
CONSTITUTIONAL PROVISIONS MAKING SHARIA “A” OR “THE” CHIEF SOURCE OF LEGISLATION: WHERE DID THEY COME FROM? WHAT DO THEY MEAN? DO THEY MATTER?

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Since 1950, a large number of Arab countries have enacted constitutions containing provisions that declare Islamic norms to be a source of legislation. The wording of these provisions varies in subtle but significant ways. Arab constitutions use different terms to describe the Islamic norms that serve as a source of law. Some refer to “*fiqh*,” others to “sharia,” and still others to “the principles of sharia.” Furthermore, these constitutions characterize the role of Islamic norms differently. Most clauses describe Islamic norms either as “a chief source of legislation” (*masdar^{um} raisi^{um} li'l tashri'*) or as “the chief source of legislation” (*al-masdar al-raisi li'l-tashri'*),¹ although a few use slightly different formulations.² Many constitutions drafted or amended in the wake of the so-called Arab Spring of 2011 are likely to include such sharia-as-source-of-legislation (“SSL”) provisions.

Where did SSL provisions come from, and what do they accomplish? Today, most academics and policy makers seem to accept that the impact of an SSL provision will depend on its wording. Provisions making Islamic norms “a chief source” of legislation have never been understood to require that state legislation be consistent with sharia norms; conversely, constitutions making sharia norms “the chief source” or “the only source” of legislation have always been understood to create such a requirement.³ The distinction is important, they believe, because a

1. See, e.g., DUSTUR JUMHURIYYA AL 'ARABIYYA AL-SURIYYA [CONSTITUTION] Feb. 24, 2012, art. 3 (Syria), available at <http://www.sana.sy/ara/369/2012/02/24/400634.htm>, translated at <http://www.sana.sy/eng/337/2012/02/23/401178.htm> (providing that Islamic norms will be “a chief source of legislation”); DUSTUR [CONSTITUTION] July 13, 1999, art. 1 (Qatar), translated at <http://english.mofa.gov.qa/details.cfm?id=80> (stating that Islam and sharia law will be “a chief source” of legislation). The word I translate here as “chief” (*raisi*) is often translated as “principal.” For an explanation of why I prefer the term “chief,” see Clark B. 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, 87 (1998) (explaining that “[t]he *rai*'s of something is usually its leader or most important part”).

2. A few describe the role of sharia norms in other ways, for example, as “the source” or as “a foundation source of legislation.” Such alternate renditions are, however, outliers. See, e.g., DOUSTOUR JUMHOURIAT AL-IRAQ [CONSTITUTION] OF 2005, art. 2, sec. 1 (Iraq), translated at www.uniraq.org/documents/iraqi-constitution.pdf (stating that Islam is “a foundation source of legislation”).

3. This position is sometimes asserted within the Arab world itself and is extremely common among non-Arab observers. See, e.g., Ashley S. Deeks &

constitution that requires legislation to respect Islamic law is inconsistent with liberal values. Working from these assumptions, the U.S. government in 2004 worked hard to prevent the government of occupied Iraq from drafting a constitution that made Islam "the chief source" of legislation.⁴ More recently, media accounts of constitutional deliberations in Arab countries have followed closely the debates about whether to make Islamic norms "the chief source of legislation." These accounts have implicitly assumed that the role of Islam in the legal system will be determined largely by the outcomes of these debates.⁵

Matthew D. Burton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INT'L L.J. 1, 5–11 (2007) (noting that, during the drafting of the Iraqi Constitution, Shia Islamists advocated for inclusion of a provision making Islam "the" chief source of legislation, while the United States, Kurds, and other secular Iraqis feared that making Islam "the" chief source rather than "a" chief source would result in Iraq becoming a strictly Islamic state to the exclusion of rights, protections, and secular influences).

4. See Gihane Tabet, *Women in Personal Status Laws: Iraq, Jordan, Lebanon, Palestine, Syria*, at 10 UNESCO SHS (SHS Papers in Women's Studies/Gender Research Paper Series 10 No. 4, 2005) (emphasis added), available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Women_in_Personal_Status_Laws.pdf (reporting that, in 2004, U.S. Transitional Administrator Paul Bremer stated that, in occupied Iraq, "Islam is the official religion of the Iraqi State and one of the sources of the law," but clarified that Islam is "not . . . the main source of the law" and insisted that he would veto any draft constitution for an independent Iraq that made Islam the chief or principal source of legislation). One year later, U.S. figures had not changed their view on the implications of adopting a constitution that made Islam "the" chief source of legislation. In an August 14, 2005, CNN interview, Ambassador Zalmay Khalilzad opined: "The difference between 'the' and 'a' source, or a principal source, is that there are other sources that also have to be respected and taken into account. That's the principles of democracy, principles of human rights, and we do not want to see a hierarchy of sources. And I believe that ultimately, the answer will be 'a', not 'the', and that these other sources will also have to be recognized as important sources of laws in this new Iraq." Interview by Wolf Blitzer with Zalmay Khalilzad, U.S. Ambassador to Afg. (Aug. 14, 2005), available at <http://transcripts.cnn.com/TRANSCRIPTS/0512/11/le.01.html>.

5. See, e.g., Kareem Fahim, *Tunisia Says Constitution Will Not Cite Islamic Law*, N.Y. TIMES (Mar. 26, 2012), <http://www.nytimes.com/2012/03/27/world/africa/tunisia-says-constitution-will-not-cite-islamic-law.html> (noting that, when Tunisia's main Islamist party said in 2012 that it would accept a constitution that did not mention Islamic law as a source of legislation, it was "signaling a forceful break with ultraconservatives who have been demanding an Islamic state"); Edyer Peralta, *Interim Leader Says Sharia Law Will Guide Libya*, NAT'L PUB. RADIO THE TWO-WAY BLOG (Oct. 24, 2011, 6:26 PM), <http://www.npr.org/blogs/the-two-way/2011/10/24/141668281/interim-leader-says-sharia-law-will-guide-libya>

This article will examine the history of SSL clauses in the Arab world. It will discuss how such clauses came to be included in Arab constitutions in the first place and how different clauses have been interpreted over the years. It will demonstrate that Arab understandings of these clauses have evolved over time. If we focus on the way in which SSL clauses have recently been interpreted and applied, the conventional wisdom of many Western academics, policy makers, and journalists is partly correct. In some ways, however, it may need to be revised.

Part I will provide background necessary to understand why Arabs, starting in the 1950s, began to adopt provisions describing sharia as a “source” of legislation. Parts II and III will survey all the Arab countries that adopted SSL provisions from 1950 to the start of the Arab Spring—discussing countries in the order that they adopted a clause. For each country, this article will look at the circumstances under which the country decided to adopt its SSL provision and why that country chose to phrase the SSL clause in the way that it did. It will then briefly explore how courts in these countries have to date interpreted and applied the national SSL provision. Part IV will explore the conclusions that we can draw from the history of SSL clauses.

Part IV begins by arguing that, if we focus on the way in which SSL clauses are interpreted today, the conventional wisdom about their meaning needs to be refined. When they first appeared, SSL clauses, no matter how they were worded, were thought to be ambiguous about whether the state can legislate in a way that violates sharia principles. After decades of debate about the meaning of these clauses, Arabs have taken a large step toward the positions described above. Provisions stating that Islamic law is *the* chief source of legislation are generally understood today to mean that states are constitutionally barred from enacting un-Islamic legislation. This is consistent with the conventional wisdom. The conventional wisdom may be wrong, however, to say categorically that constitutions containing weaker SSL provisions (or contain no

(reporting that the decision by Libya’s transitional government in 2011 to enact a transitional constitution designating Islamic law as the “main source” of legislation “will place Libya alongside Arab nations such as Egypt and Iraq that ensure that no laws contradict the tenets of Islam”).

SSL provision at all) will be interpreted to create no judicially enforceable constitutional bar on un-Islamic legislation. Under certain circumstances, a constitution that does not make Islamic law *the* chief source of legislation will be interpreted to prohibit un-Islamic legislation.⁶ Part IV goes on to argue that conventional wisdom may exaggerate the impact that constitutional prohibitions of un-Islamic legislation have on the viability of the liberal legal order. The article will conclude with some brief thoughts about the possible policy implications of my findings.

I. BACKGROUND

SSL clauses first appeared in the 1950s, when a new Syrian constitution declared that "Islamic *fiqh* [traditional scholarly interpretations of Islamic law] shall be the chief source of legislation."⁷ At the time, this clause was *not* understood to require that all state law be derived from *fiqh*. To understand what the drafters of the Syrian constitution and the Syrian public thought the clause meant, it is helpful to have some background about the evolution of Islamic legal and political theory.

In the pre-modern era, some states recognized an obligation to ensure that all laws applied in their courts were (a) consistent with a handful of core scriptural rules that the traditional class of religious scholars, known as the *fuqaha'*, recognized as unambiguous and (b) did not harm what the *fuqaha'* recognized as the legitimate interests of Muslim society.⁸ Nathan Brown and Adel Omar Sherif have

6. This may be because courts believe that a weak SSL clause must be interpreted in light of other constitutional provisions and state practice and that, in context, it implies a ban on un-Islamic legislation. Alternatively, it may be because the constitution contains other provisions that can be interpreted as establishing an independent bar on un-Islamic legislation. Constitutions whose SSL clauses make sharia something less than "the chief source" of legislation may still be interpreted to require state respect for sharia principles.

7. AL-DUSTUR AL-SURI [CONSTITUTION] Sept. 5, 1950 (Syria).

8. See Frank Vogel, *Siyasa, Part III (In the Sense of Siyasa Shari'a)*, in ENCYCLOPEDIA OF ISLAM 695 (3d ed.) (locating the origins of *siyasa shar'iyya* in works from the eleventh century of the Common Era). The concept is most famously associated, however, with the work of the thirteenth- to fourteenth-century scholar Ibn Taymiyya, who wrote a book called *al-Siyasa al-Shar'iyya*, and that of his disciple Ibn Qayyim al-Jawziyya, who wrote extensively on the concept. See generally IBN TAYMIYYA, AL-SIYĀSA AL-SHAR'ĪYYA FĪ IṢLĀH AL-RĀ'Ī WA AL-RA'ĪYYA repr. (1988); IBN QAYYIM AL-JAWZIYYA, THE LEGAL

demonstrated that a number of nineteenth-century Arab constitutions, along with some constitutions in the Persian world, implicitly seemed to recognize that principle.⁹ In the early twentieth century,

METHODS IN ISLAMIC ADMINISTRATION (Ala'eddin Khorfa trans., 2000). For analyses of Ibn Taymiyya's thought, see generally ANN S. LAMBTON, STATE AND GOVERNMENT IN MEDIEVAL ISLAM 143–51 (1981) (noting that Ibn Taymiyya's work centered on the central role that *shar`iyya* and service to God should play in modern governments); HENRI LAOUST, ESSAI SUR LES DOCTRINES ET POLITIQUES DE TAKI-D-DIN AMAD B TAIMIYA 278–318 (1939); ERWIN ROSENTHAL, POLITICAL THOUGHT IN MEDIEVAL ISLAM 51–61 (1958) (explaining that Ibn Taymiyya focused more on the ideal Muslim community governed by *shar`iyya* under Muslim prophets and lawmakers, rather than the political realities of the time). Among legal historians, there is some debate about whether early theorists of *siyasa shar`iyya*, such as Ibn Taymiyya and Ibn Qayyim al-Jawziyya, believed rulers must defer to the judgment of the *ulama* on the crucial questions of when the scriptures clearly required something or on whether a law served the public interest. Compare Vogel, *supra*, with Barber Johansen, *A Perfect Law in an Imperfect Society: Ibn Taymiyya's Concept of "Governance in the Name of the Sacred Law,"* in THE LAW APPLIED: CONTEXTUALIZING THE ISLAMIC SHARIA, 259–94 (Peri Bearman et al. eds., 2008) (arguing that Ibn Taymiyya and Ibn Qayyim al-Jawziyya saw the legal analysis of the *ulama* as merely "interpreted laws" that are "respectable products of qualified human reasoning but as such . . . cannot command general obedience and do not, therefore, qualify as the law that should be applied by the political authorities"). This appears to have been accepted in some of the important empires and provided a model going forward. Such an interpretation of the principle became fully institutionalized and bureaucratized in the Mediterranean during the period of the Ottoman Empire.

