutions in order to uncover aspects that would work in a predominantly Muslim society.

155. QANUNI ASSAASSI IRAN [CONSTITUTION] 1906 (Persia).

156. Keddie, *supra* note 130, at 593.

that had enabled the revolution became visible.¹⁵⁷ Many important elite segments of society were alarmed by the “progressive” direction in which the Majlis was taking the country. Delegates of the landowning class were unsympathetic to the social and economic reform programs and certainly did not favor effort to collect funds from the affluent members of the community.¹⁵⁸ The provisions of rights in the constitution, however, began to cause anguish, especially amongst the clerics and other conservatives.¹⁵⁹ In particular, the scope of the Majlis’ constitutional authority to enact all kinds of laws — parliamentary sovereignty — without any limitations whatsoever was novel and thus troubling; even the constitutionalist clerics in the Majlis firmly believed that the Majlis should firmly incorporate the rules of Islamic law in all its work.¹⁶⁰ It soon became clear to the clerics that their initial assumption that personal and religious laws would remain within their prerogative even after the enactment of the constitution and that the Majlis would deal solely with commercial and political aspects was misguided. Enactment of bold new rights and freedoms and women’s educational provisions was certainly not possible, though, if this were the case. One prominent cleric, Shaikh Fazlullah Nuri, Tehran’s “most learned” cleric,¹⁶¹ who had previously supported the constitutionalist movement, now began to emerge as a strong opponent of the Majlis and the country’s first constitution.¹⁶² He based his opposition to the constitutional movement upon Islamic law,¹⁶³ arguing now that constitutionalism was an innovation against Islam.¹⁶⁴ A number of other clerics agreed¹⁶⁵ and began to undermine the constitution by invoking religious rhetoric.¹⁶⁶ They now charged that the new constitution violated

157. See Joanna de Groot, *Whose Revolution? Stakeholders and Stories of the ‘Constitutional Movement’ in Iran, 1905–1911*, in *IRAN’S CONSTITUTIONAL REVOLUTION: POPULAR POLITICS, CULTURAL TRANSFORMATIONS AND TRANSNATIONAL CONNECTIONS* 15, 23 (H. E. Chehabi & Vanessa Martin eds., 2010) (discussing the instabilities and complexities of the alliances formed for the Constitutional Revolution).

158. See AFARY, *supra* note 127, at 70 (exploring how the reforms affected landowning class, namely that the abolition of the fief system and tax reform increased their share of taxes and the effort to collect more money from the landowning class to avoid foreign debt).

159. See MARTIN, *supra* note 137, at 115 (discussing the clashes between the clerics and the landed interest with the local constitutionally protected councils, as well as the debate in the Majlis about whether to abolish the fief system in order to save money).

160. See BOOZARI, *supra* note 96, at 119.

161. See MARTIN, *supra* note 137, at 58.

162. See AFARY, *supra* note 127, at 71 (concerning Nuri and the struggle between proconstitutionalists and anticonstitutionalists).

163. See MARTIN, *supra* note 137, at 3 (discussing Shaikh Fazlullah Nuri’s campaign against constitutionalism based on fundamental points of Islamic law).

164. MASOUD KAMALI, *REVOLUTIONARY IRAN: CIVIL SOCIETY AND STATE IN THE MODERNIZATION PROCESS* 119 (1998).

165. See MARTIN, *supra* note 137, at 165 (discussing general disillusionment with constitutionalism among previously supportive clerics).

166. See KAMALI, *supra* note 164, at 113.

Islam and that only a legal code based on the Sharia would be acceptable to them. Their view remained that “Man is not to make laws.” Rather, this was the prerogative of God, not a parliament composed of mere mortals.¹⁶⁷

To be sure, there were also a number of clerics who invoked Islamic arguments in *favor* of the constitution and led protests against the conservative clerical opposition to constitutionalism. For example, leaflets had been published which challenged the authority of the clerics to pronounce on seemingly “secular” matters such as the constitutional laws.¹⁶⁸ In Tehran, protests took place against the anti-constitutionalist clerics, and delegates of an urban council vowed to camp outside a main square until the supplementary constitution was ratified.¹⁶⁹ Shaikh Fazlullah Nuri was at one point even driven out of town.¹⁷⁰ Nevertheless, the argument that the constitutionalists wished to replace Islamic law with a law of foreign origin had become very powerful in the popular imagination.¹⁷¹ Indeed, the most powerful argument employed by the clerics was that the Majlis was an institution that had no legitimate basis in Islamic law and that it was introducing European laws which had no place in Islamic law. Nuri’s chief objection to the constitution — and a popular one — was that the Majlis would enact the “customs and practices of the realms of infidelity” and that it would thus violate the laws of Islam.¹⁷² The constitution was, in this view, a form of cultural imperialism that would weaken Islam.¹⁷³

As conservative opposition to the constitution was building up, the idea of constitutionalism was itself waning in popularity as the financial situation of the country deteriorated even further after the election of the Majlis.¹⁷⁴ The ailing monarch, Mozaffar al-Din Shah had died and his son, Muhammad Ali Shah, was intent on dismantling the constitution. Certain conservative clerics who had already grown dismayed with constitutionalism, such as Sheikh Fazlollah Nuri, the leading cleric of the Imam Riza Shrine in Mashhad, and those in charge of the rapidly

167. See Mehrangis Kar, *Shari'a Law in Iran*, in *RADICAL ISLAM'S RULES: THE WORLDWIDE SPREAD OF EXTREME SHARI'A LAW* 41, 43 (Paul Marshall ed., 2005) (fierce opposition to constitutionalists modernist tendencies by fundamentalists).

168. See AFARY, *supra* note 127, at 89.

169. See *id.*

170. See AFARY, *supra* note 127, at 115.

171. See MARTIN, *supra* note 137, at 138 (discussing difficulty on the part of constitutionalists to refute Shaikh Fazlallah's points).

172. Said Amir Arjomand, *The Ulama's Traditionalist Opposition to Parliamentarianism: 1907–1909*, 17 *MIDDLE E. STUD.* 174, 179 (1981).

173. See *id.* at 185. Arjomand also argues that while there were indeed such divisions between constitutionalist clerics who supported the constitution and anti-constitutionalist clerics who opposed it, ultimately they acted as a unified body when their interests were at stake. *Id.* at 185–86.

174. See Arjomand, *supra* note 172, at 185–86.

proliferating urban councils now pledged their allegiance to the new monarch.¹⁷⁵ The Shah, desiring to capitalize on these circumstances, recognized that the most effective way to undermine the constitution was to assert that it was incompatible with Islamic law.¹⁷⁶ He thus actively encouraged the clerical opposition and also began to demand that the constitution and its civil rights not violate Islamic law. This was a clever strategy that had the effect of developing an “Islamic opposition” to constitutionalism.¹⁷⁷

5. *The Supplementary Constitution of 1907 and Islamic Supremacy Clauses*

It had become clear that not only was the constitution of 1906 causing much consternation amongst various elements of Iranian society, but it was also textually incomplete. There was no bill of rights, nor were limits to the authority of the executive, legislative, and judicial branches of government clearly defined. Thus, work immediately began on a supplementary constitution which would solidify the gains of the constitutional revolution and fill gaps in the earlier constitution. Deliberations over this supplementary constitution were marked by great acrimony. The committee that was drafting this supplement was constituted by constitutionalists and prominent left-wing delegates.¹⁷⁸ Many clerics thus became particularly concerned about the work of this committee. From their perspective, the initial constitution had been drafted without enough Islamic provisions or an adequate role for the clerics — to the contrary, it contained many provisions that were deemed to be un-Islamic, and the supplementary constitution provided a means by which to remedy these defects. Thus, conservative clerics began to attend meetings of the committee so as to ensure conformity of the constitution with Islamic law.¹⁷⁹

Perhaps hoping to placate clerical opposition, Majlis parliamentarians eventually agreed to the formation of an additional committee, composed of ranking clerics and headed by Sheikh Fazlollah Nuri. Their role would be to “review” amendments so as to decide what was or was not compatible with the Sharia. In these meetings, debates occurred about the place of the Quran in the Constitution with some arguing that it was the

175. See AFARY, *supra* note 127, at 77.

176. See *id.* at 115.

177. See MARTIN, *supra* note 137, at 139 (discussing how emerging constitutional law threatened ulama’s privilege and authority, causing a growing opposition).

178. See Janet Afary, *Social Democracy and the Iranian Constitutional Revolution of 1906–11*, in *A CENTURY OF REVOLUTION: SOCIAL MOVEMENTS IN IRAN* 21, 27 (John Foran ed., 1994) (discussing the proposed supplements to the constitution which were essentially a bill of rights, and the makeup of the committee).

179. See MARTIN, *supra* note 137, at 117 (Shaikh Fazlallah attended meetings to determine law conformed to Sharia).

very foundation of the constitution itself, while others argued that it was only the foundation of religion, and not the constitution.¹⁸⁰ Conservative clerics and deputies initially rejected many of the proposed civil liberties on the grounds that they were incompatible with Islam and unacceptable to the majority Shi'i population. The anti-constitutionalist clerics led by Shaikh Fazulullah Nuri were strongly opposed to compulsory public education as against Islamic law. Similarly, freedom of the press was unacceptable. The measure that most antagonized the clerics was equal treatment of all males, since, in their view, Muslims and non-Muslims could not have the same rights.¹⁸¹ The conservative clerics were of the view that the very doctrine behind constitutional equality disregarded the rules of Islam.¹⁸² They perceived equality to be a clever way to circumvent the dictates of Islamic law under the guise of constitutionalism. An argument was also made that the members of the Majlis may not have the required competence to even be certain of what was or was not Islamic.¹⁸³ Extensive debates between clerics and others who supported the constitution and the anti-constitutionalist clerics ensued.¹⁸⁴ Ultimately, to guard against the provision of non-Islamic rights and legislation, the anti-constitutionalist clerics wanted a Council of Clerics that would have veto power over all laws of the Majlis.¹⁸⁵

As a result of these debates and disagreements, compromises had to be made and these were explicitly reflected in the 1907 Supplementary Constitution. A comparison of the first draft of the 1907 law and the final version clearly demonstrates that major concessions were made to clerical sentiment.¹⁸⁶ The supplementary constitution contained an extensive bill of rights. Property, life, domicile, privacy regarding letters and telegrams, and the right to trial were to be respected. The state, rather than the clergy, was placed at the head of the public educational system (Article 19). An additional civil rights provision (Article 14) even stated that no Iranian citizen could be exiled from the country or prevented from living there. Yet, many rights were to be subject to Islamic law. The study of science, art, and crafts was permitted "save in the case of such as may be forbidden

180. See KAMALI, *supra* note 164, at 113.

181. See MARTIN, *supra* note 137, at 129 (discussing the differing treatment of Muslims and others under Sharia and the argument that equal rights and mandated education were simply imported European ideas).

182. See BOOZARI, *supra* note 96, at 119; see also MARTIN, *supra* note 137, at 119 (discussing the argument that "infidels and Muslims" could not receive equal rights under Sharia).

183. See *id.* at 120.

184. See AFARY, *supra* note 127, at 105.

185. See Afary, *supra* note 178, at 27 (discussing the debate over a proposal for a Council of Ulama with veto power over all laws).

186. See Afary, *supra* note 144, at 341–59.

by the [Sharia]” (Article 18).¹⁸⁷ Freedom of the press was granted except for “heretical books and matters hurtful to the perspicuous religion” (Article 20).¹⁸⁸ Freedom of organization was granted throughout the nation, provided the associations were “not productive of mischief to Religion or the State” (Article 21).¹⁸⁹ Most importantly, this constitution, unlike its predecessor, included a very strong form Islamic supremacy clause. The Majlis delegates had agreed that a committee of leading clerics would review and rewrite articles of the constitution that were in conflict with Islamic law.¹⁹⁰ Article 2 of the 1907 supplementary law thus called for the establishment of a Council of Clerics — an Islamic review mechanism — and also stated that laws ratified by the Majlis could not be at variance with the Sharia — a repugnancy clause. In exchange for the Islamic supremacy clause, a clause specifically proposed by the powerful cleric, Shaykh Fazlullah Nuri,¹⁹¹ the most controversial article of the constitution was retained; that of constitutional equality for all: Article 8 provided that citizens would enjoy equal rights before the law, regardless of religion. This was thought to be in clear contradiction to what Islamic law permitted.¹⁹² The Majlis could also now enact customary laws as long as these laws did not conflict with Islamic law.¹⁹³ Other clauses such as Article 27, concerning who should decide in which court a case was to be tried and Article 71, dealing with the powers of the tribunal of justice were deliberately vaguely drafted in the constitution so as to facilitate a compromise.¹⁹⁴

187. QANUNI ASSAASSI IRAN [CONSTITUTION] 1906, art. 18 (Persia).

188. *Id.* art. 20.

189. *Id.* art. 21.

190. *See* AFARY, *supra* note 127, at 89. Afary argues that the concept of “freedom” was generally ignored in the 1907 constitution. This is not surprising

since many members of the ‘ulama continued to oppose the notion of freedom, and the word soon adopted a highly pejorative connotation. Freedom, including the right to be different and to act differently from other people, was equated with non-religiosity, immorality, lack of chastity, and licentious behavior. With regard to gender, words such as freedom and liberation had come to have a doubly negative connotation. For example, a “free woman” meant a vulgar, immoral, and sexually promiscuous one.

Id. at 220.

191. *See* MARTIN, *supra* note 137, at 118 (examining the wording of Shaikh Fazlallah’s article).

192. *See id.* at 117 (discussing the contention around Article 8); *see also* AFARY, *supra* note 127, at 108.

193. *See* KAMALI, *supra* note 164, at 113.

