CONSTITUTIONALISM IN ISLAMIC COUNTRIES
Between Upheaval and Continuity
CONSTITUTIONALISM IN ISLAMIC COUNTRIES
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Preface

This book is the result of several years of research on basic issues and current developments in the constitutional law of Islamic countries at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg as part of the Institute’s involvement with constitution-building processes and rule-of-law projects in the Middle East and Africa in the framework of its Global Knowledge Transfer Program. About half of the articles published here are based on presentations at a conference of the Max Planck Institute in Dubai, UAE, February 12–15, 2009. This conference sought to identify and analyze some of the main issues arising from the attempts to apply the idea of constitutionalism to Muslim societies. The attention of leading scholars from both Islamic and Western countries focused on the constitutional experience of Islamic countries in North Africa, the Middle East, and Central, South and South East Asia, with European and other Western experiences being used as points of reference against which the peculiar challenges and the specific answers given to those challenges in the countries surveyed were assessed. A substantial number of additional articles was commissioned for the publication of the book as it occurred to us at the end of the conference that some of the issues discussed in Dubai called for more in-depth research and analysis. Our queries elicited so many positive responses from the scholarly community that we could not include all proposed articles into this volume, due to the limits of space. We hope that the combined efforts of experienced authors and younger scholars who are just beginning to make their mark in the field of comparative research have produced fresh insights into a number of theoretical as well as practical aspects of Islamic constitutionalism. Most chapters of the book were last revised and amended in June 2011 in order to take into account recent developments in the Islamic world, and notably the revolutionary events in Tunisia, Egypt, Libya, Yemen, and beyond, which have widely become known as “Arab spring.” However, due to the limited space available for amendments at this late stage of the publication process and the as yet uncertain outcome of the revolutionary transformation processes in the Arab world this book does not pretend to provide an in-depth analysis of the “Jasmin revolution” and its potential for a renaissance of Arab and Islamic constitutional thinking: this analysis had to be left to another book.

Many colleagues and friends have supported us throughout this project. We are particularly grateful to Professor Rüdiger Wolfrum, the Director of the Max Planck Institute for Comparative Public Law and International Law and driving force behind the Institute’s
Global Knowledge Transfer Program, for his generous support in the preparation of the Dubai conference and the publication of this book. Katrin Geenen supervised the various stages of the editorial process and took care of the difficult task of formatting all texts according to the standards proposed by Oxford University Press. It is safe to say that without her this book never would have come out. Many others have been helpful at different stages of the editorial process, of whom Laura Vásárhelyi-Nagy, Hannah Emanuel, and Lena Fricke deserve special mention. Max Heidelberger accepted the difficult task of unifying the transliteration of terms and names from languages written in different scripts than English. Tony Lim and Peter Berkery of Oxford University Press assisted and supported us in all stages of this book project and never lost faith that it would finally come to fruition. We owe an enormous debt of gratitude to all of them.

Last but not least we cordially thank all the authors for their commitment to the project and the time and energy they invested in researching and writing on their topics. They never let us down. We came together as colleagues interested in similar subjects and in the course of the project often became friends. For us, this friendship is one of the most cherished results of our common endeavor.

Rainer Grote and Tilmann Röder,
Heidelberg, October 2011
Editors’ Note on the Transliteration

There is not one exclusive system of transliteration that would be appropriate for all types of texts. Any mode of transferring words and names from Arabic, Farsi, Urdu, Kazakh, Somali, Ottoman Turkish, and other regional languages into the Latin alphabet must in the first place reflect the interests of the readers. Works written for an audience with proficiency of at least basic Arabic may follow a strict system of transliteration while authors writing for a wider audience should make some concessions if they want to give their readers a chance to read the text fluently. We decided to modify the strict system of transliteration as far as deemed wise in order to help readers to intuitively pronounce the words as they should sound. The following characters need some explanation:

- ä, ī, ū: vowels with a line on top are pronounced long, all others short
- w: the vowel ū is transliterated w if pronounced like “window”
- y: the vowel i is transliterated y if pronounced like “youth”
- ī: the pronunciation of the Turkish vowel ī resembles that of the i in “middle”
- h: the consonant ħā (ح) is a sharp h like in the name “Ḥasan”
- kh: the consonant khā (خ) is pronounced like the j in Spanish (“mujer”) or the ch in German (“wach”)
- dh: the consonant dhāl (ذ) is pronounced like a soft th in English (“thumb”)
- š, ť, ż: the consonants šād (ش), ţā’ (ط), and żā’ (ظ) are pronounced very much like s, t, z in English
- ’: the consonant ‘ayn (اî) may be difficult to hear and produce; it resembles an “ah” with the extreme back of the tongue held up against the roof of the mouth
- gh: the consonant ghayn (Arab. ガイ) is pronounced like the r in French (“au revoir”)
- zh: the consonant zhe exists in several alphabets, including the Farsi alphabet, and is pronounced like the j in French (“Janvier”)

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Editors’ Note on the Transliteration

All other characters directly correspond to letters in the Latin alphabet or occur very rarely. A certain difficulty is the transliteration of Farsi, Ottoman, or Urdu characters that are mostly written, but not always pronounced, like the Arabic alphabet. We decided to remain rather close to the spelling of the words. Urdu words and names have been transliterated even though they do also exist in English, the other common language of Pakistan.

The editors and Max Heidelberger
CONSTITUTIONALISM IN ISLAMIC COUNTRIES
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Constitutionalism in Islamic Countries

Introduction

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Constitution-making first came to the Islamic world as an essentially European concept. Although there are certain elements in the Islamic tradition which can be perceived as early expressions of an autochthonous approach to constitutionalism in Islam and have indeed been interpreted in this manner, they owe their prominence in contemporary debate more to recent attempts to reinterpret the Islamic tradition in light of the requirements of constitutionalism than to any rigid historical analysis. This applies also to the so-called Charter of Madinah, a set of deeds executed by Muḥammad after his migration from Makkah to Madīnah (Yathrib), which regulated various aspects of Muslim community organization, procedures for common defense, and the relation between the Muslims and the Jewish tribes in Madinah.\(^1\) The document has been interpreted in wildly different ways, with some (mainly Islamic) scholars referring to it as the earliest written constitution of a state in the world,\(^2\) whose underlying ideas are in many regards similar to core aspirations of modern constitutionalism,\(^3\) while others (mainly “Western” commentators) have opted for a more

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\(^{3}\) A. Al-Hibri, “Islamic and American Constitutional Law: Borrowing Possibilities or a History of Borrowing?” (1999) 1 U. Pa. J. Const. L. 514: “Based on the above analysis, it is readily apparent that there are significant parallels between the concepts expressed in the Charter of Madinah, executed in the seventh century, and those of the American Constitution, drafted in the eighteenth century.”
modest view, stressing the document's character as a mere municipal charter\(^4\) or treaty whose elevation to constitutional status may have to do more with twentieth-century politics in the Muslim world than with anything inherent in the text.\(^5\) Whatever the correct or plausible interpretation may be, it is clear that no attempts were made to develop the Madīnah Charter into a more fully developed set of constitutional foundations for the state and its institutions, neither then nor in later periods of Islamic history.\(^6\) When the idea of a basic law or constitution of the state started to gain traction in parts of the Muslim world in the latter half of the nineteenth century, it did so under European influence, without any reference to the Charter of Madīnah\(^7\) or other Islamic constitutional traditions, written\(^8\) or unwritten.\(^9\) Even today, discussion on the relevance of the Charter of Madīnah for Islamic constitutionalism is largely confined to the conceptual level; by contrast, its influence on the practice of constitution-making in Islamic countries has remained negligible.

Constitutional reform movements took first root in the second half of the nineteenth century in Tunisia, Egypt, and the Ottoman Empire. They were inspired by the early European constitutional models,\(^10\) and namely by the Belgian Constitution of 1831.\(^11\)

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4. This was the view adopted by the earliest writer on the Madīnah, Charter, see J. Wellhausen, “Muhammads Gemeindeordnung von Medina” in J Wellhausen (ed), Skizzen und Vorarbeiten, Vol. 4 (Reimer, Berlin 1889) 65–83.


6. Arjomand (n 1) 572.

7. The first modern scholar who studied it, Julius Wellhausen, published his commentary on the document in 1889 (see n 4), when the adoption of basic laws in the Ottoman Empire and in the French and British colonies and protectorates was already well under way, see following text.

8. Largely forgotton by then were the legal and administrative reforms implemented by the early Ottoman rulers in the provinces of their newly conquered Empire. During the reign of Sultan Süleymān II (1520–1566), who was known locally by the Turkish nickname Qānūnī, or the “law-giver,” the rules of government were laid down for each province in a constitutional document known as “book of laws” (Qānūnnāmeh). Starting in Egypt, these provincial constitutions defined the relationship between governors and taxpayers by spelling out the rights and duties of both sides; see E. Rogan, The Arabs—A History (Allen Lane, New York 2009) 26–27, who concludes, regarding Süleymān’s constitutional legacy: “For its age, it represented the height of government accountability.”

9. N. Feldman, The Fall and Rise of the Islamic State (Princeton UP, Princeton 2008) 6, argues that the “Islamic state” had been organized under “a constitution that, like the English constitution, was unwritten and ever-evolving” until the Ottoman reforms in the nineteenth century.

10. Particularly influential in disseminating European and in particular French ideas on constitutional government in Egypt and in the Arab-speaking world was the book by Rifā‘ah al-Ṭaḥtāwī, Tākhīṣ al-Ilbrīz fi Tākhīṣ Bāris, published in 1834 in Arabic and subsequently translated into Turkish. The book contained an Arabic translation of the 1814 French Constitution, the Charte Constitutionnelle, a detailed analysis of its main provisions and an extended account of the July 1830 revolution which put an end to the attempts of the Bourbon king Charles X to restore the absolute monarchy of the pre-1789 period. Al-Ṭaḥtāwī, who had studied Arabic and Islamic theology in his native Egypt, was a member of the first Egyptian delegation sent to Europe by Muḥammad ‘Alī in 1826. On his contribution to the birth of a constitutional reform movement in the different parts of the Ottoman Empire, see Rogan (n 8) 85–88.

11. S.A. Arjomand, “Constitutions and the Struggle for Political Order” (1992) 33 European Journal of Sociology 52 and footnote 14. The Belgian Constitution of 1931 owed its influence mainly to the fact that it was the first coherent codification of the principles of liberal constitutionalism in Europe. The different French
The Ottoman Reform Decrees of 1839 and 1856 pledged to ensure “perfect security” for life, honor, and property for all Ottoman subjects and implemented reforms in the tax system, criminal justice, and military service systems. In 1857, the hereditary governor of Tunisia, the Bey, promulgated a Fundamental Pact, which contained basic human rights guarantees, including the right to property and freedom of religion. This was followed four years later by a constitution that limited the power of the monarchical ruler and provided for the creation of an appointed body, the Grand Council, which had to approve new laws and changes in expenditure. At about the same time, the reform movement made progress in Egypt as well, leading to the establishment of a Consultative Assembly of Deputies. The reform debate culminated in the adoption of the Fundamental Law (al-Lā‘īḥah al-Asāsiyyah) of February 1882, which provided for the election of the members of Assembly of Deputies instead of their appointment by the viceroy, the Khedive, and gave the Assembly the right to convene on its own accord, to determine taxes and to review the state's budget. Already six years earlier, the reform movement of the Young Ottomans in Istanbul had been rewarded with the promulgation of the Ottoman Basic Law (Kânûn-i Esâsi) of 1876 and the convening of the first Ottoman Parliament. In Iran, the constitutional revolution of 1906–11 led to the establishment of a constitutional monarchy through the adoption of the Fundamental Law of December 30, 1906. It was here, however, that the hitherto unquestioned belief of the early Islamic reformers of the compatibility of European-style constitutionalism with Islam was shaken for the first time. Alarmed by the secular implications of constitutional government, parts of the Shi‘ite clerical establishment defended the view of the unique character of Iranian constitutionalism and warned of the negative impact the uncritical imitation of foreign models would have on the country’s Shi‘ite religious tradition. It is in this context that the concept of mashrû‘eh-ye mashrû‘eh, or constitutionalism that conforms to the Sacred Law, first gained currency. The traditionalists were successful in imposing at least some of their key demands, and in particular the principle that all legislation by parliament, or Majles, should be subject to the ratification of a committee of five Islamic jurists

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12 T. Röder, “The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives” (in this volume).
15 For a detailed analysis of the Ottoman Constitution of 1876, see Röder (n 12); Brown (n 13) 22/23.
17 The position adopted by Khayr al-Dīn al-Tūnisī, President of the Tunisian Grand Council during the constitutional period, gave expression to a widely held conviction in reformist circles when he later wrote: “The aim of the two [i.e. the European and the Islamic approach to government] is the same—to demand an accounting from the state in order that its conduct may be upright, even if the roads leading to this end may differ” (quoted by Brown (n 13) 20).
18 Arjomand, “Kingdom of Jurists” (n 16).
(mojtahedīn) of the highest rank. It was incorporated into Art. 2 of the Supplementary Fundamental Law passed by the Majles in July 1907.

The early experiments with constitutionalism in the Islamic world proved to be short-lived. The hope of the constitutional reformers that the Bey in Tunis, the Khedive in Cairo, or the Sultan in Istanbul would voluntarily share power with representative assemblies turned out to be largely unfounded. In Tunisia, the members of the Grand Council grew disillusioned with the limited powers of the Assembly to curb the Bey’s excesses long before the invasion by France, and the establishment of a French protectorate in the Treaty of Bardo in 1881 put an end to the country’s constitutional experience in 1881. Similarly, the Ottoman Parliament established by the 1876 Constitution was suspended after just two sessions in 1878 when the Sultan, faced with demands by the Assembly to hold ministers to account for their alleged mishandling of the Russian-Turkish War, decided that he had had enough of the constitutional experiment and sent the deputies home. Parliament was restored thirty years later, but during its short lifespan until the collapse of the Ottoman Empire in World War I struggled in vain to achieve any real law-making powers or control over the government, although the constitutional amendments secured by the Young Turks in Parliament’s favor would influence later attempts to establish a balance between the constitutional prerogatives of parliament and those of the monarch in the interwar constitutions of the former Ottoman provinces.

Similarly, the British occupation of Egypt in September 1883 effectively cut short any movement in a constitutionalist direction. The Organizational Law which replaced the Egyptian Basic Statute in 1883 introduced a purely consultative assembly with few formal powers and even less impact on policy. Although the Iranian Constitution fared much better than the Egyptian Basic Statute in terms of longevity—it remained in force (albeit with numerous amendments) until 1979—it failed to ensure accountable constitutional government in practice. Following an extended period of anarchy and disintegration of central authority during World War I, Iran would suffer a long spell of personal rule and neo-patrimonial dictatorship during the ascendancy of the Pahlavi dynasty, interrupted only by a brief interlude of restored parliamentary government in the years following World War II.

The committee of the five Islamic Jurists which was to exercise the power to reject wholly or in part any legislative proposal that was at variance with the sacred laws of Islam under Art. 2 of the 1907 Supplementary Fundamental Law was never established. But the provision would allow the clerical jurists who were in favor of constitutional government to put pressure on the Majles to ensure the conformity of its legislation with Islamic law (Sharī‘ah).

While many of the now nominally independent former provinces of the Ottoman Empire adopted constitutions in the interwar era, these documents continued to be strongly influenced by the European powers, i.e., France and Britain, whose presence was still

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19 Tunisia achieved independence from France in 1956 and, following three years of discussion, promulgated the first constitution of the independence era on June 1, 1959; it continues in force, although with numerous amendments, until this day.
20 Brown (n 13) 23.
21 Brown (n 13) 26.
22 Rutherford (n 14) 33.
23 Arjomand, The Turban for the Crown (n 16) 59–74.
24 Arjomand, "Kingdom of Jurists" (n 16).
heavily felt in the region. They can thus largely be explained in terms of the liberal concepts of constitutional monarchy that had dominated the constitutional debate in the different parts of the Ottoman Empire in the second half of the nineteenth century. It was only with the departure of the old colonial masters following World War II that a new constitutional era in the Middle East and beyond could fully come into its own. The early post-independence period in most Islamic countries was characterized by two trends which were also reflected in the new constitutions: nationalism and secularism. Nationalism could take different forms, however. In Turkey, which struggled to emerge from the ruins of the Ottoman Empire, it soon became intimately linked with the notion of secularism. Whereas Art. 2 of the Constitution of Turkey of April 1924 expressly recognized Islam as religion of the state, any reference to the Islamic identity of the vast majority of the population was soon to be replaced by that particular brand of secularism and nationalism that subsequently became known under the name of “Kemalism.” In Iran, on the other hand, the collective memory of the major national crises of the nineteenth and early twentieth century tended to remember the important role which the Shi‘ite clergy had played in mobilizing the masses against foreign intervention and domination. In much of the Arab world, nationalism in the 1950s and the 1960s took the form of the struggle for pan-Arabism, culminating in the establishment of the (short-lived) United Arab Republic in 1958. In these countries the recognition of Islam as religion of the state was routinely included in the constitutional text in order to strengthen the sense of national identity, which in many cases was still shaky. Similarly, religion was an indispensable basis for independent statehood in the conservative kingdoms of the Arab peninsula, which for the most part lacked any political loyalties transcending the narrow confines of dynastic or tribal solidarity.

The reference to Islam as religion of the state in the early post-independence constitutions was tempered by the fact that these countries often embraced socialism, a distinctively secular ideology, as the official ideology of the state (e.g. Algeria, Egypt, Iraq, Libya, Sudan, and Syria). With the rejection of political pluralism in favor of one-party dominance that this commitment entailed, these constitutions also marked a clear departure from the liberal paradigm that had inspired many of the early constitutional experiments in the Islamic world. However, just like their more liberal-minded predecessors, the new generation of basic laws and constitutional texts largely failed to provide the foundations for the establishment of a modern state based on meaningful political participation by the public at large and successful economic and social reform. Beginning in the 1980s, the references to the socialist character of their political systems thus started to disappear from the constitutions of most, although not all, Islamic countries.

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25 Brown (n 13) 35.
26 Art. 2 of the Republican Constitution of 1924 was amended twice, first in 1928 to disestablish Islam as the religion of the Turkish state and then in 1937 to incorporate the ideological foundations of the Turkish Republic as elaborated by Kemal Ataturk, declaring the Turkish state to be “republican, nationalist, populist, statist, secular and revolutionist”; see E. Özbudun, “Secularism in Islamic Countries: Turkey as a Model” (in this volume).
28 Examples include the new or revised constitutions of Algeria, Egypt, and Iraq, where all prior references to socialism have disappeared. One of the few countries that has not yet dropped the constitutional commitment to socialism is Syria; see Art. 1 of the 1973 Constitution, which still remains in force today.
The unsatisfactory results produced by the successive flirtations with the secular ideologies of liberalism, nationalism, and socialism in many Islamic countries since the late nineteenth century left a vacuum in political and constitutional debate that in due course rekindled interest in Islam and its potential for political renewal. The first major debate on the concept of an Islamic constitutionalism in the newly independent Islamic states took place after the creation of the state of Pakistan in 1947. The fundamentalist movement in Pakistan opposed the establishment of a secular state and called instead for an Islamic constitution. In the view of its proponents, such an Islamic state constituted the very antithesis of secular Western democracy as it was based on the sovereignty of God and not on the sovereignty of the people. They successfully pushed for the incorporation of this concept into the Objectives Resolution of 1949, which later became the preamble of the 1956 Constitution of the Islamic Republic of Pakistan, the first state ever to be so designated. The Resolution recognizes the Almighty God as the ultimate source of the authority that has been delegated to the State of Pakistan through its people as a “sacred trust,” to be exercised within the limits prescribed by Him. It proclaims the adherence of the Republic to the principles of democracy, freedom, equality, tolerance, and social justice “as enunciated by Islam.” In addition, it states that the Muslim citizens of Pakistan will be given the opportunity to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qurʾān and the Sunnah, while non-Muslims will enjoy the right to freely profess and practice their religions and develop their cultures.

At the time of the adoption of the constitution the declaration of God’s sovereignty in the preamble was merely a symbolic act, devoid of any specific legal implications. A more important Islamic provision was Art. 198 of the 1956 Constitution, which provided that no law should be enacted which was repugnant to the injunctions of Islam as laid down in the Qurʾān and the Sunnah and that existing laws should be brought in conformity with these injunctions. However, the decision whether a law was repugnant to Islam or not was left to the National Assembly. Although the constitution envisaged the creation of a commission that would provide guidance to the national legislature and the provincial assemblies as to which injunctions of Islam should be given legislative effect, this advice was not to be binding on the legislative organs of the state. It was only two decades later, after the break-up of Pakistan into two independent states and following the military coup of General Zia-ul-Haq, that specific measures were taken to give legal effect to these principles. In 1980 a Federal Shariʿat Court was established and given jurisdiction to determine the conformity of laws with the Qurʾān and the Sunnah. Five years later, a new Art. 2-A was incorporated into the restored Constitution of 1973, which made the Objectives Resolution, and thus the declaration of the sovereignty of God, a substantive and justiciable part of the constitution, a move which built on an earlier ruling by the Supreme Court of Pakistan that the doctrine of legal sovereignty accepted by the people of Pakistan in the Objectives Resolution

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29 This was the position adopted namely by Maulānā Abū-ʾl-aʿlā Mawdūdī, the leading theorist of the fundamentalist and founder of the Jamāʿat-i Islāmī, see S.A. Arjomand, “Islamic Constitutionalism” (2007) 3 Annual Review of Law and Social Science 119/120.
30 The resolution was retained in the preamble of the current Constitution of Pakistan, which was adopted in 1973 after the secession of the former East Pakistan (now Bangladesh).
was the “Grundnorm” of the Pakistani constitutional order and thus legal consequences had to flow from it.\textsuperscript{32}

By that time, however, an even greater constitutional upheaval had taken place in neighboring Iran. The Islamic Revolution of 1979 turned Shi’ite doctrine and law from a mere limitation imposed on constitutional government into the very foundation of the constitutional and legal order.\textsuperscript{33} It did so essentially by transforming the theocratic concept of Mandate of the Jurist (velāyat-e faqīh) introduced by Āyatollāh Khomeini at the beginning of the 1970s and subsequently more fully explored in the writings of the Iraqi scholar Muḥammad Bāqir al-Ñadr\textsuperscript{34} into the centerpiece of the new constitution. Art. 5 of the 1979 Iranian Constitution vests the supreme leadership during the occultation of the hidden twelfth imām in the “just and pious jurist” (faqīh). The extensive powers of the Leader, as the supreme jurist is designated, include the supreme command of the armed forces, the appointment of the highest judicial authorities, the determination of the fundamental directions of policy of the Islamic Republic and the supervision of their execution through the legislative and executive bodies (i.e., the Majles and the president). The selection of the Leader is entrusted to a popularly elected but clerical body called the Assembly of Experts, which also has the constitutional power to dismiss the Leader in case of incapacity.

The 1979 Iranian Constitution also revived the early tradition of Shi’ite constitutionalism by establishing a Council of Guardians that examines the conformity of each law passed by the Majles with the Shari’ah and with the constitution. In effect, the Council turned out to be such a powerful body that its role was curtailed by the 1989 constitutional revision that set up the Maṣlaḥat Council—roughly translated as Council for the Determination of the Public Interest—as an arbiter in the recurrent conflicts between the Council and Parliament.\textsuperscript{35}

A different approach to Islamic constitutionalism that is in many respects the opposite of the Iranian approach has been taken by the Sunni Kingdom of Saudi Arabia.\textsuperscript{36} It rests on the conviction that the constitution of the Islamic state is the Book of God and the Sunnah of the Prophet and thus there is no room for a Western-style constitutional text. With the backing of the Wahhābi scholars, who have a long-standing alliance with the Saudi royal family, the rulers of the Kingdom therefore opposed the adoption of any man-made constitution for much of the twentieth century. It was only in the wake of the second Gulf War, when pressures on the royal family to impose constraints on unfettered autocratic rule intensified, that the Saudi royal family consented in 1992 to the promulgation of a Basic Law (al-Nīʿām al-Asāsī), drafted in secret by a committee under the chairmanship of Prince Nāyef, the Minister of the Interior.\textsuperscript{37} The Basic Law reaffirms the Islamic character of the Kingdom in a manner which could hardly be more forceful.\textsuperscript{38} According to Art. 1, Saudi

\textsuperscript{32} Asma Jilani v. Government of the Punjab All Pakistan Legal Decisions 1972 S.C. 139.
\textsuperscript{33} Arjomand, “Kingdom of Jurists” (n 16).
\textsuperscript{34} C. Mallat, \textit{The Renewal of Islamic Law. Muhammad Bager as-Sadr, Najaf and the Shi’i International} (Cambridge University Press, Cambridge 1993); Arjomand (n 29) 126–127.
\textsuperscript{35} Arjomand, “Kingdom of Jurists” (n 16); S.A. Arjomand, \textit{After Khomeini—Iran under his successors} (Oxford University Press, New York 2009) 30–35.
\textsuperscript{37} Mayer (n 36) 191.
\textsuperscript{38} F. Vogel, \textit{Islamic Law and Legal System} (Brill, Leiden 2000) 295.
Arabia is an Arab and Islamic sovereign state whose religion is Islam and whose constitution is the Holy Qur’ān and the Prophet’s Sunnah. Art. 7 goes on to say that the government derives its power from the Qur’ān and the Prophet’s tradition, and that the Qur’ān and the Sunnah reign supreme over the Basic Law and all other state regulations. However, unlike the Iranian Constitution or the revised Pakistani Constitution, the Saudi Basic Law does not provide for any specific mechanism for how this supremacy shall be implemented and enforced in legal practice. Instead, the King and his family continue to exercise legislative and executive powers in a largely unfettered manner, subject only to consultation (shūrā) with a Majlis, the members of which are essentially hand-picked by the King.

Most Islamic countries, however, have not followed either of these more extreme Islamist positions. Of the forty-six countries where Muslims constitute the majority of the population, only ten declare themselves to be Islamic states in their constitutions. Among those, only Iran (Art. 56 of the 1979 Constitution) and Pakistan (Art. 2 A of the 1973 Constitution) have openly embraced the concept of divine sovereignty instead of national or popular sovereignty. By contrast, most countries have settled for a more moderate version of Islamic constitutionalism, declaring Islam as the official religion of the state, but stopping short of proclaiming the country an Islamic state. While these provisions produce few direct consequences, given that Sunni Islam lacks the institutional framework that could provide the basis for the establishment of an official “church,” this does not apply to another constitutional clause that has become a staple in Islamic constitution-making since it was first introduced in the short-lived Syrian Constitution of 1950: the clause that the Sharī’ah shall constitute “a” or even “the” main source of legislation. This principle has since been embraced by republican, monarchic, socialist, and authoritarian regimes alike. Application of the Sharī’ah has become the most widely accepted indicator of the degree to which a society and political system are Islamic. At the beginning of the twenty-first century, a substantial number of Islamic countries (i.e., countries with a population of more than 50 percent Muslims), among them most Arab states, had adopted this principle in one form or another. It was a major concession to, or preemptive appropriation of, a central tenet of fundamentalist constitutional thought which reflects the mythical notion of the
Islamic state as the primary agent for the execution of the Shari’ah.\textsuperscript{47} As such, it ignores the fact that due to its rudimentary and historic character Shari’ah is hardly a sufficient basis for the legal system of a modern nation-state and that some of its most relevant parts have already been incorporated in the civil law codifications as a result of the diligent works of Islamic lawyers in countries like Egypt and Iran.\textsuperscript{48} However, the practical impact of the Shari’ah clause depends very much on the specific institutional and procedural arrangements for its implementation, thus leaving constitution-makers with a wide discretion to limit or to extend its scope.