9. See Nathan J. Brown & Adel Omar Sherif, *Inscribing the Islamic Shari'a in Arab Constitutional Law*, in ISLAMIC LAW AND THE CHALLENGES OF MODERNITY 57–59 (Yvonne Haddad & Barbara Stowasser eds., 2004) (noting, for example, the use of "Islamic political vocabulary" in the 1861 Tunisian Constitution and the institutionalization of Islam as the state religion in the 1876 Ottoman Constitution). On the incorporation of the principle into the Ottoman Constitution, see HASAN KAYALI, ARABS AND YOUNG TURKS: OTTOMANISM, ARABISM, AND ISLAMISM IN THE OTTOMAN EMPIRE, 1908–1918 23 (1997) (describing the "Young Ottoman" movement of 1876, contemporaneous with the 1876 Constitution, which attempted to harmonize modern constitutional principles with Islamic law); see also Brown & Sherif, *supra*, at 59 (explaining that the 1876 Ottoman Constitution granted the sultan, who had absolute authority, the duty to execute sharia law). On the incorporation of an analogue of this principle into the 1906 Persian Constitution and Afghan Constitutions, see Supplementary Fundamental Laws of Persia of Oct 7, 1907, arts. 1–2 (Iran), translated in EDWARD G. BROWNE, THE PERSIAN REVOLUTION OF 1905–1909 372–73 (1910) (establishing Islam as the official religion of Persia and providing that the laws of Persia may not "be at variance with" Islamic principles and law); NIZAMNAMAH-YE-ASASI-E-DAULAT-E-ALYAH-E-AFGHANISTAN [CONSTITUTION] Apr. 9, 1923, 20 Hamal 1302, arts. 21, 72 (Afg.) (M.A. Ansari, trans.), available at http://www.mpil.de/shared/data/pdf/constitution_1923-1302_english_nizamnamah-ye-asasi-e-daulat-e-aliyah-e-afghanistan.pdf

however, the rulers of Arab states began to challenge the idea that their laws would be illegitimate if they contradicted the traditional religious scholars' understandings of Islamic law. Accordingly, Arab constitutions during this period ceased to include any provisions indicating that the state was obliged to respect Islamic legal principles.¹⁰

States could stop recognizing the traditional principle of *siyasa shar'iyya* because Muslim society itself was coming to question the value of traditional interpretations of Islamic law. Muslims maintained their conviction that human salvation rested upon compliance with the *fuqaha*'s interpretation of Islamic law and that states must therefore respect this interpretation of Islamic law as well.¹¹ Many, however, did not. Some simply moved toward a secularist position.¹² Others struggled to develop an alternative,

(providing that court cases will be decided "in accordance" with sharia law and sharia law will be given "careful consideration" in the legislative process). All of these constitutions were drafted in countries that had no tradition of constitutional review, and they were clearly not designed to be enforced by courts. They do, however, reflect a public admission by the ruler of a constitutional monarchy that his legitimacy depended on his acting in a manner that is consistent with Islamic principles.

10. See generally NATHAN BROWN, CONSTITUTIONS IN A NON-CONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 35–66 (Shahrough Akhavi & Said Amir Arjomand eds., 2002). It is not entirely clear why majority Muslim nations shied away from adopting constitutional Islamization clauses for much of the twentieth century. With respect to the Arab world, Brown has suggested that Arab constitutions for much of the twentieth century were simply not designed to be "constitutionalist" documents. Arab elites during this period consistently drafted constitutions with an eye to giving the executive maximum flexibility to rule as it chose. The drafters of such constitutions had little appetite to promise in constitutional texts that they were bound to respect Islamic norms. While it was sometimes impossible to avoid making some gestures toward the protection of liberal rights provisions, such provisions were coupled with other provisions that allowed the government to define the scope of those rights or to avoid scrutiny of any violations of those rights. See *id.* at 63–66.

11. See *id.* at 165 (explaining that even as Arab governments in the twentieth century ceased deferring to the *fuqaha*' and traditional interpretations of sharia law, modern intellectuals, such as Rashid Rida, envisioned new government structures and constitutional orders that would still be based on sharia law and would rely heavily on consultations with the *fuqaha*').

12. See *id.* at 163 (noting that many Muslim intellectuals in the mid-twentieth century began to look toward Western scholars and models of government for inspiration).

“modern” understanding of Islamic law that Muslims should obey and that would inform the law of a modern Islamic state.¹³ Over time, constitutions would come to be drafted in a way that reflected this new understanding of an Islamic state. The rise of SSL clauses and the evolution of the public’s understanding of these clauses resulted from efforts to constitutionalize a new understanding of sharia and its role in the state.

In the early twentieth century, the Syrian-born Islamic thinker Rashid Rida influenced the thought of many Muslims around the Arab world and beyond, including most notably the early leaders of the Muslim Brotherhood. Like the traditional *fuqaha*, Rida argued that the state should apply law that was consistent with the clear scriptural principles and that served the public interest.¹⁴ Unlike them, he used a new, distinctly modern method of identifying clear scriptural principles, and he embraced an untraditional method of determining whether a state law advanced the public welfare. Rida’s younger contemporary, the great Egyptian lawyer, legal theorist, and code-drafter, Abd al-Razzaq al-Sanhuri, departed even more radically from the traditional theory of *siyasa shar’iyya*.¹⁵

13. *See id.* (remarking on the rise, during the mid-twentieth century, of modern Islamic intellectuals who criticized traditional Islamic scholars for their overly rigid approaches to sharia law).

14. HAMID ENAYAT, MODERN ISLAMIC POLITICAL THOUGHT 78–81 (1982) (noting that Rashid Rida sought an Islamic state both grounded in sharia law and able to address problems through dynamic interpretations of sharia law).

15. *See* Guy Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)*, in 29 STUDIES IN ISLAMIC LAW AND SOCIETY 1, 2 (Ruud Peters & A. Kevin Reinhart eds., 2007) (arguing that Sanhuri’s Egyptian Civil Code should be viewed “as part of the social discourse and historical context of its period,” rather than as an isolated and individualistic attempt at legal reform). The literature on Sanhuri is enormous and growing. In English, the first major study was a two-part article by Enid Hill. *See generally* Enid Hill, *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of ‘Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895–1971*, 3 ARAB L.Q. 33 (1988) [hereinafter Hill, *Pt. I*] (reviewing Sanhuri’s legal theories, his place in Egyptian legal history, and his early academic life); Enid Hill, *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of ‘Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895–1971*, 3 ARAB L.Q. 182 (1988) [hereinafter Hill, *Pt. II*] (providing an overview of Sanhuri’s participation in political life and contributions to Egypt’s Civil Code); Amr Shalakany, *Between Identity and Distribution; Sanhuri, Genealogy, and the Will to Islamise*, 8 ISLAMIC L. & SOC’Y 201 (2001) (providing a “genealogical study” of Sanhuri’s contributions to the Islamization and

Inspired by European nationalist legal theory, Sanhuri argued that a handful of principles, consistently followed at all times and places, could be identified as common to all the competing interpretations of Islamic law that traditional scholars had proposed over the centuries. For Sanhuri, the law of a modern Islamic state must be consistent both with those implicit principles and with the public interest.¹⁶ Many of these non-derogable principles were extremely general, and Sanhuri concluded that most rules found in modern European codes (codes that had been transplanted into the Arab world during the colonial era) were consistent with them.¹⁷ More controversially, he suggested that the public interest might actually *require* modern Arab states to apply (or continue applying) many of these transplanted European rules even though, in some areas, the government might reasonably decide instead to take a rule directly from the *fiqh* tradition.¹⁸

As Arab nations began to break free of colonial control in the mid-twentieth century, the *fuqaha'* continued to push unsuccessfully for the state to reform its laws so that they were consistent with the traditional theory of *siyasa shar'iyya*. Many of the most important Islamist political factions, however, allied themselves instead with modernist theories, and as Arab states began to de-colonize after World War II, modernist Islamist factions, particularly those who embraced Sanhuri's theory of Islamic law, strongly influenced the course of mid-century Arab legal reform. Sanhuri was commissioned to draft the new 1949 Civil Code for Egypt.¹⁹ Not surprisingly, this

modernization of Egyptian law).

16. See Shalakany, *supra* note 15, at 204 (noting Sanhuri's goals in modernizing Egyptian law were two-part, in that he hoped both to follow Islamic principles and promote social justice).

17. See *id.* at 228 (remarking that some readings of Sanhuri's contributions to the Egyptian Civil Code focus on “how his functionalist selections of Islamic law were made to coincide with modern European legislation”).

18. See *id.* at 234 (recalling an Egyptian Senate meeting in which Sanhuri was criticized for advocating for the codification of Egyptian case law, similar to codification in European states, to which he responded that codification would conform with Islamic law because Egyptian case law already conforms with Islamic law).

19. See Hill, *Pt. II, supra* note 15, at 182 (explaining that Sanhuri drafted the new civil code “using comparisons of more than 20 modern codes, the jurisprudence of the Egyptian courts, and the Islamic Shari'a”).

code retained a significant number of colonial-era rules.²⁰ Although the *fuqaha*' and Islamists associated with the Brotherhood criticized the code as only pseudo-Islamic,²¹ the code was widely celebrated in the Arab world and beyond as a successful attempt to harmonize Islamic with European law. In short order, many of the Arab states then emerging from colonial domination decided to adopt Sanhuri-inspired codes.²² By doing so, they could indigenize national legal systems, as well as ensure that the legal system remained consistent with essential elements of the transplanted European legal codes under which legal relationships had already been formed.²³ All of the so-called "Sanhuri codes" resembled the 1949 Egyptian Code. Thus, each arguably used Islamic law as a "source" of law in two different ways. First, each code assumed that embedded in the *fiqh* tradition were a limited number of extremely general principles induced from the *fiqh* tradition as a whole. Second, each code incorporated some actual rules from the *fiqh* tradition.

The Sanhuri codes recognized that the code might have "gaps"—meaning that a judge might face legal questions that could not be answered by reference to the rules in the code. The Sanhuri codes clarified that, in such a case, judges were supposed to fashion new

20. See *id.* at 187 (noting that the new civil code included provisions from previous legislation relating to inheritance, gifts, ownership of units in a building, building on leased property, risks and defects in purchases, and disposition of property during illness).

21. See FARHAT J. ZIADEH, *LAWYERS, THE RULE OF LAW, AND LIBERALISM IN MODERN EGYPT* 139 (1968) ("The utilization of *shari'ah* as only a supplement to other sources was unacceptable to the traditional groups, particularly those trained in *shari'ah* law."). For western commentary consistent with these criticisms, see, for example, HERBERY J. LIBESNY, *THE LAW OF THE NEAR & MIDDLE EAST* 95 (1975) (distinguishing between the Egyptian Civil Code, which compelled judges, in the absence of an applicable statute, to apply custom first and then sharia law, and the civil codes of Syria and Iraq, which compelled judges to prioritize sharia law over custom). *But see* Hill, *Pt. II, supra* note 15, at 189 (arguing that, due to the correlation between custom and sharia law in Egypt, the practical difference between the Egyptian Civil Code and the civil codes of Syria and Iraq is likely "negligible").

22. See Hill, *Pt. I, supra* note 15, at 39–40 (explaining that, with Sanhuri's assistance, Iraq, Syria, Libya, and Kuwait adopted civil codes similar to Egypt's, which were then used as models for legal reform in Qatar, Jordan, Bahrain, and the United Arab Emirates).

23. See *id.* (noting that the Sanhuri codes combined secular elements, a commitment to Islamic law, and a degree of indigenization specific to each state's legal history).

rules using roughly the same method Sanhuri had used to select rules for inclusion in the code.²⁴ Different codes, however, took different views about whether, when looking for rules to fill the gaps, judges should look first to try and find a rule from the *fiqh* literature that was both consistent with overarching principles *and* consistent with the public interests. Then, only if they failed to find such a rule, they should look to other sources. The Egyptian code was ambiguous on this point. When Syria adopted a Sanhuri code in 1949, it specifically instructed judges to look *first* to Islamic *fiqh* when filling gaps in legislation.²⁵ Shortly thereafter, Syria adopted the Arab world's first SSL clause.