194. *See* MARTIN, *supra* note 137, at 140 (discussing the intentional vagueness in Articles 27 and 71 so as to facilitate a compromise between the ulama and the constitutionalists).

In effect then, the supplementary constitution's Islamic supremacy clauses became a medium through which clerics safeguarded their institutional and ideological concerns in return for acceding to progressive provisions in the constitution.¹⁹⁵ Alarmed by the secular implications of imported, foreign models and the negative connotations this may have on the country, the clerical establishment pushed for a concept of constitutionalism compatible with Shiite Islam.¹⁹⁶ The inclusion of Islamic supremacy clauses in Iran's constitution, the first Islamic supremacy clause in history, could then be understood as essentially the outcome of bargaining — or, as we discussed earlier, an “insurance swap” — between constitutionalists on one hand, and conservative clerics on the other. In light of the fact that many amongst the elite and certainly the Shah were vehemently opposed to constitutionalism, the constitutionalists had no option but to compromise with the clerics if the constitution was to survive with its progressive rights. Rights and constitutionalism necessarily invoked negative reactions from the clergy and even from many members of a conservative, religiously inclined society. The constitutionalist project, if it was not to be derailed, required that such reactions be tamed. The idea that non-Muslims or women would have the same rights as Muslims or that the press would be free to publish anything, even text that went against Islamic principles, was surely anathema and revolutionary in a society in which most people identified deeply with religion. Thus, Iran's constitution was certainly progressive in that it contained many civil rights and freedoms, yet this was precisely the reason *why* it also needed to contain Islamic supremacy clauses. A willingness on the part of constitutionalists — borne out of necessity — to compromise balance the constitutional provision of rights with a strong form Islamic supremacy clause arguably here played a significant part in the endurance of the Constitution of 1906. As Keddie writes, “[f]rom 1905 . . . an ideology has been worked out associating liberal constitutionalism with Islam[.]”¹⁹⁷ Considering the traditional nature of Iranian society, the approval of the clerics — as gatekeepers of Islam — was needed to legitimize the Majlis and the Constitution.¹⁹⁸ Islamic idiom wrapped in the language of constitutional Islamic supremacy clauses thus provided insurance that limited government and rights did not mean a subjugation of Islam. As we

195. See AFARY, *supra* note 127, at 89.

196. See El Fadl, *supra* note 8, at 35 (describing how the idea of constitutionalism compatible with Sharia first gained ground in Iran in 1906 as a response to foreign models and the belief in the uniqueness of Iranian constitutionalism).

197. NIKKI KEDDIE, IRAN: RELIGION, POLITICS & SOCIETY: COLLECTED ESSAYS 77 (1980).

198. See MARTIN, *supra* note 137, at 142 (discussing the idea that “the will of the people” meant the approval of the *ulama* by Iran's people who were profoundly influenced by tradition).

will see in the other case studies in this paper, this assurance — provided through Islamic supremacy clauses — would also be repeated elsewhere.

B. *Afghanistan*

Afghanistan's constitutions, like that of Iran, have almost always been written after some major political upheaval.¹⁹⁹ The first two constitutions, drafted in 1923 and 1931, were established after the final battle for independence from Great Britain and after the revolt of 1929 that deposed King Amanullah, respectively.

Like Iran, Afghanistan's first constitution also contained many rights, yet it contained only symbolic references to Islam and no Islamic supremacy clauses. We will argue that it was this failure to incorporate strong Islamic supremacy clauses that initially led to its amendment, and eventually to its demise and replacement with a constitution that provided robust Islamic supremacy clauses. That is, unlike the Constitution of Iran, the first Afghan Constitution failed to balance the provision of rights with Islam. In other words, it failed to provide adequate constitutional insurance that Islamic law and Islam would not be trumped by an enactment of rights and other liberal features. This proved to be fatal to its existence.

1. *The Prelude to Afghanistan's 1923 Constitution*

At the turn of the century, Afghanistan was a hereditary monarchy and like many other countries, had no written constitution. It would be fair to describe Afghanistan as a tribal society comprised of different ethnicities which, for centuries, had regulated much of its affairs through Islamic law and customary law, including Pashtunwali, the tribal code of honor of the Pashtun people.²⁰⁰ Since Pashtun tribes also constituted the bulk of the military, they were the most influential as far as governance was concerned, as it was understood that the ruler would primarily comply with the precepts of Islamic law, as well as with the principles of Pashtunwali. Although the legitimacy of a ruler was determined by Islamic law, it was partly negotiated with tribal leaders.²⁰¹ This meant that the monarch, while not *constitutionally* constrained, was constrained by the consent of the important tribes in the country.²⁰² In this system in which *de*

199. See Mohammad Hamid Saboory, *The Progress of Constitutionalism in Afghanistan*, in *THE SHARI'AH IN THE CONSTITUTIONS OF AFGHANISTAN, IRAN AND EGYPT: IMPLICATIONS FOR PRIVATE LAW* 5, 6 (Nadjma Yassari ed., 2005).

200. See Tom Ginsburg, *An Economic Interpretation of the Pashtunwali*, 2011 U. CHI. LEGAL F. 89, 89 (2011).

201. See SENZIL K. NAWID, *RELIGIOUS RESPONSE TO SOCIAL CHANGE IN AFGHANISTAN 1919–29: KING AMAN-ALLAH AND THE AFGHAN ULAMA* 6 (1999).

202. RAMIN MOSCHTAGHI, *1 MAX PLANCK MANUAL ON AFGHAN CONSTITUTIONAL LAW*

facto state power was shared between the monarch and the tribes, the clerics occupied a vital third role in the running and dispensation of the judicial system. The central government granted large allowances and privileges to the clerics and they were free to administer justice in accordance with their interpretation of Islamic principles.²⁰³ Also, since the rulers often needed favorable *fatwas* (religious opinions) from the clerics on important issues, such as fighting foreign invaders or persuading people to fight against “infidels,” Afghani clerics gained significant prominence and thus became an important part of the governance structure.²⁰⁴

2. *The 1923 Constitution*

Afghanistan, again like Iran, was also subject to significant foreign influences due to a strategic rivalry between Britain and Russia, known as the “Great Game.” Successive British governments viewed Afghanistan as a buffer state that could be used to guard India, against Russian expansionary intentions. The British feared that Afghanistan would become a staging post for a Russian invasion of India.²⁰⁵ It was such suspicions that led the British to rather unsuccessfully launch various wars against Afghanistan known as the “Anglo-Afghan Wars.” It was in the aftermath of one of these wars when, in 1919, Amanullah Khan acceded to the Afghan throne. He defeated the British, led Afghanistan to victory, and more importantly, gained sovereignty in the Third Anglo-Afghan war fought in 1919. This certainly helped boost his credibility amongst his countrymen and facilitated his rise.²⁰⁶ Riding on this wave of popularity, cognizant of modernization efforts being undertaken in the Ottoman Empire,²⁰⁷ and armed with a desire to see his country similarly modernized, Amanullah Kahn began adopting a series of very ambitious legal reforms, soon after taking power. These reforms included the

VOL. 1: STRUCTURE AND PRINCIPLES OF THE STATE 13 (Tilmann Röder ed., 3rd ed. 2009).

203. See MOHAMMAD HASHIM KAMALI, LAW IN AFGHANISTAN: A STUDY OF THE CONSTITUTIONS, MATRIMONIAL LAW AND THE JUDICIARY 7 (1985) (discussing the power of the ulama in the nineteenth century, in regards to most aspects of political and cultural life).

204. See *id.* at 7 (rulers would engage the ulama to declare *fatwas*, inciting the public against “infidels” and declaring *jihad*). Amir Abdul Rahman, who reigned from 1880–1901 successfully reduced the power of the ulama by centralizing religious authority into the state, requiring qadis to pass state-controlled examinations and give them salaries.

205. See Konstantin Penzev, *When Will the Great Game End?*, ORIENTALREVIEW.ORG (Nov. 15, 2010), <http://orientalreview.org/2010/11/15/when-will-the-great-game-end/>.

206. LEON B. POUILLADA, REFORM AND REBELLION IN AFGHANISTAN, 1919–1929: KING AMANULLAH’S FAILURE TO MODERNIZE A TRIBAL SOCIETY 66 (1973) (discussing Amanullah’s reputation as an anti-British nationalist, which helped his popularity).

207. See Bruce Etling, *Legal Authorities in the Afghan Legal System (1964–1979)*, AFGHAN LEGAL HISTORY PROJECT AT HARVARD LAW SCHOOL 11 (2014) <http://www.law.harvard.edu/programs/ilsp/research/etling.pdf> (last visited Mar. 31, 2014).

adoption of Afghanistan's first constitution in 1923, which transformed the country from an absolute monarchy to a constitutional one.²⁰⁸

The Constitution of 1923, which was based on the 1906 Iranian Constitution and the Constitution of Ataturk in Turkey,²⁰⁹ was drafted with the help of French and Turkish advisors who drew heavily on Turkish law.²¹⁰ Amanullah hoped that by making reforms that were inspired by Turkey, the reforms would be seen as legitimate and thus acceptable to clerics.²¹¹ The Constitution contained a bill of rights: it guaranteed that all Afghan subjects would "have equal rights and duties to the country in accordance with Sharia and the laws of the state."²¹² The constitution also promised greater rights to religious minorities. It abolished torture, slavery, and forced labor; created a legislature; and in a rather bold move, decreed that followers of religions other than Islam, such as Hinduism and Judaism, were entitled to the protection of the state. Elementary education was made compulsory for boys and girls. Personal freedom, freedom of the press, freedom of association, and freedom of property were guaranteed. The Constitution declared "all courts of justice are free from all types of interference and intervention."²¹³ The principal of legality in criminal law was also adopted. The homes and personal dwellings of all Afghan subjects were inviolable. The Constitution also contained provisions for a State Council consisting of elected and appointed members (Article 39), although it had only advisory functions. The King was also authorized to appoint the ministers, including the Prime Minister, without consulting with the State Council. One particularly controversial reform was that Hindus and Jews were no longer required to wear distinctive dress marking their status. Apart from the adoption of a Constitution, the King also introduced progressive legislative reforms: he passed laws outlawing child marriage, marriages between close relatives, polygamy, excessive dowries, and the exchange of women as "blood money" in payment of interfamilial disputes. He also opened girls' schools and sent women students abroad for higher education.

208. See Senzil Nawid, *The Khost Rebellion: The Reaction of Afghan Clerical and Tribal Forces to Social Change*, 56 REV. DEPARTMENT ASIAN STUD. & DEPARTMENT STUD. & RES. ON AFR. & ARAB COUNTRIES 311 (1996), available at http://opar.unior.it/1317/1/Annali_1996_56_%28F3%29_S.Nawid.pdf.

209. See Fausto Biloslavo, *The Afghanistan Constitution Between Hope and Fear*, CEMISS Q., Spring 2004, at 61, 61.

210. See NIGHAT MEHROZE CHISHTI, CONSTITUTIONAL DEVELOPMENT IN AFGHANISTAN 21 (1998).

211. See NAWID, *supra* note 201, at 78. Interestingly, neither Turkey's recent move towards secularism, nor Iran's Shi'ite character seemed to have deterred Amanullah from seeking constitutional inspiration from those countries.

212. CONSTITUTION OF AFGHANISTAN Apr. 9, 1923, art. 16.

213. *Id.* art. 53.

The 1923 Constitution also contained many references to Islam. Islam was the religion of the state and the King was the “servant and the protector of the true religion of Islam.”²¹⁴ Article 72 provided that legislators had to give “careful consideration” to the “requirements of the laws of Sharia.”²¹⁵ Yet, moderating the effects of this provision, Article 72 also stated that in the process of legislation, actual living conditions of the people and requirements of the time would be given serious consideration, *in addition* to rules of the Sharia. The Constitution also provided that “all disputes and cases will be decided in accordance with the principles of Sharia and of general civil and criminal laws.”²¹⁶

While the Constitution was not overtly democratic by modern standards, it was impressive by the standards of that time, and certainly outside the realm of Europe. As one commentator notes, “the Constitution of 1923 constituted great progress for the country and changed the legal system of Afghanistan to one of the most modern ones throughout the region.”²¹⁷ To be sure, it was written without any meaningful political participation on the part of those outside of government.²¹⁸ Yet, it brought remarkable and significant social and political changes to Afghanistan.

3. *Revolt against Reform and Rights*

Ultimately, despite the fact that Amanullah Khan was a deeply religious man who often invoked Islamic principles in support of his reforms and even though the Constitution contained symbolic references to Islam,²¹⁹ the constitutional reforms were seen as having a Western taint.²²⁰ And this proved to be precisely the problem — the reforms were too ambitious for Afghan society. The constitutional provision of rights were seen by the religious and tribal elite as an innovative attack on traditional values, culture, and religion *per se*. Conservatives had much to object to in these reforms: the compulsory education for girls, the failure of the Constitution to identify the Hanafi school — a particular school of Islamic jurisprudence — as the brand of Islam that would be followed in the state, the abolition of the requirement for Hindus and Jews to wear symbols that

214. *Id.* art. 5.

215. *Id.* art. 72.

216. *Id.* art. 21.

217. MOSCHTAGHI, *supra* note 202, at 15.

218. See J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N.Y.L. SCH. L. REV. 557, 569 (2007).

219. See POUILLADA, *supra* note 206, at 59 (discussing the use of propagandistic assertions that Amanullah was anti-Muslim when in fact he was a well-read and pious Muslim who would often argue the finer points of Islam in his lectures in Egypt).