* Moreover, the progress of Islamic constitutionalism has by no means been uniform. It has made little, if any, headway in the newly independent Central Asian Republics.\textsuperscript{49} While their precedent may count for little, since they still are—with the possible exception of Kyrgyzstan—under the control of post-communist dictatorial regimes, there are also examples of a rejection of Islamization of the political and legal system as a result of a democratic debate. In Senegal, a country with a majority of almost 95 percent of Sunni Muslims, the principle of separation of state and religion in the French tradition known as \textit{laïcité} was reaffirmed in the Constitution of 2001. This followed a vivid debate in which Muslims had lobbied for the rejection of secular French law in favor of legislation that reflects more closely the traditional values and beliefs of the Senegalese Muslim community.\textsuperscript{50} These groups had at first managed to eliminate any reference to \textit{laïcité} in the early drafts of the new constitution. However, the elimination met with widespread criticism in the press, and following a broad public debate the drafters returned a more traditional version of Art. 1 which retains the constitutional commitment to a secular state.\textsuperscript{51} Even more telling have been the recent experiences with constitutional reform in Indonesia, the world’s biggest Muslim country. Following the end of Dutch colonial rule, Indonesian Muslims had fought for the establishment of an Islamic state in Indonesia.\textsuperscript{52} However, when their turn at the levers of power finally came in the post-Soeharto era, the leaders of the two most important religious organizations in the country supported wholeheartedly the constitutional amendments that transformed Indonesia into a secular, non-ideological democracy. They carried the day over those Islamic forces that had argued in favor of the restoration of the clause in the so-called Jakarta Charter (the preamble of the 1945 Constitution), which obliged Muslims to live according to Shari’ah.\textsuperscript{53} 

* Even in those countries which have embraced Islamic constitutionalism as a guiding principle of constitution-making, the modalities of its implementation have varied considerably. This reflects no doubt the hugely different circumstances in which the various

\textsuperscript{47} Rutherford (n 14) 99; Ajormand (n 29) 123.
\textsuperscript{48} Ajormand (n 29) 124.
\textsuperscript{49} See S. Akbarzadeh, “Post-Soviet Central Asia: the Limits of Islam” (\textit{in this volume}).
\textsuperscript{50} A.A. An-na’im, \textit{African Constitutionalism and the Role of Islam} (University of Pennsylvania Press, Philadelphia 2006) 146.
\textsuperscript{52} N. Hosen, “Indonesia: A Presidential System with Checks and Balances” (\textit{in this volume}).
\textsuperscript{53} Hosen (n 52); A.A. An-na’im, \textit{Islam and the Secular State: Negotiating the Future of Shari’ah} (Harvard University Press, Boston 2008), who argues that the very idea of an Islamic state reflects essentially European concepts of law and state and has little to do with either Shari’ah or Islamic tradition.
political regimes try to consolidate their grip of power by using the reference to the Islamic state as a source of legitimacy. But it is also indicative of the fact that there is not one uniform concept of the Islamic state, but different versions of it. The early liberal Islamic constitutionalists in the nineteenth century basically acted on the assumption that Islam is not only compatible with Western-style constitutionalism, but that representative limited government captures the very spirit of Islam. Later generations of Islamic constitutionalists were more skeptical with regard to the benefits to be expected from Western constitutional ideas and thus more likely to stress the threat these ideas were likely to constitute to established Islamic concepts of law, government, and society. This line of thought found its most radical expression in Mawdūdī’s characterization of the Islamic state as the very antithesis of secular Western democracy.

However, while the different proponents of a truly Islamic constitutionalism agreed that the primary function of the Islamic state is to act as the executive of the Shari’ah, considerable differences remained with regard to the way in which such a state shall be organized, and persist to this day. An early version of Shari’ah constitutionalism, which was already formulated in the constitutional revolution in Iran in 1906–09, held that Islam should act as a limitation on government and legislation, with the consequence that laws and regulations that are at variance with the sacred laws of Islam have to be eliminated from the legal system. This was the concept which would, in some form or another, eventually prevail in those countries in which the ideology of the Islamic state gained greater traction in the latter half of the century. In Iran itself, however, this approach was to be overtaken by a much more radical doctrine that holds that in order to preserve the Islamic nature of the state, it is not sufficient to merely provide for an institutionalized monitoring of the conformity of state legislation with the Qur’ān and the Sunnah; instead, the clerical establishment must be prepared to assume itself responsibility at the center of the political system, with the supreme jurist as the foremost representative of the Islamic principles taking the place of the ruler. It was this concept of velāyat-e faqīh that was codified in the Constitution of the Islamic Republic of Iran in 1979.

It is easy to discern, however, that this concept, which was by no means uncontested within Iran itself, reflects the specific position of the clerical leadership that is a central element of the Iranian Shi’ite tradition and is thus difficult to implement in countries which, like most Sunni countries, lack a powerful hierarchy of clerics. It is thus no surprise that the more recent interpretations of Sunni constitutionalism, as expounded in the contemporary writings of the leading constitutionalists of the Egyptian Muslim brotherhood, tend to stress the character of the constitution as a social pact between the ruler and the ruled. This implies that the ruled owe allegiance to the state and the government in return for the performance of certain vital functions, foremost among them the defense of the religion and the maintenance of the Shari’ah. If the ruler violates the Shari’ah, the citizens can disobey his orders and even remove him from office under certain conditions. This concept of the

54 A critical analysis of the historical and political background of the ascendancy of the concept of Islamic state is provided by N. Feldman, The Fall and Rise of the Islamic State (Princeton University Press, Princeton, 2008).
55 Rogan (n 8) 104; Arjomand (n 29) 116.
57 As A. Quraishi, “The Separation of Powers in the Tradition of Muslim Governments” (in this volume), Fn. 14 points out, Khomeini’s theory of the velāyat-e faqīh represents a dramatic change from the classical Shi’ah doctrine that jurists should not be in a position of political power until the imām returns. Its support within the ranks of the Shi’ite clergy is far from unanimous.
Islamic state leaves sufficient room for a democratic system with political pluralism and a multi-party system, which is indeed what its proponents have advocated. This modern rereading of the basic tenets of Islamic constitutionalism may thus herald a return to earlier, more modest views of the function of Shari’ah as limitation on constitutional government. However, its practical implications remain very much unclear, as it has not been put to the test in Egypt or in any other Islamic country so far.

Although the markedly political interpretation of Islam advocated by the Āyatollāh Khomeini and his followers was contested right from the start and the theocratic regime set up by the Iranian Constitution of 1979 has proved difficult to export to other Islamic countries, the Islamic revolution of 1979 succeeded in putting the relationship between constitutionalism and Islam firmly on the agenda of constitutional politics in many of the world’s Islamic countries. Even the constitutional systems of countries like Turkey, which remained faithful to a rigorously secular concept of constitutionalism during this period, have been exposed to the strains caused by the ascendancy of political Islam, as is evidenced by the repeated trials of strength between the old Kemalist elite entrenched in the military and in the constitutional court and the more or less openly Islamic parties which have dominated successive Turkish governments since the mid-1990s. The same observation applies even more to the growing number of Islamic countries which as a result of war or civil war had to rebuild their constitutional structures from scratch during the last decade (Afghanistan, Iraq, and Sudan).

Against this background, this book seeks to analyze the impact the rise of political Islam has had on the development of key constitutional concepts in Islamic countries, and to which extent the notion of constitutionalism has been transformed in these countries as a result. The first part of the book examines the relationship between Islam and certain key elements of modern constitutionalism in the Western tradition, i.e., rule of law, democracy, and human rights, from a historical as well as a contemporary perspective. What emerges from this survey is that basic concepts of “Western” constitutional discourse have to be reconceived if they are to serve any meaningful purpose in the discussion on Islamic constitutionalism. This is true above all for the notion of secularism which, as Abou el Fadl reminds us, even in the Western tradition has no fixed constitutional or legal meaning attached to it. The U.S. “wall of separation” between church and state should not be confused with French *laïcité*, and the English concept of an established Anglican Church with the Queen as its head differs considerably from both of them. In fact, as Ergun Özbudun notes, there seem to be as many constitutional doctrines regarding the separation of state and church in the “West” as there are countries.

Islamic countries, on the other hand, are simply lacking the historical experience which would allow them to understand, let alone imitate, a secular movement which in Europe was directed against the overweening power of the church as an institution. Islamic jurists and scholars did never claim—with the possible exception of the Shī’ite clergy in contemporary Iran—a central role in the political order. A similar observation applies to such basic concepts as “law” and “state.” As Asifa Quraishi convincingly argues, Islam was originally based on an inherently pluralist concept of law, one which distinguished between the *fiq̣h*, i.e., the legal rules derived by the various legal schools from the Qur’ān and the sayings of the

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58 For a summary of the constitutional ideas of four leading Egyptian writers on Islamic conception of governance—Yūsuf al-Qaraḍāwī, Ṭāriq al-Bishrī, Kamāl Abū al-Majd, Muḥammad Sālim al-ʿAwwā—see Rutherford (n 14) 99–130, who concludes that many details of Islamic governance still remain (deliberately?) vague.
Prophet, and the law made by the rulers in those areas, including most of constitutional and administrative law, which were not covered by Shari‘ah. Ironically, it was only with the appearance of the modern nation-state, which claims a monopoly on the creation of legal rules, that the pluralist character of the traditional Islamic concept of law was forgotten and efforts focused increasingly on securing a dominant role for Shari‘ah in the state legislation. This concept of the state which claims all legal authority itself was, as Rüdiger Wolfrum explains, also a European invention. It was essentially alien to Islamic thinking, which had not previously known the idea of the state as a sovereign entity with inherent rights of its own. Similarly, the concepts of rights and of the relationship between the individual and the community are different in Islam from those concepts which underpin Western constitutional discourse. It is thus necessary to adopt broader notions of key concepts like state, law, and rights in order to identify those parts of the Islamic tradition which might serve as a basis for the realization of core values of modern constitutionalism like separation of powers, rule of law, democracy, and human rights. The contributors to Part I propose different but equally intriguing ways in which this reconstruction work might be approached.

With the break-up of the Ottoman Empire and the abolition of the caliphate in 1924 the tradition of a universal or transnational form of governance of the “community of believers” in accordance with the precepts of Islam was effectively ended. Despite frequent references, especially in Arab countries, to transnational concepts like pan-Arabism in the period following independence, the debate on the proper status and role of the political leadership and its relations with Islam took place largely within the narrow confines of the domestic polity and was defined primarily by the needs and aspirations of the ruling elite of each country. This has remained so even after the ascendancy of political Islam in the late 1970s. However, while constitutional debates in the period immediately following independence tended to be dominated by concepts borrowed from Western and (former) socialist countries like nationalism, secularism, republicanism, or socialism, since the 1970s Islam has reemerged not only as a concept for defining the religious identity of Islamic societies, but also as a major if not (at least nominally) dominating element in determining their constitutional and legal foundations. As has already been mentioned, in many parts of the Islamic world the Islamic foundations of the state are today expressly recognized in one way or another. Provisions which confer a privileged rank on the Shari‘ah among the sources of the national legal order nowadays figure prominently in a growing number of national constitutions. The question arises as to how these provisions have been interpreted by judges, scholars, and politicians, and to which extent they have effectively contributed to the shaping of the constitutional and political identity of the respective societies. Part II of this volume therefore undertakes a comprehensive comparative survey of the scope and meaning of the clauses that define the role of Islam and of Shari‘ah within a number of carefully selected domestic constitutions, and of the application the relevant provisions have received in constitutional practice. In selecting the countries whose constitutional experience is analyzed in this and in the following parts, priority has been given to the “core regions” of the Islamic world, namely the countries in the Maghreb, the Mashreq, and the Arabian Peninsula, without however neglecting other regions in which Islam has historically occupied a prominent role (i.e., West and East Africa, as well as Central, South, and Southeast Asia). Special consideration has been given to those countries which—like Egypt, Iran, or Turkey—have historically (see above) played a central role in the constitutional and political development of the Islamic world and have often been seen as models of reference even beyond their direct dominion or sphere of influence.

The application of the constitutional provisions defining the Islamic character of the state and the role of Shari‘ah as foundation of the legal system frequently raises difficult
issues in practice. In many cases these clauses result from complex and often non-transparent constitutional bargaining processes between the relevant political actors, and constitute an uneasy compromise between those groups that call for the establishment of a constitutional system in which political rule is based entirely on the precepts of Islam and those forces which essentially want to maintain the secular character of the main institutions of governance and thus will accept only a moderate or limited Islamization of the constitution and the legal and political system. In this situation a special responsibility is placed on those organs and bodies that have the task to interpret and apply the relevant constitutional provisions, i.e., on the courts and tribunals, and especially on the constitutional courts (in countries where they have been established as separate institutions). Part III of this book takes a closer look at the role of constitutional review in Islamic countries, and the role such review has played in the shaping of the domestic constitutional arrangements, especially with regard to the Islamization of the state institutions and of the legal system. In particular, it examines the different functions assigned to the courts in the exercise of their constitutional review powers, the way in which their members are selected, and the conditions in which they operate more or less independently.

Parts II and III of the book may also be read as country-specific case studies on the relationship between Islam and the rule of law, and between Islam and human rights in contemporary Islamic societies, whereas Part IV analyzes the constitutional principles on which Islamic societies’ institutions of government are based, and the way in which these principles are implemented. Drawing on the historical analysis of Part I on the respective weight of democratic and authoritarian traditions in Islamic thought, the contributors in Part IV examine in particular whether the widely perceived affinity of Islam to monarchical or authoritarian forms of government is borne out by the constitutional experience of Islamic countries, or whether, on the contrary, democratic forms of government and checks and balances have been successfully acculturated in the Islamic world. Evidence suggests that there is no uniform answer to this question and that Islam is able to accommodate a huge variety of forms of government, including absolute (Saudi Arabia) and constitutional monarchies (Jordan), semi-representative theocracies (Iran), consociational democracies (Lebanon), authoritarian presidential systems (Central Asia), as well as parliamentary (Turkey, Malaysia) and presidential democracies (Indonesia, Nigeria) of the traditional type.

The final part of the book focuses on the so-called emerging constitutions. Often born in times of crisis, in response to a total or partial breakdown of the state due to war or civil war, these constitutions have been drafted or are being drafted in a number of Islamic countries with a varying degree of support and assistance from the international community (Afghanistan, Iraq, Sudan, and Somalia). The special circumstances in which they are frequently prepared and adopted (including the fight against militant Islamists, e.g., in Afghanistan and Somalia), and the involvement of the international community, have a considerable impact on the respective constitution-making processes and shape their outcome, at least in part. As part of complex bargaining processes and difficult political compromises, the resulting constitutional settlements frequently try to combine modern ideas of constitutional government with moderate Islamist concepts. A different but no less complex sort of change is being brought about by the recent revolutionary uprisings on the streets of Tunis, Cairo, Bengasi, Sanaa, and Homs, although it is not yet at all clear which direction these movements will take and whether they will result in the revitalization and effective implementation of key constitutional principles like democracy, rule of law, and fundamental rights. Only time will tell whether these concepts can be applied successfully to the often grim political and social realities of the societies concerned and thus contribute to a new flourishing of constitutionalism in Islamic countries.
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PART 1

CONSTITUTIONALISM AND ISLAM: CONCEPTUAL ISSUES
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I. OVERVIEW

This article is presented in three sections, beginning with a brief characterization of Islamic constitutional law and its underdeveloped status as compared with other branches of Islamic law. The discussion proceeds to highlight salient differences between the Islamic and Western approaches to constitutional law, to be followed by a brief discussion of Islam and secularism. Section two consists of a general characterization of the Islamic system of rule under four sub-headings. The first of these defines government in Islam as a trust (amānah), the second describes it as a limited and thus non-totalitarian government, the third addresses the Islamic system of rule as a qualified democracy, and the last characterizes it as a civilian not a theocratic system of government. The final section summarizes the main results of the preceding analysis and offers some tentative conclusions on the relationship between Islamic government and democratic constitutionalism.

II. THEORETICAL ISSUES

Constitutional law (uṣūl al-ḥukm) is one of the most under-developed areas of Islamic law and jurisprudence (fiqh) and contrasts in this respect with matrimonial law and devotional matters (munākāhāt, 'ibādāt) on which the fiqh is exceedingly elaborate. A great deal of what has been written in the past expatiates on the early caliphate and pays but little attention to subsequent developments. It is instructive to note in this context the view of the former Mufti of Egypt, Shaykh Aḥmad Huraydī, who observed that the political order that held sway in the Muslim lands over the greater stretch of history from the Umayyads to the end of the Ottomans did not, on the whole, comply with the principles of Islam. Those who wrote on Islamic government and administration focused their attention on dynastic practices that did not reflect normative principles but only expounded the history of government in those times, and there was and is “a big difference between
the two.\textsuperscript{1} The Islamic concept of constitutional law remains open to development and reform without necessarily negating its own religious and ideological heritage.

Juristic works on the caliphate are on the whole concerned with the methods of designation of the caliph, his rights and duties, and a certain institutional blueprint on the judiciary, vizierate, and departmental structures for the army, taxation, police duties, and so forth. This literature hardly addresses modern developments and phenomena such as the nation state, democracy, fundamental rights, separation of powers, and so forth. Abū-l-Ḥasan al-Māwardī’s (d. 1058 C.E./450 A.H.) renowned \textit{Kitāb al-Aḥkām al-Sulṭāniyyah} pays more attention to the realities of the Abbasid state of his time than the foundational guidelines of the Qur’ān and Sunnah. He pays scant attention to consultation and has no section or chapter on the basic rights of people.

Promulgation of formal constitutions has a short history in Islamic countries that traditionally subscribed to the Sharī‘ah and, out of a sense of veneration to it, did not entertain the idea of a formal constitution. Yet it is ironical to note that the Constitution of Madīnah (\textit{Ṣaḥīfat al-Madīnah}, also known as \textit{Dustūr al-Madīnah}, of 622 C.E./1 A.H.) is the earliest constitutional document of authoritative standing on record. This document laid the foundations of a new community under the Prophet’s leadership in the City of Madīnah. Much attention was paid in this document to establishing a basis of cooperation and cohesion between the Muslims, Jews, and pagans. Issues of leadership and subjugation of the powerful tribes to the authority of the new government, principles of equality and justice, freedom of religion, right of ownership, freedom of movement and travel, and combating crime were among the major preoccupations of this document. Thus it would appear that the constitution of Madīnah had civilian characteristics.\textsuperscript{2}

A direct parallel between the Western and Islamic experiences in constitution-making may be less than justified; yet it may be said that many of the salient features of Western constitutionalism are familiar to the Sharī‘ah. This would include commitment to the rule of law, consultative government of civilian characteristics, a substantive separation of powers, and limited government. The substance of an elective constitutional government that is accountable to the people is thus agreeable with Islam. This may also explain the fact that the post-colonial period saw acceptance of constitutionalism by many Muslim countries that promulgated formal constitutions one after another at a fairly rapid pace. Saudi Arabia did not adopt a formal constitution, and for a long time maintained that the Qur’ān was its constitution. But even Saudi Arabia in 1990 C.E. (1412 A.H.) promulgated the Law of the Consultative Assembly with its thirty articles, and for the first time established a consultative assembly (\textit{Majlis al-Shūrā}) and integrated certain features of accountability and participatory governance in the political system.

Yet there are some differences between the two traditions under review. Whereas constitutionalism in the West is entrenched in the secularist legacy of the Enlightenment that separates religion from politics, many Islamic countries have assigned a place to Islam in their national constitutions. Islam provides a set of general principles on justice, governance, accountability, and rules of law that are not postulated in the Western nation state model. Constitutionalism in the Western tradition is grounded in the view that the coercive power of state is potentially a menace to the rights and liberties of the individual, which

\textsuperscript{1} Lecture series by Shaykh Ahmad Huraydi held at the University of Cairo, as quoted by Fu‘ād A. Aḥmad, \textit{Uṣūl Niʿām al-Ḥukm fī-l-islām} (Alexandria 1991) 15–16.

need to be protected by means of a constitution—hence a duality of interests obtains between the individual and the state. Islam on the other hand subscribes to a unitary order based on the concept of tawḥīd (i.e., the Oneness of God) and thus provides a set of principles oriented toward an essential unity of basic interests between the individual and the state. Having said this, in the area of governance, Muslim countries have adopted Western doctrines and institutions as part of the colonial legacy; hence, a certain disconnect of the Muslim masses with their Islamic heritage became a cause of discontent during the post-colonial era. One of the consequences of that rupture was manifested in the Islamic resurgence movement of the later part of the twentieth century that was expressed by the demand of Muslim masses that their laws and governments be in consonance with their beliefs. One of the basic questions of concern of the Muslim constitution-making experience has been over the role and recognition of Islam and its Shari‘ah in the national constitution.

Another question arises over the relevance of the secularist debate to Islam. Secularism in the Arabic terminology (‘alamîniyyah, or dunyawiyyah) refers to the worldly and the temporal, and it is usually taken to imply the liberation of politics from religion. It came to the Muslim world together with related concepts such as modernity and westernization in the context of colonialism. For the Muslim world, during both the colonial and post-colonial periods, secularism has largely meant the marginalization of Islam and its exclusion from law and governance, or else of confining it to the sphere of personal law. Secularism is a product of Christian society that emerged as a protest movement to the historical domination of the church over the state and the eventual reversal of that order after the Reformation. Secularism and its postulates “cannot be understood outside the context of Europe’s evolution and its Christian reform movements.” With reference to law and government in the Muslim world, it is widely held that the attempted secularization of the twentieth-century Muslim world has produced dictatorship, state-enforced religion, the violation of human and civil rights, and the weakening or outright destruction of civil society. John Keane summarized the Muslim perception as follows: “In a word, secularity has won a reputation for humiliating Muslims—humiliating them through the exercise of western double standards in Kuwait, Algeria and Palestine, through the corrupt despotism of comprador governments and through the permanent threat of being crushed by the economic . . . and military might of the American-led West.”

One of the major postulates of secularism under conditions prevailing in industrial-scientific societies maintains that the hold of religion over society and people is bound to diminish over time. The hold of Islam over Muslims has apparently not diminished but has rather increased during the last one hundred years. Secularism proclaims the independence of “secular” truth from the notion of metaphysical truth. The Islamic viewpoint accepts scientific truth but also recognizes morality and transcendent faith, which are understood by Muslims not as limitations on rationality and science, but as vistas for their enrichment and perfection. Muhammad ‘Abduh (d. 1905 C.E./1323 A.H.) maintained that historically the idea of separation of religion and state originated in a certain course of events in Christian Europe; it had no precedent in Islam and stood in conflict with many of its doctrines. Islam does not have a church as such nor does theocracy find a place in its proposed

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4 John Keane, “The Limits of Secularism” in Tamimi and Esposito (n 3) 36.

political order. Government in Islam is essentially civilian, elective, and consultative and the religion also does not stand in the way of progress, science, and civilization. An earlier opinion was advanced by Shaykh Rifā’ah al-Ṭahṭāwī (d. 1873 C.E./1290 A.H.), the then Rector of Al-Azhar University in Cairo, who considered secularism a product of the French notion of laïcité, which went a long way to negate spirituality and religion and therefore cannot be easily reconciled with Islam. Similarly, the contemporary political thinker Muḥammad ʿAbid al-Jābirī considers secularism a rationalist ideology which tends to advance, however, an erroneous understanding of the universe, man, and society, and it is as such irreconcilable with Islam. Secularism is indeed at odds with Islam, but it is important to note that the conflict between them is not all-embracing, as the principles of governance in Islam remain receptive to some aspects of secularism. A careful study of the civilian and democratic features of governance that can accommodate the demands of a substantive separation of religion and state in an Islamic polity is therefore worthwhile.

III. THE ISLAMIC SYSTEM OF RULE

Contemporary writings on state and government in Islam are generally cognizant of the absence of a model and prototype for an Islamic system of rule and tend to lay emphasis on conformity to a set of principles. A government may consequently take a variety of forms and yet qualify as Islamic if it complies with those principles.

Salient among these principles are shūrā (consultation), bay’ah (pledge of allegiance), general consensus (ijmāʿ), public welfare (maṣlaḥah), and justice, all of which the Islamic government is committed to uphold. Any system of government which implements them repels turmoil (fitnah), establishes peace and order, and qualifies as Islamic, regardless of names and labels. The system of government may be similar to the historical caliphate or may be different from it and combine new features in response to actual developments.

Islamic governance may be characterized as civilian (madaniyyah), which is, however, neither theocratic nor totally secular but has characteristics of its own. It is a limited, as opposed to a totalitarian, form of government with powers constrained by reference to the definitive injunctions and guidelines of the Qur’ān and authenticated Sunnah. It is also rooted in the notions of trust (amānah) and vice-regency (khilāfah), and its principal assignments are to administer justice and secure the people’s welfare. The state is elective in character and represents the community to which it remains accountable. The Islamic system of rule may also be described as a qualified democracy that is participatory and must conduct its affairs through consultation. Some of these features are elaborated in the following paragraphs.

A. Government as a Trust (Amānāt al-Ḥukm)

In a Qur’ānic passage known as the āyat al-umārā’ or the rulers’ verse, the text provides: “God commands you to render the trusts (al-amānāt) to whom they are due, and when you judge among people, you judge with justice” (4:58).

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6 Muḥammad ʿAbduh, al-Islam wa-l-Naṣrāniyyah maʿa al-ʾIlm wa-l-Madaniyya (Matbaʿat al-Manār, Cairo 2002).
The verse immediately following is also on the same subject, as it addresses the Muslims to “obey God and obey the Messenger and those in charge of the affairs among you . . .” (4:59).

Muslims are thus enjoined to be faithful in the fulfillment of their trusts, to render impartial justice among people, and to obey their lawful rulers. The command over the fulfillment of trusts in this verse is, according to one view, addressed to the leaders of the community and those to whom the community has entrusted their affairs. Others have held the view that this verse is addressed to all strata of the people, the ruler and ruled alike. Since the language of the text does not specify any particular class of people, it may indeed be assumed that the address contemplates the ruler and ruled as well as the generality of Muslims alike.

The broad and unqualified expression ‘al-amānāt’ in this text characterizes the Islamic system of rule. Government is consequently a trust and its leaders and officials are all the bearers of that trust. Trust is signified, in turn, by the notion of accountability before God and the community. This understanding is supported by the ḥadīth which provides:

You all are shepherds (ra’in, alternative translation: custodian) and accountable for the flock (alternative translation: for the object of your protection: An imām is a shepherd of men and he is responsible for his sheepfold; a man is the shepherd of the members of his family and he is responsible for his sheepfold; a woman is a shepherdess of the members of her husband’s household and of her children and she is accountable for it . . . .8

This ḥadīth focuses on the notion of custody, which is another word for trusteeship, and practically everyone in a position of responsibility is thus declared to be the bearer of a trust. It was on this basis that the Righteous Caliphs understood their positions analogous to guardians and executors over the property of orphans. They saw it as their duty to personally supervise the community affairs, and protect their interests and rights.

Ibn Taymiyyah’s renowned book, Al-Siyasah al-Shar‘īyyah, or Sharī‘ah-oriented Polity, which is, as per his own affirmation, a commentary on the āyat al-umarā, highlights two themes in his elaboration of al-amānāt: selection and appointment of officials, which must strictly be based on merit and qualification, and fair distribution of wealth in the community. But the fact that the reference to justice occurs immediately after al-amānāt in the text indicates that impartial justice is the most important aspect of the trust of governance.9

With reference to fair distribution of wealth in the community, Ibn Taymiyyah has quoted the second caliph, ‘Umar b. al-Khaṭṭāb (d. 644 C.E./23 A.H.), to have said concerning the assets of bayt al-māl (public treasury): “No one has a greater claim to these assets in preference to anyone else, and everyone’s entitlement would be judged by his record (of service), his financial condition, his burdens and his personal needs.”10

Amānah in government is also an integral part of representation. The head of state is a representative (wakīl) of the community by virtue of wakālah, which is a fiduciary contract, and a wakīl is simultaneously a trustee. The wakīl derives his authority from the principal (muwakkil) and exercises it on the latter’s behalf. It is a restricted form of wakālah, manifested in the requirements that the leader enforces the Sharī‘ah and consults the community in the conduct of government affairs.

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8 Reported by al-Bukhari no. 853 and Muslim no. 1829.
10 Ibid 43.
B. Limited Government

Islam advocates a limited government in which the individual enjoys considerable autonomy. There are, for example, restrictions on the legislative capabilities of the state, which may not introduce laws contrary to Islamic principles. Legislation must also meet the requirements of consultation and consensus. The state power is constrained by reference to the clear injunctions of the Qur'ān and Sunnah, which are not man-made and may not be amended or abrogated by the worldly powers.  

Islam does not advocate a totalitarian government, as many aspects of civilian life remain outside the domain of law and government. Muslim jurists have thus distinguished the religious (dīnī) from juridical (qaḍā'ī) obligations and maintained that only the latter are enforceable before the courts. Most of the religious aspects of the individual’s life in society are private and non-justiciable. Even some of the religious duties, such as prayer, fasting, the ḥajj, and almost all of what is classified as recommendable, reprehensible, and permissible (mandūb, makrūh, mubāḥ) are not legally enforceable. Government normally plays an administrative and regulatory role in regard to devotional matters (ʿibādāt) and should not, without compelling reason, impinge on people’s freedom with respect to, mandūb, makrūh, and mubāḥ. The private and civil rights of the individual are also immune, by the express injunctions of Shari’ah, against encroachment by others, including the state. No government agency, nor even the Shari’ah courts, has powers to grant discretionary changes in the private rights and properties of individuals, without the consent of the person concerned. Judicial decisions must be based on lawful evidence gained without compulsion and espionage, and the grounds for those decisions must also be clearly stated. All litigants must be accorded equal treatment before the courts of justice regardless of their language, status, race, and religion. Justice is a human right in Islam and no one has a superior claim to it over others, just as everyone is equally subject to the rule of law and the Shari’ah. Trial procedures in Shari’ah courts and the substance of the Shari’ah law of evidence and proof are, as such, positivist and civilian in character and do not show significant variation with their parallel procedures in the civil courts. The court of Shari’ah must accord equal treatment to all litigants regardless of their status, race, language, and religion.