II. THE FIRST SSL CLAUSE: ARTICLE 2 OF THE SYRIAN CONSTITUTION OF 1950

After independence in the mid-1940s, the Syrian government engaged in a series of legislative reforms culminating with the decision in 1949 to adopt a Sanhuri code.²⁶ One year later, a new

24. See, e.g., CODE CIVIL [C. CIV.] art. 1 (Egypt), *translated in* LIBESNY, *supra* note 21 (providing that, in the absence of an applicable statute, Egyptian judges should bridge the gap by applying custom, sharia law, principles of natural law, and rules of equity, in that order). Another feature of the new code, according to Sanhuri, is "flexibility." The new code, he says, "substituted 'flexible standards' in place of 'inflexible rules,' so that 'solutions can change when conditions change.'" Article 1 of the Egyptian code thus suggested that judges should develop rules that were consistent with custom—but Sanhuri seems to have understood that in Egypt, custom is *fiqh* as interpreted within that country over the centuries. On this point, see Hill, *Part II*, *supra* note 15 at 188–90. Some other countries wanted to stress more explicitly that judges who developed new laws to fill "gaps" in the code should begin with *fiqh*-as-historically-interpreted-and-applied-within-a-particular-country. When Kuwait adopted a new Civil Code with a provision identical to the Egyptian code, the official explanatory memorandum published alongside the code made clear that the "custom" to which judges should look first only referred to custom consistent with sharia. "[T]he learned commentator on the Civil Code regards the latter as already being the correct view of Kuwaiti law, even on the present wording of the Constitution. His Commentary is a learned piece of analysis which we must study in some detail because of its relevance not only as far as Kuwait is concerned (it is published with the Code and thus has legal force), but because it expounds on general principles which are important for other Arab countries as well." See William M. Ballantyne, *ESSAYS AND ADDRESSES ON ARAB LAWS* 62 (2000).

25. CODE CIVIL [C. CIV.] art. 1 (Syria), *translated in* LIBESNY, *supra* note 21.

26. Nabil Saleh, *Civil Codes of Arab Countries: The Sanhuri Codes*, 8 ARAB L.Q. 161, 161 (1993).

military government began to draft Syria's first post-independence constitution.²⁷ Islamists, led by the Muslim Brotherhood, pushed vigorously for the new constitution to contain a clause declaring Islam the official religion of the new state,²⁸ and in 1950 the Constituent Assembly produced a draft constitution establishing Islam as Syria's official religion.²⁹ Syria's religious minorities were horrified, and after a period of occasionally violent contest,³⁰ the provision was dropped. Apparently to mollify the disappointed Islamists, the final draft of the constitution included a provision carving out a role for Islamic law in the state. This provision did *not* explicitly require all state laws to be consistent with Islamic legal principles. Instead, it said only: "Islamic *fiqh* shall be the chief source of legislation (*al-fiqh al-Islami hu al-masdar al-raisi li'l tashri*')."³¹

What did this mean? In a 1952 article about the constitution, Majid Khadduri suggests strongly that Syrians believed that this provision would have little practical impact—less than a provision making Islam the official religion of the state and less than one requiring state law to respect Islamic law.³² Indeed, it seems to have been

27. See generally Majid Khadduri, *Constitutional Development in Syria: With an Emphasis on the Constitution of 1950*, 5 MIDDLE E. J. 137, 151 (1951) (providing a history of Syrian constitutions through 1951).

28. JORANAES REISSNER, IDEOLOGIE UND POLITICK DER MUSLIMBRUDER SYRIENS 379–91 (1980).

29. Khadduri, *supra* note 27, at 152.

30. RADWAN ZIADEH, THE MUSLIM BROTHERHOOD AND THE CONCEPT OF DEMOCRACY 5 (1973), available at https://www.csidonline.org/9th_annual_conf/Radwan_Ziadeh_CSID_paper.pdf.

31. AL-DUSTUR AL-SURI 9/5/1950 [Syrian Constitution of September 5, 1950] Arabic Version, reprinted in YUSUF Q. KHOURY, AL-DUSATIR FI'L 'ALAM AL-'ARABI 1839–1987: NUSUS WA TA'DILAT [THE CONSTITUTIONS OF THE ARAB WORLD 1839–1987: TEXTS AND AMENDMENTS] 259–71 (1989), available at <http://www.righttononviolence.org/mecf/wp-content/uploads/1950/09/1950Syria.pdf>. Translation by author. Note that some secondary sources from the 1950s translate this provision into English as "Islamic law shall be the main source of legislation," thus rendering "al-*fiqh* Islami" as "Islamic law" rather than Islamic *fiqh* and "al-masdar al-raisi" as "main source" rather than "chief source." See, e.g., Fauzi M. Najjar, *Islam and Modern Democracy*, 20 REV. OF POL. 164, 169 (1958) (emphasis added) ("Islamic Law shall be the *main* source of legislation."); Khadduri, *supra* note 27, at 153 (emphasis added) ("Islamic Law shall be the *main* source of legislation.");

32. See Khadduri, *supra* note 27, at 152–53 (noting that this provision was likely included to appease the hardline Muslims after the removal of the provision

intended simply to describe the legal regime then in force in Syria—where the civil code had been drafted using Sanhuri’s distinctive method and where the family laws applicable to Muslims were drawn largely from *fiqh*. It was apparently not understood to create any requirement that going forward all laws be “consistent with *fiqh*.” Otherwise, Syria’s numerous non-Muslim minorities would have been likely to protest the provision, and they seem not to have done so.³³

The 1950 Syrian constitution was short-lived. After a short period of political turmoil, Syria joined with Egypt, which was then under the authoritarian rule of General Gamal Abd al-Nasir. The united entity, called the United Arab Republic (U.A.R.), adopted a 1958 constitution that did not mention Islamic law as a source of law. Syria seceded from the U.A.R. in 1961 and was governed by a provisional constitution. In 1973, Syria enacted a new permanent constitution, which again, pointedly, did not make Islam the official religion of the state. It also demoted Islamic *fiqh* from “the chief source of legislation” to “a chief source of legislation.” This clause survived in the 2012 constitution recently adopted by the embattled Assad regime in response to the uprisings after the Arab Spring.³⁴ The decision to demote *fiqh* from “the” to “a” chief source of legislation reflects the evolution of Arab thinking about SSL clauses during the 1960s and ’70s. By 1972, there was still debate about how to interpret clauses making Islamic norms “a” or “the” chief source of legislation. Nonetheless, it was considered safer for a country that did *not* want to constitutionally conform its laws to Islamic norms to describe those Islamic norms as “a” rather than “the” chief source of legislation.

establishing Islam as the state religion).

33. *See id.* at 152 (describing the violent uprising of Syria’s minorities in response to the provision establishing Islam as the state religion, and implying that the alternate decision to establish Islam as the source of legislation was seen as a compromise that would prevent further violence).

34. *See* DUSTUR JUMHURIYYA AL ‘ARABIYYA AL-SURIYYA [CONSTITUTION] Feb. 24, 2012, art. 3 (Syria), available at <http://www.sana.sy/ara/369/2012/02/24/400634.htm>, translated at <http://www.sana.sy/eng/337/2012/02/23/401178.htm> (providing that Islamic norms will be “a chief source of legislation”). Translation by author. The cited document was a “draft” that was put to referendum on February 26, 2012. According to the government, voters approved the new Constitution. *See Syria Says New Constitution Approved*, AL-JAZEERA (Feb. 27, 2012), <http://www.aljazeera.com/news/middleeast/2012/02/2012227132547956907.html>.

III. THE SPREAD OF ISLAMIC “SOURCE” CLAUSES: KUWAIT AND BEYOND

It was not until 1962 that a country other than Syria decided to draft a constitution that included an SSL clause. Thereafter, however, a growing number of Arab governments began to adopt them.

A. KUWAIT

For the first half of the twentieth century, the Emirate of Kuwait was effectively controlled by the British.³⁵ In the late 1950s, while still under effective British control, Kuwait had Sanhuri draft codes of legislation.³⁶ Shortly thereafter, in 1961, it achieved independence and was admitted into the United Nations.³⁷ At that point, it began to draft a constitution for the new state with the assistance of Egyptian advisors, among whom was apparently Sanhuri himself.³⁸ The constitution that the Emir developed with their assistance was reviewed and modified by a constituent assembly of both elected and appointed members.³⁹ The final constitution was ratified and

35. Ahmed Al-Suwaidi, *Development of the Legal Systems of the Gulf Arab States*, 8 ARAB L.Q. 289, 289 (1993).

36. See Hill, *Pt. II, supra* note 15, at 202 (“In 1959 [Sanhuri] went to Kuwait, where he decided against providing a civil code, but included much of what had constituted other civil codes in the Kuwaiti commercial code, provided a maritime law, a law of compensation, and a law establishing the primary courts.”); see also William Ballantyne, Paper Delivered to Middle East Association, 2 (Dec. 9, 2008), <http://www.serlecourt.co.uk/Members/Article.aspx?MemberID=16&ArticleID=43> (noting that, unlike Sanhuri’s civil codes, the commercial codes, including Kuwait’s, largely do not contain references to sharia law).

37. See Majid S. Hussain, A Critical Study of Constitutional and Judicial Development in Kuwait, 61–62 (June 2010) (unpublished Ph.D. dissertation, University of Newcastle Upon Tyne), available at http://www.academia.edu/1921861/A_critical_study_of_constitutional_and_judicial_development_in_Kuwait.

38. Ballantyne reports that the Kuwaiti constitution was drafted largely by Sanhuri. However, Nathan Brown reports that the Emir apparently worked with a number of Egyptian legal advisors to develop a constitution that drew upon the Ottoman Constitution of 1876 as a model but contained numerous provisions that reflected Kuwait’s unique history. See NATHAN J. BROWN, THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF 165–67 (Charles Tripp ed., 1997) [hereinafter BROWN, COURTS IN EGYPT AND THE GULF] (noting that the “chief drafter” of the Kuwaiti Constitution was Uthman Kalil Uthman, an Egyptian colleague of Sanhuri); BROWN, *supra* note 10, at 54–57 (providing the context for and details of the drafting process of the Kuwaiti Constitution).

39. BROWN, COURTS IN EGYPT AND THE GULF, *supra* note 38, at 165–66.

published in 1962,⁴⁰ along with an official "explanatory memorandum."⁴¹ It proved extremely influential in the Gulf region.⁴²

Kuwaiti society was highly traditional and steeped in a conservative Muslim ethos. Non-Muslim minorities were small. Article 2 of the new Kuwaiti constitution made Islam the official religion of the state and also declared "the Islamic *sharia* is a chief source of legislation" (*al-sharia al-islamiyya masdar^{um} raisi^{um} li'l tashri'*).⁴³ There appears to have been some concern that in this overwhelmingly Muslim society, a constitutional choice both to establish Islam *and* to make Islam "the chief source of legislation" might be read in combination to suggest a justiciable requirement that all Kuwaiti law respect Islamic principles. This probably explains why the Kuwaiti drafters departed from the wording of Syria's 1950 SSL clause in two ways.

First, Article 2 referred to *sharia* rather than *fiqh* as a chief source of legislation. Although some Muslims have used the term *sharia* as a synonym for *fiqh*, many do not. Given the influence of Sanhuri on the Kuwaiti constitution, the Kuwaiti drafters may have been signaling that the government had not and did not expect the

40. See DUSTUR DAWLAT AL-KUWAIT [CONSTITUTION] Nov. 11, 1962 (Kuwait), reprinted in YUSUF Q. KHOURY, AL-DUSATIR FI'L `ALAM AL-`ARABI 1839-1987: NUSUS WA TA`DILAT [THE CONSTITUTIONS OF THE ARAB WORLD 1839-1987: TEXTS AND AMENDMENTS] 409-418 (1989), available at <http://www.righttononviolence.org/mecf/wp-content/uploads/1962/11/1962Kuwait.pdf>, translated at <http://www.kuwaitconstitution.org/kuwaitconstitutionenglish.html>. Another online copy of the Kuwaiti constitution as amended to date can be found at http://www.wipo.int/wipolex/en/text.jsp?file_id=181002 (last visited May 27, 2012). As can be seen, there have been no significant amendments.

41. See KUWAITI COUNCIL OF MINISTERS, POLITICAL ORGANIZATION, <http://www.da.gov.kw/eng/kuwaitinfo/political.php> (last visited Jan. 9, 2013) ("The constitution of the State of Kuwait includes (183) articles and an explanatory memorandum.").