220. See NAWID, *supra* note 201, at 78.

distinguished their identity, the free press, the restriction on polygamy, and the child marriages. These were too much to accept.²²¹

Some clerics attacked the new code and Constitution as contrary to Islamic law with others brandishing “in one hand the Qur’an and in the other the [new laws], inviting true Muslims to choose between them.”²²² In response, a revolt broke out in 1924 that “shook the Afghan government to the core.”²²³ The rebellion has been cited as the “reaction of indigenous religious and tribal groups to . . . rapidly modernize Afghanistan . . .”²²⁴ Ultimately, it was religious leaders who were in the forefront of the opposition with many influential tribal leaders staying neutral and senior clerics only voicing opposition later on.²²⁵ The clerics saw the efforts of Amanullah to codify Islamic law as a means to “secularize” the law — which was unacceptable.²²⁶ Even amongst the religious groups, it was the village clerics who interpreted the reforms as diluting the social force of Islam and encroaching upon their prerogatives in areas such as education, where the Constitution now provided for compulsory education and Amanullah, rather courageously, set about opening schools for girls.²²⁷ To be sure, the rebellion was also partly caused by the introduction of universal conscription and tax reforms — efforts at centralization and state-building, which adversely affected tribal autonomy, but nevertheless introduced the innovative rights contained in the *nezamnama* and the Constitution were major reasons for the rebellion. Furthermore, the majority of the lower ranking clergy, in particular, was suspicious of the Constitution.²²⁸ In fact, the earliest calls to rise up in protest came from such clerics in rural areas.²²⁹ Oppositional protests in the country soon turned into a full scale rebellion in Khost when some religious clerics condemned the reforms as antithetical to the Sharia.²³⁰ A reactionary call to Islam thus energized the revolt immensely and a delegation Amanullah sent to placate the rebels returned with the message asking the government to make certain amendments to the Constitution and other laws if it desired the revolt to end.²³¹

221. See KAMALI, *supra* note 203, at 28 (discussing reservations in response to Amanullah’s ambitious and somewhat culturally foreign reforms).

222. POULLADA, *supra* note 206, at 85.

223. Nawid, *supra* note 208, at 311.

224. *Id.*

225. See NAWID, *supra* note 201, at 92.

226. *See id.* at 99.

227. *See id.* at 92, 96.

228. *See* Nawid, *supra* note 208, at 311–12.

229. *See id.* at 313.

230. *See id.* at 314.

231. See KAMALI, *supra* note 203, at 28 (discussing how Amanullah’s delegation to the rebels returned with recommendations for amendments to the constitution).

4. *Compromise and Islamic Entrenchment*

The renowned Afghanistan scholar Louis Dupree once wrote that Afghanistan's modern history had witnessed consistent tensions between modernizing elements and conservative ones.²³² The rebellion was evidence of this. In the midst of the rebellion and facing regime collapse, in the autumn of 1924, King Amanullah called the *Loya Jirga* to review and possibly reconsider certain provisions of the Constitution and laws, which were objectionable.²³³ Despite the fact that the King's Constitution, as described earlier, paid symbolic respect to Islam, it became apparent that the constitutional provisions contained were too weak to placate the storm of opposition. Ultimately, the *Loya Jirga* decided that major concessions had to be made. In addition to demands concerning the repeal of some of the reformed laws, the clerics at the *Loya Jirga* urged that Article 2 of the Constitution be amended to declare the Hanafi School the official school of religious jurisprudence in Afghanistan — just as the Iranian Constitution had earlier adopted Shiism as the official state religion.²³⁴ They also demanded that restrictions on non-Muslims, which were removed from the 1923 Constitution, be reinstated.²³⁵ Indeed constitutional measures of tolerance shown to non-Muslims was particularly offensive for the clerics.²³⁶ Rights granted to women was also diluted; torture was re-introduced, when “in accordance with the rules of the Sharia”²³⁷; the prior abolition of child marriage and polygamy was rescinded; and Hindus and Jews were to again pay a special poll tax and wear distinctive signs that would mark out their identity. Furthermore, similar to the case of Iran, an Islamic supremacy clause was inserted: a Council of Islamic Scholars were to “decide whether new laws were in accordance with Islamic law.”²³⁸ Article 9 was also amended to read that “Afghan subjects are bound by the religious rite and political institutions of Afghanistan.”²³⁹ The clerics also demanded a redefinition of the word “freedom” used in Article 9 of the Constitution as it could be construed to mean religious freedom or freedom to engage in activities contrary to

232. Paul Fishstein, *Afghanistan's Arc of Modernization: 1880 to 1978*, THE GLOBALIST (Sept. 1, 2010), available at <http://www.theglobalist.com/afghanistans-arc-of-modernization-1880-to-1978/>.

233. See POUILLADA, *supra* note 206, at 94 (stating that Amanullah assembled the *Loya Jirga* for a second time to reconsider legislation that the rebellion objected to and consequently amended several of the constitutional laws).

234. See Saboory, *supra* note 199, at 6–7 (discussing reassembling of the *Loya Jirga* to reconsider the religious issue).

235. See KAMALI, *supra* note 203, at 29 (discussing the pre-1923 constitution custom that required Hindus and Jews to wear distinctive clothing and headdress and pay extra taxes).

236. See NAWID, *supra* note 201, at 99.

237.

238. POUILLADA, *supra* note 206, at 122.

239. KAMALI, *supra* note 203, at 30.

Islam and thus needed to be changed.²⁴⁰ In return for these concessions, the Constitution was unanimously approved by all the members of the *Loya Jirga*.²⁴¹

While the crisis may have been resolved for the time being, unfortunately for Amanullah, problems would arise again. Amanullah's visit to Russia and Turkey in 1928 demonstrated his visible leaning towards both those countries — one communist and the other secular — which continued to generate much suspicion in Afghanistan, and not just amongst the religious elite.²⁴² Further, his rash commencement of a new set of reforms so soon after his old reforms had just been grudgingly accepted and moderated to be “Islamic” — including the removal of the veil, the mandated education of women, the adoption of Western clothing, and the changing of the weekly holiday from Friday to Thursday — alienated many Afghans. Such sweeping changes, along with Western influence, created deep resentment and rekindled memories of a long struggle for independence against Westerners.²⁴³ This time, even the clergy who had supported the government during the previous revolt were alienated.²⁴⁴ In response, in January 1929, another larger revolt broke out,²⁴⁵ ending with Kabul falling to rebel forces led by a bandit, Bacha-i-Saqao. In October 1929, Nadir Khan defeated this bandit to become the new King of Afghanistan. He would soon promulgate his own constitution.²⁴⁶

5. *The 1931 Constitution and Islamic Supremacy*

Although Nadir Shah allied himself with traditionalists, he was a modernist himself.²⁴⁷ The constitution he promulgated in 1931 to replace King Amanullah's 1923 Constitution, in the words of Louise Dupree, “embodied a hotch-potch of unworkable elements, extracted from the Turkish, Iranian and French constitutions, including the 1923 Constitution of Amanullah plus many aspects of Hanafi Sharī'a of Sunni Islam and local customs (*ādāt*), several of them, in fact, contradicting the Sharī'a . . .”²⁴⁸ Said Arjomand argues that Nadir Shah's Constitution was in many respects

240. See NAWID, *supra* note 201, at 109.

241. See *id.* at 112.

242. See *id.* at 154.

243. See *id.* at 158–59; see also Said Amir Arjomand, *Constitutional Developments in Afghanistan: A Comparative and Historical Perspective*, 53 *DRAKE L. REV.* 943, 947 (2005).

244. See NAWID, *supra* note 201, at 161.

245. Biloslavo, *supra* note 209, at 62.

246. See Arjomand, *supra* note 243, at 948.

247. See ASTA OLESEN, *ISLAM AND POLITICS IN AFGHANISTAN* 176 (1995) (discussing the modernist, rather than traditionalist, in Nadir Shah and its reflection on the constitution).

248. *Id.* at 176.

even more liberal than the earlier Constitution of 1923.²⁴⁹ Indeed, invoking a curious mix of principles of Islamic supremacy and rights, Article 91 even provided that “[e]very person may plead in court *any* provision of Shariat law to protect his rights.”²⁵⁰ Free compulsory education was to be continued, slavery and torture were prohibited, press freedom was guaranteed, and, rather liberally, it was stated that “all Afghan subjects have equal rights and duties”²⁵¹ The Constitution also created a national parliament with legislative power, a royally appointed upper House of Nobles, a consultative council to be set up in each province, and ministers that were held accountable to parliament. In fact, Afghan women were now eligible to vote in elections. Even outside the constitutional context, some of Amanullah’s more controversial reforms concerning marriage were retained, albeit in a weakened form.²⁵²

At the same time, however, the 1931 Constitution also contained more references to Islam. The King was “to carry on the administration in accordance with the dictates of the expounders of the sacred Shariat of the Holy Prophet (peace be up on [*sic*] him) and the Hanafi religion, and the fundamental principles of the country[.]”²⁵³ Religious courts were required to base their decisions on Hanafi jurisprudence. Most importantly for our purposes, the Constitution contained two strong-form Islamic supremacy clauses. It also added an explicit repugnancy clause, similar to Iran, requiring that “[m]easures passed by the [National] Council should not contravene the canons of the religion of Islam or the policy of the country.”²⁵⁴ Further, all laws and regulations were to be submitted to a Council of Clerics to ascertain their conformity with the Sharia.²⁵⁵ Equality was guaranteed under the “Shariat law and the law of the state” and press freedom was subjected to Islamic law.²⁵⁶ Similarly, whereas the 1923 Constitution gave precedence to state law to direct state activity, the 1931 Constitution proclaimed Sharia as *the* law of the state.²⁵⁷

With minor amendments made in 1933, Nadir Shah’s Constitution survived thirty-three years²⁵⁸ and its “enabling liberal features . . . produce[d] a democratic interlude with the free municipal and national

249. Arjomand, *supra* note 243, at 948.

250. CONSTITUTION OF AFGHANISTAN Oct. 31, 1931, art. 91 (emphasis added).

251. *Id.* art. 13.

252. *See* OLESEN, *supra* note 247, at 181 (discussing the Marriage Law of 1934 which kept, albeit weakened, the same ideas as the Marriage Laws of 1921 and 1924).

253. CONSTITUTION OF AFGHANISTAN Oct. 31, 1931, art. 5.

254. *Id.* art. 65.

255. Arjomand, *supra* note 243, at 950.

256.

257. *See* KAMALI, *supra* note 203, at 21.

258. Saboory, *supra* note 199, at 7–8 (considering the endurance of the 1931 constitution).

elections” after World War II.²⁵⁹ Contrarily, King Amanullah’s Constitution lasted a mere eight years and that was with great difficulty. Both constitutions were liberalizing, and indeed Nadir Shah’s Constitution may have been, as Arjomand argues, even more liberal, yet the 1931 Constitution lived much longer. One explanation for this may be that the pace of modernization Amanullah sought to achieve constitutionally was unacceptable and perhaps too much for a conservative society to bear. As Olesen writes, Amanullah’s reforms of “symbolic secularization” were greatly responsible for alienating the population, and ultimately then, the failure of his reform efforts.²⁶⁰

Yet, the explanation we advance in addition to this is that the reforms had not been accompanied by sufficient Constitutional Islamization. That is, had Amanullah incorporated strong-form Islamic supremacy clauses in his constitution to provide “insurance” against novel and perceivably “un-Islamic” rights, he may have succeeded in placating the opposition to his constitutional reforms. Even if this insurance was only symbolic, it would have denied his opponents a powerful tool for mobilization. This lesson was not neglected by Nadir Shah, who distanced himself from Amanullah’s model of aggressive and hasty secularization without providing adequate constitutional insurance for Islam — a recipe which necessarily alienated traditionalist elements in Afghan society and symbolized “godlessness.”²⁶¹ Nadir Shah was no traditionalist — he and his brothers were modernizers²⁶² — yet he understood the utility of employing religious symbolism and constitutionally co-opting religious sentiments and clerical interests. In contrast, Amanullah’s fall from power and the demise of his constitution demonstrates how a leader in a Muslim majority country, initially well respected by the religious elite and even considered to be a defender of Islam, soon had his constitutional reform thwarted as anti-Islamic and therefore illegitimate.²⁶³ Although future constitutions of Afghanistan drew upon the 1923 Constitution, Amanullah’s reforms were not only publicly rejected by the elite but also by much of the largely rural, traditional Afghan population.²⁶⁴ Despite the compromise which resulted in a constitutional amendment in 1924, a stubbornness to implement the reform program without providing further constitutional insurance upset the delicate status quo achieved in the first amendments after the Khost Rebellion. Nadir Shah, in contrast to his

259. Arjomand, *supra* note 243, at 950.

260. OLESEN, *supra* note 247, at 180.

261. *See id.* (discussing Nadir Shah’s strategy of distancing from Amanullah’s “godlessness” by repeatedly stressing conformity to Islam in his constitution).

262. *See* OLESEN, *supra* note 247, at 181 (discussing Nadir Shah’s “modernizing” that by no means returned to the status quo but did not include liberalization in his definition of modernizing).

263. *See* NAWID, *supra* note 201, at 71.

264. *See* Etling, *supra* note 207, at 7–8.

predecessor, deliberately kept a low ideological profile and was not seen as someone who publicly imposed an alien worldview upon Afghan society, even as he sought to promulgate a constitution that was in practice no less liberal.²⁶⁵ Like Iran, in Afghanistan, constitutional rights could be acceptable and secure legitimacy, as long as these rights did not impinge upon Islam. Had Nadir Shah tried to impose upon Afghan society a constitution which was simultaneously both too liberal and did not contain Islamic supremacy clauses to balance those liberal provisions — that is, without adequate and strong constitutional safeguards for Islamic law and the clerics such as a repugnancy clause — his constitution too may have died a quick death as did his predecessor's.