The head of state enjoys limited powers to grant a pardon to a convicted offender, and may not order discretionary punishments for unstipulated violations. The deterrent (ta’zīr) punishment is open to court discretionary powers with respect to determining the quantitative aspect of the punishment only for conduct which is prescribed by the Shari’ah. The judges have no powers to create an offense, without valid evidence in the sources, on discretionary grounds. There is, moreover, no recognition in the Shari’ah of any privileged individual or group and no one, including the head of state, enjoys any special immunity or status before the courts of justice.

The state’s accountability to the community is, in the present-day Muslim countries, articulated in their written constitutions, which have become a common and generally accepted feature of government. These constitutions are essentially instruments of limitation which articulate the state’s commitment to uphold and protect the basic rights of their citizens, and are, as such, consistent with Islamic principles. They may be generally subsumed under the Islamic public law doctrine of siyāsah shar’iyyah (Shari’ah-oriented policy),

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11 For further details on aspects of individual freedom, see Mohammad Hashim Kamali, Freedom, Equality and Justice in Islam (The Islamic Texts Society, Cambridge, U.K. 2002) 1-47.
which authorizes the state to issue decrees and make decisions, both within and outside the regulated Shari‘ah in the interest of good governance.12

The state has limited powers with respect to taxation. The Shari‘ah thus stipulates a number of criteria which the government must observe in the imposition of tax: (1) Tax must be just and proportionate to the ability of the taxpayer; (2) it must apply equally to all according to their ability without discrimination; (3) taxation must aim at the minimum of what is deemed necessary; (4) the well-being of the taxpayer must be observed in the determination of quantity and methods of collection; and (5) taxation must observe the time limit of one calendar year, or similar other periods, for the yield or profit to materialize.13 Abū Yūsuf, al-Māwardī, and others have emphasized that tax must be moderate and must in no case deprive the taxpayer of the necessities of life.14

C. Civilian Government

Conceptual uncertainties persisted in Islamic political thought by virtue of the fact that caliphate and imamate were subsumed, in the writing of early scholars, under the rubric of theology and kalām, rather than fiqh, to which it properly belonged. This was partially influenced by the religious character of the then ongoing debate on leadership issues, especially the Shi‘ite doctrine of imamate, which is a part of the Shi‘ite theology, but also by the notion that establishing a system of rule was necessary in order to administer important aspects of Islam, such as the collection and distribution of zakāh (legal alms), administration of justice, and so forth.

The Rightly Guided Caliphate (632-661 C.E./10-40 A.H.) that ruled the Muslims following the death of the Prophet has left a lasting impact on the minds of almost all Muslims, due mainly to its republican features. Most Muslim thinkers, jurists, and philosophers refer to it to justify their interpretations regarding the characteristics of Islamic government. After the Prophet’s demise in June 632, consultation and bay‘ah were used as the means by which the first caliph, Abū Bakr, was elected and designated into office. On accepting the bay‘ah from the people of Madīnah, in his inaugural speech, Abū Bakr praised God and addressed the congregation in the following terms:

I have been given the authority over you but I am not the best of you. If I do well, help me; and if I do wrong, set me right. Sincere regard for truth is loyalty and disregard for truth is treachery. The weak amongst you shall be strong with me until I have secured his rights, God willing; and the strong amongst you shall be weak with me until I have wrested from him the rights of others. . . .15

On Abū Bakr’s death, he nominated his successor, ʿUmar b. al-Khaṭṭāb, and the community pledged their allegiance to him. Thus the bay’ah served as the community’s confirmation in the designation and appointment of the caliph. Caliph ʿUmar b. al-Khaṭṭāb also addressed the people in his inaugural address and asked them to “rectify any aberration you might see in me.” Upon hearing this, a man rose from the audience and said, “If we see deviation on your part, we shall rectify it by the sword.” The caliph graciously praised God that there would be someone who took such a rigorous stance in the cause of righteousness.16

After the Umayyads established themselves as a dynasty, the Muslim community was forced to pledge allegiance to rulers they did not particularly like or approve of. Imām Mālik (713–795 C.E./93–179 A.H.) issued a fatwā that the bay’ah would be illegal if it was obtained by duress. His restraining fatwā represents an authoritative expression of support for representative governance.17

Muhammad ʿAbduh wrote that Islam did not recognize any religious authority of the kind known in Christianity. In response to the question over the basis of legitimacy (mashrūʿiyah) of governance in Islam and the rightful successor to rule, ʿAbduh maintained that only the Shiʿite theory of imamate located the right to rule in the principle of divine selection, whereas the Sunnis upheld the elective principle whereby the community elects its leaders. Government in Islam is also based on public good (maṣlaḥah). ʿAbduh similarly equated shūrā with democracy and ijmāʿ with consensus, and held that the authority of the ruler (ḥākim), judge (qādī), or muftī was all civilian in character. He called for the revival of ʿijtihād in order to address newly emerging priorities and problems, and defended pluralism while refuting the claim that it would undermine the unity of the ummah.18 The government also loses its legitimacy should the people decide, through a no-confidence vote, to terminate its tenure and replace it.18 It thus appears that the bases of legitimacy in an Islamic system of rule, according to ʿAbduh, are almost entirely civilian.

Shaykh Maḥmūd Shalṭūṭ (d. 1963 C.E./1383 A.H.), the then Rector of al-Azhar, similarly wrote that Islam encouraged the people to access the source evidence directly. No one is vested with the exclusive authority to interpret the Qurʾān or to issue binding opinions in the name of religion. Everyone who is qualified may give an opinion and fatwā, which, however, binds no one, and may be taken or abandoned on the basis only of its credibility and merit.19

Whereas the majority of Sunni ʿulamāʾ maintained that establishing a system of government was a requirement of Shariʿah, the Muʿtazili school of theology maintained that it was a requirement of reason and not a religious nor a Shariʿah requirement as such. Yet the Muʿtazilis did not develop their views on the subject to an extent as to provide an alternative theory of government. A step further, the Kharijites were only interested in the application of the Shariʿah and attached little importance even to the existence of a government: If

19 Maḥmūd Shalṭūṭ, al-ʿAqīdah wa Shariʿah (Dār al-Qalam, Kuwait c.1965) 476.
the community could establish justice under the Shari’ah without a superior authority, there may be no need for a government.

Even if the much-debated question as to whether government is an integral part of Islam is answered in the affirmative, it is obvious that the state is a part neither of the faith in Islam nor of its devotional acts, the ‘ibādāt. For a person can be a Muslim without believing in a state or living under any system of government. One can also perform almost all the ‘ibādāt, on an individual basis at least, without a reference to a state or a political leader. Then it remains to be said that having a government is a part of the fiqh and more likely of the civil law (fiqh al-mu‘āmalāt) aspect of Islam, and not an essential part of the religion. This would imply that matters of state and government are subject to considerations of rationality, ma‘āla, and ijtihād that realize the people’s welfare at any given time.

If theocracy means government by religious leaders who exercise spiritual authority, such as that of the Pope in the Middle Ages, who had authority to pardon sins, then the Islamic government does not qualify. The state that Islam advocates is a civilian state (dawlah madaniyyah), simply because it comes into being by election and consultation and the head of state is accountable to the people. Citizens are also entitled to advise their leaders and alert them to any error they notice on their part.  

Government in Islam is not a prerogative of the ‘ulamā’, nor is it a government by men only to the exclusion of women. Women played a considerable role in public life during the time of the Prophet and they took part in the election of the third Caliph ‘Uthman. Government in Islam is also not confined to any particular form or model, but it is committed to the enforcement of Shari’ah. That does not, however, make the Islamic government a theocracy, as the Shari’ah itself does not approve of theocratic governance.

The Shari’ah is not solely concerned with religious and worship matters. This is admittedly one aspect of it, but it also addresses matters of concern to governance, justice, people’s rights, and liberties from a wider perspective. On these matters the juris corpus of Shari’ah aspires to a high level of objectivity. Taqwā (piety) is a desirable quality in a Muslim, but a man of piety has no claim to distinction before the court of Shari’ah over a man of questionable piety. They must be treated equally before the court.

Theocratic government demands unquestioning obedience of its citizens and that naturally discourages individual freedom. Islam has, on the other hand, recognized the individual’s right to freedom to an extent which enables him to disobey an unlawful command, just as it restrains the government from issuing such a command and imposing restrictions on people’s freedom. According to a renowned hadith, “there is no obedience in transgression; obedience is only enjoined in righteousness.” In yet another hadith, the Prophet is reported to have said: “the best form of jihād is to tell a word of truth to a despotic ruler.”

It would appear from the foregoing analysis that the Islamic government is neither a theocracy, nor is it totally secular, as it does not seek to isolate religion. On the contrary, it has a duty to protect the religion and enable the people to observe it. The lawful and unlawful (halāl, harām) that are expounded in Shari’ah must also be observed by the state. The state maintains the religious values, yet it is not a theocratic state.

The civilian character of government in Islam has, however, been exposed to doubt in recent years as a result partly of the Islamic revolution of Iran 1979 C.E. (1399 A.H.), which

brought an ‘ulamā’-led government into power, and Iran looked, to all intents and purposes, a theocratic state. Āyatollāh Khomeinī’s theory of the guardianship of the jurist (velāyat-e faqīh) and his own religious personality evidently lent support to the theocratic image of the Islamic Republic, especially in the early years of the revolution. But Iran under President Khātamī became a keen supporter of civil society such that this became the focus of a continuing public debate in Iran.

The leading offices of state in Iran, including those of the President, the Supreme Leader, and the Majlis (parliament) are all elective. Ministers and government officials are being taken to task by the Majlis and the Islamic Republic has itself made no claim to be a theocratic state. On one occasion in 1984 the Majlis, for example, removed no less than seven ministers by a vote of non-confidence in accordance with the constitution.

The Sunnis, who are in the majority, maintain that caliphate and government are elective, not theocratic; that the community need not be headed by a descendant of the Prophet as long as it is governed by the rule of law, the Shari’ah. The Shi‘ites, on the other hand, consider imamate as a part of the Shi‘ite theology, and the imām, being the chosen of God and a descendant of the Prophet, receives his title through hereditary succession. The Shi‘ite imām is thus a theocratic figure and also believed to be infallible. In theory, the imām has direct authorization from God to manage the temporal and spiritual affairs of the Muslim community. But then the last living imām of the Shi‘ah Imāmiyyah went into occultation in 873 C.E. (260 A.H.), during which time the mantle of the occult imām was carried by his deputy (nā‘eb-e emām), who leads the Shi‘ite community but who is not infallible. This was taken a step further by Ayatollah Khomeini, whose idea of the velāyat-e faqīh (rule by the jurist) regarded the jurist that abides by the Sharī‘ah as a stand-in for the imām. While the Shari‘ah theoretically legitimizes the government, the velāyat-e faqīh actualizes its legitimacy. This position was further developed in the views of the President of the Shi‘ite Supreme Council of Lebanon, Āyatullāh Muḥammad Mahdī Shamsuddin, especially through his concept of wilāyat al-ummah. Thus he explained that following the Prophet’s demise, the ummah became the locus of political authority, according to the Ash‘arites and the Sunnis, but only the imām had title to authority and leadership, according to the Shi‘ite doctrine. ‘Alī b. Abī Ṭālib was the first imām to inherit that authority and the succeeding imāms carried the title after him. The twelveth imām has remained absent for a long time and only God knows when he will return, in which case the ummah assumes his authority during the time of his absence. The community exercises, in turn, its authority through elective and consultative methods. This is a fresh reconstruction of the concept of political rule, which establishes an important common ground with the Sunni notions of leadership, as both theories identify the ummah as the locus of political authority. Another common aspect between them is that Sunni and Shi‘ite doctrines on governance both derive legitimacy for the Shari‘ah.

D. Democratic Government

Democracy is basically predicated in a set of principles, the most important among which are a recognition of the inherent worth of every human being, a representative government,
the rule of law, equality of all citizens before the law, and a high level of tolerance of unconventional views and beliefs. Islam contains a set of principles which make it highly responsive toward many of the moral and legal prerequisites of democracy. If democracy means a system of governance that is the opposite of dictatorship, Islam is compatible with democracy because there is no place in it for arbitrary rule by one man or a group of men.

Among the differences commentators have noted in comparing democracy to an Islamic government, one is the attribution of sovereign authority to the people. In a democracy the people may establish any legal order or system they wish for themselves, whereas in Islam the state is bound by implementing the Shari'ah as expression of the sovereign will of the Lawgiver, and its powers are limited to that extent. Commitment to the Shari'ah basically means commitment to the clear and unambiguous ordinances of the Qur'an and Sunnah. Furthermore, democracy is predicated in a set of material goals, whereas Islam seeks both material and spiritual values. Democracy may not regulate personal morality, whereas this too is of concern to an Islamic order.

The political system in early Islam was neither democratic nor did it rest on absolutism as understood by the Greeks and Romans; it was an Arab system of government to which Islam added its own requirements. Whereas shūrā was an entrenched Arab practice, and essentially democratic, it did not have a binding character. In the history of Islamic government too, shūrā did not constitute a check on the powers of the caliph. The Qur'an, on the other hand, spoke in high praise of shūrā, to the extent of coming close to making it mandatory. The Madinan state practiced shūrā and it also showed commitment to justice, equality, and people’s rights, just as it turned its back on the ethnocentricity of the Arabian culture. These and certain other features of governance in Islam bear harmony with the principles of democracy. The medieval caliphate admittedly set a negative record with regard to shūrā (consultation), bay'ah (pledge of allegiance), ijmā' (general consensus), and the egalitarian teachings of Islam. The government was not answerable to the people, nor did it resort to consultation as such. Yet hardly anyone has spoken in support of those methods, and the ‘ulamā’ community has generally regarded them as flagrant departures from valid norm.

One of the eye-catching developments of recent decades in the Arab and Islamic world is rejection of a single-party autocratic state and an engaging discourse for democracy. This is shown by extensive participation and gains of Islamic parties and movements in general elections ever since the late 1990s held in the Muslim majority countries of the Middle East, North Africa, and Southeast Asia. The scope of the discourse over democracy and human rights is rapidly expanding to such extent that a new reading of Islam is dominating the political and philosophical horizons of the Muslim world. Islamic principles of shūrā, ijmā', bay'ah, maṣlaḥah (public good), ijtihād (juristic interpretation), pluralism (ta'addudiyah), and commitment to justice and basic rights provide the doctrinal underpinning of the ongoing pro-democracy discourse in the Muslim world.24

Islamic government is committed to the implementation of Shari'ah. Yet in a substantial sense, it is a popular government since the Shari'ah itself approves of people’s participation in government, and therefore, their direct will. The Qur'an upheld shūrā, and then the Prophet himself adopted it as a regular feature of his leadership, a pattern that was followed by the Pious Caliphs after him. This would make shūrā a part of the normative precedent.

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For moderates and almost all of the Islamic movements, *shūrā* has become a source of legitimation of any authority, while the continuation of legitimacy hinges on the application of the Shari‘ah and people’s approval. Authoritarianism and despotism are neither specifically cultural nor are they Islamic, just as they have existed in both the West and the Islamic world. What remains to be said, however, is that the West should support the quest for democracy and pluralism among Muslims, instead of supporting undemocratic regimes that do not admit opposition and systematically abuse human rights.

A conflict may exist between the idea of commitment to a divine law and the democratic notion of sovereign law-making authority. Yet the Islamic government may be described as a qualified democracy. This is because the community is the locus of authority that can hold the government to account and can ultimately depose it. The Shari‘ah also vests the people’s representatives with the authority to pass consensus-based legislation through *ijmā’* that binds the government. Some Muslim scholars have held that sovereignty in the Islamic government belongs to the *ummah*. Others have qualified this to say that the *ummah* is vested with executive sovereignty (*al-sultan al-tanfidhi*). Still others have held that the state exercises a composite sovereignty (*al-siyādah al-muzdawijah*) of the *ummah* and the Shari‘ah, since they are intertwined and cannot be meaningfully separated.

Furthermore, the Islamic government must strive to secure the people’s welfare. According to a legal maxim of Shari‘ah, “the affair of the Imam is judged by reference to the people’s welfare—*amr al-imām manūt bi-l-maṣlaḥah.*” The people’s welfare thus constitutes the criterion of success or failure of an Islamic government. A government that makes decisions, independently of the people’s *maṣlaḥah*, deviates from its basic terms of reference and may be liable to be deposed. The Islamic government is committed to the protection and observance of the basic rights of people including the rights to life, personal security, ownership, welfare, and a dignified treatment. These are also upheld by a democratic order of government.

The basic harmony between Islam and democracy is manifested in Islam’s resolute denunciation of oppressive and arrogant rulers, the Pharaoh and the Kora, who sought to enslave and humiliate their people. The Prophet, peace be on him, expressed this vividly in a *hadīth*: “when you see my community afraid of calling a tyrant ‘O tyrant’ then take leave of it (as it would not be worth belonging to).” The ruler in Islam is a representative and employee who is accountable to the people. This was amply shown in the speeches and sermons of both the first and second caliphs, Abū Bakr and ‘Umar. Bear also in mind that democracy is the fruit of a long-standing struggle in which the people successfully subjugated despotism to the will of the masses. Qaraḍāwī has touched on this point to say that democracy is humanity’s shared achievement and “we are entitled . . . to take from others ideas and methods that would benefit us, provided they do not clash with a clear and unequivocal text.” Election according to Qaraḍāwī is a form of testimony (*shahādah*) by which the electorate testifies to the suitability of the candidate he or she is about to vote for. It is an act of merit for people to participate in the elections and thus facilitate the designation of upright people to leadership.

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Separation of powers, equality before the law, and freedom of expression are among the requirements of democracy, which are also upheld by Islamic principles. A substantive separation of powers can be seen in the Islamic position, which posits legislative authority in the community (ummah) as is expressed in the general consensus (ijmā’) of the learned scholars and mujtahids among them. Juridical interpretation (ijtihād) becomes binding law only when endorsed by ijmā’. The leading scholars (i.e., mujtahids) carry out these functions in their capacity as representatives of the ummah independently of the government. The head of state, who leads the executive branch, is himself bound by a valid ijmā’. The judiciary is similarly independent in that the judges adjudicate in accordance with the decisive rulings of Shari’ah as are found in the Qur’ān and Sunnah, ijmā’, or their own ijtihād, and in carrying these functions, no one has the authority to rule over the judges. The judges’ freedom to conduct ijtihād must only be based on their true conviction and it is as such inviolable and impervious even to the notion of binding precedent. The Islamic theory of justice refuses to accept the doctrine of binding precedent (i.e., stare decisis) lest it interfere in the unfettered freedom of the judge in the conduct of ijtihād. The head of state is in theory a supreme judge himself and may grant hearing to complaints over abuse of power within the other organs of state, but these powers are basically administrative and procedural and may not impinge on the independence of the judiciary.  

Political parties are an important feature of modern democracy. As opposed to those who argued that Islam rejects political parties, one may say that the Shari’ah principles of hisbah (promotion of good and prevention of evil) and nasibah (sincere advice) as well as the people’s right to criticize their leaders can all be given a meaningful role within a multi-party system. To curb despotism and oppressive rule is usually not within the capacity of individuals acting in isolation. But when people join together in large numbers, they can influence government policy, in which case there should be no need for acts of rebellion and uprising against the government. Due to the absence of recognized procedures for legitimate collective protest in the past, partisan movements that opposed the government often staged a rebellion (khurūj), which frequently resulted in perpetuated dictatorship. Political parties, by contrast, would be able to curb dictatorship, and serve as a vehicle of expression and exercise of people’s authority, and thus a healthy means of communication between the ruler and the ruled. 

The Shari’ah in its broad outline is more democratic than totalitarian. It was due probably to its strong advocacy of the people’s rights that totalitarian regimes of the past had difficulty in a holistic implementation of Shari’ah. The ‘ulamā’ community has also acted, more often than not, as protector of the people’s rights, and has resisted oppressive governments on the people’s behalf.

The Shari’ah gave the people a code that consecrated the principles of self-governance, made men equal in the eyes of the law, and made the government subordinate to the law.

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At a time of history when everywhere the masses were in hopeless subjugation, Islam elaborated a political system fundamentally republican in character, stressing the duties of the leaders toward the people, and championed the people’s equality and freedom. At a time “when Islamic thought recognized the rights of minorities as a consequence of accepting Christianity and Judaism as recognized religions, the West considered Muslims only as infidels, and Islam was not recognized nor allowed to be practiced. Muslims (and often Jews) were harassed and persecuted.”

Muhammad Iqbal (d. 1938 C.E./1357 A.H.) spoke affirmatively of the democratic impulse of Islam but said that the Muslims never effectively developed the elective principle. This was due partly to the Persians and the Mongols, the two great peoples that embraced Islam and formed governments; they were not only strangers to the elective principle, but actively opposed to it. The Persians worshipped their monarchs as manifesters of divine power, and the Mongols were given to tribalist methods. In Iqbal’s own phrase: “The republican form of government is not only thoroughly consistent with the spirit of Islam, but has also become a necessity in view of the new forces that are set free in the world of Islam.” The position of the ruler in the eyes of the Shari’ah is the same as that of an ordinary Muslim. In Islam, the basis of legislation, after the clear injunctions of the Shari’ah, is the agreement of the Muslim community.

Muhammad Asad described the Islamic government as democratic and added that democracy as conceived by the West was infinitely nearer to the Islamic conception thereof than to its Greek parallel. For Islam maintains that all human beings are equal and must be given the same opportunities for development and self-expression. Islam essentially envisaged an elective form of government. A government that comes to power by “non-elective means becomes automatically illegal.”

Esposito and Voll have gone on record to say that “Islam is not anti-thetical to democracy”; they also referred to the views of Pakistani thinkers—Muhammad Iqbal, Fazlur Rahman, and Khurshid Ahmad—to show how the principles of consultation (shūrā), consensus (ijmā’), and interpretive judgement (ijtihād) embody many of the precepts of democracy. Difference of opinion (ikhtilāf) in interpretation and in policy is perfectly acceptable.

IV. CONCLUSION

The foregoing analysis and review of the evidence presented in this article suggest that there are some differences between the Islamic system of rule and the Western conception of political democracy and democratic governance. Yet there is enough in common between the substantive postulates of the two traditions to justify a basic characterization of the Islamic system of governance as a qualified democracy that derives its mandate from the people and is answerable to them. The head of state is designated through consultation and election; only the people have the authority ultimately to depose a ruler or government that

has violated the terms of their accountability and trust. The examination of the Islamic doctrines also show that government in Islam exhibits significantly civilian features notwithstanding its commitment to protect Islam, its beliefs and values. Finally, it is a government under the rule of law, namely the Shari‘ah. In addition, there is evidence to the effect that unlike the common assertions that describe the Shari‘ah as a “religious law,” the Shari‘ah accommodates many of the positivist aspects of a secular legal system.

Muslim jurists across the centuries have subscribed to the necessity of leadership and a system of rule that manages the community affairs in accordance with the basic principles of Islam, but evidence is inconclusive as to what form and structure an Islamic government should possess. The analysis leads to the conclusion that the Islamic system of rule consists basically of a commitment to a set of principles rather than of a firm preference for any particular institutional format. An Islamic government is thus rooted in the political mandate and authority of the people; it is elective and consultative and subject to the rule of law; it is a limited government that is committed to people’s rights and welfare and is a carrier of their trust. An Islamic government is also committed to the injunctions of Islam on equality and justice, the moral autonomy and freedom of individuals, and it upholds and protects the religion of Islam. Differences of opinion, and religious and cultural pluralism, are acceptable in an Islamic polity, and non-Muslims are entitled to follow and practice their own religion free of interference. They are also allowed to practice their own laws and traditions pertaining to customary and personal status matters. Any government that is committed to these principles may consequently be described as Islamic, regardless of the organizational form and model to which it may subscribe.
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I. INTRODUCTION

Constitutionalism reflects embedded normative values that arise from evolved historical practices that are not easily transplanted outside their natural habitat. In many ways, constitutionalism must be practiced and not theorized. Therefore, it is doubtful whether it is helpful to abstract the doctrines of constitutionalism from their remarkably diverse cultural and social contexts. When speaking of constitutionalism and Sharī‘ah (Islamic law), one must be concerned that not only are we dealing with idealistic abstractions but that we are falling prey to an anachronism.

This, however, does not invite us to abandon all attempts at constructing a coherent discourse on constitutionalism and Sharī‘ah; it only requires us to be mindful of the limits of abstractions that are not backed up by a history of cultural practice. Constitutionalism is a political tradition more than a theory of government. Constitutionalism gives expression to or appropriates normative values generated by a historical practice and tradition. But in the same way there are traditions of constitutionalism, there are also traditions of terror, tyranny, or personalized rule. Normativities generated by Islamic doctrines could possibly support or promote practices consistent with constitutionalism or tyranny. To the extent that Islamic doctrinal normativities legitimate or promote particular traditional practices, one can argue that these normativities could potentially support or undermine...
a constitutional tradition. Consequently, this chapter will focus on potentialities—i.e., the doctrinal aspects in Islamic political thought that could legitimate, promote, or subvert the emergence of a constitutional practice in Muslim cultures. These doctrinal potentialities exist in a dormant state until they are co-opted and directed by systematic thought supported by cumulative social practices. This article will focus on doctrinal potentialities or concepts constructed by the interpretive activity of Muslim scholars (primarily jurists), but will not focus on the socio-political practices in Islamic history. In addition, this article will not seek to identify contemporary efforts at systematic thought and practice that attempt to develop or give effect to these tradition-based potentialities.

II. THE NOTION OF CONSTITUTIONALISM AND MAJORITARIAN DEMOCRACY

There is no single form of constitutionalism, indeed there are many different theories explaining and justifying a variety of constitutional practices. In the broadest sense, constitutionalism connotes a political system in which there are limits imposed on the powers of the government, an adherence to the rule of law, and the protection of fundamental individual rights. The powers of the government are limited not only by being subject to the law, but also by the imposition of institutional restraints on the discretion of the government in dealing with its citizens. Furthermore, the rule of law mandates the existence of recognizable and predictable rules enjoying legitimacy that are equally applicable to all members of society. Individual rights require the affording of protections to the interests guarding the well-being and dignity of individuals, and that such interests be considered as entitlements and not mere privileges. Perhaps the requirement of individual rights is the most difficult to justify conceptually, but every constitutional democracy in the contemporary age has recognized that individuals ought to be protected from capricious governmental actions, and that the citizenry is entitled to a basic level of well-being and dignity. For instance, a state that habitually practices torture, summary executions, slavery, or indentured service against its citizenry cannot be described as a constitutionalist system.

2 Michel Rosenfeld, “Modern Constitutionalism as Interplay Between Identity and Diversity” in Michel Rosenfeld (ed), Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives (Duke University Press, Durham and London 1994) 3, 13–14 argues that although a single definition is not possible, modern constitutionalism does impose certain requirements.

3 On the different practices related to limits imposed on government, see Rosenfeld (n 2) 11.


The existence of a written constitution is not what creates a constitutional system. A political system could generate a written constitution, but not base or bind itself by such a document. In other words, the document could fail to appropriate or reflect the socio-political culture of a system and, therefore, such a document could be violated regularly, altered, or suspended on a regular basis. Furthermore, the constitutional document, itself, could fail to impose limits on the powers of the government or fail to guard the rights of the citizenry. Furthermore, a written constitution is not mandatory for the existence of constitutionalism as long as there is an established practice of limits on governmental powers, the rule of law, and recognizable limitations on how the government may treat its citizens. For instance, England, New Zealand, and Saudi Arabia do not have written constitutions or a bill of rights, but England and New Zealand are constitutional democracies and Saudi Arabia is most definitely not.

Finally, it must be noted that constitutionalism, as a concept, is not the same as a majoritarian democracy. In fact, as several commentators note, constitutionalism is anti-majoritarian and therefore exists in tension with democratic practice. Constitutionalism mandates that there are fundamental social values and individual entitlements that may not be negated by the will of the majority. The will of the majority is respected as long as it does not trump the fundamental rights of the minority. Of course, some scholars have argued that constitutionalism, far from being contrary to democracy, in reality makes democracy more effective, or guards democracy from its occasional failures. The fact that constitutionalism guards certain basic values and treats them as inviolable has led some commentators to argue that constitutionalism is founded on a tradition of natural law. In addition, Sanford Levinson and others have argued that constitutionalism is a form of faith or civil religion. Constitutionalism requires a conviction or belief in certain normative values about the worth of a human being and social morality. This belief is akin to a religious conviction that is ingrained in the cultural values of a society.