42. See William M. Ballantyne, *The Constitutions of the Gulf States: A Comparative Study*, 1 ARAB L.Q. 158, 158 (1986) (noting that, when the United Arab Emirates, Qatar, and Bahrain emerged as independent states in the early 1970s, they used the Kuwaiti Constitution as a model); cf. BROWN, *supra* note 10, at 59-61 (explaining that each of these countries modified the Kuwaiti Constitution in significant ways).

43. DUSTUR DAWLAT AL-KUWAIT [CONSTITUTION] Nov. 11, 1962, art. 2 (Kuwait), translated at <http://www.kuwaitconstitution.org/kuwaitconstitutionenglish.html>; see also Said Amir Arjomand, *Islamic Constitutionalism*, 3 ANN. REV. L. & SOC. SCI. 115, 123 (2007).

legislature to refer directly to rules of *fiqh* when it drafted future laws. Rather, the government would draw upon the universal principles of sharia that modern scholars like Sanhuri induced from the *fiqh*. Second, the Kuwaiti constitution made sharia “a” rather than “the” chief source of legislation. The implication of this change was unclear. On its face, it seemed to be that laws would need to be consistent not only with the universal principles of sharia but with other principles as well. Alternatively, it could be understood to say that the constitution permitted the state to adopt laws inconsistent with *sharia*—although they were consistent with some other “chief source.”

The constitution was published with an explanatory note that the courts were to use as official guidance. The note did not completely resolve the issue. It states that the legislature and executive can regulate society according to rules that are not drawn directly from *fiqh* and implies that they can adopt laws inconsistent with *fiqh*.⁴⁴ It is ambiguous about whether the state must always respect the fundamental principles of *sharia*.⁴⁵ As a practical matter, however, this ambiguity proved to be unimportant. Even if Article 2 required the government to legislate in accordance with the essential

44. Hussain, *supra* note 37, at 138 (characterizing the explanatory note as saying that Article 2 gave “the legislature an Islamic framework within which to include other sources of legislation wherever there was a void in Islamic jurisprudential legislation. In this case, it would be better to improve or develop legal provisions to be compatible with the necessities of environmental development”).

45. See Saba Habachy, *A Study in Comparative Constitutional Law: Constitutional Government in Kuwait*, 3 COLUM. J. TRANSNAT'L L. 116, 116–18 (1963) (reporting that, when the draft constitution was presented for final approval of the emir, it was accompanied by a letter, which may have been the “explanatory note,” which stated that the constitution was supposed to bring the principle of democracy to Kuwait in a manner that reflected the “factual situation in Kuwait.” However, Article 2 provides that the “factual situation” informing the way in which the principle of democracy was applied is defined by Kuwait’s commitment to Islamic law. In other words, it was a *descriptive* statement about Kuwait rather than a *prescriptive* statement about what Kuwait would have to do in the future). See Mohammad al-Moqatei, *Introducing Islamic Law in the Arab Gulf States: A Case Study of Kuwait*, 4 ARAB L.Q. 138, 142–43 (1989) (summarizing the concern of those who opposed an amendment to Article 2 making Islamic law “the chief source of legislation,” rather than “a chief source of legislation,” namely that such an amendment would invalidate several statutes and lead to “constitutional controversy,” in spite of the fact that Article 2 imposes a positive obligation on lawmakers to consider Islamic law).

principles of Islamic law, leading scholars seem to have believed that courts would have no power to hear cases challenging the legislature's judgment that they had complied with that requirement.⁴⁶ In keeping with this body of scholarly interpretation, Kuwait's Constitutional Court has consistently held that Article 2 does *not* give it the duty or power to strike down laws that it deems inconsistent with sharia norms.

In 1992, the Constitutional Court heard a case challenging the provisions of the Kuwaiti Civil Code that allow for the charging of interest.⁴⁷ The defendant argued that these provisions were inconsistent with sharia and should therefore be declared void under Article 2. The Court, echoing the explanatory memorandum, held that Article 2 made sharia "a source" and not "the only source" of law.⁴⁸ As such, the court held, the government could adopt rules such as this one irrespective of the fact that they are inconsistent with traditional interpretations of Islamic sharia.⁴⁹ In this opinion, the Court did not make clear whether it was denying the petitioner's assertion that Article 2 barred the state from enacting un-Islamic legislation or whether it was merely holding that states had no power to enforce the requirement.⁵⁰ More recently in *Nashi v. Dashti*, the

46. Hussain, *supra* note 37, at 138 (noting that Article 2 grants legislators some discretion in their consideration of Islamic law); *cf.* Al-Moqatei, *supra* note 45, at 142–44 (1989) (recalling a proposal in 1984 to amend Article 2, proponents of which argued that the Explanatory Note to the Constitution unambiguously required the legislature to adopt Islamic law).

47. Ballantyne, *supra* note 36, at 3 (citing Case No. 8/1992/Constitutional Court, at 5 (Kuwait)).

48. Hussain, *supra* note 37, at 297–98 (citing Case No. 8/1992/Constitutional Court, at 5 (Kuwait)).

49. Ballantyne, *supra* note 36, at 3 (citing Case No. 8/1992/Constitutional Court, at 5 (Kuwait)).

50. Many observers interpret this court opinion to say that Article 2 of the Kuwaiti constitution makes sharia only one source of law among many and does not bar the state from adopting laws inconsistent with sharia. *See* Hussain, *supra* note 37, at 297–98 (finding that the court held that "the constitutional text does not prevent the ordinary legislator from using other sources that he sees it suitable, without causing a constitutional contradiction"); *cf.* Ballantyne, *supra* note 36, at 3 (characterizing the Constitutional Court's decision as allowing the code in question to "evade" sharia law). It is possible, however, that it is saying something slightly different. Although Islamic jurists in the pre-modern world did not permit contracts charging interest, there is within the modern world a debate about whether the ban was correct. Many continue to argue that the traditional ban is correct. However, some leading Islamist thinkers have argued that there are no clear scriptural

Kuwaiti court again refused to overturn laws widely thought un-Islamic.⁵¹

Distressed by the implications of the memo and by the court cases just described, conservative Islamists in Kuwait have regularly called for Article 2 of the Kuwaiti Constitution to be amended. Some have suggested that the Islamic sharia should be made *the* chief source of legislation.⁵² Against the backdrop of Sanhuri's theory and the experience of Syria as described above, however, many Islamists seem to believe that even this clause might not be interpreted to require state legislation to conform to sharia either.⁵³ Thus, many have more dramatically called for sharia to be listed as *the only* source of legislation.⁵⁴ The most recent major push for such an amendment took place this past year.⁵⁵

principles that categorically preclude it and Sanhuri too was not able to induce an "essential" sharia principle precluding it. The court might thus be read to be reserving an opinion as to whether the law was inconsistent with sharia. In essence, it would be saying that the state is barred from enacting laws inconsistent with sharia but that cases of non-compliance with sharia are non-justiciable.

51. Jill Goldenziel, *Veiled Political Questions: Islamic Dress, Constitutionalism, and the Ascendance of Courts*, 61.1 AM. J. COMP. L. 1, 35–36 (forthcoming Jan. 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2061928 (citing *Al-Nashi v. Dashti et al.*, Constitutional Court of Kuwait (2009)) (holding that Law 17 (2005), which required women "in their candidacy and after election to comply with the rules and provisions adopted in Islamic Law," did not require female government officials to wear headscarves because the legislature may consider various interpretations of sharia law and various sources outside of sharia law in upholding the public interest and, if the legislature is at all bound by sharia law, it is only bound by those tenets it expressly adopts in legislation).

52. See Al-Moqatei, *supra* note 45, at 142 (describing the 1984 proposal to amend Article 2).

53. See discussion *supra* Part II.

54. See Al-Moqatei, *supra* note 45, at 141–44 (citing the arguments of the National Assembly members who proposed to amend Article 2, including that the Explanatory Note to Article 2 compelled the legislature to derive all of its laws from sharia).

55. See Ismail bin Matt, *Toward an Islamic Constitutional Government in Sudan* (unpublished manuscript), available at <http://www.amss.org/pdfs/35/finalpapers/IsmailbinMatt.pdf> (noting that thirty-one out of fifty members of Parliament support changes to the Constitution making sharia "the only source" of law in Kuwait); B. Izzak, *Amir Rejects Proposal to Amend Constitution – Islamists' Sharia Bid Thwarted – MP to Grill Social Affairs Minister*, KUWAIT TIMES (May 17, 2012), <http://news.kuwaittimes.net/2012/05/17/islamists-sharia-bid-thwarted-mp-to-grill-social-affairs-minister-amir-rejects-proposal-to-amend-constitution/> (reporting that the Amir rejected a request by Islamist members of

B. SUDAN

During the 1960s, Islamists in Sudan had been pushing for the state to adopt an “Islamic” constitution.⁵⁶ In 1968 a constituent assembly with Islamists in leadership positions proposed such a constitution. Article 113 of the proposed constitution said, “the principles of the Islamic Sharia are *the chief source of legislation*.”⁵⁷ Clearly fearing that this clause might by itself be insufficient to establish the principle that all law must respect Islamic principles, they also included in Article 114 a provision stating, “Every legislation passed after the adoption of this constitution in contravention with the provisions of *kitab* and *sunnah* (i.e., *Qur’an* and the [hadith literature]) should be void, provided that such contravention did not in essence previously exist.”⁵⁸ As a result of ongoing political turmoil and a military coup, this draft of the constitution was scuttled.⁵⁹ Eventually in 1973, a new president enacted a new constitution that ambiguously made both the Islamic sharia and custom (‘urf) simultaneously “the two chief sources of legislation” [*al-Sharia al-Islamiyya wa’l-’urf masdar^{an} ra’isi^{an} li’l-tashri*’].⁶⁰ Because the courts never had an opportunity meaningfully to construe this provision, we cannot

Parliament to amend Article 79 of the Constitution to require that all laws comply with sharia law); Al-Rai, *Islamist MPs to Go Ahead with Constitutional Amendments*, KUWAIT TIMES (May 19, 2012), <http://news.kuwaittimes.net/2012/05/19/islamist-mps-to-go-ahead-with-constitutional-amendments/> (reporting that, in spite of the Amir’s rejection of their Article 79 amendment, Islamist members of Parliament will continue in pursuit of “Islamization of laws” and will eventually propose another Article 2 amendment).

56. See Ali Suleiman Fadall, *Constitution Making in the Sudan*, 4–6 (unpublished manuscript), available at http://unmis.unmissions.org/Portals/UNMIS/Constitution-making%20Symposium/110524_Ali%20Suleiman_paper_dft2.pdf (describing Sudan’s attempts to draft an “Islamic” constitution from independence in 1953 until the adoption of a draft Islamic constitution in 1968).

57. See bin Matt, *supra* note 55 (citing DRAFT CONSTITUTION, 1968, art. 113 (Sudan)) (emphasis added).

58. See *id.* (citing DRAFT CONSTITUTION, 1968, art. 114 (Sudan)).

59. Fadall, *supra* note 56, at 5–6 (recalling that the 1968 Draft Constitution was substantially revised before formal adoption in 1973).

60. See THE PERMANENT CONSTITUTION OF THE SUDAN, 1973, art. 9 (Sudan) available at <http://www.righttononviolence.org/mecf/wp-content/uploads/1973/01/1973Sudan.pdf>, translated at <http://www.righttononviolence.org/mecf/wp-content/uploads/2012/01/Constitution-Sudan-1973-+-amendment-1975.pdf>.

speculate about how it was interpreted.⁶¹

In the 1980s a series of military regimes in the Sudan decided to compensate for their lack of democratic legitimacy by reaching out to Islamists. They revised statutes to make them conform to Islamic law. In 1998, the second of these regimes drafted a new constitution that reflected the concern that provisions making Islamic norms “a chief source” or “the chief source” continued to be ambiguous on the key question of whether all state law would have to respect those norms. The 1998 Constitution, like the earlier 1968 Constitution, declared Islamic law to be one of “the sources” of legislation and then stated explicitly that no law could be inconsistent with Islamic law or any of these other sources.⁶² Importantly, the Constitution

61. This is for two reasons. First, the government enacted reforms that greatly limited the ability of the judiciary to exercise judicial review. *See* Fadall, *supra* note 56, at 6 (noting that, after another attempted military coup, the constitution was amended to increase the power of the president to the point that “the constitution became what the president thought it should be”). At the same time, whether or not courts thought it was required to, the military government began a process of radical legislative Islamization—one that obviated the need for Islamists to bring cases arguing that the government was acting in a manner inconsistent with Islam. For the process of Islamization in the Sudan, see generally 13 CAROLYN FLUEHR-LOBBAN, *ISLAMIC LAW AND SOCIETY IN THE SUDAN* (1987) (providing an overview of the role of Islam in Sudanese society based on anthropological research conducted in the 1970s); Olaf Köndgen, *Sharia and National Law in the Sudan in* SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 181 (Jan Michiel Otto ed., 2010) (mapping the application of sharia law in Sudan from the sixteenth century to 2010 and arguing that, after more than twenty years of increasing Islamization, the threat of war with South Sudan has eclipsed Islamization as the government’s highest priority); AHARON LAYISH & GABRIEL R. WARBURG, *THE REINSTATEMENT OF ISLAMIC LAW IN SUDAN UNDER NUMAYRI* (Rudd Peters & Bernard Weiss eds., 2002) (analyzing the methods used by President Muhammad Ja’far Numayri to reinstate sharia law in Sudan in 1983 and the results of this “experiment” for Sudanese society); Carolyn Fluehr-Lobban, *Islamization in Sudan: A Critical Assessment*, 44 MIDDLE E.J. 610 (1990) (examining the parallel between the rise of Islamization in northern Sudan and the rise in conflict between northern Sudan and southern Sudan, culminating in both the imposition of sharia law and the outbreak of civil war in Sudan).