As Saboory notes, considering Afghanistan's deeply traditional nature, implementing constitutionalism was inevitably going to present a significant challenge.²⁶⁶ Thus in a country where the population is not only overwhelmingly Muslim but where "Islam [remained] the common cultural denominator,"²⁶⁷ strong-form Islamic supremacy clauses were necessary to engage in constitutional designers — and constitutional designers in Iran appreciated that. Weak, symbolic references to Islam that did not guarantee that laws and rights would not offend Islamic sentiment — as provided in the 1923 Constitution — were certainly not enough. A constitutional emphasis on Islam and strong Islamic supremacy clauses may thus, paradoxically, have helped rather than defeated Nadir Shah's liberalization efforts.

C. *Egypt*

1. *Constitutional History Before 1971*

Egypt, unlike Afghanistan and Iran, has had a number of constitutions that incorporated an Islamic supremacy clause.²⁶⁸ The first Egyptian Constitution in 1882 was promulgated in the midst of a financial crisis when Egypt was a part of the Ottoman Empire but had significant political autonomy.²⁶⁹ It was fairly brief, drafted with British assistance and contained few rights provisions.²⁷⁰ It was terminated soon thereafter due to British occupation of the country. Egypt's next constitution was

265. OLESEN, *supra* note 247, at 182 (discussing how Nadir Shah's used religious concepts rather than the alien worldview as Amanullah did with words like "progress" and "interests of the nation").

266. Saboory, *supra* note 199, at 5 (discussing the Islamic and traditional society as factors for the difficult implementation of constitutionalism).

267. NAWID, *supra* note 201, at 1.

268. See Lombardi, *supra* note 20, at 754–58 (tracing Egyptian history).

269. See BROWN, *supra* note 11, at 26 (exploring the political backdrop of the first Egyptian constitution); Maurice S. Amos, *The Constitutional History of Egypt for the Last Forty Years*, 14 TRANSACTIONS GROTIUS SOC'Y 131 (1928).

270. BROWN, *supra* note 11, at 62.

promulgated in 1923, after Egypt obtained independence.²⁷¹ It was modeled after the Belgian Constitution of 1830–31 and has been described as a very liberal document, although it was written by a commission indirectly appointed by the monarch.²⁷² In 1930, this constitution was suspended and replaced with a more restrictive one, only to be re-established again in 1936.²⁷³ In 1952, a revolution — known as the 23 July Revolution — overthrew the monarchy, abrogated the 1923 Constitution, and enacted a 1953 Interim Constitution that remained intact until a new constitution was drafted in 1956. After Egypt's short-lived merger with Syria, a new constitution was promulgated in 1958. In 1964, Gamal Abdel Nasser enacted yet another constitution.

It is important to note that none of these short-lived constitutions contained more than symbolic references to Islam, such as making Islam the religion of the state. This would change, however. In 1971 an Islamic supremacy clause would be added to Egypt's most enduring constitution — a constitution lasting forty years and longer than any of its predecessors.²⁷⁴

2. *The 1971 Constitution*

Anwar Sadat assumed the presidency in Egypt after Nasser's sudden death in 1970. Nasser was a popular leader, while Sadat did not possess the public charisma of his predecessor. In fact he came to power based upon an explicit understanding within the executive committee of the Arab Socialist Union that he would engage in a form of “collective leadership,” in which there would be no individual rule — as had occurred under Nasser. Rather, under Sadat, the party elite would be consulted on all important decisions.²⁷⁵ Accordingly, some party members saw Sadat as a “yes-man” who could be easily manipulated.²⁷⁶ It was on the basis of this agreement that he was unanimously voted into power by the executive committee members of the Arab Socialist Union.²⁷⁷ While Sadat certainly respected the collective leadership principle for a short period from

271. Nathan J. Brown & Roni Amit, *Constitutionalism in Egypt*, in *POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH* 184 (Daniel P. Franklin & Michael J. Baun eds., 1995).

272. ABDESLAM M. MAGHRAOUI, *LIBERALISM WITHOUT DEMOCRACY: NATIONHOOD AND CITIZENSHIP IN EGYPT, 1922–1936* 130 (2006).

273. *Id.*

274. Nathan J. Brown, *Islam in Egypt's Cacophonous Constitutional Order*, in *THE RULE OF LAW, ISLAM, AND CONSTITUTIONAL POLITICS IN EGYPT AND IRAN* 233 (Saïd Amir Arjomand & Nathan J. Brown eds., 2013).

275. KIRK J. BEATTIE, *EGYPT DURING THE SADAT YEARS* 44 (2000).

276. *See id.* at 43 (discussing Sadat's reputation as Nasser's poodle and a “yes-man”).

277. *See id.* at 44 (discussing Nasser's preference for collective leadership in contrast to Nasser's more authoritarian style).

September 1970 to January 1971,²⁷⁸ he soon pushed aside his opponents, purging them from senior posts and imprisoning them.²⁷⁹

It was clear that Sadat wanted to signal a break from Nasser's regime and enhance his legitimacy. As one commentator notes "Nasser left a void that few men could have filled. Tellingly, in the early days of his rule, Sadat's picture was routinely seen alongside that of Nasser."²⁸⁰ Accordingly, he distanced himself from the legacy of his predecessor by claiming that his was a new "era of legality."²⁸¹ He released many political prisoners including members of the Muslim Brotherhood, who had been imprisoned under Nasser, and also began to court the religious right and students.²⁸² Detention camps were closed²⁸³ and 119 "reactionary" judges who were removed in 1969 were reinstated.²⁸⁴ Lawyers who had been jailed under Nasser due to their affiliation with banned political organizations were freed. He also significantly cut back on the powers of the hated secret police.²⁸⁵ As a parallel to these liberal political gestures, Sadat also sought to enhance his Islamic credentials. Apart from the release of the leaders of the Muslim Brotherhood, he concurrently cultivated the image of the "believing president"²⁸⁶ — one committed to Islamic values and encouraged the use of "*Muhammad*" as a prefix to his name.²⁸⁷ While Nasser had no interest in mixing Islam with politics,²⁸⁸ Sadat, in contrast, thus deliberately sought to demonstrate that his regime was strengthening religion's role in politics and did not shy from using Islam as a political instrument.²⁸⁹

In 1971, Sadat further sparked liberal hopes when he announced that he would promulgate a new constitution. This constitution was to mark a considerable step forward from the 1956 Constitution, although the latter

278. *See id.* 44 (discussing Sadat's short period of commitment to collective leadership).

279. *See id.* at 76 (discussing Sadat's purge of several hundred individuals, mostly Centrists, from his government).

280. RAYMOND WILLIAM BAKER, *SADAT AND AFTER: STRUGGLES FOR EGYPT'S POLITICAL SOUL* 58 (1990).

281. *Id.*

282. *See* BEATTIE, *supra* note 275, at 81–83 (discussing Sadat's sympathies with the religious right and students as part of a new governmental strategy).

283. BAKER, *supra* note 280, at 58 (describing the steps taken to liberalize the political climate and the popularity of Sadat's "de-Nasserization").

284. BEATTIE, *supra* note 275, at 83.

285. *Id.*

286. R. HRAIR DEKMEJIAN, *ISLAM IN REVOLUTION: FUNDAMENTALISM IN THE ARAB WORLD* 82 (1995).

287. GLENN E. PERRY, *THE HISTORY OF EGYPT* 121 (2004) (arguing that Sadat's growing religiosity was characterized by the return of his unused first name Muhammad).

288. *See* Fareed Zakaria, *Islam, Democracy, and Constitutional Liberalism*, 119 *POL. SCI. Q.* 1, 12 (2004) (describing Nasser's vicious crackdown on Muslim Brotherhood).

289. BEATTIE, *supra* note 275, at 102.

was to serve as its foundation.²⁹⁰ It contained a number of liberal measures. It explicitly stated that government would be based on the rule of law; that torture was prohibited; that freedom of speech, assembly, artistic freedom and religious belief were guaranteed; and that unauthorized searches and seizures were prohibited. It also strengthened parliamentary autonomy and the independence of the judiciary.²⁹¹ To be sure, Sadat's constitution had many illiberal features and centralized power in the presidency. For example, Article 108 authorized the president to issue decrees having force of law in situations of emergency.²⁹² Furthermore, it would be the president who would chair the Supreme Judicial Council. There was however a two term limit on presidential power. In Egypt's Constitution, the juxtaposition of liberal provisions on rights alongside contradictory illiberal provisions that concentrate extensive powers in the president could be attributed partly to the divided nature of the committee that was drafting it — "liberal law professors and presidential legal advisors who each worked to tailor the constitution to their own vision."²⁹³

Most relevant for us, the Constitution also contained a clause that had not been present in any previous Egyptian Constitution — an Islamic supremacy clause in the form of Article 2, which decreed that Sharia would be a "principal source of legislation."²⁹⁴

3. *Legitimizing Presidential Rule through Islamic Supremacy*

One significant difference between early twentieth century Iran and Afghanistan on one hand and Egypt in 1971 on the other was that clerics or religious figures were not a significant political force in Egypt. By this time, by virtue of the changes brought about by Muhammad Ali's modernization efforts in the nineteenth century and the general dismantling of clerical institutions, the religious establishment was generally subsumed within, or subjugated to, the state. In fact, in Egypt, as in much of the rest of the Sunni world, clerics and the religious establishment now generally drew authority from the state. Contrarily, in Iran and to a lesser extent in Afghanistan, the religious establishment operated independently of the state. Thus, religious opposition or pressure on any matter in Egypt in 1971 would have come from "Islamist" political

290. James Feuille, *Reforming Egypt's Constitution: Hope for Egyptian Democracy?*, 47 *TEX. INT'L L.J.* 237 (2011); see generally Stilt, *supra* note 110; Lombardi, *supra* note 110, at 408.

291. See BEATTIE, *supra* note 275, at 83 (describing the constitutional inclusion of liberal clauses).

292. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Sept. 11, 1971, art. 108.

293. Bruce K. Rutherford, *The Struggle for Constitutionalism in Egypt: Understanding the Obstacles to Democratic Transition in the Arab World* 221–49 (1999) (unpublished Ph.D. dissertation, Yale University) (on file with author).

294. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Sept. 11, 1971, art. 2.

organizations, the most prominent of which was the Muslim Brotherhood. Yet, while the Brotherhood was indeed a rising political force in Egypt at the time, there is no suggestion that they were strong enough to challenge the incumbent regime of Sadat politically. In fact, Nasser cracked down intensely on the Muslim Brothers, imprisoning over 30,000 members and executing several of its leaders.²⁹⁵ By the mid-1960's the Muslim Brotherhood "was in a state of disarray [as] [i]ts key leaders were arrested or dead, its branches were dissolved, and its wealth was confiscated."²⁹⁶ Thus, rather than being forced to concede to the demands of the Muslim Brotherhood or some other Islamist opposition group during the early era of his regime, it was Sadat who *chose* to be lenient with them. And as part of a general amnesty designed to demonstrate the openness of his regime, Sadat released many of their leaders and allowed them to organize on university campuses and later allowed them to undertake social and religious activities.²⁹⁷ It does not seem like Sadat was facing fractious coalitions of the type present in Iran during its much more participatory constitution writing process in 1906–07. To the contrary, Sadat boasted that "as [the] 'father of the Egyptian people'[,] he had written the Constitution in one evening and with the help of a single legal specialist, as a gift to the Egyptian people."²⁹⁸ This was certainly a far cry from how the Iranian Constitution was written. While this may be an exaggeration, it is certainly true that members of the committee that drafted the Constitution were hand-picked by Sadat.²⁹⁹

We believe Sadat's motivation in including an Islamic supremacy clause then lay in using it as a political device that would legitimate extensive presidential authority contained in his constitution. After Sadat engaged in his "corrective revolution" and having "barely won an internecine battle with the Nasserist old guard . . . [Sadat] was keen to fuse as many powers as possible in the person of the president . . . himself."³⁰⁰ Accordingly, Sadat tried to transfer powers from the office of head of the Arab Socialist Union (the party) to the office of the President. The Constitution was part of this, as Sadat himself acknowledged before his assassination that he had

295. BRUCE K. RUTHERFORD, EGYPT AFTER MUBARAK: LIBERALISM, ISLAM, AND DEMOCRACY IN THE ARAB WORLD 81 (2013) (chronicling the tensions between Nasser and the Muslim Brothers from 1954 to 1966).

296. *Id.* at 81–82.

297. *See id.* at 82–83 (arguing that the revival of the Muslim Brotherhood in the 1970s was due to Sadat's leniency in an effort to counter the influence of leftist and Nasserist groups).

298. BAKER, *supra* note 280, at 59 (describing the relationship between Sadat and the Egyptian liberals, who viewed Sadat's official liberalization as paternalistic and "cavalier").

299. *See* Mona El-Ghobashy, *Unsettling the Authorities: Constitutional Reform in Egypt*, in THE JOURNEY TO TAHRIR: REVOLUTION, PROTEST, AND SOCIAL CHANGE IN EGYPT 121, 126 (Jeannie Sowers & Chris Toensing eds., 2012).

300. *Id.* Our thanks to Clark Lombardi for pointing this out.

deliberately packed it with presidential prerogatives.³⁰¹ To facilitate the acceptance of such prerogatives, he built popular support by offering tactical but limited constitutional checks on his power through both liberalization and Islamization. This is in line with Sadat's other overtures after he assumed the presidency such as bolstering his reputation as the "Believing President" — certainly a marked change from the secularizing legacy of his predecessor. Furthermore, Sadat claimed that his era would represent a new dawn of legality. Nasser was a hugely popular and charismatic leader, while Sadat did not yet possess that standing among his countrymen. Therefore, the inclusion of rights and an Islamic supremacy clause would surely signal the sincerity of his claims of legality and respect for Islam and hence bolster Sadat's legitimacy.