This explanation does not address other contentious conceptual issues such as the necessity of a free market place or the right to private ownership of property for the

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Rosenfeld (n 2) 20, 27; Murphy (n 6) 134; Cass R. Sunstein, “Constitutions and Democracies: An Epilogue” in Jon Elster and Rune Slagstad (eds), Constitutionalism and Democracy (Cambridge University Press, Cambridge 1988) 327.

Murphy (n 6) 134.


On a discussion on whether constitutionalism needs natural law, see Murphy (n 6) 143–145.

Sanford Levinson, “The Constitution in American Civil Religion” in Jon Elster and Rune Slagstad (eds), Constitutionalism and Democracy (Cambridge University Press, Cambridge 1988) 9–36. Levinson states, “However much traditional religion may have lost its power to structure reality for most Western intellectuals, analogues present themselves in the guise of various civil religions.” Ibid. at 36. Levinson argues that constitutionalism is one of those civil religions. Also see Max Lerner, “Constitution and Court as Symbols” (1937) 46 Yale LJ 1290, 1319; Robert Bellah, “Civil Religion in America” in Russell E. Richey and Donald G. Jones (eds), American Civil Religion (Harper and Row, New York 1974).

existence of constitutionalism. Furthermore, this article will not address the role of civil society—a society in which power is presumably distributed among social institutions—or whether constitutionalism must be based on a secular order that limits religion to the private sphere or that excludes religious laws from the public sphere. These are important issues, but they require a much more extensive treatment. The meaning or necessity of the existence of these institutions for the creation or survival of constitutional orders is heavily contested. Nevertheless, some of the issues discussed in this article are pertinent to discussions on secularism in Muslim societies and, therefore, there will be an occasion to elaborate upon this practice. At this stage, the intent is simply to clarify the sense in which the word constitutionalism is used in this article before proceeding to address the Islamic context.

III. THE MAIN CONCEPTS OF ISLAMIC POLITICAL THOUGHT: A GOVERNMENT BOUND BY RULE OF LAW

Ibn Khaldūn (d. 784/1382), the well-known Muslim historian and sociologist, separated all political systems into three broad types. The first system Ibn Khaldūn described as a natural system, which approximates a primitive state of nature. This is a lawless system in which the most powerful dominates and tyrannizes the rest. The second system, which Ibn Khaldūn describes as dynastic, is tyrannical as well, but it is based on laws issued by a king or prince. However, due to their origin, these laws are baseless and capricious, and so people obey such laws out of necessity or compulsion, but the laws themselves are illegitimate and tyrannical. The third system, and the most superior, is the caliphate, which is based on Shari‘ah law. Shari‘ah law fulfills the criteria of justice and legitimacy, and binds the governed and governor alike. Because the government is bound by a higher law that it may not alter or change, and because the government may not act whimsically or outside the pale of law, the caliphate system is superior to any other.

Ibn Khaldūn’s categorization is not unusual in pre-modern Islamic literature. The notion that the quintessential characteristic of a legitimate Islamic government is that it is a government subject to and limited by Shari‘ah law, is repeated often by classical jurists. Muslim jurists insisted that a just caliph must apply and be himself bound by Shari‘ah law, and in fact, someone such as Abū al-Faraj al-Baghdādī Ibn al-Jawzī (d. 597/1200) asserted that a caliph who tries to alter God’s laws for politically expedient reasons is implicitly accusing...
the Sharī'ah of imperfection. Ibn al-Jawzī elaborates upon this point by contending that under the guise of political expediency or interests, innocent Muslims could be murdered. In reality, he argues, no political interest could ever justify the killing of a Muslim without legitimate legal cause.

Particularly after the fourth to tenth centuries, it became fairly well-established that the jurists (ʻulamāʾ) are the spokespersons for the Divine law, which was expressed in an often repeated phrase that the ʻulamāʾ are the inheritors of the Sharī'ah. Effectively, Muslim jurists argued that the caliph should consult with the jurists before undertaking to implement any laws. Although jurists often argued that the caliph ideally should himself be trained in law and qualify for the rank of a mujtahid (jurist of the highest rank capable of generating de novo law), this did not mean that the caliph was empowered to implement laws without regard to the opinions of the jurists. Even a caliph who is a mujtahid is bound by the well-established principles [of Sharī'ah] and the rules of law. This subject will be discussed in detail, when the concept of government by consultation (shūrā) will be explained. Before proceeding, it is important to distinguish between the concepts of the rule of law and the supremacy of law.

Although the idea of government limited by law is well-supported in the Islamic tradition, this does not necessarily amount to a principle of limited government or the rule of law. In a system where law is supreme or there is rule by law, the government is expected to be bound by particular substantive laws. However, in a system where there is rule of law, the government is not only bound by particular positive rules but by the process and institution of law. Arguably, this distinction could be valid because classical jurists did not advocate the notion of the supremacy of the rule of law, but did advocate the supremacy of legal rules. One could argue that the Islamic tradition did affirm the notion of rule by law but it did not affirm the concept of rule of law. In other words, in their discourses, Muslim jurists were not articulating the idea that there is a process that guards core legal values and that this process is binding upon the government. Rather, they were arguing that the positive commandments of Sharī'ah, such as the punishment for adultery or the drinking of alcohol, ought to be respected and enforced by the government. Of course, it is possible for a government to declare its intention to abide by all the positive commandments, but otherwise manipulate the interpretation and application of the rules or the processes of law in order to obtain desired results. It is possible that the juristic conception of a government limited by Sharī'ah amounted to a notion that the government is acting lawfully if it implements Sharī'ah. The difficulty, however, is that a government could implement Sharī'ah criminal penalties, prohibit usury, dictate rules of modesty, and so on, and yet remain a government of unlimited powers not subject to the rule of law.

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17  Ibn al-Jawzī (n 16) al-Shifā’, 55, 57; id. (n 16) al-Mi̇bā’Î̇, 1:298.
19  So, for instance, Ibn al-Jawzî states: “Religion is the origin, and government is its protector.” Ibn al-Jawzî, (n 16) ‘al-Shifâ’, 46f. See also Barakât (n 14) 102f.
This is because Shari'ah is a general term for a multitude of legal methodologies and a remarkably diverse set of interpretive determinations. Structurally, Shari'ah comprises the Qur'an, Sunnah, and fiqh (juristic interpretive efforts). Substantively, the Shari'ah refers to three different matters: 1. General principles of law and morality; 2. Methodologies for extracting and formulating the law; and 3. The ahkām, which are the specific positive rules of law. In the contemporary Muslim world there is a tendency to focus on the ahkām at the expense of the general principles and methodology. It is entirely possible to be Shari'ah-compliant, in the sense of respecting the ahkām, but to ignore or violate the principles and methodologies of Shari'ah.

As is the case with present Muslim states, nothing prevents the government from incorporating a process that rubberstamps whatever the government deems desirable. Unless the conception of government is founded around core moral values about the normative purpose of Shari'ah, and unless there is a process that limits the ability of the government to violate those core moral values, the idea of a government bound by Shari'ah remains hopelessly vague. It is quite possible for a government to faithfully implement the main technical rules of Shari'ah, but otherwise flout the rule of law. In fact, using the implementation of the technicalities of Shari'ah as an excuse could allow the government unrestrained powers. For instance, in order to guard modesty, the government could pass arbitrary laws forbidding many forms of public assembly. Under the guise of protection of orthodoxy, the government could pass arbitrary laws punishing creative expression. Under the guise of protection of individuals from slander, the government could punish many forms of political and social criticism, and a government could imprison or execute political dissenters under the claim that they are sowing fitnah (discord and social turmoil). Arguably, all such governmental actions are Shari'ah-compliant unless there is a clear sense about the limits imposed upon the ability of the government to service even the Shari'ah. Put differently, the rules of law cannot be used as an excuse to flout the rule of law, and the state cannot be allowed to usurp the process by which Shari'ah law is determined.

Concerns about the reach or extent of a ruler’s power under Shari'ah has antecedents in Islamic history, and so it is not an entirely novel issue. The Mālikī jurist al-Qarāfī (d. 684/1285) attempted to articulate a theory defining the legal jurisdiction of caliphs, judges, and juris-consuls. In addition, there is a considerable juristic discourse on the proper jurisdiction of the police and market inspectors as opposed to judges. In summary, the police and market inspectors have no jurisdiction over any issue that involves competing factual or legal contentions. These issues must be referred to the judge. Any disputes involving contentious facts or interpretations of law must be brought before the judiciary and should not be determined by the executive.

In addition, the Islamic tradition is replete with historic anecdotal evidence expressing concern about the ability of contending parties to manipulate the interpretation of the Shari'ah to achieve certain aims. For instance, a report was attributed to the Prophet in which he reportedly says, “If you lay siege to a fortress, do not accept the surrender of the fortress on the condition that you will apply God’s law, for you do not know [what] God’s
law requires. Rather, have them surrender on the condition that you will apply your own judgment." Reports such as this reflect a nascent concern with the nature of the constraints that the broad concept of Sharī'ah may have on the actual process of adjudication or resolution of disputes. Notably, however, the invocation of Sharī'ah or the Qur'ān and Sunnah in confrontations with authority was often used as a symbolic point referring to legitimacy or legality in the management of the social order. For example, in another anecdotal report that reflects this dynamic, the first Umayyad Caliph Muʿāwiya (r. 40–60/661–680) asked ḥujr b. ʿAdī al-Kindi (d. 51/671) for his allegiance (bay'ah). Al-Kindi reportedly agreed to give his allegiance but only on the condition that Muʿāwiya abides by the Qur'ān and Sunnah. Muʿāwiya refused, arguing that a conditional allegiance is ineffective and, hence, al-Kindi refused to give his oath of allegiance.  

Similar dynamics are observed in the early Islamic debates on God’s dominion or sovereignty (ḥākimiyyat Allāh). As is well-known, the group known as the Harūriyyah (later known as the Khawārij) rebelled against the fourth Rightly-Guided Caliph ʿAlī Ibn Abī Ṭālib (d. 40/661) when he agreed to arbitrate his political dispute with Muʿāwiya. The Khawārij believed that God’s law clearly supported ʿAlī and, therefore, an arbitration or any negotiated settlement was inherently unlawful. The law, as a general category, supported ʿAlī, and any settlement that did not reflect this principle of legality, by definition, was illegitimate. Ironically, ʿAlī himself had agreed to the arbitration on the condition that the arbitrators would apply the law of the Qur’ān. Ultimately, the arbitration did not succeed and ʿAlī and Muʿāwiya were compelled to return to armed conflict. In the view of the Khawārij, by accepting the principle of arbitration and by accepting the notion that legality could be negotiated, ʿAlī himself had lost all claims to legitimacy. In fact, the Khawārij declared ‘Alī a traitor, rebelled against him, and eventually succeeded in assassinating him. Typically, the story of the Khawārij is recounted as an example of early religious fanaticism in Islamic history, and this view is substantially correct. However, one ought not overlook the fact that the Khawārij’s rallying cry of “dominion belongs to God” or “the Qur’ān is the judge” (al-ḥukm li-Allāh or al-ḥukm li-l-Qur’ān) was a call for the symbolism of legality and the supremacy of law.  

This search for legality quickly descended into an unequivocal radicalized call for clear lines of demarcation between what is lawful and unlawful. The anecdotal reports about the debates between ‘Alī and the Khawārij regarding this matter reflect an unmistakable tension about the meaning of legality, and the implications of the rule of law. In one such report, members of the Khawārij accused ‘Alī of accepting the judgment and dominion (ḥākimiyyah) of human beings instead of abiding by the dominion of God’s law. Upon hearing of this accusation, ‘Alī called upon the people to gather and brought a large copy of the Qur’ān. ‘Alī touched the Qur’ān, commanding it to speak to the people and


23 This argument is supported by the fact that the rebellion of the Khawārij took place in the context of an overall search for legitimacy and legality after the death of the Prophet. Furthermore, the research of some scholars on the dogma and symbolism of the early rebellions lends support to this argument. See Hishām Jaʿīt, al-Fitnah: Jadaliyyat al-Dīn wa al-Siyāsah fi al-Islām al-Mubakkir (Dār al-Ṭālīʿah, Beirut 1989).
to inform them about God's law. The people gathered around 'Alī exclaimed, “What! It cannot speak, for it is not a human being.” Upon hearing this, 'Alī commented that the Qur’ān is but ink and paper, and it is human beings who give effect to it according to their limited personal judgments. Arguably, anecdotal stories such as this do not relate only to the role of human agency in interpreting the Divine word, but they also symbolize a search for the fundamental constitutional values in society. These constitutional values might differentiate between the issues that are subject to political negotiation and expedience, and those issues that constitute unwavering matters of principle and that are strictly governed by law. Furthermore, one can discern in such reports a search for the proper legal limits that may be placed upon a ruler’s range of discretion.

IV. JUSTICE AS A CORE CONSTITUTIONAL VALUE

One of the issues commonly dealt with in Islamic political thought was the purpose of government (or the caliphate). The statement of Imām al-ḥaramayn al-Juwaynī (d. 478/1085) is fairly representative of the argument of Muslim jurists. Al-Juwaynī states:

The imāmah (government) is a total governorship and general leadership that relates to the special and common in the affairs of religion and this earthly life. It includes guarding the land and protecting the subjects, and the spread of the message [of Islam] by the word and sword. It includes the correcting of deviation and the redressing of injustice, the aiding of the wronged against the wrongdoer, and taking the right from the obstinate and giving it to those who are entitled to it.

The essential idea conveyed here is that government is a functional necessity in order to resolve conflict, protect the religion, and uphold justice. In some formulations, justice is the core value that justifies the existence of government. Ibn al-Qayyim (d. 751/1350), for example, makes this point explicit when he asserts:

God sent His message and His Books to lead people with justice . . . Therefore, if a just leadership is established, through any means, then therein is the Way of God . . . In fact, the purpose of God’s Way is the establishment of righteousness and justice . . . so any road that establishes what is right and just is the road [Muslims] should follow.

This argument is rooted in a methodical debate among pre-modern scholars about the nature of people if left without a government. The debate is remarkably similar to the Western discourse on the state of nature or the original condition of human beings. In fact, the similarity is such that one suspects that it might be the result of a cross-cultural transmission from the Islamic Civilization to the Christian West.
The Islamic debate focused on the original, so-to-speak uncorrupted, nature of human beings, and how that nature affects the role and purpose of government. Some scholars such as Ibn Khaldūn (d. 784/1382) and jurists such as al-Ghazālī (d. 505/1111) argued that human beings are by nature fractious, contentious, and not inclined toward cooperation. Al-Ghazālī, in particular, added that human beings are prone to misunderstandings and conflicts. If one observes the affairs of people, one will notice that married couples and even parents and children fight and refuse to cooperate in mutually beneficial endeavors. Therefore, these authorities typically argued, government is necessary to force people to cooperate with each other. Government, in a paternalistic fashion, must force people to act contrary to their fractious and contentious natures.

Another school of thought exemplified by al-Mawārdī (d. 450/1058) and Ibn Abī al-Rabīʿ (d. 656/1258) argued that people, by their nature, have a tendency to cooperate for physical and spiritual reasons. In fact, God created human beings weak and in need to cooperate with others in order to limit the ability of human beings to commit injustice. Furthermore, God created human beings diverse and different from each other so that they will need each other. This need will invite human beings to further augment their natural tendency to assemble and cooperate in order to establish justice. The relative weakness of human beings and their remarkably diverse abilities and habits will further induce people to draw closer and cooperate with each other. Importantly, human beings, by nature, desire justice, and will tend to cooperate in order to fulfill it. If human beings exploit the Divine gift of intellect and the guidance of the law of God, through cooperation, they are bound to reach a greater level of strength and justice. The ruler, this school of thought argued, ascends to power through a contract with the people pursuant to which he undertakes to further the cooperation of the people, with the ultimate goal of achieving a just society or, at least, maximizing the potential for justice.

We will address the concept of the contractual governance later, but for now it is important to emphasize the potential of the pre-modern discourse on the original condition. The discourse on the original condition and the proclivity of human beings toward justice could be appropriated into a normative stance that considers justice to be a core value that the constitutional order is bound to protect. Furthermore, this discourse could be appropriated into a notion of delegated powers in which the ruler is entrusted to serve the core value of justice in light of systematic principles that promote the right of assembly and cooperation in order to enhance the fulfillment of this core value. In addition, a notion of limits could be developed that would restrain the government from derailing the quest for justice or from hampering the right of the people to cooperate in this quest. Importantly, if the government fails to discharge the obligations of its covenant then it loses its legitimate claim to power.

There is a pronounced tension between the obligation of implementing the Divine law and the demands for justice. In part, this tension is well exemplified in the ongoing debate between Positivism and Natural law, and it is also inherent to any system of law that must negotiate a relationship with normative moral values. In the context of Shari‘ah debates, the

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28 Ibn Abī al-Rabīʿ was reportedly influenced by Neo-Platonist thought.
issue and tension can be summed up in the following question: Does the Divine law define justice or does justice define the Divine law? If it is the former, then whatever one concludes is the Divine law therein is justice. If it is the latter, then whatever justice demands is, in fact, the demand of the Divine. For instance, while asserting that people in the original condition will naturally gravitate toward cooperation, Ibn Abī al-Rabī’ argued that after people form a social unit, God sends His law to the people. God also appoints leaders that guard and apply God’s law. Thus, God’s appointee ensures that the people cooperate in giving effect to God’s law. 30 In effect, Ibn Abī al-Rabī’ makes the organizing principle of society the Divine law, and the Divine law becomes the embodiment of justice. Under this paradigm, there is no point in investigating the constituent elements of justice—there is no point in investigating whether justice means equality of opportunities or results, or whether it means maximizing the potential for personal autonomy, or perhaps, the maximization of individual and collective utility, or the guarding of basic human dignity, or even the simple resolution of conflict and the maintenance of stability, or any other conception that might provide substance to a general conception of justice. There is no point in engaging in this investigation because the Divine law preempts any such inquiry. The Divine law provides particularized positive enactments that exemplify, but do not analytically explore, the notion of justice. Conceptually, the organized society is no longer about the right to assembly, cooperation, or the right to explore the means to justice, but simply about the implementation of the Divine law. Finally this implies the problem noted above, which is that the implementation of the Divine law does not necessarily amount to the existence of limited government, rule of law, and the protection of basic individual rights.

V. THE INSTRUMENTALITIES OF GOVERNMENT IN ISLAMIC THOUGHT

In Sunni theology, it is well-established that the Prophet died without naming a successor to lead the Muslim community. The Prophet intentionally left the choice of leadership to the Muslim nation as a whole. 31 A statement attributed to the Rightly Guided Caliph Abū Bakr asserts, “God has left people to manage their own affairs so that they will choose a leader who will serve their interests.” 32 The word caliph, the title given to the Muslim leader, literally means the successor or deputy. Early on, Muslims debated whether it is appropriate to name the leader the Caliph of God (khalīfat Allāh), and most scholars preferred the designation The Caliph of the Prophet (khalīfat rasūl Allāh). Hence, the well-known jurist al-Māwardī (d. 450/1058) states:

And, he is called Caliph because he succeeded the Prophet [in leading] the nation. So it is proper to call him the caliph of the Prophet [successor of the Prophet]. The scholars disagreed over whether it is proper to call him the Caliph of God. Some allowed it because he [the leader] fulfills the rights of God in His people . . . but the majority of the jurists disallowed it . . . because succession can only be in the rights of one who is dead or absent, and God is never absent or dead. 33

30 Sharaf and Muḥammad (n 15) 213.
31 Abū Ya’lā (n 18) 196, 199; al-Ghazālī (n 18) 135–137; al-Māwardi (n 29) 5.
Nevertheless, in Sunni thought, the caliph's source of legitimacy and parameters of his powers have remained ambiguous. Whether the caliph was considered the Prophet's successor or God's deputy, from a theological point of view, the caliph did not enjoy the authority of either the Prophet or God. Theologically speaking, God and His Prophet cannot be equated with any other, and their powers of legislation, revelation, absolution, and punishment cannot be delegated to any other. Yet, the exact nature and extent of the caliph's powers remains a highly unsettled and contested issue. This is partly due to the fact that the Divine law provides a nexus to the powers, and authority, of both God and His Prophet. In principle, the application of God's law implies giving effect to the Divine Will, which, in turn, implicates the authority of the Divine. Therefore, Ibn al-Jawzi, for example, states: “The Caliph is God's deputy over God's followers and lands, and [the caliphate entails] applying His orders and laws. [This job] was performed by His Prophets and the Caliph performs that role after them [the Prophets].”\footnote{Al-Baghdādī, \textit{al-Misbāh} (n 16) 1:93. On the juristic challenges to governmental claims of divine sovereignty or sacred authority, see Khaled Abou El Fadl, \textit{Rebellion and Violence in Islamic Law} (Cambridge University Press, Cambridge 2001) 8ff.} Even if one assumes that the caliph cannot be considered the moral equivalent of God or the Prophet, the question remains: How much of the Prophet's legislative and executive authority does the caliph enjoy? According to the prominent, and somewhat unrepresentative, jurist Ibn Ṭaymiyyah (d. 728/1328), the word caliph simply means the physical or historical act of ruling after the Prophet, but it does not connote the transference of the Prophet's authority or power. The caliph is the historical, not the moral, successor of the Prophet, and thus, the moral and legal authority of the Prophet (or God) does not vest in a person carrying the title of caliph.\footnote{Mubārak al-Baghdādī (tr), \textit{Qamar al-Dīn Khān, Ibn Ṭaymiyyah} (Maktabat al-Falāh, Kuwait 1973) 102–122.} At one point, Ibn Ṭaymiyyah asserts:

\begin{quote}
He [the Caliph] is not the people's Lord so that he could possibly do without [their assistance]; and he is not God's Prophet, acting as their agent to God. But he and the people are partners who [must] cooperate for the welfare [of the people] in this earthly life and the Hereafter. They [the people] must help him, and he must help them.\footnote{Khan (n 35) 178.}
\end{quote}

Ibn Ṭaymiyyah's conception of the relationship between the ruler and the commoners is egalitarian, but it does not help in understanding the source of the caliph's powers or in delineating the nature of the relationship between the ruler and his people. Ideally, the ruler and ruled should cooperate in order to maximize the best interests of the community, but what is the exact nature of the caliph's powers vis-à-vis his subjects? The Sunni jurist al-Bāqillānī (d. 403/1013) is more explicit in differentiating between the authority of the caliph, and God or the Prophet. He states:

\begin{quote}
The \textit{imām} (leader) is chosen to apply the laws expounded by the Prophet and recognized by the nation, and he, in all that he does, is the nation's trustee and representative; and it [the nation] is behind him, correcting him and reminding him . . . and removing him and replacing him when he does what calls for his removal.\footnote{Al-Bāqillānī, \textit{al-Tawḥīd fī al-Radd' in Yūsuf Ibish} (n 15). On Bāqillānī's political thought, see Yusuf Ibish, \textit{The Political Doctrine of al-Bāqillānī} (American University of Beirut, Beirut 1966).}
\end{quote}
In al-Bāqillānī’s conception of the caliphate, the caliph is the people’s duly delegated agent who is charged with the obligation of implementing God’s law. This leads to the idea of a representative government, and to a government of limited powers—arguably, the limitations are imposed by the people who act as overseers, ensuring compliance with God’s law. Significantly, the caliph’s charge is not necessarily to give effect to the will of the people, but to give effect to God’s Will, as exemplified by God’s law. This, once again, leads the focus to the issue of the boundaries set by the Divine law, and to the extent that Shari‘ah law provides limits on the discretion and power of the ruler.

The point, quite simply, is that wedding the notion of the caliphate to the Divine law creates an intimate connection between the caliph and the Divine Will, and that the Divine Will is not as discernable as some would like to believe. Al-Bāqillānī’s discourse, itself, reflects this symbolic connection when he discusses whether a ruler may name a successor to the caliphate. Al-Bāqillānī argues that, in fact, it is permissible for the caliph to do so, and that the people should accept his nomination. His justification is the most interesting part of his discussion; he argues that the people should accept the caliph’s decision because there is a legal presumption that the caliph always acts in the best interest of his people. For people to believe otherwise is a sin that calls for repentance. This type of presumption is coherent only if the ruler represents the Divine Will, and not the will of the people, and only if the ruler answers to God and not the people. If the ruler discharges the duties of piety by giving effect to God’s law, however God’s law is defined, he has fulfilled his duties toward the people, and the quality or genuineness of his intentions are assessed only by God. As a result of this type of paradigm, most Muslim jurists argued that a ruler is not removable from power unless he commits a clear, visible, and major infraction against God (i.e., a major sin).

Muslim jurists, however, did not completely sever the connection between the ruler and the people. In theory, the caliphate must be based on a contract (‘aqd) between the caliph and ahl al-‘aqd (the people who have the power of contract; also known as ahl al-ikhtiyār, or the people who choose) who give their bay‘ah (allegiance or consent to the caliph). In the classical theory, a person who fulfills certain conditions (mustawfi al-shurūt) must come to power through a contract entered into with ahl al-‘aqd pursuant to which the caliph is to receive the bay‘ah in return for his promise to discharge the terms of the contract. The terms of the contract were not extensively discussed in Islamic sources. Typically, jurists would write a list of terms that included the obligation to apply God’s law, the obligation to protect Muslims and the territory of Islam, and in return, the ruler was promised the people’s support and obedience. There is no precedent in Islamic discourses for a negotiated contract of the caliphate. The jurists seemed to treat the contract as a contract of implied terms, but there is no explicit rejection of the notion of a contract of negotiated terms. The extent to which the contract of the caliphate is subject to the principle of freedom of contract and permissibility of negotiation remains largely undeveloped even in contemporary Islam. Thus far, it has been assumed that the terms of the contract are defined by Shari‘ah law.

Who are ahl al-‘hall wa al-‘aqd? According to the Mu’tazilite scholar Abū Bakr al-Aṣamm (d. 200/816), the public, as a whole, must constitute ahl al-‘hall wa al-‘aqd; therefore, the public at large must form a consensus, and each person must individually give his bay‘ah to

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38 Ibish (n 37) 99.
39 Al-Bāqillānī (n 37) 76.
40 Watt (n 15) 58; Lambton (n 15) 19, 37.
The Centrality of Shari'ah to Government and Constitutionalism in Islam

41 The vast majority of the classical jurists, however, disagreed with this position. They argued that *ahl al-ḥall wa al-ʿaqd* are those who possess the necessary *shawka* (power or strength) to ensure the obedience or, in the alternative, the consent of the public. It is not entirely clear whether the material element is the obedience or consent of the people. Do the people who possess this *shawka* represent the consent of the governed or represent the ability to yield the sufficient amount of power to insure the obedience of the people? Ahmad Ibn Ḥanbal, the eponym of the Ḥanbali juristic school of thought, seems to primarily speak of obedience; the people of *shawka* must be able to deliver the obedience of the people to the ruler. 42 On the other hand, the jurist al-Ghazālī seems to focus on consent as the material issue. He argues that *shawka* means the ability to deliver the consent of the people—the consent of the *ahl al-ḥall wa al-ʿaqd* must represent the consent of the governed. 43 The idea of the consent of the governed ought not to be equated, however, with conceptions of delegated powers or government by the people. The consent of which al-Ghazālī, and others, speak does not seem to mean the existence of a representative government that seeks to give effect to the will of the people. Rather, consent in pre-modern Islamic discourses appears to be the equivalent of acquiescence. Typically, jurists assert that *ahl al-ḥall wa al-ʿaqd* must be people who fulfill certain conditions such as decency, probity, knowledge, and wisdom. 44 Beyond these qualifications, the jurists state that *ahl al-ḥall wa al-ʿaqd* must consist of a certain number of the notables of society (*shuraṇa* al-*umma*) or the prominent *ʿulamaʿ* (jurists). 45 There is considerable disagreement about how many individuals would be sufficient to form the *ahl al-ḥall wa al-ʿaqd*. Some, such as al-Juwaynī, argued that the exact number is immaterial; *ahl al-ḥall wa al-ʿaqd* could be a single person or a hundred as long as the requirement of *shawka* is fulfilled. 46

One must admit, however, that the discourse exhibits a certain amount of distrust of the laity (*al-ʿāmma*). The Mu'tazili scholar al-Jāḥiẓ (d. 255/868–869) asserts: “They [the laity] tend to float with every ebb and flow, and maybe [the laity] will be more content with choosing [to the caliphate] the wrong-doers instead of the righteous [rulers] . . . ” 47 Although al-Jāḥiẓ, being a Mu'tazili, is not representative of mainstream Islamic thought on many issues, he does reflect a wider trend. Considered in their historical contexts, the distrust exhibited by the classical jurists toward the laity is hardly surprising. In addition, since the juristic class saw itself as the expounders and defenders of the Divine law in organized societies ordered around tribal, feudal-like, or guilded institutions, it is not surprising that jurists did not focus on the political function of individuals or on majoritarian will. In pre-modern periods, institutions represented individuals and individuals were empowered by well-defined custom-bound roles and functions, and in these historical contexts, the institution of the tribe or guild mattered far more than the individual. Therefore, deference to
any kind of strict majoritarian authority would have made little sense. Expecting the juristic tradition to give effect to or to defer to the will of the majority would be an anachronism. In terms of analyzing any potential dynamics between Sharī’ah and constitutionalism, the idea of contractual government would appear to be far more significant and promising than any classical notions of majoritarian rule. This begs the question of the nature of this contract of governance, or what are the values that inspired this contractual notion? Interestingly, Muslim jurists did struggle with this issue but they often debated whether the contract of the caliphate is akin to an employment contract, sale contract, or marriage contract in trying to figure out the jurisprudence that should apply to this unique form of contractual relationship. In Islam, the concept of a political contract had rather clear historical origins—it was initiated and practiced by the Companions after the death of the Prophet.