62. *See* THE CONSTITUTION OF THE REPUBLIC OF THE SUDAN art. 65, *translated in* THE NAME OF GOD, THE GRACIOUS, THE MERCIFUL: THE CONSTITUTION OF THE REPUBLIC OF THE SUDAN (Max Planck Inst. for Comparative Public Law & International Law, 1998) (“Islamic law and the consensus of the nation, by referendum, Constitution and custom shall be the sources of legislation; and no legislation in contravention with these fundamentals shall be made; however, the legislation shall be guided by the nation’s public opinion, the learned opinion of

explicitly denied the courts the power to enforce this provision—leaving the question of whether the law was consistent with Islam to be resolved by the political branches. To the best of my knowledge, there is no record of how the existence of the clause has affected the actual process of legislation.

C. YEMEN ARAB REPUBLIC

After the overthrow of the imamic monarchy in 1962,⁶³ the Yemen Arab Republic imposed a series of temporary constitutions, many of which proposed Islam as the only source of law and at least one of which contained an explicit repugnancy clause requiring that no law contravene *sharia* principles.⁶⁴ In 1970, however, Yemen finally formed a constituent assembly that was tasked with the job of drafting a new constitution that reflected the popular will. As they carried out their work, the drafters debated the role of Islam. Interestingly, it appears that younger politicians who were considered relatively secular suggested that sharia be made merely “the chief source of legislation” on the grounds that this would allow the state to enact laws that were not drawn from *fiqh*.⁶⁵ It is unclear whether they thought such a provision would permit governments to adopt laws that were inconsistent with the narrower range of principles that Islamic modernists would recognize as the essential principles of sharia. In response, hard-line Islamists demanded successfully that the 1970 Constitution make Islam “the source of all legislations” (*al-sharia al-islamiyya masdar jami’ al-tashri’at*).⁶⁶ This language was included in Article 3 and in the 1991 Constitution that is currently in force.⁶⁷

scholars and thinkers, and then by the decision of those in charge of public affairs.”).

63. See generally PAUL DRESCH, A HISTORY OF MODERN YEMEN 89–119 (2000) (providing a history of Yemen and a discussion of the overthrow of the Imamic regime).

64. See Al-Tayib Zain al-Abidin, The Role of Islam in the State: Yemen Arab Republic 1940–1972, 108–14 (1975) (unpublished Ph.D. dissertation, Cambridge University) (on file with author).

65. See *id.* at 118.

66. PERMANENT CONSTITUTION OF THE YEMEN ARAB REPUBLIC, Dec. 28, 1970, art. 3, translated in *Translation: Constitution of the Yemen Arab Republic*, 25 MIDDLE E. J. 389 (1971).

67. *Id.*

More scholarship needs to be done into the courts' interpretation and application of Yemen's SSL clause. The clause is embedded in a constitution that indicates through all sorts of other provisions a desire to create a justiciable requirement that law respect sharia principles as understood by Islamic scholars.⁶⁸ Published reports confirm that the court does, in fact, review laws for consistency with Islamic principles.⁶⁹ There has been no systematic study, however, of its case law. More studies would need to be undertaken before we could speak with any confidence about the method that the courts are using.

D. EGYPT

Egyptian legal advisors assisted in the drafting of many of the Arab constitutions that made sharia norms a chief source of legislation. Ironically, Egypt itself came late to the ranks of countries that adopted a sharia source-of-law clause. Egypt's 1923 Constitution made Islam the religion of the state, but it did not declare Islamic law a "source" of legislation.⁷⁰ In 1952, a military coup led to the dissolution of the 1923 Constitution.⁷¹ For almost thirty years thereafter, a government led by Jamal Abd al-Nasir governed Egypt under a series of temporary constitutions that did not

68. *See id.* (highlighting the fact that Article 8 insists that fundamental rights shall be only be interpreted and enforced as permitted by sharia and by legislation; that Article 79 requires the heads of the executive branch to swear before the parliament that they will respect God and his law; that Article 155 declares that all the members of the Supreme Constitutional Court shall be "Shari'ah scholars of high qualifications"; and that Article 156 requires judges to swear before parliament that they will follow the book of God and the law of his Prophet). *See generally* BROWN, *supra* note 10, at 87–89.

69. *See generally* Chibli Mallat, *Recent Judgments from the Yemen Supreme Court*, 2 ISLAMIC L. J. 71 (1995) (describing a particular case where the court used a method of reasoning that included reviewing the laws for consistency with Islamic principles).

70. *See* Mohamed Abdelaal, *Religious Constitutionalism in Egypt: A Case Study*, 37 THE FLETCHER F. OF WORLD AFF. 35, 36 (2013) (noting that, while Article 149 of Egypt's 1923 Constitution inserted Islam as the religion of the state, Islamic law was not inserted as a source of legislation until President Mohamad Anwar el-Sadat assumed power in 1970 and proposed to add the phrase into the Permanent Egyptian Constitution of 1971).

71. *See* Kristin A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 722 (2004) (recounting that the current constitution of Egypt is its fourth constitution since the 1952 military coup that ended the monarchy and dissolved the 1923 Constitution).

include an SSL clause.

By the late 1960s, however, Nasir’s government had begun to face serious popular discontent, including discontent from Islamists.⁷² After the death of President Nasir in 1971, Egypt’s new president, Anwar Sadat, decided to draft a new constitution that would reach out to a wide variety of constituencies in Egypt, including Islamists.⁷³ In appealing to Islamists, Egypt’s constituent assembly decided to adopt an SSL clause.

Bruce Rutherford, who did exhaustive work on the drafting of the Constitution, reports that the decision to adopt an SSL clause was uncontroversial.⁷⁴ A member of the Constitutional Drafting Committee proposed to include a provision stating, “the principles of the Islamic sharia are a chief source of legislation.” He added that such language was consistent with Article 1 of Sanhuri’s 1949 Civil Code and was similar to constitutional provisions that had already been incorporated into the constitutions of other countries.⁷⁵ The SSL clause was adopted without any further discussion.⁷⁶

Interestingly, when the draft was made public, a public discussion erupted about the choice of wording—one that would shape Egyptian views about the meaning of SSL clauses and ultimately would shape views around the Arab world. The debate began when someone wrote a letter to the editor arguing that it would be preferable to say that the principles of Islamic sharia were “the” rather than “a chief source of legislation.”⁷⁷ A leading member of the committee felt obliged to respond. He argued that this would limit the flexibility of the legislature and force it to legislate in accordance with classically

72. Clark B. Lombardi, *The Constitution as Agreement to Agree: The Social and Political Foundations (and Effects) of the 1971 Egyptian Constitution*, in *THE SOCIO-POLITICAL FOUNDATIONS OF CONSTITUTIONS* (Dennis Galligan & Mila Versteeg eds., forthcoming 2013).

73. Bruce Rutherford, *The Struggle for Constitutionalism in Egypt: Understanding the Obstacles to Democratic Transition in the Arab World* 246–48 (1999) (unpublished Ph.D. dissertation, Yale University) (providing details on the involvement of several members of the Islamic religious establishment on the committee responsible for drafting the new constitution, including their attempts to get elements of Islamic constitutionalism in the new constitution).

74. *Id.* at 249–50.

75. *Id.* at 249.

76. *Id.*

77. *Id.*

trained *'ulama*.⁷⁸ This argument would seem to overstate in many ways the importance of the proposed change. The experience of Syria, Sudan, and Yemen makes clear that a clause making Islam “the chief source of legislation” could plausibly be interpreted *not* to create a justiciable requirement that all state law conform to sharia norms.⁷⁹ Furthermore, most Egyptians who wanted the constitution to create a justiciable requirement that the law respect sharia principles were modernists who did not necessarily expect courts to rely on the *fuqaha*'s interpretation of sharia and indeed most likely expected lay judges to interpret and apply the principles themselves using modernist methods of reasoning.⁸⁰

Whatever the shortcomings of this response, it inspired a new raft of letters to the editor in major Egyptian newspapers.⁸¹ The ensuing debate seems to have nurtured a popular perception among Egyptians that a provision making sharia “a” chief source of legislation did not create a justiciable requirement that legislation conform to sharia

78. See Joseph P. O’Kane, *Islam in the New Egyptian Constitution: Some Discussions in “al-Ahram,”* 26 MIDDLE E. J. 137, 141 (1972) (relaying the committee members’ opinion that, similar to Kuwait’s constitution, recognizing “shar[ia] as a principal source of legislation” allows legislators to adapt to changing circumstances in society if need be by allowing them to reference sources other than sharia while still generally imposing an Islamic orientation); see also Rutherford, *supra* note 73, at 250 (arguing that making sharia the sole source of legislation would impose unacceptable restrictions on legislators especially regarding the economy and personal status legislation). See generally CLARK B. LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT* (Rudd Peters & Bernard Weiss eds., 2006) (using the example of Egypt’s inclusion of an SSL clause in Article 2 of its 1971 Constitution to discuss the effect that “constitutional Islamization” has on the legal system already in place and attempts by a country to modernize, particularly in terms of human rights or financial legal issues).

79. See discussion *supra* Parts II, III(B), (C).

80. See generally LOMBARDI, *supra* note 78, at 117–18.

81. See O’Kane, *supra* note 78, at 138 (dividing the positions taken by the authors of the letters into three categories: those who wanted to see Islam declared the state religion; those requesting that Islam at least be recognized as a source of legislation, if not the only source; and those seeking an improvement in the status of women and the modernization of laws regarding marriage and family life). Compare LOMBARDI, *supra* note 78, at 117–18 (analyzing the debate of whether sharia should be “a” source of legislation versus “the” source of legislation), with Rutherford, *supra* note 73, at 250 (providing details of the position held by the most influential member of the constitutional drafting committee and his belief that making sharia *the* source of legislation would severely hamper the ability of the legislators to create laws helping Egypt on its path toward democratic government).

principles, whereas a provision making sharia “the chief source” of legislation *would* create such a requirement. Thus, as Islamism grew in Egypt during the 1970s, Islamists sought to amend the Constitution to make the principles of the Islamic sharia *the* chief source of Egyptian legislation—fully expecting such a provision to be interpreted as one that would require courts to void any law inconsistent with sharia.

In 1980, in an attempt to reach out to Islamists, the Egyptian government decided to signal a new commitment to ensuring that its legislation was consistent with Islam. To signal this commitment, it amended Article 2 of the Constitution and made the principles of the sharia “the chief source of legislation.” At roughly the same time, a new constitutional court was established, and in a seminal 1985 ruling, the new court held that Article 2 as amended created a partially justiciable requirement that law conform to Islamic principles.⁸² Challenges to the Islamicness of legislation enacted prior to 1980 were non-justiciable, while challenges to legislation enacted thereafter were not. The court thereafter began to perform Islamic review of new legislation. In subsequent years, the court developed the Arab world’s most expansive body of Islamic review jurisprudence. This jurisprudence made clear that the constitution did not require the government to legislate in line with the *ulama*’s interpretation of Islamic law; rather, it only had to legislate in line with universal principles identified through a modernist-inspired method of interpretation—one that clearly drew heavily on the work of thinkers like Rashid Rida and Sanhuri.⁸³ The state was thus constrained by only a limited number of rules and principles, most of which were quite general. Among them was a principle that the state had to act in the public interest. In applying this theory, it left the legislature considerable discretion to act in the public interest. To the

82. See 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, 392 (2005) (describing the court’s 1985 ruling that resolved the threshold question of justiciability as “politically ingenious” by holding that the SCC had jurisdiction to hear challenges to legislation enacted after Article 2 was adopted).