While the Iranian Constitution of 1906–07 was a genuine attempt to contain executive power, the Egyptian 1971 Constitution, in contrast, seemed to be an attempt to enhance the prospects for regime survival. This is perhaps true for much of the Arab world where constitutions are more accurately defined as instruments of rule rather than instruments of constraint on the arbitrary exercise of power.³⁰² For example, the case of Iran, an Islamic supremacy clause represented a compromise or exchange, in return for obtaining the support of the religious establishment for a constitution that innovatively limited the monarch's power and contained a bill of rights. Contrarily, the Egyptian Constitution contained an Islamic supremacy clause, not as an "Islamic" concession in exchange for rights between political groups seeking modernization, but as a tool for legitimating Sadat's regime and facilitating the concentration of greater power in the executive. As such, the Islamic supremacy clause could be seen as a form of concession in one sense, that is, to secure the regime and its constitution's legitimacy despite its "non-constitutionalist" features. Even the rights in the constitution — as we argue is the case with the Islamic supremacy clause — seem to have been inserted as concessionary gestures for the expansion of presidential power. In fact, there is evidence that the "liberalizing" articles in the Egyptian Constitution were included in response to Sadat's prime minister, Mahmud Fawzi, and other's strong objections to establishing a supremely power presidency that would be unconstrained — that is, it may have provided insurance against abuse of presidential power. Certainly, as Stilt has pointed out, public consultations in Egypt at the time made it clear that people understood Islam and rights to be linked in constitutional design, in that they both served the cause of just governance.³⁰³ Nevertheless, since the 1971 Constitution in Egypt was

301. *Id.*

302. *Id.* at 125–26; see generally BROWN, *supra* note 11, at 67.

303. Stilt, *supra* note 110.

written mainly not to limit but to expand the regime's power, the Islamic supremacy clause served as simply one tool — with the provision of rights being another — to legitimate a concentration of power in ruler.³⁰⁴ It was a legitimacy-boosting device for a president who wished to cultivate his image as the religious, “Believing President.” An Islamic supremacy clause could work to boost Sadat's legitimacy precisely because there had been an Islamic revival in Egypt and the broader Arab world in the aftermath of the Egyptian defeat to Israel in the 1967 war — a defeat which exposed the weakness of Nasser's ideology of secular nationalism.³⁰⁵ Sadat must have realized that the Islamic supremacy clause would appeal to this heightened sense of religious awareness in Egyptian society and mark a break from the socialist and secular decades of the past that had delivered little for Egypt.³⁰⁶ Further, the Islamic supremacy clause would also legitimate Sadat's “Islamic” credentials in the eyes of Islamic movements, previously suppressed under Nasser — people that Sadat came to rely upon to dampen the threat he faced from Nasserites and Marxists, and therefore people that he needed to appeal to in turn.³⁰⁷ For example, to build up alternative bases of political support, Sadat actively sought to call upon the Muslim Brother's leaders who had fled abroad³⁰⁸ and deliberately courted the religious right.³⁰⁹ As Tamir Moustafa argues,

Article 2 was almost certainly intended to bolster the religious credentials of the regime at a time when Sadat was using the Islamist trend to counterbalance Nasserist power centers within the state and society. Just as Sadat gave free rein to the Islamist trend to

304. Egyptian politics: the dynamics of authoritarian rule 26. However, we do not argue that the rights and Islamic supremacy clauses in the constitution both served the *same* legitimating function. The provision of rights may have not only legitimated Sadat's regime but also served as a signal that the regime will not abuse its extensive powers. It is conceivable how a promise that all enacted laws or rights will not be repugnant to Islamic law can insure against the enactment of provisions that may be contradictory to Islamic law; similarly, it is understandable how provisions guaranteeing that the state will not torture or detain arbitrarily can theoretically be a bulwark or insurance against extensive state power and certainly arbitrary exercises of it. Constitutional rights certainly impede the exercise of state power. On the other hand, it is slightly harder to argue that a clause stating that the principles of Shariah will be “a primary source of legislation” was also inserted to signal such a bulwark against presidential power, since it targeted the legislature. This is especially so since per the wording in the constitution the ruler was not constrained by Islamic law, as may be the case with rights which were more specifically detailed. Rather Islam was to be a source of legislation, and it would be more difficult to use such a provision to prevent misbehavior by the executive.

305. See PERRY, *supra* note 287, at 120–21 (discussing the Islamic revival in Egypt after the war in 1967, involving a trend away from Nasser's secularism).

306. See Maurits Berger & Nadia Sonneveld, *Sharia and National Law in Egypt*, in SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 51, 62 (Jan Michiel Otto ed., 2011).

307. See PERRY, *supra* note 287, at 122 (discussing Sadat's techniques to portray religiosity to the growing Islamic political movement).

308. See BEATTIE, *supra* note 275, at 82.

309. See *id.* at 83.

organize on university campuses for tactical purposes, so too was religion used to build a new base of legitimacy in contradistinction to the failures of the Nasser era in achieving economic growth and pan-Arab unity.³¹⁰

Another commentator writes that Article 2 was precisely the goodwill gesture that signaled a desire for rapprochement with the Islamic groups.³¹¹ Indeed by the mid 1970's, Islamists had become the dominant political force in Egypt's universities.³¹²

At the same time as Islamic supremacy clauses would appeal to particular audiences and enhance Sadat's legitimacy, the provision of rights in the constitution would provide a form of insurance against excessive presidential power and serve to legitimate the constitution in the eyes of liberals. This potentially contradicting method of appealing to two audiences — at home and abroad — would come to be a hallmark of Sadat's regime.³¹³

4. *The Amendment of 1980 — Further Constitutional Islamization*

As compared to Nasser, Sadat sought to politically liberalize Egypt.³¹⁴ However, his close advisors were mistaken in the belief that they would be able to control the pace of liberalization without opening up a Pandora's Box of political forces.³¹⁵ Liberalizing the press and allowing political formations, albeit limited, was not always possible without undermining the legitimacy of the liberal ideas on which Sadat claimed his state was situated.³¹⁶ Different political interests vehemently opposed many of Sadat's policies and Egyptian society, and as a result, became increasingly polarized during the 1970's.³¹⁷

Sadat's measures to "let the Islamist genie out of Egypt's political bottle"³¹⁸ had visible effects. Initiatives such as releasing Muslim

310. Moustafa, *supra* note 69, at 617–18; *see generally* LOMBARDI, *supra* note 36, at 123 (discussing strategic motivations for incorporating Article 2).

311. Mohamed Abdelaal, *Religious Constitutionalism in Egypt: A Case Study*, FLETCHER F. WORLD AFF., Winter 2013, at 35, 36 (2013); *see* DEKMEJIAN, *supra* note 286, at 80 ("Internally, Sadat faced a legitimacy crisis because he lacked the charisma of his predecessor; nor did he possess a secure base in the Egyptian power structure dominated by his Nasserist rivals. To counterbalance the latter he progressively liberated the Brothers from jail and encouraged their entrenchment in the student unions and elsewhere in society Sadat's quest for legitimacy also involved increasing reliance on Islamic themes as a partial substitute for the ideological vacuum that he had created by progressively jettisoning Nasserism.").

312. *See* BEATTIE, *supra* note 275, at 252.

313. *See* Berger & Sonneveld, *supra* note 306, at 64.

314. *See* BEATTIE, *supra* note 275, at 180.

315. *See id.* at 199.

316. *See id.*

317. *See id.* at 211.

318. *Id.* at 257.

Brotherhood leaders and encouraging Islamic activist groups to flourish in university campuses was part of Sadat's strategy to counter the leftist opposition and enhance his appeal. The Muslim Brothers, in particular, realized that Sadat would continue to seek a tactical alliance with them to contain the Nasserite and Marxist threat.³¹⁹ Although leftist students remained active on campus, they were rapidly outpaced by the Islamist groups that flourished under Sadat. Once the regime allowed them to operate, it became difficult to oppose them since opposition to them could be dismissed as anti-religious.³²⁰ Through the Islamic press, the Muslim Brotherhood leadership appealed to its members to fully utilize the peaceful means that were now available to them as a result of Sadat's liberalization.³²¹ Amidst this relatively open domestic political environment, Sadat signed a peace treaty with Israel. This event, along with the Iranian revolution that had been steadily building up momentum since 1978 "represented a watershed in regime-Islamist relations . . . [as] [n]early all Islamists were enervated and energized by that development."³²² The peace process led the Islamic press to launch a marked critique of the regime.³²³ Beattie writes that by the time the peace treaty was signed, religious consciousness was intensifying in Egyptian society.³²⁴ In this environment, student union elections in 1978–79 were overwhelmingly won by Islamic candidates, who opposed peace with Israel, praised the new Iranian Constitution, and called for the full application of Sharia law.³²⁵ While the joint project to subjugate the Nasserists initially proved to be a common ground of collaboration for the Muslim Brothers and Sadat, the peace treaty would soon unravel that relationship.³²⁶

In January 1977, major food riots shook the regime and set off a protracted crisis for Sadat.³²⁷ Sadat's reforms failed to encourage economic growth and his popularity had now begun to wane. In response, Sadat

319. See BAKER, *supra* note 280, at 248 (explaining the reasons for Sadat and the Muslim Brotherhood to act in conjunction against the Nasserist left in the 1970s).

320. See BEATTIE, *supra* note 275, at 203–04.

321. See BAKER, *supra* note 280, at 246 (describing the Brothers' strategic approach in the 1970s, particularly through the Islamic press, to realize their goal of a new Islamic order in Egypt in the 1980s).

322. BEATTIE, *supra* note 275, at 252.

323. See BAKER, *supra* note 280, at 244 (relating the escalating differences between Sadat and the Brotherhood after Sadat's 1977 trip to Jerusalem, including growing domestic criticism countered by warnings against treason).

324. See BEATTIE, *supra* note 275, at 253.

325. See *id.* at 253.

326. See BAKER, *supra* note 280, at 249 (detailing the growing differences between Sadat and the Muslim Brothers, particularly in the areas of foreign policy and student militancy, after their initial joint successes in attacking Nasser's legacy and fostering Islamic student groups).

327. DEKMEJIAN, *supra* note 286, at 81.

became increasingly dictatorial, and among other measures, took over the post of prime minister, passed a “law of shame” that would punish anyone who undermined the “dignity of the state,” and frequently resorted to referenda that produced “yes” votes from over ninety-nine percent of the population.³²⁸ On May 22, 1980, facing increasing domestic opposition for his economic and foreign policies, Sadat amended Article 2 of the 1971 Constitution — the Islamic Supremacy Clause — so that rather than be “a” source of legislation, Islamic law would now be “the” source of legislation in Egypt.³²⁹

Article 2 was perhaps amended to once again enhance the regime’s legitimacy through Islamization, particularly in light of Sadat’s waning popularity and ineffective economic and foreign policies. However, while bolstering Sadat’s legitimacy was certainly part of the reason for amending Article 2, coalitional bargaining was the more proximate cause. By the end of the 1970’s, Sadat’s “controlled liberalization” measures, as Beattie labels them, had significantly opened up the political scene in Egypt and greatly empowered the opposition — which included the Islamic opposition of course. This amendment then became necessary as an exchange for something Sadat wanted beyond simply legitimacy — another term in office. And this seems to be what happened. As Clark Lombardi writes,

By the late 1970’s, the government could no longer afford to ignore these calls to give sharia a more important role. As a result, the government was finally forced in 1980 to respond to the concerns of its growing Muslim opposition by amending its constitution to give Islamic law a vital role in Egyptian society.³³⁰

Lombardi and Brown write also that “dismayed by the secularization of Egyptian law, Islamist organizations eventually succeeded in pressuring the Egyptian government to adopt [Article 2].”³³¹ Certainly Article 2 was not simply granted as a goodwill concession from Sadat without providing something of political value in return to him: rather, it was part of a bargain. Sadat wished to stay in power, and Article 77 of the 1971 Constitution presented a stumbling block since it limited the President to two six-year terms. To do this, he needed the support of ordinary Egyptians and also the Islamists. Thus, the amendment to Article 2 was proposed alongside the amendment to Article 77. Article 2, as proposed, would now read “the principles of the Islamic Sharia are the primary

328. PERRY, *supra* note 287, at 125–27 (describing Sadat’s growing authoritarianism characterized by his mass arrests of the opposition and his legal manipulations).

329. *Id.*; see also Lombardi, *supra* note 20, at 757.

330. Clark Benner Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 37 COLUM. J. TRANSNAT’L L. 81, 86 (1998).

331. Lombardi & Brown, *supra* note 14, at 386.

source of legislation.” Article 77 would now add the phrase “the President may be reelected for other successive terms.”³³² Mohammed Abdelaal comments that by “[u]sing Article 2, [Sadat thus cunningly] played to the religious tendency of ordinary Egyptians, as well as the Islamists, in order to pass Article 77, as any opposition to Article 77 would have struck down Article 2 at the same time.”³³³ Thus, while Sadat’s earlier Article 2 declaring Islamic law to be “a” source of law was indeed primarily motivated by a desire to boost legitimacy and mark a break from his predecessor’s past — that is, as a goodwill gesture seeking to appeal to Egyptians and appease the Islamic constituency in particular — by 1980, the Egyptian political scene had changed dramatically. Therefore, the amendment of Article 2 reflected, or was at least partially, the “extracted” outcome of a bargain between the regime and increasingly open and vocal Islamic opposition, rather than a concession “granted” by Sadat unilaterally to enhance his legitimacy, as was the case in 1971.