The Prophet, himself, was keen on taking the bay’āh of his followers on several occasions. Even more, when the Prophet became the governor of Medina, he drafted what is now known as the Constitution of Medina (waṭīqat al-Madīna). The Constitution of Medina does not read like a modern constitutional document—rather, it reads more like a contract or a corporate organizational document. These historical precedents must have persisted into the practices of the early Muslim community. So, although the historical origin was clear, the theoretical justifications for the doctrine of a political contract and bay’āh remained ambiguous. As the jurists formed a socially and professionally recognizable class of experts, they reasoned that the purpose of the contract is to uphold God’s law. The notion of a contract representing the will of the governed, however, remained vague. The overwhelming majority of Muslim jurists do not argue that the purpose of the caliphate’s contract is representation. Rather, Muslim jurists indicate that the contract is essentially a promise to uphold God’s law. The consent of the people is needed because the contract is premised on a cooperative relationship between the governor and governed, with the purpose of guarding and protecting the righteous religion and Sharī’ah. Even though, as we will see below, there are glimpses of the notion of representation on behalf of the people, the dominant paradigm is one in which both the ruler and ruled act as God’s duly delegated agents (khulafa‘ Allāh) in implementing the Divine law. Particularly after the age of miḥna (Islamic inquisition—217–234/833–849), the ‘ulamā’ were able to establish themselves as the exclusive interpreters and articulators of the Divine law. Thus, in order for a caliph and community to attain and continue enjoying Islamic legitimacy, they would have to dedicate themselves to upholding the Will of God as articulated by the jurists. In a sense, we end up with a tri-polar dynamic with the ruler and governors at one pole, the jurists at another, and the laity at the third. But one would have to consider the possibility that between the interpretive and legislative tasks of the jurists and the executory duties of the ruler, the

48 For instance, see al-Baghdādī, ‘Kitāb’ (n 46) 132ff.; Lambton (n 15) 18.
common people do not play a major role in the negotiative process between the three social poles. This possibility is quite clear in a statement by the jurist Ibn Qayyim who states:

Properly speaking, the rulers (\(\text{al-umarā'}\)) are obeyed [only to the extent] that their commands are consistent with the [articulations] of the religious sciences (\(\text{al-'}\text{ilm}\)). Hence, the duty to obey them [the rulers] derives from the duty to obey the jurists (\(\text{fa-tā'atukum taba'li-}\)\(\text{tā'at al-'}\text{ulamā'}\)). [This is because] obedience is due only in what is good (\(\text{ma'rūf}\)), and what is required by the religious sciences (\(\text{wa mā awjabahu al-'}\text{ilm}\)). Since the duty to obey the jurists is derived from the duty to obey the Prophet, then the duty to obey the rulers is derived from the duty to obey the jurists [who are the experts on the religious sciences]. Furthermore, since Islam is protected and upheld by the rulers and the jurists alike, this means that the laity must follow [and obey] these two [i.e., the rulers and jurists].

The final instrumentality of government that warrants mention is the concept of shūrā (government by consultation). Shūrā was often invoked as the ideal of participatory governance—an ideal frequently used as a contrast and in opposition to despotic and unjust systems of government. In various historical contexts, this ideal was employed by groups that resisted power frequently using the concept of shūrā to embarrass or shame despotic rulers. There are many historical reports indicating that the Prophet regularly consulted with his Companions regarding the affairs of the state. The concept of shūrā, shortly after the death of the Prophet, had become a symbol signifying participatory politics and legitimacy. 'Alī accused 'Umar b. al-Khaṭṭāb and Abū Bakr of not respecting the shūrā by nominating Abū Bakr to the caliphate in the absence of the Prophet's family. The opposition to 'Uṭmān b. 'Affān (r. 23–35/644–656), the third Rightly Guided Caliph, accused him of destroying the rule of shūrā because of his nepotistic and autocratic policies. The Pretender to the caliphate, Ibn al-Zubayr (r. 60–73/680–692), accused the Umayyads of destroying the shūrā as well. Al-Ḥasan, 'Alī's son, and the Prophet's grandson, lamented that the caliphate was passed on from Mu'āwiya (the first Umayyad Caliph, r. 40–60/661–680) to his son Yazid by saying: “If it had not been for that fact, the caliphate would have been continued by shūrā until the Final Day.” Al-Jāḥiẓ contended that Mu'āwiya was able to achieve power only by destroying the shūrā and ruling by force and oppression. Although the precise meaning of shūrā in these historical narratives is unclear, most certainly the concept did not refer to the mere act of a ruler soliciting the opinions of some notables in society. Shūrā signified the antithesis or the opposite of autocracy, government by force, or oppression.

Post-third/ninth century, the concept of shūrā took much more of an institutional shape. Shūrā became the formal act of consulting ahl al-shūrā (the people of consultation), who are the same group of people forming ahl al-ḥall wa al-ʾaqd. Muslim jurists debated
whether the results of the consultative process are binding (shūrā mulzimah) or non-binding (ghayr mulzimah). If the shūrā is binding, then the ruler must abide by the determinations made by ahl al-shūrā. The majority of the jurists, however, concluded that the determinations of ahl al-shūrā are advisory and not compulsory. Some jurists, such as al-Ghazālī, did not specifically discuss the issue of the binding nature of shūrā, but argued that a caliph who is not a mujtahid should not rule on any problem without first consulting the jurists. In this context, al-Ghazālī concluded: “Despotic, non-consultative, decision-making, even if from a wise and learned person is objectionable and unacceptable.”

VI. THE POSSIBILITY OF INDIVIDUAL RIGHTS

This is the most challenging topic, and it is not possible to do it justice in this article. Despite its critical significance, the very concept of individual rights is elusive both in terms of the sources and the nature of those rights. What defines a right and how to formulate or define a right in the modern world is the subject of enormous debate. For instance, whether there are inherent and absolute individual rights, or simply presumptive individual entitlements that could be outweighed by countervailing considerations, is debatable. Moreover, while all constitutional democracies afford protections to a particular set of individual interests, such as freedom of speech and assembly, equality before the law, right to property, and due process of law, which exact rights ought to be protected, and to what extent, is subject to a large measure of variation in theory and practice. For the purposes of this article, a minimalist, and hopefully non-controversial, notion of individual rights will be used. Individual rights are not understood as entitlements, but qualified immunities—the idea that particular interests related to the well-being of an individual ought to be protected from infringements whether perpetuated by the state or other members of the social order, and that such interests should not be sacrificed unless for an overwhelming necessity. This, as noted, is a minimalist description of rights, and a largely inadequate one. It is certainly doubtful that there is an objective means of quantifying an overwhelming necessity, and thus, some individual interests ought to be unassailable under any circumstances. These unassailable interests are the ones that, if violated, are bound to communicate to the individual in question a sense of worthlessness, and that, if violated, tend to destroy the faculty of a human being to comprehend the necessary elements for a dignified existence. Therefore, for instance, under this conception, the use of torture, the denial of food or shelter, or the

56 A jurist of the highest ranking, capable of deciding de novo issues of law. Al-Ghazālī also argues that a caliph need not be a mujtahid as long as he regularly consults the jurists.

57 Al-Ghazālī (n 18) 191, 193; Sharaf and Muḥammad (n 15) 399-403. On consulting the jurists, also see Ibn al-Jawzī (n 16) al-Shifāʾ 55, Abū Yaʿlā, (n 18) 221; Sharaf and Muḥammad (n 15) 351, who discuss the thought of the Seljuq wazīr, Nizām al-Mulk (d. 485/1092).

58 Al-Ghazālī (n 18) 186, 191; Sharaf and Muḥammad (n 15) 399–403.

means for sustenance, such as employment, under any circumstances, would be a violation of an individual’s rights.

Some contemporary Muslims have argued that the Islamic tradition can be interpreted to provide for a systematic vision of individual rights, and some of these scholarly arguments have been more persuasive than others. It is fair to say, however, that the Islamic juristic tradition did not articulate a notion of individual rights as privileges, entitlements, or immunities. Nonetheless, the juristic tradition did articulate a conception of protected interests that accrue to the benefit of the individual. In jurisprudential theory, the purpose of Sharī’ah is to fulfill the welfare of the people. The interests or the welfare of the people is divided into three categories: the necessities (darūriyyāt), the needs (hājjīyyāt), and the luxuries (kamāliyyāt or taḥsīniyyāt). The law and political policies of the government must fulfill these interests in descending order of importance—first, the necessities, then the needs, and then the luxuries. The necessities are further divided into five basic values—al-darūriyyāt al-khamsah: religion, life, intellect, lineage or honor, and property. But Muslim jurists did not develop the five basic values as conceptual categories and then explore the theoretical implications of each value. Rather, they pursued what can be described as an extreme positivistic approach to rights. Muslim jurists examined the existing positive legal injunctions that can be said to serve these values, and concluded that by giving effect to these specific legal injunctions, the values have been sufficiently fulfilled. So, for example, Muslim jurists contended that the prohibition of murder served the basic value of life, the law of apostasy protected religion, the prohibition of intoxicants protected the intellect, the prohibition of fornication and adultery protected lineage, and the right of Compensation protected the right to property. Limiting the protection of the intellect to giving effect to these specific legal injunctions, the values have been sufficiently fulfilled. So, for example, Muslim jurists contended that the prohibition of murder served the basic value of life, the law of apostasy protected religion, the prohibition of intoxicants protected the intellect, the prohibition of fornication and adultery protected lineage, and the right of compensation protected the right to property. Limiting the protection of the intellect to the prohibition against the consumption of alcohol or the prohibition of life to the prohibition of murder is hardly a very thorough protection of the intellect or life. At most, these laws are partial protections to a limited conception of values, and at any case, cannot be asserted as the equivalent of individual rights. If reduced to technical legalistic objectives, these five values are effectively emptied of any theoretical social and political content

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and significance. If properly developed, these basic five values could act as a foundation for a systematic theory of a political and social order.

To argue that the Islamic juridical tradition did not develop the idea of fundamental or basic individual rights does not mean that that tradition was oblivious to the notion. In fact, the juridical tradition tended to sympathize with individuals who were unjustly executed for their beliefs or those who died fighting an injustice. Jurists typically described such acts as a death of muṣāburah, a description that carried positive or commendable connotations. Muslim jurists produced a formidable discourse condemning the imposition of oppressive taxes or who resist a tyrannical government. Furthermore, the majority of Muslim jurists refused to condemn or criminalize the behavior of rebels who revolt because of the imposition of oppressive taxes or who resist a tyrannical government. In addition, the juridical tradition articulated a wealth of positions that exhibit a humanitarian or compassionate orientation. For example, Muslim jurists developed the idea of presumption of innocence in all criminal and civil proceedings, and argued that the accumulator always carries the burden of proof (al-bayyinah ‘alā man idda‘a). In matters related to heresy, Muslim jurists repeatedly argued that it is better to let a thousand unbelievers go free than to wrongfully punish a single Muslim. The same principle was applied to criminal cases. Moreover, many jurists condemned the practice of detaining heterodox groups that advocate their heterodoxy (such as the Khawārij), and argued that such groups may not be harassed or molested until they carry arms and form a clear intent to rebel against the government. Muslim jurists also condemned the use of torture, arguing that the Prophet forbade the use of mutilations (such as the Khawārij), and opposed the use of coerced...
confessions in all legal and political matters. A large number of jurists articulated a doctrine similar to the American exculpatory doctrine—confessions or evidence obtained under coercion are inadmissible at trial. Interestingly, some jurists asserted that a judge that relies on a coerced confession in a criminal conviction is, in turn, held liable for the wrongful conviction. Most argued that the defendant, or his family, may bring an action for compensation against the judge, individually, and against the caliph and his representatives, generally.

One of the most intriguing discourses in the juristic tradition is that which relates to the rights of God and the rights of people. The rights of God (ḥuqūq Allāh) are rights retained by God as His own through an explicit designation to that effect. These rights belong to God in the sense that only God can say how the violation of these rights may be punished and only God has the right to forgive such violations. These rights are, so to speak, subject to the exclusive jurisdiction of God, and human beings have no choice but to follow the explicit and detailed rules that God set out for the handling of His jurisdiction. All other rights not retained by God, accrue to the benefit of human beings. These are called ḥuqūq al-ibād, ḥuqūq al-nās, or ḥuqūq al-ādamiyyīn. Importantly, while violations of God’s rights are only forgiven by God through adequate acts of repentance, the rights of people may be forgiven only by the people. For instance, a right to compensation is retained individually by a human being and may only be forgiven by the aggrieved individual. The government, or even God, does not have the right to forgive or compromise such a right of


A considerable number of jurists in Islamic history were persecuted and murdered for holding that a political endorsement (bay’ah) obtained under duress is invalid. Muslim jurists described the death of these scholars under such circumstances as a death of muṣābarah. This had become an important discourse because caliphs were in the habit of either bribing or threatening notables and jurists in order to obtain their bay’ah. See Ibn Khaldūn, al-Muqaddimah, 165; Khaled Abou El Fadl, The Islamic Law of Rebellion: The Rise and Development of the Juridical Discourses on Insurrection, Insurgency and Brigandage (Ph.D. diss., Princeton University, 1999) 86f. On the Islamic law of duress and on coerced confessions and political commitments, see Khaled Abou El Fadl, “Law of Duress in Islamic Law and Common Law: A Comparative Study” (1991) 30 (3) Islamic Studies 305, 350.


compensation if it is designated as part of the rights of human beings. Therefore, the Mālikī jurist Ibn al-ʿArabī (d. 543/1148) states:

The rights of human beings are not forgiven by God unless the human being concerned forgives them first, and the claims for such rights are not dismissed [by God] unless they are dismissed by the person concerned . . . The rights of a Muslim cannot be abandoned except by the possessor of the right. Even the *imām* [ruler] does not have the right to demand [or abandon] such rights. This is because the *imām* is not empowered to act as the agent for a specific set of individuals over their specific rights. Rather, the *imām* only represents people, generally, over their general and unspecified rights.  

In a similar context, the Ḥanafī jurist al-ʿAynī (d. 855/1451) argues that the usurper of property, even if a government official (*al-Ūlīm*), will not be forgiven for his sin, even if he repents a thousand times, unless he returns the stolen property.  

Most of these discourses occur in the context of addressing personal monetary and property rights, but they have not been extended to other civil rights, such as the right to due process or the right to listen, to reflect, and to study, which may not be abandoned or violated by the government under any circumstances. This is not because the range of the rights of people was narrow—quite to the contrary, it is because the range of these rights was too broad. It should be recalled that people retain any rights not explicitly reserved by God. Effectively, since the rights retained by God are quite narrow, the rights accruing to the benefit of the people are numerous. The classical juristic practice has tended to focus on narrow legal claims that may be addressed through the processes of law rather than on broad theoretical categories that were perceived as non-justiciable before a court. As such, the jurists tended to focus on tangible property rights or rights for compensation instead of focusing on moral claims. So, for instance, if someone burns a person’s books, that person may seek compensation for destruction of property, but he could not bring an action for injunctive relief preventing the burning of the books in the first place. Despite this limitation, the juristic tradition did, in fact, develop a notion of individual claims that are immune from governmental or social limitation or alienation.

VII. CONSTITUTIONALISM AND SHARĪʿAH

A number of contemporary Muslim commentators have argued that Islam is fundamentally compatible with a constitutional system of government. In a style that has become all too common in the contemporary Muslim world, commentators will generate a laundry list of concepts such as *shūrā*, the contract of the caliphate, the idea of *bayʿah*, and the supremacy of Sharīʿah, and then conclude that Islam is compatible with constitutionalism.

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Some proclaim that the Qur’ān is the constitution of Muslims and then rest in the comfort of the same assertion. These types of arguments, however, are for the most part vacuous. They are the product of an intellectual restlessness induced by the rather abysmal fortunes of the Islamic heritage in the modern age. As noted earlier, constitutional practice appropriates the values and intellectual heritage that prevails within a society. Although various trajectories of constitutional thought were definitely generated in the Islamic intellectual heritage, it would be an exaggeration to claim that constitutional values or constitutionalism are inherently a part of the Islamic tradition. But in the contemporary age it is the trajectories of the Islamic tradition that can be co-opted and developed into full-fledged constitutional visions and commitments that could then grow into systematic constitutional practices.

Any constitutionalist practice must come to terms with the centrality of Sharī’ah to the conception of government in Islam. In many ways, in an Islamic system, sovereignty belongs to the Sharī’ah, and not to the people. Sharī’ah represents the Will of God, and according to many classical jurists, people and government must steadfastly work and cooperate to serve Sharī’ah and its objectives. The difficulty, however, is that Sharī’ah is a construct of limitless reach and power, and any institution that can attach itself to that construct becomes similarly validated and empowered by the Divinity of Sharī’ah. Sharī’ah is God’s Way, and it is represented by a set of normative principles, methodologies for the production of legal injunctions, and a set of positive legal rules. But Sharī’ah also encompasses a variety of schools of thought and approaches, all of which are equally valid and equally orthodox. Nevertheless, Sharī’ah as a whole, with all its schools and variant points of view, remains the Way and law of God. It is certainly true that the Sharī’ah is capable of imposing limits on government, and of generating individual rights, both of which would be considered the limits and rights dictated by the Divine Will. Nevertheless, whatever limits are imposed and whatever rights are granted, may be withdrawn in the same way they are created: through the agency of human interpretation. In other words, because the Sharī’ah, for the most part, is not explicitly dictated by God, Sharī’ah relies on the interpretive acts of the human agents for its production and execution. This creates a double-edged conceptual framework—on the one hand, Sharī’ah could be the source of unwavering and stolid limitations on government and an uncompromising grant of rights, but on the other hand, whatever is granted by God can also be taken away by God. In both cases, one cannot escape the fact that it is human agents who determine the existence, or non-existence, of the limits on government and the grant of individual rights. This is a formidable power that could be yielded, in one way or another, by the human agent who attaches himself or herself to the Sharī’ah.

To propose secularism as a solution in order to avoid the hegemony of Sharī’ah and the possibility of an abuse of power is unacceptable. There are several reasons for this: one, given the rhetorical choice between allegiance to the Sharī’ah and allegiance to constitutionalism, quite understandably most Muslims will make the equally rhetorical

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76 The four surviving Sunni schools of law and legal thought are the Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbali schools. On the history of these schools, as well as those which are now extinct, such as the Ẓabari and Zāhirī schools, see Christopher Melchert, The Formation of the Sunni Schools of Law, 9th–10th Centuries C.E. (Leiden: Brill, 1997). On the organization, structure, and curriculum of legal learning, see George Makdisi, The Rise of Colleges: Institutions of Learning in Islam and the West (Edinburgh: Edinburgh University Press, 1981).
decision to ally themselves to the Shari‘ah. Two, secularism has become an unworkable and unhelpful symbolic construct. In the Muslim world, secularism is normally associated with what is described as the Western intellectual invasion, both in the period of colonialism and post-colonialism. Furthermore, secularism has come to symbolize a misguided belief in the probity of rationalism and a sense of hostility to religion as a source of guidance in the public sphere. Beyond, the issue of symbolism, as noted earlier, there is a considerable variation in the practice of secularism. It is entirely unclear to what extent the practice of secularism requires a separation of church and state, especially in light of the fact that there is no institutional church in Islam. Put differently, to what extent does the practice of secularism mandate the exclusion of religion from the public domain, including the exclusion of religion as a source of law? Finally, to the extent that the secular paradigm relies on a belief in the guidance-value of reason as a means for achieving utilitarian fulfillment or justice, it is founded on a conviction that is not empirically or morally verifiable. One could plausibly believe that religion is an equally valid means of knowing or discovering the means to happiness or justice.

The fact that secularism is a word laden with unhelpful connotations in the Islamic context should not blind us to the fact that the discourse of Shari‘ah enables human beings to speak in God’s name, and effectively empowers human agency with the voice of God. This is a formidable power that is easily abused. Interestingly, although, as noted above, Muslim jurists insisted that the rulers consult with the jurists on all matters, the jurists themselves never demanded the right to rule the Islamic state directly. In fact, pre-modern Muslim jurists never assumed direct rule in the political sphere. Through Islamic history, the ‘ulama’ performed a wide range of economic, political, and administrative functions, but most importantly, they acted as negotiative mediators between the ruling class and the laity. As Aafaf Marsot states: “[The ‘ulamā’] were the purveyors of Islam, the guardians of its tradition, the depository of ancestral wisdom, and the moral tutors of the population.” While they legitimated and often explained the rulers to the ruled, they also used their moral weight to thwart tyrannous measures, and, at times, led or legitimated rebellions against the


80 Marsot (n 79) 149.
ruling classes. As Marsot correctly points out, “[t]o both rulers and ruled they were an objective haven which contending factions could turn to in times of stress.” For a variety of reasons, modernity turned the ‘ulamā’ from “vociferous spokesmen of the masses” into salaried state functionaries that play a primarily conservative, legitimist role for the ruling regimes in the Islamic world. The disintegration of the role of the ‘ulamā’ and their co-optation by the modern praetorian state, with its hybrid practices of secularism, has made Islamic normative determinations all the less rich.

There are a variety of historical and doctrinal reasons that explain the traditional function of the ‘ulamā’ as mediators and moral educators, and their renouncement of the role of direct rulers. However, there is one aspect of Islamic theology that might contribute to the development of a meaningful discourse on constitutionalism in the Muslim context. As noted earlier, Muslims developed several legal schools of thought, all of which are equally orthodox. But paradoxically, Shari‘ah is the core value that society must serve. The paradox here is exemplified in the fact that there is a pronounced tension between the obligation to live by God’s law, and the fact that this law is manifested only through subjective interpretative determinations. Even if there is a unified realization that a particular positive command does express the Divine law, there is still a vast array of possible subjective executions and applications. This dilemma was resolved, somewhat, in Islamic discourses by distinguishing between Shari‘ah and fiqh. Shari‘ah, it was argued, is the Divine ideal, standing as if suspended in mid-air, unaffected and uncorrupted by the vagaries of life. The fiqh is the human attempt to understand and apply the ideal. Therefore, Shari‘ah is immutable, immaculate, and flawless—fiqh is not.

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82 Marsot (n 79) 159.

83 Daniel Crecelius, “Egyptian Ulama and Modernization” in Keddi (n 79) 167–209, 168. Crecelius makes this point about the ‘ulamā’ of Egypt in the modern age. However, see Fouad Ajami, “In the Pharaoh’s Shadow: Religion and Authority in Egypt” in James Piscatori (ed), Islam in the Political Process (Cambridge University Press, London 1983) 18; Mortimer (n 81) 91, 95; Malise Ruthven, Islam in the World (Oxford University Press, Oxford 1984) 179. Of course, there are notable exceptions in the contemporary Islamic practice. Many clerics become prominent opponents of the present Muslim regimes, and suffer enormously for their troubles.


As part of the doctrinal foundations for this discourse, Muslim jurists focused on the tradition attributed to the Prophet stating: “Every mujtahid (jurist who strives to find the correct answer) is correct” or “Every mujtahid will be [justly] rewarded.” This implied that there could be more than a single correct answer to the same question. For Muslim jurists, this raised the issue of the purpose or the motivation behind the search for the Divine Will. What is the Divine Purpose behind setting out indicators to the Divine law and then requiring that human beings engage in a search? If the Divine wants human beings to reach the correct understanding, then how could every interpreter or jurist be correct?

The juristic discourse focused on whether or not the Sharī'ah had a determinable result or demand in all cases, and if there is such a determinable result, are Muslims obligated to find it? Put differently, is there a correct legal response to all legal problems, and are Muslims charged with the legal obligation of finding that response? The overwhelming majority of Muslim jurists agreed that good faith diligence in searching for the Divine Will is sufficient to protect a researcher from liability before God. As long as the reader exercises due diligence in the search, the researcher will not be held liable nor incur a sin regardless of the result. Beyond this, the jurists were divided into two main camps. The first school, known as the muḥatta‘ī‘ah, argued that ultimately, there is a correct answer to every legal question. However, only God knows what the correct response is, and the truth will not be revealed.
until the Final Day. Human beings, for the most part, cannot conclusively know whether they have found that correct response. In this sense, every mujtahid is correct in trying to find the answer, however, one reader might reach the truth while the others might mistake it. God, on the Final Day, will inform all readers who was right and who was wrong. Correctness here means that the mujtahid is to be commended for putting in the effort, but it does not mean that all responses are equally valid.

The second school, known as the muṣawwibah, included prominent jurists such as al-Juwaynī, Jalāl al-Dīn al-Suyūṭī (d. 911/1505), al-Ghazālī (d. 505/1111), and Fakhr al-Dīn al-Rāzī (d. 606/1210), and it is reported that the Muʿtazilah were followers of this school as well.⁸⁷ The muṣawwibah argued that there is no specific and correct answer (ḥukm muʿayyan) that God wants human beings to discover, in part, because if there were a correct answer, God would have made the evidence indicating a Divine rule conclusive and clear. God cannot charge human beings with the duty to find the correct answer when there is no objective means to discovering the correctness of a textual or legal problem. If there were an objective truth to everything, God would have made such a truth ascertainable in this life. Legal truth, or correctness, in most circumstances, depends on belief and evidence, and the validity of a legal rule or act is often contingent on the rules of recognition that provide for its existence. Human beings are not charged with the obligation of finding some abstract or inaccessible legally correct result. Rather, they are charged with the duty to diligently investigate a problem and then follow the results of their own ijtihād. Al-Juwaynī explains this point by asserting, “The most a mujtahid would claim is a preponderance of belief (ghalabat al-ūn) and the balancing of the evidence. However, certainty was never claimed by any of them (the early jurists) . . . If we were charged with finding [the truth] we would not have been forgiven for failing to find it.”⁸⁸ According to al-Juwaynī, what God wants or intends is for human beings to search—to live a life fully and thoroughly engaged with the Divine. Al-Juwaynī explains: it is as if God has said to human beings, “My command to My servants is in accordance with the preponderance of their beliefs. So whoever preponderantly believes that they are obligated to do something, acting upon it becomes My command.”⁸⁹ God’s command to human beings is to diligently search, and God’s law is suspended until a human being forms a preponderance of belief about the law. At the point that a preponderance of belief is formed, God’s law becomes in accordance with the preponderance of belief formed by that particular individual. In summary, if a person honestly and sincerely believes that such and such is the law of God, then, as to that person “that” is in fact God’s law.⁹⁰

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⁸⁸ Al-Juwaynī (n 86) 50f.

⁸⁹ Al-Juwaynī (n 86) 61.

The position of the second school (*muṣawwibah*), in particular, raises difficult questions about the application of the Shari‘ah in society.91 This position implies that God’s law is to search for God’s law, otherwise the legal charge (*taklīf*) is entirely dependent on the subjectivity and sincerity of belief. The first school (*mukhāṭṭa‘ah*) indicates that whatever law is applied is potentially God’s law, but not necessarily so.92 This raises the question: Is it possible for any state-enforced law to be God’s law? Under the first school of thought, whatever law the state applies, that law is only potentially the law of God, but we will not find out until the Final Day. Under the second school of thought, any law applied by the state is not the law of God unless the person, to which the law applies, believes the law to be God’s Will and Command. The first school suspends knowledge until the end of life, and the second school hinges knowledge on the validity of the process and ultimate sincerity of belief.