83. See LOMBARDI, *supra* note 78, at 118–19; Lombardi & Brown, *supra* note 82, at 393 n.34 (discussing the similarity in thought between Rashid Rida and Sanhuri regarding how Islamic legislation should be checked against universal aspects of Islamic law that promote social utility).

extent that Islam restrained the state, the court found that it did so in a way that was consistent with liberal values—a development that allowed Egyptians as a whole to grow comfortable with the idea of Islamic review, but left some political Islamists unsatisfied.

E. UAE (1971)

Egypt was not the only country to adopt a constitution in 1971 with an SSL clause. Article 7 of the United Arab Emirates' ("UAE's") 1971 Constitution, which is still in force, says that sharia shall be "a chief source of legislation." At the time this clause was drafted, people in many countries believed such a provision was insufficient, by itself, to create a justiciable requirement that legislation conform to sharia norms. In the UAE, however, this provision has been read in light of other constitutional provisions and in light of state practice. As such, it has been interpreted arguably, though not definitively, to create such a requirement.

A number of emirates in the Gulf asked Sanhuri in 1969 to draft a constitution for a proposed new federation to be called the United Arab Emirates.⁸⁴ After accepting and beginning, illness prevented the aging Sanhuri from continuing. The task of drafting thus fell to Dr. Wahid al-Ra'fat, an expert on the Kuwaiti legal system, on the understanding that his proposal would be reviewed by a committee of experts.⁸⁵

Some UAE citizens wanted the constitution to contain an SSL clause exactly like Article 2 of the Kuwaiti Constitution, which, as we have seen, made sharia "a" chief source of legislation. Islamists, however, pressured the court to make Islamic sharia the *only* source of legislation—for which Islamists in Kuwait had also been pushing. As a compromise, Dr. Ra'fat initially proposed making the Islamic

84. See Hadif al-Rashid al-Owais, *The Role of the Supreme Court in the Constitutional System of the United Arab Emirates: A Comparative Study* 50–51 (1989) (unpublished Ph.D. dissertation, University of Durham), available at <http://etheses.dur.ac.uk/786/> (stating that the first resolution of the first successful meeting of the Supreme Council declared that Sanhuri should be entrusted with drafting the "full and permanent charter of the Union").

85. See *id.* at 51–52 (noting that, although Dr. Ra'fat was originally selected to review the draft of the constitution produced by the legal experts, he eventually decided it was necessary to draft a complete revision of his own rather than just commenting on the legal experts' draft).

sharia *the* chief source of legislation.⁸⁶ This wording would clarify, he thought, that the UAE would operate in the manner that the Sanhuri codes proposed: legislators would be required to respect general principles of Islamic law that had been deduced from the various interpretations of Islamic law that had been proposed over the centuries. When determining what specific rules to adopt, however, legislators would be able to draw from any number of sources—including European civil and commercial codes.⁸⁷ In the UAE as in Egypt, however, some apparently worried that people reading a clause making sharia “the chief source of legislation” might interpret this as a law requiring the government to codify and apply traditional *fiqh* rules. (That this fear should be shared in the two countries must surely reflect the influence in both countries of a cadre of Egyptian jurists.) Ultimately, the committee chose not to make sharia “the chief source of legislation.” Instead, it followed the Kuwaiti constitution. Article 7 of the UAE Constitution said, “The Islamic Sharia is a chief source of legislation” (*al-Sharia al-Islamiyya masdar^{um} raisi^{um} li'l tashri*’).

After the adoption of the UAE constitution, some argued that, notwithstanding its relatively mild language, Article 7 required legislators to legislate in accordance with sharia and required judges to void legislation that did not conform to sharia.⁸⁸ Intriguingly, as

86. See Wahid al-Ra’fat, Op-Ed, *Wafd Party Figure Protests Misinterpretation on Islamic law*, AKHIR SA’AH (Egypt), May 18, 1984, at No. 2581, translated in NEAR EAST/SOUTH ASIA REPORT 6-7 (Joint Publications Research Serv., 1984), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA338094> (quoting his own memorandum, which read, “One of the provisions which the amendment deals with is the stipulation in Article Four of the draft permanent constitution, that Islamic law is the main source of legislation, in place of the expression ‘Islamic law is a main source of legislation’ as stated in Article Seven of the temporary constitution,” and continuing to note that “[t]his latter statement puts Islamic law on an equal footing with other sources of legislation . . . which is the contrary of what would have been the case had it said ‘Islamic law is the only source of legislation’ . . . [i]t was considered that that should not be adopted, in defense against the suspicion of fanaticism or extremism which conflicts with our tolerant Islamic law, which is open to all new things as long as they do not conflict with its principles and its valid provisions”).

87. *Id.*

88. See Butti Sultan Ali al-Muhairi, *The Position of Shari’a Within the UAE Constitution and the Federal Supreme Court’s Application of the Constitutional Clause Concerning Shari’a*, 11 ARAB L.Q. 219, 226–31 (1996) (explaining that observers fall into two camps, Liberal and Islamist, with the latter arguing that a

the new state began to operate under the 1971 Constitution, the government behaved in a manner that suggested agreement with the idea that the state is required to respect at least the core principles of Islamic law. Most important, the government in 1978 enacted legislation instructing the Supreme Court, when exercising cassation jurisdiction over court decisions, to treat as void legislation that did not “conform to the Islamic Sharia.”⁸⁹

In such an environment, the courts began to exercise Islamic review. It remains unclear whether they do so *only* because the UAE’s statutes require such action or whether they might do so in the absence of a statute—on the ground that the Constitution’s SSL clause requires them to do so. In the 1985 *Junatta Bank* case, the UAE’s highest court followed the view of Egypt’s Supreme Constitutional Court in 1985.⁹⁰ It held that it could not strike down laws permitting interest because the laws were enacted prior to 1978.⁹¹ Nevertheless, the court declared that, with respect to all new government actions and new laws, the courts must treat as void any law that the court finds to be inconsistent with the general principles of sharia.

Subsequently, courts have consistently examined laws enacted after 1978 for consistency with the general principles of Islam and have treated non-conforming laws as void. Interestingly, the jurisprudence suggests that courts void un-Islamic legislation not merely because Law No. 10/1973, Article 33 instructs them to do so, but because Article 7 of the Constitution requires them to do so. A series of Supreme Court cases from the early 1980s appear to hold that Article 75 of Law No. 10/1973 reflects the original

law is unconstitutional when it violates the sharia).

89. *Id.* at 232.

90. See discussion *supra* Part III(D) (providing that Egypt’s new court ruled that the SSL provision in Egypt’s constitution created only a partially justiciable requirement that new laws conform with Islamic law); see also al-Muhairi, *supra* note 88, at 235–37 (describing the decision of the UAE court that found the SSL provision of UAE’s constitution to also be only a partially justiciable requirement that new laws conform with Islamic law).

91. See al-Muhairi, *supra* note 88, at 235–37 (noting that laws passed before the new constitution became operable in 1978 remained in force as long as no amendment occurred and they were not expressly abolished); cf. Omer Eltom, *The Emirates Law in Practice: Case Law Study*, 100 LEGAL ISSUES 5 (2009) (discussing later cases).

understanding of what Article 7 required.⁹² Two leading scholars of the UAE legal system paraphrase the holdings in the last of these cases as follows:

[A]lthough it may appear from Article 7 of the Constitution that Shari'a is to be on equal terms with other sources of Law because it is referred to as "a main source" instead of "the main source" of Law, the doubt has been removed by Article 75 in which the legislature has explained the intention from Article 7 of the Constitution that Shari'a is to have a paramount position that makes it prevail over other sources of law. . . . [T]he jurisprudential disputes over the interpretation of the said Constitutional Clause which exist in another country, was not envisaged in the UAE, especially after the promulgation of Article 75.⁹³

In short, even if Article 75 was repealed, courts might interpret Article 7 of the Constitution to say that they *still* have to strike down newly enacted legislation that is inconsistent with the essential principles of Islam.

F. QATAR

The Emirate of Qatar was at one point expected to join the United Arab Emirates.⁹⁴ Ultimately, it decided not to join and, instead, to become an independent nation.⁹⁵ In 1972 it drafted a *provisional* Constitution of 1972, Article 7 of which said, ". . . the Islamic Sharia is the chief source of its legislation" (*al-Sharia al-Islamiyya al-masdar al-raisi li'l tashri'ha*).⁹⁶ As Ballantyne noted, the 1972

92. See Case No.1, Year 8 (1982) published in 100 UAE OFFICIAL GAZETTE 45–49 (1982); Case No.1, Year 10 (1983) published in 129 UAE OFFICIAL GAZETTE 102–07 (1984); and Case No.4, Year 9 (1984) published in 135 UAE OFFICIAL GAZETTE 83–93 (1984); see also al-Owais, *supra* note 84, at 346–51 (explaining that Article 7 requires that sharia be given paramount consideration compared to other sources of law); al-Muhairi, *supra* note 88, at 239–43 (providing that Case No. 1/Year 8 was the first time the UAE Supreme Court announced that measures that fail to comply with sharia would be disregarded).

93. See al-Muhairi, *supra* note 88, at 242 (discussing Case 4, Year 9 (1984)).

94. See Ballantyne, *supra* note 42, at 158 (noting that until a late stage Qatar and Bahrain were planned to be part of the United Arab Emirates until protracted negotiations interfered with this intended result).

95. *Id.* at 158.

96. Al Jaridah al Rasmiyah (Qatar Official Gazette) No. 5, 22 April 1972; see W.M. Ballantyne, *The States of the GCC: Sources of Law, the Shari'a and the Extent to Which It Applies*, 1 ARAB L.Q. 3, 9 (1985-86) (stating that the Qatari Constitution prescribes sharia as the main source of law, which is a much stronger

Constitution was unusually autocratic, even by the minimalist democratic standards of the Gulf region.⁹⁷ The 1972 Constitution thus lacked a provision for judicial review of legislation.⁹⁸ Indeed, in 1997, Nathan Brown reported that after extensive research in the region, “not a single Qatari judge or lawyer could name one case in the history of the courts that had a constitutional dimension.”⁹⁹ In such an environment, Article 7 obviously did not create a justiciable requirement of state respect for Islamic law because *no* constitutional question was justiciable. In the 2000s, a cautious program of constitutional reform began. In 2004, Qatar adopted a new constitution, and by 2008 a constitutional court with the power of judicial review was finally created.¹⁰⁰

Strikingly, the 2004 Qatari Constitution demoted the role of sharia from “the” to “a” chief source of legislation.¹⁰¹ This probably does not reflect a changing view of the government’s obligations. More likely, it reflects the fact that, between 1971 and 2004, Arabs were coming to understand SSL clauses making sharia “the chief source” of legislation differently than they had in 1972. In 1972, these clauses were considered ambiguous. It was not at all clear that they barred a state from enacting laws

declaration than in other constitutions of nearby states); *see also* Ahmed al-Suwaidi, *Developments of the Legal Systems of the Gulf Arab States*, 8 ARAB L.Q. 289, 296 (1993) (explaining that Article 7 of Qatar’s first Provisional Constitution was replaced by the Amended Provisional Constitution of 1972, which in Article 7 declares that “the religion of the State is Al-Islam” and that the “Islamic *Shari’a* is the principle source for its legislation”). Published in *al-Jaridah al-Rasmiyah* (Qatar Official Gazette) No. 5, 22 April 1972. Ballantyne and Suwaidi each report that the constitution makes sharia, “THE chief source of its legislation.” *See* Ballantyne, *supra*, at 9; al-Suwaidi, *supra*, at 296.

97. *See* Ballantyne, *supra* note 42, at 161–62 (translating and interpreting several articles of the 1972 Constitution to illustrate its autocratic nature).

98. *See* Jill Crystal, COUNTRIES AT THE CROSSROADS 2004 - QATAR (2004), <http://www.unhcr.org/refworld/docid/473868f264.html> (last visited Jan. 17, 2013) (claiming that a judicial agency has not been established for judicial review even though Article 140 of the Constitution states, “the law shall define the judicial agency that is authorized to settle disputes related to constitutional validity of laws and regulations”).