The Egyptian example demonstrates how Islamic supremacy clauses may serve a different function depending on the level of political openness in a country. It shows not only how the motivations for adding or amending an Islamic supremacy clause in the constitution at any given time may be multiple and overlapping, but also show how these motivations can alter and evolve over time based on the domestic political situation in which the constitution is being written or amended. Initially, the insertion of an Islamic supremacy clause in the 1971 Constitution had more to do with enhancing the legitimacy of Sadat’s one-man rule by signaling its Islamic credentials for domestic audiences and particularly the Islamist groups. As Egyptian society became politically more transparent and oppositional in the coming decade, the amendment to strengthen the Islamic supremacy clause in 1980 had more to do with facilitating negotiated exchange with increasingly vocal and agitating oppositional groups, rather than enhancing once again the legitimacy of Sadat’s regime at a time of waning popularity.

That is, while Egypt was relatively less democratic and politically liberal in 1971, the motivations for inserting an Islamic supremacy clause was to legitimate the concentration of presidential power in Sadat and appeal to certain constituencies. As Egyptian society became more politically open, the motivations still remained largely the same: to legitimate Sadat’s rule and extension of political power. Yet the amendment to Article 2 also came to represent a negotiated grand compromise between opposing factions rather than a clause merely “granted” by Sadat.

332. Abdelaal, *supra* note 311, at 36.

333. *Id.* at 37.

It is interesting that this clause has become a central part of the Egyptian constitutional order, even after the fall of the regime of Anwar Sadat's successor, Hosni Mubarak. Article 2 was retained in the Constitution and hurriedly pushed through by Muslim Brotherhood-backed President Mohamed Morsi in late 2012.³³⁴ Morsi's government was deposed by a military coup in the summer of 2013, and the new military-backed government drafted a new constitutional text that was approved by a national referendum in January 2014. The 2014 Constitution, however, kept Article 2 intact.³³⁵

D. Iraq

Iraq's first constitution, that of 1925, enacted when the country was still under British occupation, established a constitutional monarchy. An amendment in 1943 increased the powers of the monarchy vis-à-vis the parliament.³³⁶ After the monarch was overthrown in a coup that came to be known as the "July 14 Revolution," this constitution was replaced with a new provisional constitution in 1958. The leaders of the revolution created a body with absolute authority — the Revolutionary Command Council.³³⁷ This new constitution emphasized the Kurd and Arab identity of the country, created a republic and emphasized the sovereignty of the people, and granted certain rights including, *inter alia*, freedom of the press and equality before the law.³³⁸ Interim constitutions followed in 1963, 1964, 1968, and 1970. The 1970 Constitution, although deemed to be interim, stayed in force until Saddam Hussein's Baath regime was toppled in 2003. It proclaimed Iraq as a "sovereign people's democratic republic," recognized the Arab character of the state, and granted some economic and political rights.³³⁹ All of these constitutions provided that Islam was to be the religion of the state but none contained Islamic supremacy clauses. Ironically, the first time an Iraqi Constitution would contain an Islamic supremacy clause was when it was drafted during foreign occupation.

334. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Dec. 26, 2012, art. 2.

335. DRAFT CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT 2013, art. 2.

336. See ADEED DAWISHA, IRAQ: A POLITICAL HISTORY FROM INDEPENDENCE TO OCCUPATION 161 (2009).

337. See BROWN, *supra* note 11, at 86; KANAN MAKIYA, REPUBLIC OF FEAR: THE POLITICS OF MODERN IRAQ 6 (2d ed. 1998).

338. See JUAN ROMERO, THE IRAQI REVOLUTION OF 1958: A REVOLUTIONARY QUEST FOR UNITY AND SECURITY 139 (2010).

339. IRAQ: ISSUES, HISTORICAL BACKGROUND, BIBLIOGRAPHY 177–78 (Leon M. Jeffries ed., 2003).

1. *Foreign Invasion and Democracy Bring Iraq's First Islamic Supremacy Clause*

On March 19, 2003, the United States launched an invasion of Iraq — Operation Iraqi Freedom — the stated intention of which, in the words of President George W. Bush, was “to free its people and to defend the world from grave danger.”³⁴⁰ Soon after the invasion, as Saddam Hussein’s regime crumbled, the Coalition Provisional Authority (CPA) was established as a transitional government with executive, legislative, and judicial authority. As reports circulated that the CPA was to appoint a body comprised of Iraqis to essentially write a new constitution for Iraq, the leading Shiite cleric in Iraq, Grand Ayatollah Sistani, issued a *fatwa*, or religious opinion, on June 26, 2003 declaring that “[t]hose [occupation] forces have no jurisdiction whatsoever to appoint members of the Constitution preparation assembly” and demanded that Iraq’s constitution drafters should be elected, not appointed.³⁴¹ Nevertheless, on July 22, 2003, the CPA formed the Iraqi Governing Council (IGC) and appointed its members. Twenty-five members representing various factions and ethnic groups comprised the IGC; the individuals were largely Iraqi dissidents who had fled the country during Saddam Hussein’s regime. The influence of the *fatwa* would be immense since Sistani remained an extremely popular and influential figure in Iraq.³⁴² Soon, after the *fatwa*, twenty-four of the IGC’s twenty-five members eventually traveled to meet Sistani and were certain that his argument could not be challenged.³⁴³ By insisting on using a democratic process for constitution writing, Sistani greatly undermined the legitimacy of constitution writing by an appointed body, as planned by the CPA. Andrew Arato wrote that “Sistani was obviously aware of the rhetorical power of advocating a democratic alternative against the Americans’ imposed model[.]”³⁴⁴ Soon, understanding its precarious position, the CPA agreed to adopt an arguably more “‘democratic’ direction.”³⁴⁵ As per an alternative proposal released on November 15, 2003, a two-stage constitution writing process was envisaged: the constitution would eventually be written by an elected constituent assembly. In the interim though, beginning June 30, 2004, the

340. Press Release, White House, President Bush Addresses the Nation (Oct. 19, 2003, 10:16 PM), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030319-17.html>.

341. Noah Feldman, *The Democratic Fatwa: Islam and Democracy in the Realm of Constitutional Politics*, 58 OKLA. L. REV. 1, 6 (2005).

342. See DIAMOND, *supra* note 3, at 127 (relating stories of Sistani’s power and general fear of disobeying him).

343. See Feldman, *supra* note 341, at 7.

344. ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ 104 (2009).

345. *Id.* at 102 (recounting the CPA’s characteristic attempts to establish democratic legitimacy while initially operating under much confusion about the direction of the constitutional project).

country would be governed by a transitional national assembly to be selected by caucuses, rather than direct elections.³⁴⁶ Also, a temporary “fundamental law” — known as the Transitional Administrative Law (TAL) — would be drafted by the IGC and serve as the governing document until a permanent constitution was promulgated.³⁴⁷ On November 26, Sistani denounced this plan and renewed his call for free and direct elections.³⁴⁸ He also insisted that even the interim constitution being drafted by the IGC must be approved only by directly elected representatives of the people.³⁴⁹ When the CPA did not entertain this idea, the interim constitution also became unacceptable to Sistani.³⁵⁰ Although the TAL was eventually written, by not acceding to Sistani’s democratic request for approval of the interim constitution, the Americans “gained . . . a determined enemy.”³⁵¹ Over the next few months, Sistani would continually object that the TAL was not legitimate as “an unelected body could not bind an elected one.”³⁵²

2. *Islam in the Interim Constitution*

Article 7 of the TAL, for the first time in any constitution of Iraq, incorporated two different types of Islamic supremacy clauses — a “source” and a “repugnancy” clause which stated that “Islam . . . is to be considered a source of legislation [and] [n]o law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this Law may be enacted during the transitional period.”³⁵³

We know that there was sufficient pressure on the CPA to avoid the inclusion of Islam in the TAL and later also in the permanent constitution; yet Islamic supremacy clauses were incorporated. Evangelical Christian

346. Feldman, *supra* note 341, at 7; ARATO, *supra* note 344, at 110 (describing the development of the November 15th Agreement on Political Process and citing the “Fundamental Law” and its various elements).

347. Noah Feldman & Roman Martinez, *Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 FORDHAM L. REV. 883, 894 (2006).

348. ARATO, *supra* note 344, at 115 (quoting Sistani’s rejection of the November 15 Agreement and analyzing the inherent contradictions and ambiguities in the Agreement that led to Sistani’s interpretation).

349. Edward Wong, *Shiite Cleric Won't Back Down on Direct Elections*, SUN SENTINEL (Jan. 12, 2004), http://articles.sun-sentinel.com/2004-01-12/news/0401120065_1_al-sistani-grand-ayatollah-ali-influential-shiite-cleric.

350. ARATO, *supra* note 344, at 120 (presenting Sistani’s desire for a freely elected transitional assembly to give the constitution validity, which conflicted with the United States’ goals and rendered the interim constitution unacceptable).

351. *Id.* at 128 (arguing that Sistani’s opposition to the TAL was due to the changing negotiations with the United States over free elections, and was therefore more reasonable than Bremer believes).

352. DIAMOND, *supra* note 3, at 177.

353. Law of Administration for the State of Iraq for the Transitional Period, Mar. 8, 2004, art. 7.

groups in the United States strongly insisted on complete separation of religion and state in Iraq, with no role for Islam whatsoever. Noah Feldman argues that these groups had special access to President George W. Bush who himself called on Paul Bremer — head of the CPA — to insist that the religious liberty clauses in the International Declaration of Human Rights must be included in the TAL.³⁵⁴ On another occasion, President Bush also asked Bremer whether “the ayatollahs [were] going to take over.”³⁵⁵ Further, these groups also made a concerted effort to advance this position through the Office of International Religious Freedom. Republican Senators Santorum and Brownback also “made public statements as well as back-channel telephone calls to U.S. personnel emphasizing the importance not only of establishing strong guarantees of religious freedom but also insisting on the marginalization of official Islam.”³⁵⁶ At one point, even Colin Powell asked Paul Bremer whether Iraq would now have Sharia law.³⁵⁷

Nevertheless, those advocating against the inclusion of Islam were to learn how futile it would be to take such a position. The opening up of the political arena to democratic forces in Iraq meant that it became inevitable that Islamic supremacy clauses would be a hallmark of any new constitution. Bremer writes that up to a few weeks before the deadline of March 1, 2004 set by the November 15 Agreement, the issue of the role of Islam in the constitution — that is, Article 7 — remained unresolved. The Shia Islamist parties, SCIRI and Dawa, as per his account, were proposing that the TAL declare that Islam was “the” basis of all law.³⁵⁸ They also referred back to Sistani before deciding on the issue of Islam.³⁵⁹ Although the final draft referred to Islam only as “a” source, Bremer credits this to his back-channel communications with Sistani who was allegedly “softening” on the role of Islam.³⁶⁰ However, in a later draft that referred to Islam as “a principal source,” the Shia Islamists were keen that the “a” be replaced with a “the.” Other members of the drafting committee resisted this replacement and the formula eventually agreed upon was that Islam would be “a” source of legislation, as long as it was clear that a repugnancy clause would also be inserted in the TAL.³⁶¹ Later on, during this process, the language moved further. Although Kurds agreed to this language, the Sunni Arabs in the committee demanded that a reference to “democratic values” be added to the repugnancy part of Article 7. Another

354. Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 875–77 (2005).

355. BREMER, *supra* note 33, 175.

356. Feldman, *supra* note 354, at 876.

357. BREMER, *supra* note 33, at 73.

358. *Id.* at 292.

359. *Id.* at 293.

360. *Id.* at 294.

361. *Id.* at 296.

Shia on the committee, Dr. Rubaie, a committee member, eventually made a counter-proposal that Article 7 be drafted to forbid laws that “contradicts the universally agreed tenets of Islam, the principles of democracy or the rights cited in Chapter 2 of the law.”³⁶² Feldman also notes that this multi-faceted repugnancy clause was “a core part of the political compromise on the role of Islam in the TAL.”³⁶³ That “the Shi’i Islamist parties, led by SCIRI, began pressing hard for a series of demands that would enhance the TAL’s commitment to Islam and strengthen its majoritarian bent.”³⁶⁴ Similarly Nathan Brown seems to corroborate this account of the final language as a compromise when he writes that “the final version of the Law represents a compromise between those who wished to have Islam serve as ‘a source’ and those who wished it to be ‘the primary source’ of legislation.”³⁶⁵

3. *Islam in the 2005 Permanent Constitution*

An Islamic supremacy clause also found its way into Iraq’s permanent Constitution of 2005, though it was formulated in different terms. Article 2 of the 2005 Constitution, *inter alia*, in a strengthening of the clause contained in the TAL, read that Islam “is a foundation source of legislation” and “no law may be enacted that contradicts the established provisions of Islam.”³⁶⁶ The clause also provides that “[n]o law that contradicts the principles of democracy may be enacted [and] [n]o law that contradicts the rights and basic freedoms stipulated in this constitution may be enacted” either. In this sense this Article is also, like its predecessor in the TAL, a multi-faceted repugnancy clause.

What factors influenced the adoption of a stronger Islamic supremacy clause in the permanent constitution and in particular, what prompted the modified language strengthening the Islamic supremacy clause? Probably not a failure to learn or a lack of experience since Article 2 had no meaningful impact on lawmaking during the period.³⁶⁷ Deeks and Burton comment that “if Iraq’s brief democratic experience is any guide, we only once saw or heard legislators refer to Islam as a source of law during the year in which the TNA produced legislation”³⁶⁸ The answer lies in the fact that free elections for the National Constitutional Assembly had taken

362. *Id.* at 299.

363. Feldman & Martinez, *supra* note 347, at 904.

364. *See id.* at 896.