Building upon this intellectual heritage, Shari‘ah ought to stand in an Islamic polity as a symbolic construct for the Divine perfection that is unreachable by human effort. It is the epistle of justice, goodness, and beauty as conceived and retained by God. Its perfection is preserved, so to speak, in the Mind of God, but anything that is channeled through human agency is necessarily marred by human imperfection. Put differently, Shari‘ah as conceived by God is flawless, but as understood by human beings, Shari‘ah is imperfect and contingent. Jurists ought to continue exploring the ideal of Shari‘ah, and ought to continue expounding their imperfect attempts at understanding God’s perfection. As long as the argument constructed is normative, it is an unfulfilled potential for reaching the Divine Will. Significantly, any law applied is necessarily a potential unrealized. Shari‘ah is not simply a bunch of *aḥkām* (a set of positive rules) but also a set of principles, methodology, and a discursive process that searches for the Divine ideals. As such, Shari‘ah is a work-in-progress that is never complete. To put it more concretely, a juristic argument about what God commands is only potentially God’s law, either because in the Final Day we will discover its correctness (the first school) or because its correctness is contingent on the sincerity of belief of the person who decides to follow it (the second school). If a legal opinion is adopted and enforced by the state, it cannot be said to be God’s law. By passing through the determinative and enforcement processes of the state, the legal opinion is no longer simply a potential—it has become an actual law, applied and enforced. But what has been applied and enforced is not God’s law—it is the state’s law. Effectively, a religious state law is a contradiction in terms. Either the law belongs to the state or it belongs to God, and as long as the law relies on the subjective agency of the state for its articulation and enforcement, any law enforced by the state is necessarily not God’s law. Otherwise, we must be willing to admit that the failure of the law of the state is, in fact, the failure of God’s law and, ultimately, God Himself. In Islamic theology, this possibility cannot be entertained.93

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91 I deal with these two schools of thought more extensively elsewhere, see Khaled Abou El Fadl, *Speaking in God’s Name: Islamic Law, Authority and Women* (Oneworld Publications, Oxford 2001).

92 I am ignoring in this context the role of *ijmā‘* (consensus) because of the complexity of the subject. Some modern Muslims have argued that the doctrine of consensus is the normative equivalent of majority rule. I think this is a gross oversimplification, and, at any case, majority rule, as explained, is not the same as constitutionalism.

93 Contemporary Islamic discourses suffer from a certain amount of hypocrisy in this regard. Often, Muslims confront an existential crisis if the enforced, so-called Islamic laws result in social suffering and misery. In order to solve this crisis Muslims will often claim that there has been a failure in the circumstances
Institutionally, it is consistent with the Islamic experience that the ‘ulamā’ can and do play the role of the interpreters of the Divine Word, the custodians of the moral conscience of the community, and the curators reminding and pointing the nation toward the Ideal that is God. But the law of the state, regardless of its origins or basis, belongs to the state. It bears emphasis that under this conception, there are no religious laws that can or may be enforced by the state. The state may enforce the prevailing subjective commitments of the community (the second school), or it may enforce what the majority believes to be closer to the Divine Ideal (the first school). But, it bears emphasis; in either case, what is being enforced is not God’s law. This means that all laws articulated and applied in a state are thoroughly human, and should be treated as such. This means that any codification of Shari‘ah law produces a set of laws that are thoroughly human. These laws are a part of Shari‘ah law only to the extent that any set of human legal opinions can be said to be a part of Shari‘ah. A code, even if inspired by Shari‘ah, is not Shari‘ah—a code is simply a set of positive commandments that were informed by an ideal but do not represent the ideal. As to the fundamental rights that often act as the foundation of a constitutional system, a Muslim society would have to explore the basic values that are at the very core of the Divine Ideal. It would seem that the five juristic core values of protecting religion, life, intellect, honor, and property are a good starting point. It would seem that there must become normative organizing values upon which a scheme of rights and protections would have to be developed, for instance, the protection of religion would become the right to the freedom of religious belief; the protection of life would mean that the taking of life must be for just cause and the result of a just process; the protection of the intellect would have to mean the right to free thinking, expression, and belief; the protection of honor would have to mean the protecting of the dignity of a human being; and the protection of property would be the right to property and in certain conditions, compensation for the taking of property. Of course, this is not a complete or exhaustive list of all rights that ought to be guarded in a constitutional order. The five values are the core from which other necessary rights could be derived.

Most importantly, in a constitutionalist system, both the governor and the governed answer to a higher system of values and moral order. Neither political expedience nor majoritarian whims can transcend the normative values and moral commitments of a society that is dedicated to pursuing visions of liberty, dignity, and well-being. The challenge confronted by any social order ought to be the pursuit of justice and virtue. However, as the classical jurists would argue, virtue cannot be pursued by unvirtuous means and justice cannot be pursued through injustice. The classical jurists would also agree that there is nothing just or virtuous in despotism and autocracy. To the extent that constitutionalism avoids the excesses and corruptions of power by placing strict limits upon government and carefully restraining and defining the powers of rulers, this is both just and virtuous and completely consistent with the objectives of Shari‘ah.

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of implementation. This indulgence in unnecessary apologetics could be avoided if the problematic idea of Shari‘ah state law is abandoned.

This proposal is nonsense unless the ‘ulamā’ regain their institutional and moral independence.
I. INTRODUCTION

Can a separation of powers emerge by default rather than constitutional design? Historians and experts on Islamic law and society have long observed that rulers and religious legal scholars occupied separate realms of authority in classical Muslim societies. In some significant ways, these different realms constituted a separation of powers, with rulers and scholars “checking and balancing” each other in mostly stable political environments. Their mutually interdependent relationship stemmed largely from a division of lawmaking authority that distinguished ruler-made law, siyāsah, from scholar-crafted law, fiqh. As a result, the rule of law in Muslim lands depended upon both siyāsah and fiqh, and legal and political order was achieved by rulers and scholars working both in cooperation and competition with each other. But, unlike the relationship between executive, judicial, and legislative powers in modern democracies, the classical Muslim balance of power was not between government entities but rather between the government as a whole and the non-governmental forces of scholarly academia. Neither had absolute power over the law, and each institution recognized the other’s presence and role in the system.

This article offers a brief overview of this classical Muslim balance of power, summarizing how it was both similar to and different from the contemporary constitutional concept of a separation of powers, and suggesting ways the classical Muslim structure of authority might provide useful insights for rule of law questions in Muslim majority countries today.

1 For another commentator drawing the “separation of powers” parallel (although coming to different contemporary conclusions than I do here), see Noah Feldman, The Fall and Rise of the Islamic State (PUP, Princeton 2008).
II. SEPARATION OF POWERS FROM THE PERSPECTIVE OF ISLAMIC TRADITION

A. The Scholars

To appreciate the way that legal authority was bifurcated between Muslim rulers and scholars, we begin with the jurisprudential workings of Shari’ah itself. Shari’ah literally means “way” or “road.” As a legal term, Shari’ah refers to “God’s Law,” a divine exhortation to all Muslims including legal and political authorities about the ideal way to behave in this world. Muslims have two tangible sources of information about this Law of God. The first is the Qur’ān, which Muslims believe is the actual word of God, revealed to the last prophet, Mohammad. The second is the lived example of the Prophet Mohammed. Because the Qur’ān and the Prophet’s life do not answer every single life and legal question, Muslim scholars engaged—and continue to engage—in rigorous interpretation of those sources to come up with detailed legal rules on a wide range of topics, from contracts and property to inheritance and criminal law. These rules are called fiqh (literally “understanding”). Fiqh is the work product of Muslim legal scholars, a continually evolving literature of rules and principles developed as a result of their efforts to articulate God’s Law, Shari’ah, in concrete terms.

The use of the term “fiqh” and not “Shari’ah” for these rules is significant, and reflects a fundamental epistemological premise of Islamic jurisprudence. Muslim fiqh scholars undertook their work of interpreting divine texts with a conscious awareness of their own human fallibility. They recognized that their extrapolations of fiqh rules were at best only probable articulations of God’s Law, and that none could be claimed with certainty to be “the right answer.” Because the process of legal interpretation (ijtihād) was an inherently human activity, fiqh rules had an epistemological status of probability, not certainty. The authority of fiqh is therefore grounded not in the correctness of its result, but rather in the sincerity of the ijtihād reasoning that generated it. That is, as long as it is the result of sincere ijtihād, any fiqh conclusion qualifies as a possible—and thus legitimate—articulation of Shari’ah. Multiplied over time, as more and more scholars engaged in ijtihād, a healthy and unavoidable Islamic legal pluralism emerged, both in interpretive methodologies and specific bodies of doctrine. Eventually, this diversity coalesced into several definable schools of law, each with equal legitimacy and authority for Muslims seeking to live by Shari’ah. Thus, for a Muslim, there is one Law of God (Shari’ah), but there are many versions of fiqh articulating that Law here on earth.

Fiqh rules are what many people, Muslims and non-Muslims, often mean when they say “Shari’ah.” That is, when referring to things like the Islamic grounds for divorce, inheritance percentages, or evidentiary proof for adultery, most people today use the term “Shari’ah.” But it is important not to confuse the two terms, fiqh and Shari’ah, because fiqh—the product of human legal interpretation—is inherently fallible and thus open to question, whereas Shari’ah—God’s Way, which all fiqh scholars aim to articulate—is not. This is especially important to remember in contemporary discourses, where revival of Islamic law is happening simultaneously with critical re-thinking of its doctrines. Without sufficient

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2 See Khaled Abou El Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (Oneworld Publications, Oxford 2001) 39: “Islamic legal methodologies rarely spoke in terms of legal certainties (yaqīn and qaṭ’). The linguistic practice of the juristic culture spoke in terms of probabilities or the preponderance of evidence. . . . Muslim jurists asserted that only God possesses perfect knowledge—human knowledge is tentative.”
awareness of the difference between fiqh and Shari'ah, many assume the scholar-articulated fiqh rules to be God’s Law, without remembering the inherently contingent nature of ijtihad. Similarly, it is risky to speak, for example, of “changing Shari’ah” to accommodate modern times, because this implies that God’s Law is not itself already perfect—a suggestion likely to inspire resistance with many Muslims. But the idea of changing fiqh is quite a different matter, because fiqh, itself already fallible, has always evolved over time and space to take into consideration a variety of changing social norms. In other words, simple language choices could play a significant role in alleviating some of the perceived deadlocks in global debates over what is and is not negotiable for Muslims.

B. The Rulers

Muslim rulers did not create fiqh. But they did make law. Fiqh scholars jealously guarded their academic freedom, insisting on the right to read scripture and perform ijtihad to articulate fiqh doctrine without interference from the rulers. But fiqh scholars also recognized the need for rules and regulations that maintained order and security in society, and they recognized that the only institution capable of reliably doing so would be those caliphs, sultans, and kings who commanded temporal physical power over the population. Thus, ruler-made laws—here referred to collectively as siyasa (literally “administration” or “management”)—could be considered a legitimate part of God’s Law (Shari’ah) because they were important for the public good (maslahah). After all, the Qur’an described rulers who commanded police power in their societies and used it to maintain basic safety, security, and justice for their people. Thus, the fiqh scholars commenting on the Shari’ah-legitimacy of siyasa considered the service of the public good (maslahah), and the importance of social order, as a major reason for affording respect and obedience to siyasa rules.

The authority to create siyasa law can be seen as a part of Shari’ah, conceived as the complete rule of law for a society, even if individual rulers might not live up to the Qur’anic ideal. In fact, to the frustration of many Muslim proponents of democracy today, classical fiqh scholars writing on the matter of Shari’ah-compliant siyasa were remarkably deferential to rulers, and resisted articulating grounds for social revolt or resistance to siyasa power unless it was especially egregious. To them, this meant standing in the way of the essentials of Muslim religious practice. Rulers lost full Shari’ah legitimacy in the eyes of the classical fiqh scholars only if they forced Muslims to sin—that is, if rulers forced Muslims to do things that were Qur’anically prohibited or prevented them from doing things that are Qur’anically required. Beyond that, fiqh scholars might have complained about the corruption of a given ruler, but they generally did not comment on the nature of

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3 See Sherman Jackson, “Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?” (2006–2007) 30 Fordham Int’l L. J. 158, 165: “Islamic law was emphatically neither the product nor preserve of the Muslim state. In fact, it developed in conscious opposition to the latter.” See also Abou El Fadl, Speaking in God’s Name (n 2) 26: “Particularly after the age of mi’na (inquisition [833–848 AD]) the ‘ulamā [religious scholars] were able to establish themselves as the exclusive interpreters and articulators of the Divine law. . . . [T]he inquisition was a concerted effort by the State to control the juristic class and the method by which Shari’ah law was generated. Ultimately, however, the inquisition failed and, at least until the modern age, the jurists retained a near exclusive monopoly over the right to interpret the Divine law.”

4 More specifically, the ruler cannot force a Muslim to perform an act that is religiously prohibited (such as drinking wine) nor prohibit actions that are religiously mandatory (such as praying the five daily prayers).
siyāsah itself. And rulers generally respected the fiqh scholars’ demand to be the sole authoritative interpreters of God’s Law.

It is important to recognize that siyāsah and fiqh are fundamentally different types of law. Fiqh was (and still is) the product of highly structured jurisprudential analyses of scripture by religious scholars whose work in this regard did not depend upon any official position or appointment. Siyāsah, on the other hand, was generated according to the will of the ruler, who created and enforced laws as needed for maintaining public order. The content of these laws did not generally come from interpretations of divine text, but rather, ruler evaluations of public need, and addressed mostly topics on which the scripture had little or nothing to say (such as civil taxes, zoning, marketplace regulations, economics, and public safety). Fiqh scholars, on the other hand, focused on those topics addressed in the divine texts, and elaborated rules about them. Moreover, institutionally, the application of siyāsah was also different from the fiqh. Muslim rulers usually applied a uniform set of siyāsah rules to everyone, but appointed a variety of fiqh scholars as judges so that laypeople seeking to resolve their fiqh-based legal conflicts could do so according to their chosen school of law.

How did the two realms check and balance each other? Not by a constitutional enumeration of powers, but rather as a result of the practical realities of the rulers’ police power on the one hand and the social influence of the scholars on the other. Because most fiqh...
scholars held significant respect among the people, scholars were aware that they risked real social resistance if they took an action which the scholars significantly opposed. The historical record includes many instances where a new ruler, having just accomplished a military takeover, sought support of a prominent religious legal scholar in order to solidify his standing with the public. \(^9\) *Fiqh* scholars, conversely, were themselves “checked” from doing too much to undermine the rulers because they commanded no army. If a ruler felt his political desires were worth the effort of physically subduing any potential social resistance, that ruler could “check” the scholars by simply ignoring their complaints. In this way, the interaction of these legal, political and social forces together operated to create an effective separation of powers in which neither realm—rulers or scholars—had full control over societal norms.\(^{11}\)

### III. CONTEMPORARY QUESTIONS IN ISLAMIC CONSTITUTIONALISM

There are several ways in which an appreciation of the classical *fiqh-siyāsah* balance of powers might inform contemporary debate about Islamic constitutionalism. First, it illustrates that a Shari‘ah-based system does not demand a theocracy. It also opens up a space for democracy within a legal and political system that respects the sovereignty of God. Lastly, it sheds new light on the idea of giving a contemporary branch of government the power to perform a “Shari‘ah check” on popular legislation.

#### A. Does Shari‘ah Demand a Theocracy?

The classical *fiqh-siyāsah* division of legal and political authority was, it can be seen from the description above, not a theocratic distribution of power. Historically, those in physical power of Muslim states were distinct from those who articulated religious law. Religious scholars generally did not hold temporal power. Moreover, Muslim rulers created their *siyāsah* laws not by analysis of divine texts (as the *fiqh* was), but from their own determinations of governing needs.\(^{12}\) It is true that the rulers did enforce some *fiqh* by appointing judges to

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\(^9\) A primary reason for this incredible social influence was the direct contact these scholars had with the public, via legal responsa called *fatwās*, as experts providing the public with individualized answers to their legal questions. In Muslim history, these *fatwās* quickly became the primary means for average Muslims to acquire individualized authoritative answers for important *fiqh* questions of daily life and worship, and the function of *mufti* (one who provides *fatwās*) became a consistent part of most *fiqh* scholars’ lives, a function that continues even today. See Muhammad Khalid Masud, Brinkley Messick, and David S. Powers, “Muftis, Fatwas and Islamic Legal Interpretation” in Muhammad Khalid Masud, Brinkley Messick and David S. Powers (eds), *Islamic Legal Interpretation: Muftis and Their Fatwas* (Harvard Studies in Islamic Law, Harvard College, 1996) 26–32.

\(^{10}\) See Antony Black, *The History of Islamic Political Thought: From the Prophet to the Present* (Routledge, New York 2001); Muhammad Qasim Zaman, *Religion and Politics under the Early Abbassids: The Emergence of the Proto-Sunni Elite* (Islamic History and Civilization. Studies and Texts Series, Brill 1997).

\(^{11}\) For a look at the reality of how these two types of law intersected on the ground, see Kristen Stilt’s study of the *muftasib* in Mamluk Egypt. Kristen Stilt, *Experiences of Law in an Islamic Empire* (forthcoming).

\(^{12}\) Islamic legal and political history is thus quite different from Christian legal and political history in one very significant way: not only was there no state “church” in Islamic history, but there was no “church” at all for the state to co-opt (or to be co-opted by). Most historians point to the Abbassid period called the “*miḥna*” as the major—and ultimately unsuccessful—attempt by Muslim rulers to dictate belief upon
adjudicate fiqh issues when it was necessary to resolve the people’s fiqh-based legal disputes. But in doing so, rulers usually respected fiqh diversity by appointing a variety of judges to adjudicate according to each school’s doctrine as needed by the population. Most importantly, the content of the fiqh that was enforced by these judges was that of the fiqh literature. Rulers did not have the authority to create or change the content of fiqh scholars’ articulations of God’s Law. Their power extended only as far as the siyāsah arm of enforcement could reach. And the fiqh scholars, for their part, were apparently not interested in wielding physical power. Even taking into account the political-theological differences between Sunni and Shi’ah doctrines about the ideal government, for the bulk of Muslim history neither Sunnī nor Shi’ah fiqh scholars sought control of the political realm of the rulers.

This seems attributable not only to their awareness of the corrupting potential of worldly power and the negative impact this would have on the credibility of those trusted to articulate God’s Law, but also to the epistemological status of the fiqh itself: because each fiqh

the people. See Marshall G.S. Hodgson, The Venture of Islam: Conscience and History in a World Civilization I: The Classical Age of Islam (UCP, Chicago 1974) 285–319, 479–89. It was the resistance of the religious legal scholars (most famously Aḥmad Ibn Ḥanbal), upon pain of torture and even death, that many point to as the crucial moment that determined the strict division of rights and responsibilities of Muslim rulers and scholars: Rulers would maintain order in society, but they could not control belief; and religious legal scholars could articulate God’s Law, but they would not claim political power. This division of power reflects in many ways the same motivation behind the separation of church and state in modern Western democracies (namely, to avoid the oppression that can result from state control of belief), but, as Islam did not have a “church” to separate from the state, Muslim protection of religious freedom involved a different separation of powers: a separation of types of law. Thus, Muslim rulers would make siyāsah law (binding on everyone, but not an articulation of God’s Law), and Muslim religious scholars would make fiqh law (an articulation of God’s Law, but only with probable likelihood of being correct, and therefore not binding in and of itself).

13 Classical Shi’i legal and political theory centers the authority of decision-making in the infallibility of a divinely-inspired imām descended from the Prophet. The Muslim ruler should be not only a jurist but the divinely-appointed imām of that age. See Abdulaziz Abdulkhusein Sachedina, The Just Ruler in Shi’ite Islam: The Comprehensive Authority of the Jurist in Imamite Jurisprudence (Oxford University Press, Oxford 1998). In Shi’i legal theory, God is the fountainhead of the Law, and enforces this Law through the imām, who in turn is served by the mujtahids (scholars of ijtihād-qualifications) for the interpretation of the law and by the heads of Shi’i temporal states. Shi’i mujtahids can neither create law nor deduce new rules; theirs is merely the duty to interpret, referring always to the imām’s word. See A.A.A. Fyzee, “Shi’i Legal Theories” in Majid Khadduri and Herbert Liebesny (eds), Law in the Middle East (Middle East Institute, Washington, D.C. 1955) 113, 121-27. But when the last imām went into occultation, this aspect of Shi’i law ceased to have as much practical impact, since traditional Shi’i theology held that jurists should not be in a position of political power without the presence of the imām. Until the imām’s return, Shi’a fiqh scholars found themselves in much the same position as their Sunni counterparts: aware of their own fallibility, yet nevertheless offering probable articulations of God’s Law.

14 This, of course, changed with Ayatollah Khomeini’s theory of the velāyat-e faqīh, which ultimately became the political doctrine of legitimacy of the Islamic Republic of Iran after 1979. But, it is important to remember, Khomeini’s theory itself represents a drastic change from the classical Shi’ih position which maintained that political power was for the imām’s return. See Sachinedina (n 13); Chibli Mallat, The Renewal of Islamic Law: Muhammad Baqer as-Sadr, Najaf and the Shi’i International (CUP, Cambridge 1993); Hamid Algar (trs, ed), Islam and Revolution: Writings and Declarations of Imam Khomeini (Mizan Press, Berkeley, California 1981).
doctrine was inherently fallible, fiqh scholars remained opposed to the idea of forcibly mandating a given fiqh doctrine upon the population.  

B. If God is Sovereign, Then How Can There Be Democracy?

A parallel question about Islamic states centers on the question of popular sovereignty. Namely, if a Shari’ah-based state recognizes that God is sovereign, then does this mean that no one but God makes law? And if so, would this demand a state in which all law is crafted by religious scholars interpreting divine scripture? A quick look at Muslim history reveals that this was never the case. Muslim rulers made siyāsah law all the time. What they did not do was make the fiqh. Siyāsah law, as seen above, was substantively quite different from fiqh. It emerged not from scholarly interpretation of scripture, but ruler determination of what was necessary for social order. And it was siyāsah that was imposed uniformly upon the population. Fiqh was enforced through the filters of the several schools of law and litigant identity.

Of the two, siyāsah lawmaking best resembles the work that happens in legislatures today. Because the legitimacy of the siyāsah power of the ruler was, in the Shari’ah-minded eyes of the scholars, based on the service of the public good (maṣlaḥah), we might conclude today that any mechanism for determining the public good could serve as the source of modern “siyāsah” law. Thus, although in the past the public good was defined unilaterally by a given ruler, today it could be determined by majoritarian democratic means. Siyāsah, in other words, easily translates as secular lawmaking (legislative, executive, or judicial) in the modern world.

The implications of this re-conceptualization are many. First, if laws made by democratic legislatures are recognized as modern versions of ruler-made siyāsah, then a whole range of important social order legislation could gain credibility as the siyāsah arm of a

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15 It is reported, for example, that ‘Abbasid Caliph al-Manṣur (753–775 C.E./135–158 A.H.) approached Mālik ibn Anas, the famous Medinan scholar (and later eponym of the Maliki school of jurisprudence), to adopt Malik’s law book, “al-Muwattā,” as the official law of the Empire. See Frank Vogel, Islamic Law and Legal System: Studies of Saudi Arabia (Brill, Leiden Bosten Köln 2000) 314. Malik did not like the idea. According to one report, Malik asserted that it would be “too severe to force the people of different regions to give up practices that they believed to be correct and which were supported by the hadith and legal opinions that had reached them.” Umar Faruq Abd-Allah, Malik’s Concept of ‘Amal in the Light of Maliki Legal Theory (D.Phil University of Chicago, Chicago 1978) 100; see also Vogel (n 15) 315 (noting that later caliphs al-Mahdi and Hārūn al-Rashid also reportedly made the same request, and quoting Malik’s response). Interestingly, Caliph al-Manṣur seems to have left it at that. He apparently did not attempt to force Malik on the issue, pursue the idea with another jurist, nor draft a legal code himself. This indicates not only that there was some cooperation between caliphs and jurists at this time, but also that the jurists had successfully established their authority over the definition and development of fiqh, and that authority was acknowledged by the caliphal rulers. In this we can see the beginnings of the fiqh-siyāsah separation of law in the Muslim world. For most Muslim governments after this point, if fiqh played a role in the ruler’s power at all, it was done through cooperation with the work of the fiqh-scholars, not in usurpation of it. It might even be said that for Muslims, uniformity of fiqh became associated with oppression and rigidity, since it meant ruler usurpation of the fiqh legal realm.

16 Whether a given law in fact serves the public good is of course a matter of interpretation, and can never be conclusively answered. But this should not be cause for alarm, since the correctness of the result does not seem to have played a role in the legitimacy of siyāsah rule, nor, in fact of democratic legislation today.
Sharī'ah-based legal system. That is, if the conceptual separation of fiqh and siyāsah power is taken as a general model for Shari’ah government, it could be said that when a state makes a siyāsah rule for the public good, then the state is acting consistently with its Islamic obligation to uphold the Shari’ah, because siyāsah that serves the public good is part of the Shari’ah (as long as it does not force Muslims to sin). This might inspire Muslims to give a new kind of respect to “secular” legislation on a whole range of things, including, for example, civil rights, health care, poverty, and education. And the impact might go beyond domestic law. Shari’ah-based respect for state legislation might also have an impact on Muslim participation in global efforts such as international treaty-making on such things as human rights and nuclear proliferation. At present, Muslim-majority countries regularly make Shari’ah-based reservations to many of these international conventions, where it is believed that Shari’ah differs from international rights norms. But if these treaties are seen as siyāsah matters that serve a public good, they might gain a Shari’ah respect that otherwise would not be possible. This approach might help point the way toward workable compromises between Islamic law and international rights norms, changing the current paradigm of these apparently irreconcilable absolutes.

In addition, the public debate leading up to a legislative vote might change if the siyāsah nature of the legislation were kept foremost in people's minds. Because siyāsah is grounded on the idea that it serves the public good (and not on interpretations of scripture), the arguments for and against siyāsah legislation, likewise, should articulate why a given bill would or would not serve the public good. Advocacy for legislation would thus be based on generally appreciable arguments for the public good, and not on discrete understandings of fiqh and debates over what is or is not proper Shari’ah (a debate properly kept in the fiqh, not siyāsah, realm). After all, for any society with multiple schools of fiqh (as well as religious denominations), it would not truly serve the public good (maslaḥah) to enact a uniform law solely on the basis of one particular fiqh school, disregarding the fiqh of the rest of the Muslim population. Instead, if public debate about proposed legislation (i.e., a siyāsah law) focuses on what is empirically good or bad for society, then citizens of all fiqh schools and all religions could participate in this conversation with equal relevance and credibility, making pragmatic arguments for the social good, rather than oppositional arguments about Islam and Islamic law. Under this scenario, there is no pressure for the legislature to “get it right” in terms of Shari’ah, but only in terms of what is best for the people. That way, if

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17 See (n 4).
19 It should be noted here that this reservation often really means that the international document differs in some way from established fiqh. These reservations may, then, be in themselves overstating the Islamic mandate, because, as seen above, fiqh is itself inherently fallible and open to reconsideration. But such reconsideration requires a public awareness of the important difference between fiqh and Shari’ah, without which people (Muslim and non-Muslim) are left vulnerable to any claim that something is Shari’ah, and therefore beyond question as a matter of religious adherence.
20 To specify the point a bit more, under the pre-modern fiqh-siyāsah model (before law became centralized at the government level under the nation-state model), a Maliki would have access to authorities on Maliki law (muftis and qadis) to solve her fiqh-based disputes, even if the rulers favored the Hanafi school of fiqh.
21 As Mohammad Fadel puts it, “Muslims should not ask whether the human rights standard is the same as that under Islamic law; but only whether the human rights standard represents a legitimate act of government. I would argue that if human rights conventions do not preclude Muslims from fulfilling their
a mistake is made, it can be changed by popular democratic processes, without public resistance which might arise from a perception that God’s Law is being “changed.”

There is one major potential objection to this approach: many Muslims today assert that it is the duty of an Islamic state to legislate fiqh, especially the hadūd (Qur’ānically defined criminal law). This concern must be taken seriously, as it is pervasive in Muslim populations. But it is equally important to recall that, historically, even this obligation was tempered by the ruler’s obligation to achieve the public good. An example is the famous decision of the respected Caliph ‘Umar b. al-Khaṭṭāb to waive the Qur’ānic punishment for theft during a time of famine. Following this example, it would follow that Muslim governments today could make similar siyāsah choices—even against established fiqh—when the population is convinced that real-life justice demands it, as long as it is recognized to be a siyāsah action made for the public good rather than claiming to be an authoritative fiqh articulation of God’s Law (and as long as it does not force Muslims to sin).