99. BROWN, *supra* note 10, at 183 n.66.

100. *See* United Nations Development Programme, Program on Governance in the Arab Region (POGAR), Judiciary: Qatar, <http://www.undp-pogar.org/countries/theme.aspx?t=9&cid=15> (last visited June 10, 2012).

101. DUSTUR [Constitution] July 13, 1999 (Qatar), *translated at* <http://www.mofa.gov.qa/details.cfm?id=206> (last visited Jan. 15, 2013).

inconsistent with sharia. Furthermore, there was no judicial review. Thus, the Qatari government, when it drafted a constitution with this type of SSL clause, did not think it was committing itself to legislate in accordance with sharia—and certainly not to legislate in accordance with an independent court’s interpretation of sharia. By 2004, however, discourse in Egypt and elsewhere had convinced most Arabs that SSL clauses making sharia “the chief source” of legislation did commit the state to legislate in accordance with sharia, and a court stood ready to enforce this provision.

Against this backdrop, Ballantyne plausibly suggests that the drafters of the Qatari constitution wanted to indicate that Qatari judges, unlike their Egyptian counterparts, had no power to strike down legislation inconsistent with sharia norms.¹⁰² If that was their goal, it remains to be seen whether courts will nevertheless assert the power of Islamic review. UAE jurisprudence suggests that they could, in theory, argue that under certain circumstances, an SSL clause making Islamic law “a chief source” of legislation can give courts the power of judicial review. The circumstances that led UAE courts to assert the power of Islamic review are not present in Qatar and, to date, the Qatari courts have not asserted this power.

G. BAHRAIN

Like Qatar, Bahrain considered joining the United Arab Emirates. When it finally decided not to do so, it drafted its own constitution. Article 2 of Bahrain’s 1973 Constitution says, “Islamic Sharia is a chief source of legislation.”¹⁰³ Article 2 of the 2002 Constitution repeats this language.¹⁰⁴

102. See Ballantyne, *supra* note 36, at 4.

103. CONSTITUTION OF THE STATE OF BAHRAIN Sept. 6, 1971, art. 2 (emphasis added), available at <http://www.bahrain.bh/pubportal/wps/wcm/connect/ae5e35804b96f82b80808713d8048f0c/bhDostoor1973.pdf?MOD=AJPERES>.

104. CONSTITUTION OF THE STATE OF BAHRAIN Feb. 14, 2002 (as amended through June 2012), available at <http://www.shura.bh/LegislativeResource/Constitution/Pages/default.aspx>. Unfortunately, I am not aware of any study that focuses on the drafting of this provision or on the way it has been interpreted.

H. IRAQ

After the American invasion of Iraq in 2003 and the overthrow of Saddam Hussein's regime, Iraqis drafted a series of new constitutions. The debates about the role of Islam tell us much about the way in which SSL language had by that time come to be understood. Iraq's new constitutions did, ultimately, adopt idiosyncratically worded SSL clauses.

After the 2003 U.S. invasion of Iraq, the government hastily drafted, without significant public input, a Transitional Administrative Law ("TAL"), which functioned as a temporary constitution.¹⁰⁵ The TAL had somewhat idiosyncratic provisions. Instead of referring to sharia norms as "a" or "the" chief source of legislation, Article 7 of the TAL said that Islam itself "is to be considered a source of legislation" (*yu'id masdar al-tashri*). It continued to say, "It shall not be permitted to enact a law conflicting with the settled tenets of Islam that have been agreed through consensus" (*la yajuz sann qanun yata'arrad ma' thawabit al-Islam al-mujma' alayha*). As Intisar Rabb has pointed out, the SSL provision was unique among Arab constitutions and was, in fact, extremely unclear.¹⁰⁶

Thereafter, the Transitional Administration tasked a constituent assembly, which was supposed to be broadly representative of Iraq's diverse population, with the job of drafting a constitution that would be widely acceptable to the Iraqi people. There was also an implicit understanding that the draft constitution would have to be acceptable to the occupying forces as well. The new constitution was to include its SSL provision in Article 2. According to U.S. officials stationed at the U.S. Embassy in Iraq during the drafting period, participants debated the wording of this provision.¹⁰⁷ Their published account of

105. See Intisar A. Rabb, "We the Jurists": Islamic Constitutionalism in Iraq, 10 U. PA. J. CONST. L. 527, 539 n.24 (2008) (citing the Law of Administration for the State of Iraq for the Transitional Period).

106. See generally *id.* at 539–41 (2008) (pointing out that the precise meaning of Islamic constitutionalism in Iraq will not be clear until the government shows what form it will give the terms "Islam" and "settled Islamic (legal) rules").

107. See generally Deeks & Burton, *supra* note 3, at 5–6 (recounting that debates regarding the wording of the sharia provision were among some of the most contentious of the entire constitution-writing process, not so much due to substantive disagreements, but more due to different interpretations of Islam

the negotiations tells us much about the evolution of popular understanding about the implications of SSL clauses among Arabs and non-Arabs alike. Negotiators from powerful Shiite Islamic parties wanted the new provision to describe some set of sharia norms as "the chief source of legislation." Echoing the position imputed in this paper to the drafters of the 2004 Qatari Constitution, participants associated with secular parties argued against this. They complained that such a provision would create a justiciable requirement that law respect those norms. With the strong support of U.S. officials, they succeeded in getting the provision to say instead that Islam rather than sharia would be recognized as a "basic source of legislation" (*masdar asas li'l tashri*).¹⁰⁸ Having won the battle, however, they lost the war. Article 2 went on specifically to note, "Enacting a law conflicting with the settled rulings of Islam is not permitted."¹⁰⁹ This addition would seem to accomplish exactly what the secularists had wanted to avoid. It created a justiciable requirement that law conform to a subset of sharia norms. So long as a judge could (a) determine what the constitution means when it refers to the "settled rulings of Islam," or "*thawabit ahkam al-Islam*," which is not a common phrase in Islamic thought and (b) carry out the Islamic legal interpretation necessary to determine whether a law contravened these settled rulings of Islam, then the court should be able to exercise Islamic review of legislation.

Given this clear textual provision authorizing judicial review, it is fascinating that the Federal Supreme Court of Iraq seems recently to have decided not to carry out Islamic review. After a 2010 case in which the court appeared ready to perform Islamic review,¹¹⁰ the

among different people).

108. See *id.* at 7–10 (reporting that the approved draft used the term "*masdar asasi*," meaning "basic source," which differed from the version that was presented for approval, which included the term "*masdar asas*," meaning "foundation source," for unexplained reasons, perhaps even just a drafting error). *But see* Rabb, *supra* note 105, at 539 (translating "*masdar asas*" as "basic source," suggesting that there is no real difference between the two terms and they both translate to "basic source"). Agreeing with Rabb about the proper translation, I translate it as "basic source."

109. See Deeks & Burton, *supra* note 3, at 7 (citing Article 2(A) as stating, "No law that contradicts the established provisions of Islam may be enacted").

110. Federal Supreme Court of Iraq, decision No. 60 of December 21, 2010, available at <http://www.iraqja.iq/view.738/>. See generally Haider al-Hamoudi, *Religion and Law in Iraq: A Noteworthy Federal Supreme Court Opinion*, JURIST

justices backtracked. In two cases decided over the past two years, the court appears to have taken the position that the question of whether a law violates the constitutional command to respect the settled rulings of Islam is a political question. It can only be resolved confidently by a legislature with access to expert advisors.¹¹¹

The courts of Egypt, the United Arab Emirates, and Yemen have all declared themselves competent to determine, on their own, whether new state legislation is consistent with sharia norms (or, more precisely, with those sharia norms that their respective constitutions have made non-controvertible). The courts have thus performed what might be described as a form of Islamic review. The Iraqi Federal Supreme Court's apparent decision to avoid performing Islamic review on the grounds that it is ill-equipped to do so is unusual. It is likely due to a confluence of factors that exist in Iraq but not in other countries. First, Iraq is a majority Shi'ite country. Although a majority of Sunnis in majority Sunni countries like Egypt and the UAE appear to reject the idea that the traditionally trained *fuqaha'* have unique authority to interpret God's law, a majority of Shi'ites in Iraq may continue to believe that traditional training is a prerequisite to Islamic interpretive authority and thus may not respect the interpretation of Islamic law developed by a court whose judges are not traditionally trained.¹¹² Second, notwithstanding this

(Feb. 10, 2011), <http://jurist.org/forum/2011/02/religion-and-law-in-iraq-a-noteworthy-federal-supreme-court-opinion.php> (describing how the court showed itself willing to challenge the views of the Iraqi clerics in interpreting Islamic law, but suggesting that doing so would be much more dangerous on issues outside of commerce, such as women's right to divorce, for example).

111. See Federal Supreme Court of Iraq, decision No. 61 of January 31, 2012, available at <http://www.iraqja.iq/viewd.933/>; Federal Supreme Court of Iraq, decision No. 59 of November 21, 2011, available at <http://www.iraqja.iq/viewd.886/>; Haider al-Hamoudi, *Judicial Review of Islamic law Under Iraq's Constitution*, JURIST (Apr. 26, 2012), <http://jurist.org/forum/2012/04/haider-hamoudi-iraq-islam.php>.

112. See, e.g., CHIBLI MALLAT, *THE RENEWAL OF ISLAMIC LAW: MUHAMMAD BAQAR AS-SADR, NAJAF AND THE SHI'A INTERNATIONAL* 38 (Roger Owen ed., 1993) (describing how *muqallids*, or laymen, are devoid of knowledge of the *fiqh* and, therefore, their acts are usually considered void unless they act in accordance with a *fatwa* or a recognized *mujtahid*, or person with proper training in the *fiqh*); Rabb, *supra* note 105, at 550–55 (commenting on Resolution 137, which would have put family law issues firmly in the hold of Islamic jurists, and suggesting that some supported the resolution because existing codified law was “not the output of a proper Islamic legal interpretive process”).

fact, most judges do not have traditional training.¹¹³ The Supreme Court may well worry that rulings on questions of Islamic law, and particularly Shiite Islamic law, will not be respected.

IV. SSL CLAUSES TODAY: WHAT DO THEY MEAN? DO THEY MATTER?

The history of SSL clauses that is recounted above suggests that the conventional wisdom about SSL clauses should be refined. Conventional wisdom holds that constitutions with SSL clauses making sharia “the chief source of legislation” create a constitutional obligation that all state legislation be measured against Islamic legal norms; others do not. Furthermore, it suggests that when a country adopts a constitution that requires state respect for Islamic law, this creates a barrier to the rule of law. The historical survey of SSL clauses above suggests that there is a kernel of truth in the conventional wisdom, but also that the conventional wisdom still needs to be revised in significant ways.

To begin, there may not be as rigid a distinction as people think between SSL clauses that make sharia “the chief” or “the only” source of legislation and those that make sharia merely one chief source among many. When SSL clauses first appeared in 1950, and for almost two decades thereafter, they were understood to be ambiguous on the key question of whether the legislation inconsistent with sharia was void. Courts interpreted each SSL clause in light of the circumstances in which they were adopted and in light of the broader constitutional and legislative scheme into which the clauses were embedded.¹¹⁴

Early SSL clauses were interpreted in ways that were inconsistent with the conventional wisdom that SSL clauses making sharia “the chief source” of legislation are the only clauses that require states to legislate in accordance with sharia. In the 1950s and ’60s, some strong SSL clauses making sharia “the chief source of legislation” seem *not* to have been read as requiring all state legislation to respect

113. Al-Hamoudi, *supra* note 110 (highlighting the court’s lack of authority to challenge the jurists on matters of sharia as family law).

114. In at least one case, courts also drew insight from a pattern of state practice that indicated, to the courts, that the government understood the SSL clause to prohibit legislation inconsistent with sharia.

sharia.¹¹⁵ On the other hand, in the UAE, courts concluded that in adopting an SSL clause making sharia merely “a chief source of legislation,” the Emirati government had promised not to enact legislation inconsistent with sharia.¹¹⁶ Since the 1970s, however, Arab understanding of these clauses seems to have evolved and now corresponds, *in part*, to the conventional wisdom. Today, most importantly, Arab academics and the public at large increasingly embrace the idea that SSL clauses making sharia “the” chief source of legislation are best interpreted to prohibit un-Islamic legislation.¹¹⁷ If, today, an Arab government adopts a new constitution including an SSL clause that makes Islamic norms “the” chief source of legislation (or revises a constitution to include such a phrase), courts will most likely assume that drafters intended the provision to require that the state always respect those norms. Thus far, the conventional wisdom seems to correspond with contemporary reality. It is not clear, however, that a clear consensus has yet emerged about the implications of a government’s decision *not* to enact a strong SSL clause and instead to enact a weaker clause making sharia merely “a” chief source of legislation.