365. Nathan J. Brown, *Transitional Administrative Law*, GEORGE WASHINGTON UNIV. art. 7 (Mar. 8, 2004), <http://home.gwu.edu/~nbrown/interimiraqconstitution.html> (providing access to draft of the Interim Iraqi Constitution).

366. IRAQ CONSTITUTION Oct. 15, 2005, art. 2.

367. *See* Ashley S. Deeks & Matthew D. Burton, *Iraq’s Constitution: A Drafting History*, 40 CORNELL INT’L L.J. 1, 7 (2007).

368. *Id.* at 10.

place in Iraq in January 2005, as scheduled. Sistani managed to organize the Shiites into a single electoral list as the United Iraqi Alliance (UIA), which brought together several smaller groups under a banner widely associated with Sistani. They won about forty-eight percent of the vote and secured 140 seats in the assembly. The Kurds acting through the Democratic Patriotic Alliance of Kurdistan/Kurdistan Coalition List came second with about twenty-five percent of the vote and seventy-five seats.³⁶⁹ Thus an outcome which Bremer tried to resist was finally realized: a major Shiite victory in elections, making them the most significant political force in Iraq.³⁷⁰ The secular group, the Iraqi List, which was openly and materially supported by the Americans, came in at a distant third, with only about thirteen percent of the vote and forty seats.³⁷¹ This meant that no government could be formed without the Shiite UIA.³⁷² Further, the Sunni boycott had ensured that the Sunnis were now significantly under-represented and that they would be left without much influence when drafting the constitution.³⁷³

In terms of compromises for making of the permanent constitution, the Kurds, otherwise quite secular, were indeed quite willing to make concessions on religious issues, as long as their main demand of federalism and regional autonomy was heeded.³⁷⁴ On the other hand, Shi'i Islamists wanted to entrench Islam's role deeper in Iraq.³⁷⁵ Indeed, Feldman argues that "the Shi'i-Kurd understanding on federalism allowed a larger role for Islam at the national level than might otherwise have been possible."³⁷⁶ This is a similar type of bargaining dynamic that we have observed in other cases of Constitutional Islamization. In particular, on provisions relating to the role of Islam, the discussions pitted Shi'i Islamist politicians against a

369. ARATO, *supra* note 344, at 208 (summarizing the results of the 2005 Iraqi legislative election, including names of parties and leaders, numbers of votes and seats, and total percentages of the votes).

370. *Id.* at 207 (explaining the organization of the Shiite groupings under the UIA and the eventual legitimization process).

371. *Id.* at 208 (summarizing, in a table, the results of the 2005 Iraqi legislative election, including names of parties and leaders, numbers of votes and seats, and total percentages of the votes).

372. *See id.* at 211 (explaining the demographics of the election, such that the combined smaller parties would still not have enough of the seats necessary to elect a Presidential Council and form a government).

373. *See* JONATHAN MORROW, U.S. INST. PEACE, SPECIAL REPORT NO. 155: IRAQ'S CONSTITUTIONAL PROCESS II: AN OPPORTUNITY LOST 6 (Nov. 2005), *available at* <http://www.usip.org/sites/default/files/sr155.pdf>.

374. *See* ARATO, *supra* note 344, at 211 (describing the political position and priorities of each coalition, including the Kurds, the Allawi, and the Shiites); *see also* Feisal Amin Rasoul Al-Istrabadi, *Islam and the State of Iraq: Post-2003 Constitutions*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 607 (Rainer Grote & Tilmann J. Röder eds., 2012) (discussing Kurdish coalition with Shi'i religious parties in service to Kurdish regional rights).

375. *See* Feldman & Martinez, *supra* note 347, at 898.

376. *Id.* at 915.

loose coalition of the Kurdish parties and more secular Arabs. Feldman argues that the Americans generally supported this latter group, but ultimately only played a facilitative role, and that the final settlement reflected the considerable strength of the Islamists who led the constitutional drafting effort following their election victory.³⁷⁷ While the Kurds were principally opposed to the Shi'ite inclination to enhance the role of Islam in the constitution any further,³⁷⁸ the language of the Constitution was ultimately bent toward the majority Shi'ite's position.

4. *The Journey of Article 2 — Islamic Supremacy*

From one account of the constitutional deliberation, we know that the draft that emerged from the National Assembly's Constitutional Committee on July 22 was different from the final version. It stated that Islam "is the basic source of legislation. No law may be enacted that contradicts its tenets and provisions [its tenets that are universally agreed]."³⁷⁹ Shi'ite Islamists apparently desired to make Islam "the" basic or fundamental source of legislation. However, others, including the Kurds, felt that Islam should be only "a" source of legislation. Deeks and Burton write that

by August 6, a number of competing phrasings had appeared: "the fundamental source," "the first source," "the basic source," "a main source," "a source among sources," and "a fundamental source." The Kurds continued to prefer the TAL language, which used "a source," and they ultimately prevailed . . . [as by] August 10, the drafts reflect the use of the indefinite article — "*a* principal source."³⁸⁰

Apart from the "a" or "the," there was also debate around whether the word "principal" or "fundamental" would be used. Seculars wanted the word "principal" to be used so that Islam would not be the first or primary source. The Shi'ite Islamists in SCIRI were however still pushing for "*the principal* source of law." In the following days, there was much going back and forth between "fundamental" and "principal," and "fundamental" seemed to have been what was decided. However, ultimately drafters changed the wording from the "adjectival fundamental" to a noun that is

377. *Id.* at 901.

378. See ARATO, *supra* note 344, at 236 (analyzing the debate between the Kurds, the Shi'ites, and Ambassador Khalilzad over the role of Islam in the state and, in particular, the inclusion of Sharia experts on the Supreme Federal Court); see also Haider Ala Hamoudi, *Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution*, 7 U. ST. THOMAS L.J. 692, 698 (2010).

379. Deeks & Burton, *supra* note 367, at 7 (alteration in original).

380. *Id.* at 9 (emphasis added).

best translated as “foundation,” and thus “foundation” is what made it into the constitution.³⁸¹

The TAL, like the permanent constitution, also contained a repugnancy clause. It seems that the influence of constitution-making in other Muslim countries was clearly on the minds of various groups here.³⁸² Feldman argues that they may have been encouraged by U.S. acquiescence to adopt similar language in the Afghan Constitution. He notes that the Shias initially agreed to not having a repugnancy clause in the TAL but later changed their mind, after learning that the Afghan Constitution would include one.³⁸³ Secular and nationalist forces resisted this clause.³⁸⁴ As such, even though the insertion of a repugnancy clause was almost certain, there seemed to have been some debate concerning its precise language. While Article 7 of the TAL referred to Islam’s “universally agreed principles” along with democracy and rights, the proposals for the permanent constitution initially sought to replace that language with “Islam’s confirmed rulings.” Simultaneously, others wanted to retain the addition of the TAL formulation “or the principles of democracy” and “the fundamental rights and freedoms in the constitution.”³⁸⁵ While there was not much controversy in including these provisions in the permanent constitution, Shi’i Islamists did try to cut back on the breadth of freedoms that were contained in the TAL.³⁸⁶ Ultimately, certain Shi’ite negotiators wanted to use the phrase “constant rulings,” “confirmed rulings,” or “the tenets of its provisions,” and to exclude concepts of democracy and rights from the repugnancy clause completely. On the other hand, the Kurds believed that the Shia-proposed language was too fundamentalist. Eventually, “established provisions” was agreed as a compromise.³⁸⁷ This account is corroborated by another commentator (although he translates the constitution to use the word “settled” rather than “established”) who states that “in the end, a compromise could only be reached as to Article 2 where the constitution made clear that law could not be enacted that violated the ‘settled rulings of Islam’ rather than, as the Shi’i Islamists wished, the ‘rulings of *shari’a*.’”³⁸⁸

381. *Id.* at 10.

382. See Haider Ala Hamoudi, *Repugnancy in the Arab World*, 48 WILLAMETTE L. REV. 427, 439 (2012) (arguing that “Iraqi constitutional drafters were aware during their negotiations that Egypt had been operating under a principle of repugnancy for nearly two decades. They were also aware that repugnancy provisions had appeared in the constitution of Afghanistan, and as a result, Islamists within Iraq of both the Shi’i and Sunni variety wanted to ensure that a similar provision appeared in the Iraqi constitution.”).

383. Feldman & Martínez, *supra* note 347, at 903.

384. See Hamoudi, *supra* note 378, at 698.

385. Deeks & Burton, *supra* note 367, at 13.

386. See Feldman & Martínez, *supra* note 347, at 907.

387. Deeks & Burton, *supra* note 367, at 13.

388. Hamoudi, *supra* note 378, at 698–99 (putting forth the idea that an emphasis on Sharia as

It was also relevant for the purposes of the repugnancy clause, not just what the clause would say but who would reconcile its potential contradictions and interpret it. The Kurds were, in principle, willing to accept the Islamic nature of the repugnancy clause, but along with the secular Sunni, they accordingly did not wish to see any jurists on the court³⁸⁹ despite the insistence of the Shias that there be at least four Sharia experts on the court.³⁹⁰ The Kurds and Arabs were concerned that the presence of jurists meant that the court would be “Shi’i dominated and result in a particularly strong Shi’i version of Islam.”³⁹¹ In fact, the Kurds were the strongest domestic force opposing the Article 2 formulations proposed by the Shia Islamists.³⁹² Nevertheless, the Shiites secured a further victory by entrenching in the constitution that the Federal Supreme Court would comprise of judges and experts in Islamic law.³⁹³ Considering that as per Article 2, laws also could not be repugnant to democracy *and* rights, and resolving potential contradictions would be left to the judiciary, this was significant.³⁹⁴

5. *Why Constitutionalize Islam?*

What light does the Iraqi case shed on the general issue of understanding why countries adopt Constitutional Islamization? From the multiple accounts of the drafting of both the TAL in 2004 and the permanent constitution in 2005, it is clear that the inclusion of Islamic supremacy clauses in both constitutions, despite the contrary wishes of the Americans, owed itself to the growing room for democratic input in Iraq after the invasion. And within this democratic space, the influence of the Shia groups — representing a majority of Iraqis — both during the drafting of the TAL, within the IGC, and more strongly, after the elections, ensured that Islamic supremacy clauses would be robustly entrenched in the constitution.

Yet, this begs the question: why did the Shia want a strong Islamic supremacy clause? In our case study of Iran, we saw that during constitutional negotiations, the clerics and conservatives lobbied for the insertion of a repugnancy clause and the formation of a clerical council that would review laws for compliance with this clause. It thus served as

compared to Islam may have entrenched Islamic law interpretations of Shia Islam further).

389. See Deeks & Burton, *supra* note 367, at 13.

390. See Feldman & Martinez, *supra* note 347, at 917.

391. Hamoudi, *supra* note 378, at 699.

392. See *id.* at 710.

393. See ARATO, *supra* note 344, at 237 (detailing the compromise in the constitutional draft to include both judges and Sharia experts on the courts, but delay the decision on their appointment and number until the next National Assembly due to lack of consensus over the role of Islam).

394. See Hamoudi, *supra* note 378, at 699–700.

insurance or a safeguard to prevent the future enactment of “un-Islamic” laws and extension of rights by the Majlis in the context of a constitution that already contained many innovative rights. Such a constitution was, from one perspective, already usurping God’s sovereignty and law. Fear of the unknown possibilities of lawmaking, in a sense, was a major part of the reason for entrenching the Islamic supremacy clause in Iran. In Afghanistan, rapid modernization and centralization by King Amanullah — including, primarily, the promulgation of Afghanistan’s first constitution and an innovative set of rights that would potentially replace much of the uncodified religious and other laws — offended religious sensibilities which viewed his efforts as an attack on Islam and Afghan values. Dampening opposition to such modernization required the insertion of progressively stronger Islamic supremacy clauses. In Egypt, there was a different dynamic: a leader wished to legitimize his rule through an Islamic supremacy clause and then later on, win the political support of an increasingly Islamic opposition in an increasingly religious society — so he first inserted and then strengthened the Islamic supremacy clause.

In Iraq, we know from the well-documented constitutional drafting history that all parties recognized that Islam was to play some role in the constitutional framework. All accounts of the constitutional drafting argue that all parties accepted that *some* role for Islam would be reserved in the constitution. Indeed, there was “nearly unanimous resistance to placing rights above the Sharia.”³⁹⁵ Disagreements, if any, centered on the strength of the language to be used in defining that role. Further, those disagreements polarized along ethno-religious lines. It was the Shia parties that wished to entrench the strongest language possible for Islam in the constitution, while some of the more secularist Arabs, Kurds, and certainly the Americans wished it would have a limited role. The fact that all parties were in agreement to secure some role for Islam, even about rights, would imply that there was some consensus that laws and rights must not be contrary to Islamic values and the Islamic character of Iraqi society, at least at an abstract level. This is not surprising; as Professor Feldman writes “[w]here the country is majority Muslim, many citizens will often want Islam to have some official role in state governance, beyond mere symbolism”³⁹⁶ and that Islamic democrats believe that “a majority of Muslim citizens would choose government with an Islamic cast if they were free to do so.”³⁹⁷

395. Yash Ghai, *A Journey Around Constitutions: Reflections on Contemporary Constitutions*, 122 S. AFR. L.J. 804, 827 (2005).

396. Feldman, *supra* note 354, at 860.

397. *Id.* at 864.