C. Could Democratic Legislation Be Trumped by Religious Law?

There is one final area in which awareness of the classical fiqh-siyāsah separation of powers could shape discourses about modern Islamic constitutionalism: the “Sharī’ah check.” Many constitutions of Muslim-majority countries today give one branch of government the authority to perform a Sharī’ah check on the laws of the land. For example, a supreme
duty of a man who had stolen a she-camel and ordered two well-nourished camels to be delivered instead.” Malik also relates a story during ‘Umar’s caliphate in which several slaves of a certain Ḥāṭib stole and ate a camel. “Umar at first ordered their hands to be cut off, then changed his mind, saying to Ḥāṭib: ‘I believe that you have been starving them . . .  . By God, I am going to impose a fi ne upon you that will be hard for you to bear. ’ And then ordered Ḥāṭib to pay double the price of the camel to the victim of the theft.” See Abd-Allah (n 15) 649 (quoting Malik’s Muwatt a 2:748).

This is not such a radical assertion as it might seem, when it is recalled that fiqh itself is fallible.

This sort of analysis would support, for example, Tariq Ramadan’s recent call for a moratorium on the death penalty in Muslim countries, as his call was based on the ground that it is disproportionately applied to women and the poor and is therefore unfair and not consistent with Sharī’ah. See Tariq Ramadan, “An International Call for Moratorium on Corporal Punishment, Stoning and the Death Penalty in the Islamic World” April 5, 2005, http://www.tariqramadan.com/spip.php?article264, accessed August 23, 2009. Unfortunately, but perhaps not unsurprisingly, he was severely criticized by Muslim leaders and academics from around the world who asserted that he was attempting to ban a God-decreed punishment. See Dina Abdel-Majeed, “Tariq Ramadan’s Call for a Moratorium: Storm in a Teacup,” http://www.readingislam.com/servlet/Satellite?c=Article_C&cid=1153698300075&pagename=Zone-English-Discover_Islam%2FDIEMainLayout, accessed August 23, 2009, quoting Tariq al-Bishri stating that the moratorium initiative is “juristically baseless.” See also http://www.islamonline.net/English/In_Depth/ShariahAndHumanity/Topic_01.shtml, accessed November 09, 2009, featuring live dialogue and response statements from prominent Muslim scholars. The debate between Ramadan and his critics is a good example of both the challenge and the potential of dialogue on these topics.

This arrangement reflects not classical Muslim configurations of law and government, but instead the nation-state model. That is, it is not Islamic legal pluralism, but the legal centralism characteristic of European nation-states that is the normal constitutional order for most Muslim-majority countries. See Vogel (n 15) 365, describing new autocracy, centralization, and positivization of law and legal system using moral obligations to God, then such norms represent a legitimate rule of law from the Islamic perspective.” Mohammad Fadel, “The Challenge of Human Rights” (2008) Seasons: The Journal of Zaytuna Institut 69.

Ahmad Al-Bayhaqi, Al-Sunan Al-Kubra (Vol. VIII, Dar al-Kutub al-Ilmiyah) 278: “During a famine year, Caliph ‘Umar refused to cut the hand of a person who had stolen a she-camel and ordered two well-nourished camels to be delivered instead.”

23 This sort of analysis would support, for example, Tariq Ramadan’s recent call for a moratorium on the death penalty in Muslim countries, as his call was based on the ground that it is disproportionately applied to women and the poor and is therefore unfair and not consistent with Sharī’ah. See Tariq Ramadan, “An International Call for Moratorium on Corporal Punishment, Stoning and the Death Penalty in the Islamic World” April 5, 2005, http://www.tariqramadan.com/spip.php?article264, accessed August 23, 2009. Unfortunately, but perhaps not unsurprisingly, he was severely criticized by Muslim leaders and academics from around the world who asserted that he was attempting to ban a God-decreed punishment. See Dina Abdel-Majeed, “Tariq Ramadan’s Call for a Moratorium: Storm in a Teacup,” http://www.readingislam.com/servlet/Satellite?c=Article_C&cid=1153698300075&pagename=Zone-English-Discover_Islam%2FDIEMainLayout, accessed August 23, 2009, quoting Tariq al-Bishri stating that the moratorium initiative is “juristically baseless.” See also http://www.islamonline.net/English/In_Depth/ShariahAndHumanity/Topic_01.shtml, accessed November 09, 2009, featuring live dialogue and response statements from prominent Muslim scholars. The debate between Ramadan and his critics is a good example of both the challenge and the potential of dialogue on these topics.

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court might have the authority to strike down legislation on the basis of inconsistency with Shari’ah. These allocations of authority appear to set up a Shari’ah-style separation of powers, but it is important to see how they are fundamentally different from the classical *fiqh-siyāsah* separation of powers described above. The classical arrangement in Muslim lands balanced government power with non-government academic influence, whereas the modern arrangement splits government power within itself, with no body checking the activity of the state from the outside. It might be argued that the crucial element that made the classical Muslim ruler-scholar separation of powers viable was precisely the separation and independence of the *fiqh* scholars from the state. The modern phenomenon, on the other hand, is a division of powers, but it is a division of state power only, not of state and non-state power, mutually balancing each other.

That is not to say that an internal division of *siyāsah* power is a bad idea. Dividing what used to be uniform state power into separate (executive, legislative, and judicial) entities so that no branch has a monopoly on state power, is a step forward in the evolution of *siyāsah* organization, and moreover is consistent with the growing global consensus about democracy and the idea that people should have a voice in how they are governed. But controlling the executive or legislative power by empowering a high court with Shari’ah-based judicial review is not the same thing as balancing rulers with scholars. In the past, *fiqh* scholars had a powerful type of “academic freedom” because their authority came not from any state appointment but from the public reputation established by their scholarly work. A “Shari’ah Court” (even one with judicial independence) cannot carry out the same sort of external check on government power because it itself is ultimately part of the *siyāsah* government structure.

It is important to realize that one reason for so much attention on state power for shari’ah-recognition is the radical transformation in the conception of legal authority in Muslim-majority countries during and after colonialism. Whereas pre-modern Muslims lived with two kinds of law (ruler-made *siyāsah* and scholar-made *fiqh*), the era of colonialism not only displaced Shari’ah as the basis for the rule of law (and the *fiqh* scholars as the source of its articulation), but it also introduced the nation-state model of government in which the state held all legal authority. Thus, instead of a bifurcation of legal authority between *siyāsah* and *fiqh*, now there is really only *siyāsah*. *Fiqh* scholars still exist, 26 of course, but now mostly in background academic discourses. They do not operate in a balanced interdependent relationship with the state.

A problem with this new centralization of all power in Muslim nation-states is that it risks theocracy. With a state-centered model of law, and a public lack of appreciation of the difference between *fiqh* and Shari’ah, there is very little to stop a popular majority from legislating their version of *fiqh* laws, describing them as Shari’ah, and claiming that they are religiously-mandated by Islam and thus impervious to public debate. Now that there is no longer any recognized role for credible non-governmental voices articulating Shari’ah

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26 The continued presence of *fiqh* scholars illustrates the continued relevance of *fiqh* for Muslims today, even under the secularized nation-state model. Pluralistic though it is, and lacking the institutional infrastructure that it once had, this community of *fiqh* scholars remains the authoritative source for Shari’ah knowledge for vast numbers of Muslims around the world. Thus, even when a modern state claims to enact Islamic law, or strike down secular legislation for Shari’ah-non-compliance, it often does not carry the same Shari’ah authority with the population that *fiqh* scholars do.
unhindered by state control (i.e., the *fiqh* scholars), a constitution that gives Shari’ah author-
ity to a branch of government seriously risks setting up an Islamic theocracy. Ironically, this
phenomenon is new in Muslim history, created by the effort to recognize a role for Shari’ah
within modern constitutional norms. But it is decidedly different from the classical separa-
tion of *fiqh* and *siyāsah* powers, and it risks rejection by global constitutional norms which
tend to presume no public role for religious law. The challenge for Islamic constitutionalism
in the modern era will be to find effective solutions to this problem, exploring creative divi-
sions of legal and political authority that will resonate with both the democratic and Islamic
affinities of Muslims today. Variations on the classical *fiqh-siyāsah* separation of powers may
be a useful direction of inquiry.

IV. CONCLUSION

Islamic constitutionalism has caught the world’s attention. In the many academic and popu-
lar conversations about modern Islamic states, a central topic is the concept of separation of
powers and the rule of law. This article has sketched an overview of the separation of legal
power in pre-modern Muslim societies, namely, that of the ruler’s *siyāsah* power and the
scholars’ *fiqh* authority. Important to understanding the classical picture is a disentangling
of the contemporary confusion between the concepts of Shari’ah, *fiqh*, and *siyāsah*. As indi-
cated above, clarity on these terms might help to reduce the obstacles to a workable modern
Islamic constitutionalism. A renewed appreciation of the scholar-ruler, *fiqh-siyāsah*, separa-
tion of powers could point toward new ideas about the location of legal and political author-
ity that resonate with Muslim populations in the countries in which the question of Islamic
constitutionalism is most relevant. I do not suggest a recreation of the old order, but merely
to look for inspiration in history when seeking solutions to today’s challenges.

An appreciation of history also goes a long way toward not repeating its mistakes. The
classical separation of *fiqh* and *siyāsah* lawmaking power was part of the Muslim response to
a mistake committed by an early Muslim state when it attempted to control the beliefs of
the population.27 The Western solution to a more extreme version of the same problem was
to separate church and state. Both were insightful solutions, uniquely suited to their own
populations and religious sensibilities, and could serve as templates for understanding
some of the tensions in contemporary constitutional debates. Today’s global constitutional
discourse tends to operate on the presumption that all law comes from the state, but this
premise may not be fully effective with populations that recognize a role for law that exists
separate from the state (as is true today of the role of *fiqh* for many Muslims). A bifurcation
of legal authority, inspired by the Muslim *fiqh-siyāsah* history, may be an important concept
to be incorporated into constitutional models for Muslim countries. Moreover, this aspect
of Islamic legal and political history may even prove useful for secular liberal democracies
struggling with questions of tolerance and religious and cultural diversity in a shrinking
globe where a homogeneous “nation” is not the uncontested basis of political organization.
The challenge for all global constitutionalism today is to find inspiration in this diversity
and to seek solutions to a complex set of problems while still maintaining relevance to and
support from those populations.

27 See Stilt (n 11).
PART 2

INTERRELATIONS BETWEEN CONSTITUTIONALISM AND SHARĪ‘AH: ANTAGONISM OR COMPLEMENTARITY?
Constitutionalism in Islamic Countries
A Survey from the Perspective of International Law

RÜDIGER WOLFRUM*

1. INTRODUCTION

At first glance the title of this article appears to contain a contradiction. Is it not an established doctrine under the principle of sovereign equality of states that each state has the sovereign right “freely to choose and develop its political, economic and cultural system”?¹ And does this not imply that a national constitution is out of reach of international law? Perhaps twenty years ago the answer would have been in the affirmative, namely that international law has no relevance for national constitutions. Today it is acknowledged that international law does have a considerable influence on national law and that several central elements of constitutions are influenced by it. Both systems’ development depends on constant dialogue between national constitutional orders and international law, which leads to the internationalization of constitutional law and the constitutionalization of international law. International law promotes and encourages changes in domestic law while, at the same time, developments in national constitutional law also impact international law and practice. International human rights standards, for instance, are binding upon states that have ratified the relevant international agreements. Apart from that, the United Nations promote good governance and the rule of law, both concepts being interrelated and belonging, as well as human rights, to the realm of national constitutional law.

There is a further aspect, which deserves consideration with regard to the constitution of an Islamic state: is it appropriate to attribute the same meaning to such a constitution as has developed historically in the legal theory of Western Europe and the United States,

¹ The author wishes to express his gratitude to Ms. Johanna Mantel for her useful comments and her assistance in the preparation of this text.

namely that the constitution is the supreme law of the land? Considering the history of Islamic legal thinking, one might conclude that the notion of a constitution is alien to Islamic law. The same applies to such fundamental principles as the separation of powers and the rule of law. Historically, Islamic legal thought has deduced all aspects of governance from the religion, defining the Qur’an itself as the constitution.\(^2\) Those who claim that Islam does not recognize a separation between religion and government often invoke a passage from the Qur’an, which orders believers to obey divine authority.\(^3\) According to this verse, Islamic life is a unity in which every aspect of life is interconnected with the other. There are to be no divisions between the spiritual, social, economic, and political sectors of life. The religion of Islam specifies not only how its adherents must behave, but also how their society is to be structured.\(^4\) From this perspective, Islam cannot leave the highly important component of human organization—the affairs of the state and the exercise of power—outside of its realm. Therefore, a “man-made” constitution in addition to the religion’s authority is deemed superfluous and futile. This philosophical basis of Islam was certainly important in the early formation of Islamic constitutional theory. However, it has been overtaken by recent developments. Almost every Islamic state now has a constitution and endeavors to establish a balance between religion and state organization. One exception is Saudi Arabia, where rulers and religious scholars have repeatedly emphasized that the Qur’an and the Sunnah as such form the state’s constitution. And even Saudi Arabia, despite not having a constitution in the formal sense, does have a Basic Law regulating the essential issues of state organization since 1992. Incidentally, apart from this religious argument there are also other states in the world, which, for historical or other reasons, do not have a formal written constitution or adopted a constitution only recently, after many years of existence. The most prominent example is the United Kingdom, where constitutional law consists of a collection of disparate written sources, including statutes, judicial case law, and international treaties.

One further element should also be mentioned preliminarily. Islam does not consider the state to be an entity with inherent rights of its own. Islamic thinking develops societal organization from the individual or the community of individuals rather than the state.\(^5\) The concept of sovereignty as it has developed in Western Europe is actually alien to Islamic legal thought.\(^6\) This aspect should make it easier for Islamic states to adopt new developments in international law, which tend to head in this direction.

Before going further into detail, the term “Islamic state” should be clarified. There are manifold possible definitions. Most commonly, “Islamic state” refers to a state that has adopted Islam as the ideological foundation for its political institutions. This usually includes Islam as the state religion, and Sharī’ah as a (or the primary) source of legislation. One could also define “Islamic state” as a member state of the Organization of Islamic Countries.

\(^2\) For the historical perspective, see Mohammed H. Kamali, “Civilian and Democratic Dimensions of Governance in Islam” (2004) 9 al-Shajarah 125.

\(^3\) Qur’an Chapter IV Verse 59: “Believers, obey Allah, and obey the Messenger, and those charged with authority. If you dispute any matter, refer it to Allah and His Messenger. That is best, and most suitable for final determination.”


\(^5\) Cf. Kamali (n 2) 132: “Islam advocates a limited government in which the individual enjoys a considerable autonomy.”

In this article, however, the criterion shall be the determination of Islam as the state religion because this aspect is of specific importance in the implementation of international law in the Muslim world. Secular states with a majority Muslim population such as Turkey and Azerbaijan are thus excluded from this definition. Nonetheless, the subsequent analysis will for the sake of completeness refer to states that have a majority Muslim population but are constitutionally secular.

Modern Islamic states vary in the extent to which national law is based on Islamic law or on revisions thereof. One may categorize such constitutions as follows: First, constitutions in which Islam is constitutionally acknowledged as the state religion but with limited consequences, such as in Algeria, Jordan, and Yemen. And second those in which the organization and functioning of state power reflect a deep acknowledgement of Islam, such as in the Islamic Republic of Iran, the Kingdom of Saudi Arabia, and the Kingdom of Bahrain.

Equally, the role attributed to Islamic law differs significantly and there is tremendous variety in the interpretation and implementation of Islamic law in Muslim societies. In many Islamic states religious law plays no role or only a minor role, whereas in others Islamic law is constitutionally laid down as a major or dominant source of legislation. The Constitution of Algeria, for instance, does not even mention Islamic law, while a few legal systems are based solely on religious law, such as Iran and Saudi Arabia. In Saudi Arabia, which does not have a constitution in the formal sense, the Qur'an is regarded as the country’s constitution. The Constitution of Iran states that all laws and regulations must be based on Islamic criteria and this principle applies absolutely and generally to all articles of the constitution itself. There are other states, as for instance Egypt and Pakistan, where Islamic law is part of the substantive law in general but not the dominant source of legislation. Lastly, in a number of countries Islamic law is limited and only applied when dealing with personal status. Several of the countries with the largest Muslim populations, including Indonesia, have largely secular constitutions and laws, with only a few Islamic provisions in family law. Turkey has a constitution that is officially based on strong laicism although it has a largely Muslim society. India has no reference to Islam in its constitution but has passed special legislation making Muslim personal law applicable to Muslims.

II. THE HISTORICAL DEVELOPMENT OF THE RELATIONSHIP BETWEEN ISLAMIC LAW AND INTERNATIONAL LAW

Before analyzing the mutual influence of international law and Islamic law in detail it is expedient to outline the historical development of the relationship between Islamic law and international law in more general terms.

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7 Due to the definition above, constitutions in which Islam is not constitutionally privileged, such as the secular Lebanon or laic Turkey, are excluded from the following categorization.
8 This categorization follows the one developed by Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (BIICL, London 2008) 32.
9 According to the Royal Decree of the King of Saudi Arabia of January 1992, Art. 1: “The Kingdom of Saudi Arabia is an Arab and Islamic sovereign State, its religion is Islam, and its constitution, the Holy Quran and the Prophet’s Sunnah.” Art. 7: “The Rule in the Kingdom depends on the Holy Quran and the Prophet’s Sunnah.” Art. 8: “The Rule in the Kingdom is based on justice, consultations and equality in accordance with the Islamic Sharia.”
10 The Muslim Personal Law (Shari’at) Application Act 1937 provides for the application of the Islamic Law Code of Shari’at to Muslims in India.
When Muslim jurists began systematically to analyze and interpret the normative elements enshrined in the sources of Islam in the ninth century, they moreover developed legal standards to govern the relationship of the nascent Islamic states with non-Muslim powers. For the Muslim scholars questions of international law arose largely in connection with their analysis of the law governing international wars and treaties. The rules they developed are best viewed as a set of permissive default rules that enable the Islamic state to conduct foreign relations with external actors on behalf of the Muslim community, subject only to certain moral limits established by Islamic religious commitments. With the adoption of European notions of territorial sovereignty in the twentieth-century, Islamic countries largely abandoned the normative framework previously established by Muslim jurists. Certain moral ideas of pre-twentieth-century Islamic law, e.g., inter-Muslim solidarity, however, continue to have moral and political salience among Islamic countries today.

The most fundamental concept in the Islamic perspective of international law was the division between the “territory of Islam” (dār al-islām) and the “territory of war” (dār al-ḥarb). An intermediate category of “the territory of peace” (dār al-sulţ) also came to be recognized for states formally at peace with an Islamic state. With the demise of the Ottoman Empire at the conclusion of World War I, the Islamic conception of states existing within the dār al-islām gave way to the European model of the nation-state. While republican Turkey or, more precisely, its ruling Kemalist elite adopted this model with enthusiasm, much of the Islamic world which, at that time, was largely under colonial domination, accepted this development more as a fait accompli and as a strategy to achieve independence, without necessarily abandoning a trans-national sense of Muslim (or Arab) solidarity. Majid Khadduri’s statement in the 1950s that Islamic states had fully adapted to the nation-state system was perhaps somewhat exaggerated at the time; today one may consider it fully appropriate. The normative challenges posed by the modern system of independent nation-states to pre-modern Islamic conceptions of international law are resolved with respect to the relationship of Islamic states to non-Islamic states. It is the existence of separate and independent Islamic nation states instead of a united Muslim or Arab community, however, that probably remains under-theorized by contemporary jurists of Islamic law.

The most important doctrinal development in the Islamic perspective of international law in the post World War II era was the conclusion that the category dār al-ḥarb was obsolete. The rise of international law and institutions such as the United Nations that purported to guarantee the independence of all states, secure the self-determination of previously colonized peoples, and protect human rights, radically changed the political environment in which Muslims found themselves. This change in the international environment means that international relations have changed from a system in which war and conquest was the default rule to one in which peace and friendship was the norm. Moreover, Islam can fulfill its universal aspirations simply by virtue of international guarantees of religious freedom and the commitment by non-Islamic states to maintain a posture of neutrality with respect to the Islamic religion. In sum, any state that committed itself to providing freedom of religion to Muslims and permitted Islam to be taught and practiced freely could not be considered part of dār al-ḥarb. The rejection of the category of the dār al-ḥarb also has consequences for the Islamic law of warfare: if the dār al-ḥarb no longer exists by virtue of

the guarantees of modern international law, then it can no longer be lawful from an Islamic perspective to launch wars except for the purpose of self-defense. Indeed, that is the position that has been taken by several well-known Muslim jurists of the twentieth century.\footnote{Al-Zuhili (n 12) 15, 26–27.}

The foregoing remarks show that modern Islamic scholars see the international legal system as compatible with the notion of an Islamic state. From the perspective of international law, Islamic states as actors in international law are not any different than other states. Islamic law constitutes a legal culture of its own, which according to the model of the Statute of the International Court of Justice is to be represented on the international level.\footnote{Arts. 9 and 38 of the Statute of the International Court of Justice: “…the representation of the main forms of civilization and of the principal legal systems of the world should be assured” and “the general principles of law recognized by civilized nations shall be applied.”} However, the role of Islamic law in the advancement of international law has in the past “received less attention than it undoubtedly deserves.”\footnote{Lori Damrosch, “The ‘American’ and the ‘International’ in the American Journal of International Law” (2006) 100 AJIL 2, 9-10.} Except for the above-mentioned Khadduri with his pilot article in 1950,\footnote{Khadduri (n 11) 370–371.} barely any authors have analyzed the subject. On the contrary, several authors have argued that “Islamic notions of international law are fundamentally incompatible with basic premises of the Western international legal tradition.”\footnote{Clark Lombardi, “Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis” (2007) 8 Chicago Journal of International Law 85, 86; Christopher A. Ford, “Siyar-ization and Its Discontents: International Law and Islam’s Constitutional Crisis” (1995) 30 Tex. Int’l. L. J. 499; David A. Westbrook, “Islamic International Law and Public International Law: Separate Expressions of World Order” (1993) 33 Va. J. Int’l. L. 819.} Other authors have found that international bodies exclude non-Western legal traditions in the administration of international justice.\footnote{Antony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” (1999) 40 Harv. Int’l. L.J. 1, 76.}

Recent studies, however, show that Islamic law as such is influential, for instance in the creation and development of international legal norms. There are certain principles derived from Islamic law that are of relevance for international law, such as the sanctity of agreements and the rule of reciprocal treatment. These two basic tools of international lawmaking, namely treaty sanctity and reciprocity, are well-embedded in Islamic legal thinking and practice. Today’s Islamic states are active subjects of international law and dynamic participants in international organizations. Islamic jurists and experts play an important part in the composition of international courts and tribunals. A comprehensive analysis of the jurisprudence of the International Court of Justice shows that, although rarely, its judges do refer to Islamic law.\footnote{Lombardi (n 17).} No judgment uses Islamic law in any decisive way but several judges have found Islamic law could help resolve disputes or advance the work of the court in dissenting opinions.\footnote{Lombardi (n 17) 94.} More recently, international and Islamic legal scholars call for the integration of Islamic law principles, such as the notion of individual duty into the international Bill of Human Rights.\footnote{Jason Morgan-Foster, “Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement” (2005) 8 Yale Human Rights and Development Law Journal 67.} Islamic states today should have no difficulty in pursuing,
together with the rest of the world, the progressive development of international law through either codification or custom and should be able to make their own positive contributions to the common task of promoting the further development of international law.

III. REFERENCE TO HUMAN RIGHTS AND INTERNATIONAL LAW IN THE CONSTITUTIONS OF ISLAMIC STATES

Before dealing with specific human rights provisions in the constitutions of selected Islamic states and states with a majority Muslim population, a general observation concerning the concept of human rights may be pertinent. In Islamic states there are some basic divergences from the Western liberal concept of individual rights developed in eighteenth-century Europe. The concept of rights and the concept of the individual appear differently in Islam. Rights are the corollaries of duties owed to God and to other individuals. In this framework, individual duties trump individual rights. To put it broadly, communalism prevails over individualism. Furthermore, the relationship between the individual and the state is not seen as an adversarial one as it is at the root of the Western human rights concept. Finally, the separation of powers—a core element of the rule of law principle—is not inherent to Islamic legal thinking.

In the following, this article analyzes to what extent several constitutions refer to human rights, principles such as the rule of law, and the status of international treaties in domestic law. These are indicators for a possible interlacing of international law and national constitutional law. The selection of constitutions has been effected so as to cover an array of legal systems, including states with a majority Muslim population that are highly secular, states that have declared Islam the state religion, and those that have based their legal system on Islamic law. It is furthermore important to include constitutions from different regions of the world in the survey. However comprehensive this may be, one must be cautious in drawing conclusions: Relying solely on constitutional provisions does not necessarily display a complete picture of the realities prevailing in the states concerned. In analyzing the approach toward human rights this study concentrates on the equality between men and women and the freedom of religion, both issues where there are traditionally differences in approach between Islamic and non-Islamic states.

Before analyzing Islamic constitutions from an international law perspective, it should be emphasized that another important difference exists concerning the human rights catalogues. The following analysis is based on the international human rights catalogue as it is established and accepted today. When considering this, the reader must keep in mind that there is a different understanding to some human rights principles in Muslim societies. One is the above-mentioned emphasis on individual duty in Islamic law, which is not yet integrated into the international human rights system. Moreover, most of the constitutions referred to in the following analysis emphasize the principle of solidarity among the population.

24 Donna Arzt (n 4) 203.
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example, Art. 7 of the Constitution of Egypt provides that: “Social solidarity is the basis of the society.”

This is an element that has not received sufficient attention in the past in the literature on human rights, although its implementation may have an effect on the interpretation and application of individual human rights. It would be worthwhile to undertake an in-depth study on the meaning of this principle in theory and in practice. Further examination of this topic would, however, go beyond the scope of this article.

A. Africa

Due to its size alone the African continent provides for the most diverse constitutional systems.

Unlike most constitutions, which will be examined in this article, the constitutions of the Republic of Senegal (2001) and the Republic of Chad (1996) do not contain a reference to Islam, although the vast majority of the people concerned are of Muslim faith. Both state clearly that these states are of a secular nature.

The Constitution of the Republic of Senegal refers to international law in two places, namely the preamble, dealing with human rights, and Title IX, dealing with international treaties. As far as human rights are concerned, the preamble of the constitution, which is an integral part thereof, reaffirms the commitment to the French Declaration of Human Rights of 1789 as well as “international instruments adopted by the United Nations and the Organization of African Unity, in particular the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the African Charter on Human and Peoples’ Rights.” In the same context there is a reference to “good governance.” Title II of the constitution contains a catalogue of human rights (“public liberties”) containing the traditional civil and political rights as well as most of the economic, social, and cultural rights as enshrined in the two International Covenants. As already mentioned, Title IX deals with international treaties. In this respect, the Constitution of the Republic of Senegal follows a modified dualistic approach—that is, international and national law are different bodies of law and international law must be introduced into national law before it may be applied at the domestic level—which is, as a matter of principle, not different from many other countries in the world. Treaties which concern the status of persons have to be approved or ratified by law. Such treaties may have, subject to the requirement of reciprocity, upon their publication an authority superior to that of the laws (Art. 98).

The Constitution of the Republic of Chad also commits itself to the principles of international human rights and mentions explicitly the Universal Declaration of Human Rights as well as the African Charter on Human and Peoples’ Rights. Chapter I of the constitution contains an elaborate list of civil, political, economic, social, as well as cultural rights that mirrors international human rights standards, although a reference to the equality of men and women is missing. Art. 1 of the constitution states expressly that the Republic is founded on the principles of democracy, the rule of law, and justice. The Constitution of the Republic of Chad also follows a moderate dualistic approach as far as international treaties are concerned. International treaties duly ratified have a “greater authority” than that of laws under the condition of reciprocity.

The Interim National Constitution of the Republic of Sudan, which is the most recent one dealt with in this context, is of particular interest for the subject matter of this contribution. It declares in Art. 1.1 that the Republic of Sudan is “... a democratic, decentralized, multi-cultural, multi-lingual, multi-racial, multi-ethnic, and multi-religious country.” The constitution continues to state (Art. 4.1) that the unity of Sudan is based on “the free will
of its people, supremacy of the rule of law, decentralized democratic governance, accountability, […] and justice.” Part II of this constitution contains a bill of rights and — apart from that — Art. 27.3 declares:

All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of Sudan shall be an integral part of this Bill.

Like all other constitutions dealt with so far, the Interim National Constitution of the Republic of Sudan follows a dualist approach as far as international agreements are concerned. These agreements are ratified by the President of the Republic (Art. 58.1) after they have been approved by the National Legislature (Art. 91.3.d).

**B. Middle East**

Although all countries of the Middle East (excluding Israel and Lebanon) are Islamic states, there are great differences in how the legal system is constitutionally oriented with respect to Islamic law.