It might seem logical to assume that a decision to adopt an SSL clause making sharia something *less* than “the chief source” indicates an intention *not* to be bound by any firm prohibition on legislation inconsistent with sharia. Indeed, some governments seem to be counting on courts to adopt this position.¹¹⁸ It is not absolutely certain, however, that governments will actually be able to insulate themselves from Islamic review simply by favoring constitutional language that makes sharia merely “a” rather than “the” chief source of legislation.

115. Syria’s 1950 Constitution and Sudan’s (never-enacted) draft Islamic constitution of 1968 each contained a provision making Islamic norms “the chief source” of legislation, but neither seems to have been understood as a provision barring legislation that was inconsistent with these norms. *See* discussion *supra* Parts I, II, III(B).

116. *See* discussion *supra* Part III(E).

117. *See* discussion *supra* introduction.

118. As noted above, Syria and Qatar each appear to be afraid that their constitutional judiciaries will interpret sharia in a manner that is inconsistent with that of the political branches and might thus be inclined to strike down legislation. To limit the likelihood of this happening, they have amended their SSL clauses to make Islamic law today merely “a chief source of legislation,” rather than “the chief source,” as it was before. *See* discussion *supra* Parts II, III(F).

SSL clauses are interpreted contextually. Going forward, SSL clauses making sharia “a chief source” of legislation will be situated in constitutions that make Islam the official religion of the state and may contain provisions instructing courts to permit regulations that are necessary to preserve morality or public order—words that can be read, if one wants to, as a proxy for Islamic legal values. These factors create opportunities for courts, if they are so inclined, to follow the lead of the UAE courts and interpret a clause making Islamic law merely “a chief source” to require the state to respect Islamic law *and also to respect all other chief sources of legislation*.¹¹⁹ While this seems unlikely in the short term, there continues to be a strong trend toward increased piety in the Muslim world, and the political power of the Islamic political factions appears to be growing. Courts may increasingly be staffed by judges who have Islamist sympathies or who may feel pressure to increase their legitimacy in the eyes of an Islamizing public, or they may simply wish to reinforce their power by adding a new ground for judicial review. It seems unwise categorically to preclude the possibility that down the line courts will interpret at least some weak SSL clauses to require that legislation be measured for consistency with Islamic values.

This brings us to the important question: Does it really *matter* if an SSL clause is interpreted to require state law to respect sharia? As noted, it is commonly assumed that it does matter. Policy makers and journalists seem to believe that, if Arab courts review state law for consistency with Islamic norms, they are likely to void legislation that contravenes classical interpretations of Islamic law. In the process, they will strike down important laws reflecting liberal commitments to equality and individual rights. (Some worry as well that it will cause them to strike down laws essential to the functioning of a modern economy).¹²⁰ However, if we look at the

119. Alternatively, they may, like courts in the UAE, argue that other factors—particularly the state’s conduct after the adoption of the clause—suggested that the clause might require the state to respect the principles of Islamic sharia. *See* discussion *supra* Part III(E).

120. At the urging of secularist Iraqi political groups, the United States insisted that the 2004 Iraqi constitution *not* contain an SSL provision making sharia “the” chief source of Iraqi legislation. *See* discussion *supra* Part III(H). This was not merely because the United States thought such a provision would require state law to conform to sharia. Americans also thought that this provision would lead the

history of SSL clauses described above, it is striking that, to date, most SSL clauses, including clauses that are understood to require state law to respect sharia, have had surprisingly little direct impact on the legal system at all. Quite simply, courts have proven unable or unwilling to use them aggressively to reshape national legal systems.

As we have seen, some SSL clauses have been drafted in countries that did not give courts *any* power of judicial review.¹²¹ In other countries, the constitution has singled out the SSL clause as unique and has barred courts only from exercising Islamic review.¹²² In yet other countries, judges have creatively interpreted the constitution or exercised prudential powers and have held that disputes about the Islamic-ness of legislation should be treated as partially or wholly non-justiciable. For example, in both Egypt and the UAE, the courts creatively interpreted their country's SSL clause to be partially non-justiciable. They have the authority only to void un-Islamic legislation enacted *after* the enactment of the constitutional SSL provision—a ruling that leaves in place a great deal of controversial existing legislation, such as the legislation permitting interest.¹²³ More dramatic still, Iraqi courts seem recently to have taken the position that the question of whether a law is consistent with Islam is one that only the political branches are qualified to answer.¹²⁴

In countries where courts *do* exercise Islamic review,¹²⁵ these

courts to strike down the type of liberal social and economic legislation that the United States expected Iraqi parliaments to enact. Similar fears drove secular liberal Tunisian groups after the Arab Spring to successfully fight against the inclusion of an SSL provision making Islamic norms “the” chief source of legislation.

121. See discussion *supra* Parts III(B) n.61, III(F).

122. Sudan's draft constitution of 1968 did envision a constitutional court, but, intriguingly, it explicitly said that the SSL provisions were not justiciable. See discussion *supra* Part III(B).

123. See discussion *supra* Part III(D), III(F).

124. See discussion *supra* Part III(H).

125. See Clark B. Lombardi, *Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian Aspirationally 'Islamic' State*, in CONSTITUTIONAL COURTS: A COMPARATIVE STUDY (Andrew Harding & Peter Leyland eds., 2009) [hereinafter Lombardi, *Egypt's Supreme Constitutional Court*] (arguing that the claim that secular judges *can* interpret Islamic law is consistent with much modern Islamic legal and political theory and noting that some judges clearly believe that they have a constitutional duty and perhaps a moral duty to exercise this power and that claiming the right of Islamic review gives them considerable power); see also MARTIN LAU, THE ROLE OF ISLAM IN THE LEGAL

courts seem to apply the law in a manner that is quite deferential to legislative judgment that their law is consistent with Islam. That is true of the jurisprudence of the Egyptian Supreme Constitutional Court referenced briefly above. It develops a jurisprudence that adopts a modernist approach to Islamic legal interpretation. That is to say, it holds that sharia imposes upon governments only a handful of requirements—most of which are very general. Provisions that require the state to legislate in accordance with Islam are thus understood to leave government considerable discretion to legislate in the public interest. Although it is beyond the scope of this paper to discuss Islamic constitutional jurisprudence outside the context of Arab SSL clauses, it is worth noting that courts outside the Arab world seem to interpret constitutional prohibitions on un-Islamic legislation in a similar way.

That courts set few limits does not mean that they set *no* limits. Interestingly, however, the limits that *are* set are not invariably inconsistent with liberal values. Clearly, courts in some countries tend to interpret Islamic constraints on legislative discretion in a way that precludes the state from enacting laws that realize liberal values of equality and individual rights.¹²⁶ However, courts in some other countries do not. Courts in Egypt (and, it is worth noting, courts in Pakistan as well) have embraced a modernist view that not only tolerates the liberal rule of law, but seems to support it.¹²⁷

SYSTEM OF PAKISTAN 209 (2006) (stressing that judges in Pakistan exercised Islamic review as a way to embark on judicial explorations of previously untested areas of Pakistani law).

126. The constitutions in Iran and Saudi Arabia do not have SSL clauses, *per se*. Each, though, has a procedure by which courts can review laws for consistency with Islam and requires courts to treat non-conforming laws as void. The courts responsible for Islamic review seem at times to embrace a traditionalist view of Islam’s restraints on state discretion—one that is inconsistent in key respects with modern liberal values.

127. See LOMBARDI, *supra* note 78 (concluding that Egypt has refused to strike down liberal legislation that is inconsistent with traditional Islamic law and sometimes uses Islam’s putative commitment to justice as a justification to protect un-enumerated liberal rights); *see also* LAU, *supra* note 125 (stating that, in a few rare cases, Pakistani courts have struck down illiberal, putatively “Islamic” legislation on the grounds that it misunderstands Islam and noting the most famous case as being the *Hazoor Baksh* case, in which the court’s decision led to a backlash against the court); Lombardi, *Egypt’s Supreme Constitutional Court*, *supra* note 125, at 241 (mentioning the court’s use of Islamic law to support liberal decisions on questions of property law and human rights law); Lombardi & Brown,

To make sense of this, it is important to remember that Muslims in the modern world disagree deeply about fundamental issues: who can interpret Islamic law, what method interpreters should use, and, ultimately, what laws an Islamic state is required or permitted to impose on its citizens. In almost every majority Muslim country, illiberal Islamic voices contest fiercely with liberal ones. In countries where people agree that the government commit to respecting sharia, people may disagree about who should police compliance. It is not universally accepted that secular judges are better qualified than the political branches to wade through the competing interpretations of Islam and determine which interpretation should guide the state. This may explain the large number of cases in which constitutional courts are explicitly denied the power to enforce an SSL clause and the large number of cases in which courts with the power of Islamic review have been reluctant to enforce it carefully. It also explains why judiciaries themselves can come to such different understandings of the constraints that Islam requires.

In short, when looking at countries where the constitution requires the state to respect Islam, the liberal-ness of the state's laws seems to depend primarily on choices by the political branches. To the extent that courts exercise Islamic review at all, they tend to do so in a way that is highly deferential to the legislature. In those countries where the courts are willing to apply SSL clauses in a way that places significant substantive constraints on legislative discretion, the impact on the liberal rule of law varies. Ultimately, history suggests therefore that it is hard to generalize about the impact of SSL clauses requiring the state to respect Islam, and it is particularly hard to generalize about the impact they have on the liberal rule of law. The conventional wisdom needs to be revised to ask whether a clause will have an impact at all and, if so, to say that what sort of impact it will have depends on contextual factors that will differ from country to country and that may themselves evolve in future years: the jurisdiction of constitutional courts, the degree to which

supra note 82, at 380 (commenting on the creative version of Islamic law that the Supreme Constitutional Court of Egypt has used to find sharia norms consistent with aspects of human rights norms, as well as liberal economic policies employed by the government).

constitutional judges embrace a policy of judicial restraint, and whether the constitutional judiciary tends to prefer an illiberal (or liberal) interpretation of Islam.

V. CONCLUSION

The popular and judicial understanding of SSL clauses in the Arab world has evolved over the decades, and it may continue to change in the future. If a country today drafts a constitution containing an SSL clause making Islamic norms “the” or “the only” source of legislation, this clause will probably be understood to require state laws to respect Islamic norms—though there is the possibility that it will be interpreted to be non-justiciable. Yet, depending on the context of its drafting and on the other provisions of the constitution, an SSL clause making Islamic norms “a chief source” of Islamic law might *also* be interpreted to require that law respect sharia norms. At the same time, a constitutional provision requiring state law to respect Islamic law may not adversely affect laws dealing with liberal principles of equality and human rights.

Conversely, the absence of SSL clauses does not mean that Islam will be marginalized. Even if they are not constitutionally required to Islamize their legal systems, governments can choose to do so. The absence of SSL clauses probably provides less safety than some may hope. If the champions of an illiberal interpretation of Islam control the political branches, they are likely *voluntarily* to try and establish a putatively Islamic regime that reflects their understanding of Islam.

Those who wish to predict or influence the trajectory of democracy and liberalism in the Arab world should not focus myopically on the question of how the SSL clause is worded or even on the question of whether national constitutions contain provisions requiring state law to respect Islam. They should focus at least as hard (and perhaps harder) on other questions of constitutional design and of social context. Does the constitution create a genuinely representative government, such that conservative Islamists who are currently powerful will be unable to entrench themselves in power? Does the constitution create the conditions for a free and active civil society? Does it empower the judiciary to protect liberal rights? Are civil society and judges actually vested in the liberal constitutional project? Are important figures in each group familiar with and

sympathetic to theories of Islamic law that reconcile Islamic law and liberal values? With respect to ensuring that this last answer is yes, they might pay attention to constitutional provisions or laws that regulate the educational institutions and religious institutions that help to shape the public's understanding of Islam and Islam's relationship to liberal values.