That the Islamic supremacy clauses served for all an identitarian function is clear. For decades, Saddam Hussein operated a brutal, secular dictatorship in a Muslim majority country with a religious population. Now that his regime was no more and a democratic opportunity arose to establish a legal order and constitution that would loudly proclaim a break from the past, Islam stepped into the breach. As such, asserting the Islamic character of the Iraqi state through Islamic supremacy clauses, both as a prospective means of asserting identity and as a reaction to what had gone on in the past, perhaps had something to do with an assertion of identity. In fact, the Constitution may not have been legitimated otherwise.³⁹⁸ Hamoudi argues that the clause was clearly intended “to establish Iraq as a state that does not permit law to violate Islam’s ‘settled rulings’”³⁹⁹ — and since settled rulings implies those rulings on which there is consensus, the motivations for the Islamic supremacy clause are therefore largely symbolic.⁴⁰⁰ The fact that Iraqis may have wanted to define their identity through the Constitution and through Islam symbolically when there was an opportunity to do so, is not surprising. Yet, the argument that the clause was an assertion of identity *only*, would not explain the intense disagreements that arose over the language in the clause and more importantly, the polarization of the disagreements on ethno-religious lines. Further, this argument would also not explain why it is included in addition to language in Article 2 of the permanent constitution, which explicitly asserts an identitarian focus — suggesting that the article “guarantees the Islamic identity of the majority of the Iraqi people.”⁴⁰¹ As Feldman writes, “there are numerous other constitutional provisions reaffirming the important role of religion in Iraqi society,”⁴⁰² which already asserted the Islamic religious identity of Iraq.

This is not to say that the Islamic supremacy clause does not have symbolic value or that there would have been no bargaining if it were just symbolic, but only that there is a possibility that something more than symbolism may have motivated the constitutional negotiators. To be clear, “settled rulings” was the end result, not the beginning; there was much acrimony before that result was achieved. As Hamoudi himself notes, the Kurds along with the Sunnis strongly opposed the Shia formulation of the

398. *See id.* at 878. (“In the Iraqi case, Ambassador Bremer unwittingly strengthened the Islamists’ position when, apparently in response to pressure from Senators Santorum and Brownback, he publicly stated in comments to reporters in the Iraqi town of Hillah that the Iraqi constitution would not be Islamic. This unfortunate statement had the effect of strengthening the hand of the Islamists precisely because it reeked of imposed constitutionalism”); *see also* Hamoudi, *supra* note 378, at 695 (clauses that are an “assertion of identity, primarily of the Islamic variety”).

399. Hamoudi, *supra* note 378, at 710.

400. *Id.*

401. IRAQ CONSTITUTION Oct. 15, 2005, art. 2.

402. Feldman & Martinez, *supra* note 347, at 906.

clause.⁴⁰³ Thus while an assertion of identity is no doubt a major factor in the insertion of the clause, there must have been something perceived to be more at stake than symbolism on the minds of the negotiators. Rather, our view is that the language of the clause encompassed debates, not simply of symbolism, but of conflicts over whose vision of Islam would dominate. Essentially, our argument is that Shia negotiators wished to entrench Islam more deeply in the Constitution since, based on Iraq's Shia majority and the significant influence of the clerics in Najaf — such as Ayatollah Sistani — it would be *their* interpretation of Islam that would become the correct interpretation. Furthermore, since Islam was of such constitutional significance, it was strategically important to have control over its interpretations. If, in Iraq, Islam were to be “the” source of law or repugnancy would be only defined in terms of Islam's “constant rulings” rather than “universally agreed tenets” of Islam, then there is less room for maneuver in terms of what is allowed or disallowed. On the other hand, if Islam were to be “a” rather than “the” source of law, it is certain that Islam would be the supreme source of law and the party that expects to be the majority in Iraq — in terms of demography, political representation in the legislature, and religious influence — would be in the best position to argue that Islam requires a particular legal outcome. Similarly, with the repugnancy clause, using language such as “constant rulings” provides narrower space for debate than if language such as “universally agreed tenets” is adopted. Not only are “rulings” more precise, providing less room for legislative deliberation, but the language also provides significantly less room for the opposition, since there is little need to debate what is or is not universally agreed. In fact, there are few tenets of Islam that are universally agreed. The language of universal agreement means that consensus must be built between different sects and groups as to whether there is agreement.

In fact, Feldman's translation of Article 2 in the TAL explicitly refers to the language in TAL as meaning laws cannot be repugnant to “provisions of Islam on which *there is consensus*.”⁴⁰⁴ Similarly, in the permanent constitution, requiring compliance with “settled rulings” rather than rulings, means that there must be some debate and bargaining on whether a ruling is just a ruling — without acceptance of legitimacy — or has actually been “settled,” and therefore accepted — perhaps by all the major theological sects. In the absence of moderating language such as “settled” or “agreed,” the majority in Iraq may simply be able to plow through whatever its rulings are — the need to build consensus along confessional or sectarian party lines for lawmaking is more limited for two reasons: first,

403. Hamoudi, *supra* note 378, at 710–11.

404. Feldman & Martinez, *supra* note 347, at 903 (emphasis added).

rulings imply a more precise limitation as to what is disallowed in terms of lawmaking; and second, the majority may be able to push through with its interpretation. Thus, considering this possibility of “imposed” majoritarian law making by the Shia, it is probably not surprising that Kurds and Sunni negotiators vigorously bargained for arguably counter-majoritarian checks. A provision that Islam be only one source of law amongst others provides leverage to argue that while *majoritarian* Shia Islam — which may require one outcome when legislating laws — the constitution requires reliance on other sources of law, and therefore debate and consensus becomes necessary.⁴⁰⁵ Similarly, a repugnancy clause, which forbids the enactment of laws that contradict democracy and rights in *addition* to “settled rulings,” provides room for dissenting voices to argue that a law, whilst compliant with the rulings of certain sects, is not yet settled since it has not met the require degree of acceptance as per other schools of thought.

Alternatively, it could be argued that a certain law, perhaps with a majoritarian bent, whilst not necessarily repugnant to Islam, certainly offends certain rights contained in the constitution — and therefore cannot be enacted; or even if enacted, must be invalidated by the courts. Thus, unlike Afghanistan and Iran, where the Islamic language provided a safeguard against “imposed” notions of democracy or rights with an alien pedigree, the reverse seemed to be happening in Iraq; language moderating Islam and an insistence on democracy and rights provided a safeguard against “imposed” Islam which may impinge upon the position of the minority Sunnis, Kurds, and more secular groups. That is, as Feldman writes, “these clauses raise the possibility that future interpretations of the Islamic noncontradiction clause would be influenced by the principles of democracy, whatever these may be defined to constitute.”⁴⁰⁶

Ultimately, since the wording in the constitution remains vague, the final determination — once it has moved beyond legislative debates between opposing factions — of what “settled rulings” or “democracy” of rights are, rests with the judiciary in the highest court. And all parties realized this. Battles over what these indeterminate words mean and how to reconcile the multi-faceted repugnancy clause or assess how other sources of law sit beside the “foundational” source rest with the Supreme Court. Hence, it would make perfect sense for the Shia negotiators, to ensure entrenchment of their majoritarian interpretations of Islam by insisting on the inclusion of jurists on the Supreme Court. Similarly, it was a reasonable course of action for the Sunnis and Kurds to declare that they had no appetite for religious judges to sit on the Supreme Court. This is

405. Hamoudi argues that the parties wanted an entrenchment/protection for Shia Islam to protect from persecution. Hamoudi, *supra* note 378, at 709.

406. Feldman & Martinez, *supra* note 347, at 904.

understandable: in a country with a majority Shia population, securing seats for jurists on the court means that laws reflecting the majoritarian, or Shia, interpretations of Islam would have a greater likelihood of not being declared void. On the other hand, judges, as compared to jurists, might be inclined to give greater weight to counter-majoritarian aspirations contained in the repugnancy clause or at the very least, provide liberal, pluralist interpretations to religion.⁴⁰⁷

It then seems that, in Iraq, an overwhelmingly Muslim majority country, occupation brought in a degree of democratization. Democratization meant that Islam would certainly play a far greater role in the constitutional order than it had in the past. That is, “as the constitutional process became increasingly participatory and democratic . . . the constitution itself became increasingly Islamic in orientation and detail” and “more democracy meant more Islam.”⁴⁰⁸ Indeed, as Feldman adds, “most Iraqi politicians agreed that their new regime would embrace Islam, democracy, and human rights simultaneously. The only serious differences on these issues concerned precisely how to balance these commitments within the constitutional text.”⁴⁰⁹ That is, while democratization meant that all parties were in agreement that on an abstract or symbolic level, Islam would play some role, there was significant disagreements between sects as to how much Islam was appropriate for the constitution to include and whose version of Islam this would be. For the Kurds and Sunnis, entrenching Islam strongly in the constitution meant that there was a risk that their political interests might have, in the future, been subjugated to Shia, majoritarian interpretations that might have come out of Najaf or an increasingly Shia dominated legislature, where they might have been sitting in opposition. This required not only bargaining for a diluted role for Islam in the constitution but as a second-best, moderating the language of the Islamic supremacy clause and bargaining for counter-majoritarian checks in the repugnancy clause — such as protections for democracy and rights. The different ethnic-religious groups were therefore, through the Islamic supremacy clause, vying to entrench competing constitutional and legal order which would protect their interests in an uncertain post-Saddam Iraq. Thus, Article 2 of the permanent Constitution and Article 7 of the TAL are not mere assertions of identity, as Hamoudi asserts, but also reflected and were indeed symptomatic of competing strategic political visions.

407. *See generally* HIRSCHL, *supra* note 30 (arguing that judges bring theocratic governance in check as courts act as a bulwark against the threat of radical religion).

408. Feldman & Martinez, *supra* note 347, at 884.

409. *Id.* at 885.

CONCLUSION

This Article has argued that the phenomenon of Constitutional Islamization, or the constitutional incorporation of Islamic supremacy clauses, are best understood not as impositions of theocracy, but as carefully negotiated provisions. In this sense, their incidence is consistent with democracy and should not be thought of as in inexorable tension with it. Constitutional Islamization is subject to a distinct political logic which, in every instance, involves coalitional politics. For this reason, we observe that essentially every instance of Islamization is accompanied by an *expansion* in the rights content of the constitutional order.

We also examined the historical origin and spread of Constitutional Islamization. Our analysis of the data showed that Islamic repugnancy clauses likely emerged as a borrowed legal technique influenced by colonial repugnancy and in fact, Islamic supremacy clauses are most likely to occur in countries which have in the past been associated with a British colonial legacy. Also, Islamic supremacy clauses generally, from their innovation in Iran in 1906, have become more popular as time has gone on, now being found in the constitutions of almost half of majority Muslim states. This likely reflects the democratic demand for such clauses, and gives the regimes that adopt them some resilience.

Our argument about coalitional politics was confirmed in the case studies. In Afghanistan, the first constitution was drafted by a popular, religious ruler, and it contained innovative rights and freedoms but no Islamic supremacy clauses. This provoked a strong conservative reaction and the constitution and the regime that promulgated it ultimately collapsed. Its successor constitution of 1931, which lasted over three decades, contained rights but also contained robust Islamic supremacy clauses. The new monarch, having witnessed the revolt that toppled his predecessor, would certainly have been cognizant of the adverse reactions a constitution could provoke if it contained rights and freedoms which could be seen as controversial. Considering his reputation as a “modernizer,” his decision then to include Islamic supremacy clauses in the constitution would then have been partly motivated by the desire to co-opt clerics and conservatives to his reform programs. In Afghanistan, unlike Iran, the constitution writing process had not been opened up to those outside of the monarchic circle, thus there was no element of coalitional compromise, yet Nadir Shah’s choice in adopting Islamic supremacy clauses could be seen as a preemptive attempt to stave off prospective opposition to the constitution.

Similarly, in the case of Iran in 1906, the promulgation of a first constitution that contained rights provoked strong reactions. In response, the inclusion of Islamic supremacy clauses in the supplementary

constitution could be seen as the “price” of including a bill of rights. In contrast with the Afghan case, in which the monarch simply promulgated a constitution in 1931 which contained Islamic supremacy clauses, constitution makers in Iran were constantly negotiating and debating the specific Islamic supremacy clauses and rights in the constitution. Although the motivations for including Islamic supremacy clauses in Iran and Afghanistan may have been similar in terms of pacifying opposition, the former case featured more extensive bargaining and negotiation, but the Afghan monarch was more interested in preempting any opposition to constitutionalism and rights, since the negative experience of his predecessor was still fresh. Bargaining was greater in Iran than in Afghanistan.

Iraq and Egypt present a similar contrast in the Arab world. Whereas the Islamic supremacy clauses were a key demand of Iraq’s largest group, the Shia, in Egypt the clauses were introduced by Sadat — along with new constitutional rights — to preempt opposition and legitimate his presidency. Whereas Nasser was in a strong position to dictate outcomes, Sadat was initially a weak ruler. The Iraqi negotiations in contrast reflected the familiar dynamic of a negotiated balance between rights and Islam, in which both sets of promises were incorporated as a form of mutual insurance against downstream lawmaking.

Our finding of the co-occurrence of rights and Islamization has several implications. At the broadest level it is consistent with the work of scholars who have suggested the basic compatibility of Islam and constitutional democracy.⁴¹⁰ In this sense, it suggests that those outsiders monitoring constitution-making in majority Muslim countries — who argue for the exclusion of Islamic clauses — are focused on a straw man. Not only are these clauses popular, but they are accompanied by a set of provisions that advance basic values of liberal democracy. Like rights provisions, Islamic clauses certainly do not resolve all downstream disputes over their precise meaning. However, this in turn suggests that constitutional advisors should focus more attention on the basic political structures of the constitution, including the design of constitutional courts and other bodies that will engage in interpretation. The project of balancing rights and Islam cannot but be resolved in each country through its own political and judicial processes, and it is these which should be the main focus in constitutional design.

410. *Id.* at 884 (stating that in Iraq, “more democracy meant more Islam”).

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