The recent popular uprisings and revolutions in several Arab countries have led to the re-examination of the respective constitutions and have initiated new constitutional drafting processes which have and may further lead to fundamental changes in the concerned constitutional frameworks. The changes so far have not affected the countries ideological foundation on Islam and basic orientation of constitutional systems on Islamic law.

In Egypt the Supreme Council of the Armed Forces, which was instated after the popular revolution ousted former President Mubārak, proposed amendments to the Constitution of the Arab Republic of Egypt of 1971 (as amended to 1980 and 2007), which were accepted by referendum and adopted on March 30, 2011 as an Interim Constitutional Declaration.\(^{25}\) Article 2 of the Interim Constitution has not altered the wording of the respective Art. 2 of the constitution of 1971 and declares that Islam is the religion of the state and that the Sharī’ah is the principal source of legislation. Articles 4 to 23 of the Interim Constitution, like Parts 2, 3, and 4 of the former constitution contain a list of civil, political, economic, social, and cultural rights, which reflect in general international human rights standards. Article 6 of the Interim Constitution refers to equality before the law and prohibits discrimination on the basis of race, origin, language, religion, or creed, but does not refer to gender. Also the Interim Constitution does not contain an explicit recognition of the equality of men and women in the fields of political, social, cultural, and economic life, as had Art. 11 of the former constitution, which, however, was qualified by the reference to Islamic jurisprudence. The freedom of belief and the freedom of practice of religious rites are guaranteed by Art. 11 of the Interim Constitution (Art. 46 of the former constitution). Like the former constitution, the Interim Constitution provides for the rule of law (explicitly in Art. 24; see in particular Part 4). The only reference to international law in the Interim Constitution is made in Art. 56 No. 6, which empowers the Supreme Council of the Armed Forces to sign international treaties, which are then “considered a part of the legal system of the state.” In respect of international treaties Egypt continues to implement a moderate dualistic approach. (Art. 151 of the 1971 Constitution had stipulated that international treaties after ratification and publication have the force of law. The previous qualification of

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some treaties, which the President could only ratify after approval by the People’s Assembly is not included in the Interim Constitution.)

In Jordan the recent reform efforts by the national government urged by the events in other Arab countries has not yet led to any changes in the constitution. The Constitution of the Hashemite Kingdom of Jordan of 1952 declares that Islam is the religion of the state but there is no reference to Islamic jurisprudence as the source of law. Chapter 2 of the constitution contains political, civil, and economic rights, but does not cover all the rights enshrined in the Universal Declaration of Human Rights of 1948. In particular, there is no reference to the equality of men and women. According to Art. 14 of the Constitution:

The State shall safeguard the free exercise of all forms of worship and religious rites in accordance with the customs observed in the Kingdom, unless such is inconsistent with public order or morality.

The constitution is based upon the separation of powers and the rule of law. According to Art. 33 of the Constitution, international treaties require ratification by the King; some require the prior approval of the National Assembly. The status of such international treaties in the national Jordanian system has not been specified. But one may assume that Jordan also, in principle, follows a dualistic approach.

In Bahrain the recent popular revolts have mostly been repressed, inter alia with the help of Saudi-Arabian armed forces. Although the royal government led by Prime Minister Prince Khalifa bin Salman Al Khalifa has promised democratic reform and modernization, no concrete changes have yet been made to the constitutional framework. Therefore the Constitution of the Kingdom of Bahrain of 2002 is applicable. According to Art. 2 of the Constitution the religion of the state is Islam and the Sharī‘ah is a principal source of legislation. Chapter II and III of the Constitution contain the international human rights standards concerning civil and political rights and several of the economic, social, and cultural rights. The equality of men and women is expressly stated. As far as the freedom of religion is concerned, Art. 22 states:

The freedom of conscience is absolute. The State guarantees the inviolability of worship, and the freedom to perform religious rites and hold religious parades and meetings in accordance with the customs observed in the country.

The King ratifies international treaties and some of them require the approval in the form of law. International treaties have the force of law after having been ratified and published.

Finally, the Constitution of the United Arab Emirates (as amended 1996), which establishes Islam as the official religion of the Union and the Sharī‘ah as the principal source of legislation,26 contains in its Parts 2 and 3 a catalogue of human rights and freedoms covering most of the international civil and political rights as well as several of the economic, social, and cultural rights. There is no direct mention of the equality of men and women. As far as the freedom of worship is concerned, Art. 32 reads:

Freedom to exercise religious worship shall be guaranteed in accordance with established customs, provided that it does not conflict with public policy or violate public morals.

26 Art. 7 of the Constitution of the United Arab Emirates (as amended 1996).
The ratification of international treaties rests with the Supreme Council in the form of decree.

C. Asia

The Constitution of the Republic of Indonesia (1945) contains no reference to Islam, although the majority of its population is of the Muslim faith. However, Art. 29 stipulates that the state shall be based upon the belief in the One and Only God. Moreover, it guarantees the freedom of religion. Art. 1 para. 3 states that the state of Indonesia shall be based on the rule of law. The constitution provides that international agreements must be approved by the Peoples Representatives Council (Dewan Perwakilan Rakyat) before the president (Art. 11 para. 2) may conclude them, but leaves further provisions regarding international agreements to be regulated by law. Chapter XA contains Indonesia's human rights catalogue, which puts a noticeable emphasis on economic, social, and cultural rights. The Constitution of the Republic of Indonesia likewise follows a moderate dualistic approach as far as international treaties are concerned.

The Constitution of Afghanistan (2004) establishes Islam as the state religion in Art. 2 but guarantees the freedom of religion in the same article. The Afghan Constitution contains several notable references to international law. Its preamble refers to the United Nations Charter as well as the Universal Declaration of Human Rights. Art. 7 stipulates that the state shall abide by the United Nations Charter, international agreements, and the Universal Declaration of Human Rights. The ratification of international agreements is the duty of the National Assembly (Art. 90 para. 5). Chapter 2 contains the fundamental rights and duties of citizens, which are based on the international human rights catalogue. Concerning gender equality, Art. 22 declares: “The citizens of Afghanistan, man and woman, have equal rights and duties before the law.”

To briefly summarize: All the constitutions referred to so far establish a linkage between international law and national law. In this respect almost all of them follow a modified dualistic approach. International agreements become part of national law after having been ratified; the role of parliament varies in this respect. All constitutions mentioned so far refer to human rights; some meet international human rights standards, others not. This indicates at least that the analyzed states do not reject the applicability of human rights as a matter of principle. Finally, it should be emphasized that the concept of the inherent dignity of the individual and of fundamental rights are acceptable to most Islamic states.

IV. THE IMPACT OF THE SHARĪ’AH ON THE RATIFICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES

Regarding the ratification of international human rights treaties by Islamic states, one may distinguish by way of generalization three different attitudes. There are some states, such as Saudi Arabia, Pakistan, and Iran, which invoke religious considerations as the determining factor in voting against or abstaining from human rights initiatives in international organizations, such as the United Nations. The classic example is the Universal Declaration of Human Rights, in particular its provision on the freedom of religion. Art. 18 of that Declaration provides for the right of everyone to change one’s religion. This led Saudi Arabia to abstain in the voting on the Declaration. In the negotiations for the International Covenant on Civil and Political Rights—Art. 18—this provision was altered, mentioning merely the right to adopt a religion. Despite the changes that have been made Saudi Arabia has not ratified either of the two International Covenants, indicating that these would not conform to the religious thinking prevalent in the country.
Unlike Saudi Arabia, Pakistan has signed the two international human rights covenants but is not a party to the Convention on the Elimination of Discrimination against Women. The refusal was based upon religious considerations. Pakistan has yet to ratify the International Covenant on Civil and Political Rights. It did ratify, however, the Convention on the Rights of the Child. When doing so, the government of Pakistan expressly linked the decision to ratify and to implement the Convention to the latter’s compatibility with both Islam and the Constitution. 27

Other Islamic states prefer to limit the impact of international human rights treaties by entering reservations. Such reservations may take different forms. From the point of view of international law broad reservations are problematic as they run counter to the very object and purpose of the international agreement. For example, the reservation of Djibouti to the Conventions on the Rights of the Child states: “the government of Djibouti shall not consider itself bound by any provision or articles that are incompatible with its religion and its traditional values.” 28 Similarly, Iran asserted in its accession to the Convention on the Rights of the Child that it “reserves the right not to apply any provision or articles of the Convention that are incompatible with Islamic laws and the internal legislation in effect.” 29 Finally, Saudi Arabia’s reservation to the International Convention on the Elimination of all Forms of Racial Discrimination states that it will implement the provisions of the convention providing that these do not conflict with the precepts of the Islamic Shari’ah. Several Islamic states have made an equally broad reservation to the Convention on the Elimination of Discrimination against Women.

It is fair to say, however, that such reservations do not only come from Islamic states. For example, the reservations made by the United States concerning the International Covenant on Civil and Political Rights are, taken together, equally broad and thus run counter to object and purpose of the Covenant. 30 From the perspective of international treaty law such general reservations, which make it impossible to determine which commitments the state in question has entered into and whether it is living up to them, are also incompatible with object and purpose of the international agreement in question. Many states have objected to these reservations and so have the competent treaty bodies.

Some Islamic states have made very specific reservations. For example, Algeria made reservations on Arts. 13, 14(1) and (2), 16, and 17 of the Convention on the Rights of the Child. Reference should also be made to reservations on Art. 20 of the Convention on the Rights of the Child made by Egypt and Jordan. Whereas the reservations by Algeria cover core elements of that Convention, the reservations of Egypt and Jordan only deal with the provisions concerning adoption. They do not question the application of the Convention or most of it, but rather a particular and perhaps not even central aspect. 31

28 Id.
29 Id.
The International Convention on the Elimination of All Forms of Racial Discrimination has received the widest support in the Islamic world, and all African Islamic states have ratified the African Charter on Human and People’s Rights.

V. CONCLUSION

It is by now well-established that international law exercises an influence on the content of national constitutions. Although such influence may not become apparent at once, it is evident in modern constitutions or those that have been amended recently. Some constitutional lawyers and constitutional court judges in particular see this development with skepticism. However, this development is unavoidable if one accepts that the national legal systems contribute in a significant way to the maintenance of peace and stability not only in the country concerned, but also in the region at large. The influence of international law targets human rights standards and institutional principles such as the separation of powers, the rule of law, or good governance.

If one assesses the academic discussion as well as the discussion in human rights institutions such as the Human Rights Council, it is particularly the application and implementation of human rights that has given rise to controversy. Considering, however, the Arab Charter on Human Rights of 1997, it is not the application of human rights in general that is at stake but the application of some of these rights. Most controversial in this respect is the status of women, where differences in perception are apparent. In spite of that, the common ground is much broader than many of the controversial discussions seem to suggest. This common ground appears to be a solid basis for further progressive developments.
This [Nigeria] is not a [true] Islamic state. . . Some states of the Federation are practicing some aspect of Sharia. [However] it is the Constitution that is governing the affairs and the activities of the Federation [of Nigeria] as well as the state governments. It is the Constitution that is [the ultimate determining legal document], not Sharia itself. [In contrast], in an ideal Islamic State, it is the whole country that is practicing Sharia law. That is quite different from the situation here in Nigeria.

Mohammed Mouktakha Mahabbu

I. INTRODUCTION

Christianity and Islam are the dominant religions in Nigeria, and the Nigerian people are universally known to be very religious. Even so, Nigeria is a secular state: there is a clear separation between the state and religion. Nevertheless, the constitution permits the

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2 Femi Ajayi, “Senators in Dilemma Over Shari’a Law,” http://nigeriaworld.com/columnist/ajayi/senators.html, accessed June 26, 2009. There is no settled answer yet to the question of which of these two religions has the most adherents in the country. An opportunity to settle this issue was missed in 2006 at the time of Nigeria’s recent census exercise. Given the long-standing claims of Muslims that they constitute a majority in the country, the leadership of the Christian Association of Nigeria seriously demanded that a question on religious affiliation be included in the census questions, but the federal government refused to do this, probably because of the volatile nature of the issue.
application of customary law and Shari’ah in the country to a limited extent. This article is solely concerned with the applicability of Shari’ah under the Nigerian constitutional system. In other words, this article seeks to explain the constitutional status of Shari’ah in Nigeria; to demonstrate the limited scope or extent of its application in the country.

There is no question that the constitutional status of Shari’ah has been and is still a deeply controversial issue in Nigeria. However, it will become clear below that the current constitutional status of Shari’ah—limited application of Shari’ah (applicable only within private arena)—is unlikely to change significantly in the future within the context of a united sovereign Nigerian state. The current status can be traced back to the British colonial rule of the country. Hence, in order to properly understand the rationale behind the present status, it is important to understand the history and nature of the Nigerian state as well as the applicability of Shari’ah in colonial Nigeria. Accordingly, section II of this article is devoted to a brief outline of the history and nature of Nigeria, while section III deals with the application of Shari’ah in Nigeria before and during the British colonial rule. Furthermore, section IV focuses on the application of Shari’ah in the immediate post-independence Nigeria as well as the Great Debate on the constitutional status of Shari’ah in Nigeria since the 1970s. The present constitutional status of Shari’ah in Nigeria is to be found in the 1999 Constitution of Nigeria, and is the subject of section V. Lastly, section VI is devoted to concluding remarks.

II. HISTORY AND NATURE OF NIGERIA: IN A NUTSHELL

The Nigerian state is not a homogenous entity; it consists of multiple nationalities and ethnic groups. To be sure, what is today known as “Nigeria” never existed before the British colonized the territories which today comprise the Nigerian state. In other words, the present Nigerian state was a British creation—through a piecemeal process which culminated in the amalgamation of Northern and Southern Nigeria in 1914. Prior to British incursion into the territories now known as Nigeria there existed disparate peoples, following different cultures, religion, and systems of government. Hatch correctly summed up the position thus:

It should be remembered that no such entity as “Nigeria” existed until 1914. It was the creation of the British government, partly inspired by the desire to save expense. The peoples who inhabited the region now known as Nigeria had always lived in separate and often contentious societies.4

Given the above scenario, Oba, a Nigerian Muslim scholar, has rightly concluded that “pluralism is a main feature of Nigeria as a country.”5 Specifically, he mentioned ethnic, religious, legal, and linguistic pluralism.6 As he puts it in part, “the pre-colonial Nigeria comprised over 250 nation states embracing over 500 ethnic and linguistic groups.”7

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3 Here used as a synonym of “Islamic law.”
6 Id. 817–818.
7 Id. 817.
To emphasize, this pluralism still exists in present-day Nigeria since in 1914 the varied societies “were declared by Britain to be members of a single state named Nigeria.”

Importantly, two main reasons informed the amalgamation of the Northern and Southern Nigeria in 1914, namely: (1) to reduce administrative costs for the colonialists; and (2) to help the poor Northern Nigeria by placing the wealth and financial resources of the south at its disposal. Lord Harcourt, British Secretary of State for the Colonies, disclosed these reasons in his infamous after-dinner speech in London on June 17, 1913 in the following words: “We have released Northern Nigeria from the leading strings of the treasury. The promising and well-conducted youth . . . is about to effect an alliance with a southern lady of means [Southern Nigeria] . . . I have issued the special license and Sir Frederick Lugard will be performing the ceremony. May the union be fruitful.” From this, it can be deduced that the colonial masters concluded that Northern Nigeria could not exist independently as a viable state, and this is arguably still the case given the notorious fact that the Nigerian economy is based on oil exploited from Southern Nigeria—specifically the Niger Delta region.

It should further be noted that Islam and traditional religions were the major religions at the time the British colonizers arrived at the territories now comprising the present day Nigeria. The Islamic religion was the main religion in Northern Nigeria while the people of Southern Nigeria mostly adhered to traditional religions. Under British rule, the people of Southern Nigeria embraced Christianity, the imported religion of the colonizers, to a far greater extent than the people of Northern Nigeria—thus largely abandoning their traditional religions. Furthermore, the existing pre-colonial systems of government were different: while government was based mainly but not exclusively on Islamic law in the north (customary laws also applied), this was not the case in Southern Nigeria, where government functioned according to the various native laws, customs, and traditions of the various peoples of the area. However, for present purposes, only the Islamic system of government will be explored further here.

Importantly, the British colonial authorities initially administered the different parts of the present-day Nigeria separately, adopting what was called an indirect rule system to govern the people based on their existing traditional and/or Islamic systems of government. Clearly, this was a recognition of the need to avoid potential problems that would

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8 Hatch (n 4) 12. The author further explained that “when, late in the nineteenth century, the British claimed suzerainty over those lands which now comprise Nigeria, they were not annexing a "country," a "nation," or a "state." Britain negotiated with the French and Germans certain colonial frontiers; within this area lived many different societies, speaking no common language, following no common religion, and sharing no common culture. Britain imposed her authority over them, creating certain administrative institutions to exact that authority. In 1914 all these varied societies were declared by Britain to be members of a single state named "Nigeria" (Id.). See also F.U. Okafor, “Introduction” in F. Okafor (ed), New Strategies for Curbing Ethnic and Religious Conflicts in Nigeria (Fourth Dimension, Enugu 1997)1, where the author stated: “Before 1914, there was no entity known as Nigeria. The various ethnic and cultural groups that now make up Nigeria existed [for centuries] as autonomous political entities, having their own political systems, social and religious values. Nigeria is thus an amalgam of many ethnic nations.”


arise in any radical disruption of the peoples’ ways of life. In fact, the Royal Charter granted to the Royal Niger Company\(^{11}\) administration of the northern part of the present-day Nigeria clearly instructed the company that:

> Careful regard shall always be had to the customs and laws of the class, tribe, or nation to which the parties respectively belong, especially with respect to the holding, possession, transfer, and dispossession of lands and goods, and testate or intestate and other rights of property and personal rights.\(^{12}\)

This same recognition would later inform the need to restrict the application of Islamic law in the context of amalgamated Nigeria. Although the amalgamation of 1914 created the state of Nigeria, “the various ethnic groups existing within the territory now called Nigeria largely retained their independence under a native administration system which ensured that the people governed themselves.”\(^{13}\) However, a truly federal system of government was established for the first time in Nigeria under the 1954 colonial Constitution of the country.\(^{14}\) Under this Constitution, Nigeria consisted of three regions, namely, Northern, Eastern, and Western Regions. In August 1963, a fourth region—the Mid-Western Region—was created by the federal Parliament. Following the attempted secession of the Eastern Region in 1967 (after a military coup d’état and counter-military coup d’état in 1966 that caused the death of several people of the Eastern Region residing and working or doing business in the north), the country was structurally reorganized by Colonel Yakubu Gowon, Military Head of State, into twelve States. By a continuing process of state creation under successive military governments of the country, the number of Nigerian component states later grew further to nineteen, twenty-one, and then to thirty states. Today, the federation consists of thirty-six component states (nineteen in the north and seventeen in the south),\(^{15}\) all of which are governed by one single Constitution: presently, the Constitution of the Federal Republic of Nigeria 1999.\(^{16}\)

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\(^{11}\) Originally, the Royal Niger Company was a trading company, which was not involved in the government of the people. The Charter gave it colonial powers, which were later taken over by the British government when it decided to directly colonize the people.


\(^{13}\) Ebeku (n 10) 27. Cf. Oba (n 5) 817.


\(^{15}\) The creation of states in Nigeria is a serious political issue, particularly because of its revenue-sharing and office-sharing implications. See Ebeku (n 10) 42–44. As Ken Saro-Wiwa, a leading figure of the southern minorities in whose homeland Nigeria exploits its vast oil resources, poignantly puts it: “The way and manner in which the states and local governments were created were an affront to truth and civility, a slap in the face of modern history; it was robbery with violence. What Babangida [Military Head of State] was doing was transferring the resources of the delta, of the Ogoni and other ethnic minorities to the ethnic majorities—Hausa-Fulani, the Igbo and the Yoruba—since most of the new states and local governments were created in the homes of these three. None of the local governments or states so created was viable: they all depended on oil revenues which were to be shared by the states and local governments according to the most outrageous of criteria...” See Ken Saro-Wiwa, *A Month and a Day: A Detention Diary* (Penguin Books, London 1995) 99–100.

\(^{16}\) This contrasts with the position in other federal states, for instance, the United States, where each of the fifty component states of the Union has its own constitution. The original Regions of Nigeria also had their separate constitutions.
III. APPLICATION OF SHARI‘AH IN NIGERIA: BEFORE AND DURING THE BRITISH COLONIAL RULE

Islam (including Shari‘ah), the Muslim religion, is not indigenous to any part of the Nigerian state; to be sure, not even in Northern Nigeria, where it has a strong foothold. In other words, like Christianity, Islam is a foreign religion, which was brought to Nigeria by foreigners.

According to historical accounts, Islam may have been introduced into Northern Nigeria “via North Africa (especially Morocco)” between the eleventh and fourteenth centuries. At that time, the indigenous people were governed by kings under various native laws and customs, and followed traditional religions. Importantly, the introduction of Islam did not automatically wipe out the traditional practices of the people, and by the eighteenth and early nineteenth centuries it was found that “Islamic learning and practice in most of Hausaland [Northern Nigeria/Sokoto Caliphate]” was no more than a shadow of real and true Islamic teachings and practice. This avowedly compelled some Hausa faithful Muslims, particularly Shehu Uthman dan Fodio and his followers, to embark upon a jihād (“holy” war for religious revival) in Hausaland in the nineteenth century that led to the overthrow of the Hausa kings, and “the consolidation of the Sokoto Caliphate with Shari‘ah applying to all aspects of life . . . Qur‘àn and the Sunnah were now the Constitution.” In other words, “Islamic law” became the “state law.” Importantly, it has been suggested that this was the status of Shari‘ah when the British colonialists came into Northern Nigeria: they “met Islam firmly established as State religion” and “State law.” This contrasts with the position in Southern Nigeria, where the people largely followed traditional religions and systems of government and “Islamic law was not institutionalized.”

As already explained, the initial British approach to government was based on the policy of indirect rule: a policy which allowed the people to continue with their pre-colonial

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17 See Oba (n 5) 823.
20 Gwandu (n 18) 10.
21 For an interesting account of the jihād, see Murray Last, The Sokoto Caliphate (Longman, London 1977).
22 Gwandu (n 18) 12.
23 See Oba (n 5) 824. See also Kumo (n 18) 43: “In most of what is now the Northern States, Islamic law was, before the British conquest, the law of the land . . . On the arrival of the British conquerors, they found an established system of both law and government, organized on the basis of Shari‘ah.”
24 Oba (n 5) 823.
25 Id. 824. The Islamic law followed (and still being followed) in Northern Nigeria is that of the Maliki school of law. See also Adesubokan v. Yunusa (1971) 1 All NLR 225.
26 Oba (n 5) 824.
system of government.\textsuperscript{27} However, this approach changed when Britain began to be directly involved in the government of the people. Gradually, the British introduced their own system of laws—basically, the rules of common law, the principles of equity and English statutes described as being of general application and in force in England on January 1, 1900. Importantly, in the case of Northern Nigeria, this new approach restricted the full application or operation of Sharī'ah, which was treated as a species of customary law of the people.\textsuperscript{28} Among other things, this was achieved by statutory provisions which required all customary laws to pass repugnancy, compatibility, and public policy tests before they could be applied in cases before the courts established by the colonial rulers.\textsuperscript{29} Specifically, section 34(1) of the former Northern Region High Court Law,\textsuperscript{30} which is still applicable in the present northern states of Nigeria, directs the High Court to observe and enforce the implementation of any applicable native law and custom, provided such native law and custom is “not repugnant to natural justice, equity and good conscience, nor incompatible either directly or indirectly or by implication with any law for the time being in force . . . .”\textsuperscript{31}

In effect, throughout the colonial period, which ended in 1960 with Nigeria attaining independent statehood, Sharī'ah was only a subordinate law and Islam was by no means a state religion. Importantly, the application of Sharī'ah was restricted to private law cases if Muslims were involved (so-called Islamic personal law). In criminal justice it had no application whatsoever, except for the minimal extent incorporated into the Northern Nigeria Penal Code (for example, the offense of adultery\textsuperscript{32}).\textsuperscript{33}

\textsuperscript{27} It seems that the policy of “indirect rule” applied only to Northern Nigeria, and not to the other parts of Nigeria. See H.F. Morris, “Attitudes Towards Succession Law in Nigeria During the Colonial Period” (1970) 14(1) Journal of African Law 5, 6. In any case, the present focus is on Northern Nigeria.


\textsuperscript{30} Cap 42 of the Laws of Northern Nigeria 1963.

\textsuperscript{31} An example of an earlier controlling/restrictive “statute” is the Native Court Proclamation of 1900 made by Frederick Lugard (colonial officer in Northern Nigeria). Among other restrictions, this Proclamation did not allow native courts (which were authorized to administer native law and custom—including Islamic law—prevailing in the area of jurisdiction of each court) to inflict any inhuman and degrading punishment or death penalty. The main provisions of the Proclamation are noted in Kumo (n 18) 44.

\textsuperscript{32} Even so, the harsh Sharī'ah punishment for adultery (death by stoning) does not apply.

In the end, contrary to the suggestion of Nigerian Islamic scholars that this status of Shariah was born out of British hatred of Muslims and the Islamic religion, it is submitted that the position was designed to ensure religious co-existence and foster peace and harmony in a multi-ethnic and multi-religious state. And this probably explains why the northern states of Nigeria have been slow to return to the pre-colonial status since independence in 1960. As Allot, a respected authority on African law, has rightly said in his comment on the Supreme Court of Nigeria decision in the celebrated case of Adesubokan v. Yunusa: “To restore Islamic law in all its rigour (not that it ever seems to have applied in a pure form in Northern Nigeria), allowing it to override other laws, customary and statutory, might be socially and legally disruptive of the present order.”


It should be noted from the outset that the subordinate legal status of Shariah under Nigerian law as established by the British colonialists essentially remained the same after the country attained independence in 1960. As already indicated, the Northern Region government, and the succeeding state governments after the restructuring of the Nigerian state, basically retained the position in the various laws of the regions and states. However, from the mid-1970s, when Nigeria began the process of making a new constitution to replace the 1963 Republican Constitution, the question of the constitutional status of Shariah became a controversial issue. In any case, it is possible to trace the genesis of the “Shariah debate” in Nigeria to the statements and actions of Ahmadu Bello, the Premier of the Northern Region of Nigeria, in the 1960s.

Perhaps following the footsteps of Uthman dan Fodio, he championed the propagation of Islam in all parts of Nigeria and particularly in Northern Nigeria. As Premier of Northern Nigeria, Ahmadu Bello set up a religious Commission, Jam’atu Nasril Islam (JNI), which met regularly to discuss religious matters and advise him on these matters. Moreover, in Jihad Manuscripts published by the JNI on July 25, 1962, he contributed an article in which he said, inter alia:

Muslim Law is a law written in clear terms. It has stood the test of time. It cannot be worked out in Nigeria. The judges of the High Courts are learned men in their own fields. But their learning is incomplete in the eyes of the Muslims. The amendment to the Constitution of Northern Nigeria was made by my Government purposely to enable the learned Judges to obtain the expert advice of the Grand Khadi of the Sharia Court of Appeal who is also versed in his own field—when hearing a case involving Muslim personal law... Is it an attempt to suppress and eventually exterminate Muslim Law in the legal system of the Federation? When the time comes I will mobilize the people of the Region [Northern Nigeria] so that they can play their full part in this all-important task which might

34 See, e.g., Oba (n 5) 825–826.
35 The constitutionality of the expansion of Shariah in some northern states of Nigeria from 1999 has been considered in several articles, and a great majority concluded that it was unconstitutional. See, e.g., Iwobi (n 33).
36 (1971) 1 All NLR 225.
37 See Allot (n 28) 84.
38 See Kumo (n 18) 42–51.
be likened to a Jihad... A Jihad is war waged for some sacred interest to protect the faith, life, property, liberty and self-respect.39

Furthermore, in his address to the World Moslem League in November 1964 in Medina, he made his mission clear when he said:

I have personally devoted my life to the cause of Islam [...] In my endeavour to expand the religion of Islam I have, by the Grace of Allah, been able to convert some 60,000 non-Muslims in my region to Islam within a period of 5 months (from November 1963 to March 1964) [...] I have successfully been able to build several Mosques in as many suitable centers as possible having regard to the resources at my disposal [...] It is also fitting at this juncture for me to mention the numerous attempts being made by the Jews [Israeli] to entice underdeveloped countries to their side. Barely two years ago [1962] they offered a sizable amount of liaison to the Federal Government of Nigeria. The offer was accepted by all the governments of the Federation except we [Moslems] in the North who rejected it outright. I made it vividly clear at the time that Northern Nigeria would prefer to go without development rather than receiving an Israeli loan or aid [...] I hope when we clean Nigeria we will go further afield in Africa.40

From the foregoing, it is fair to say that Ahmadu Bello aspired to Islamize Nigeria, and make Shari’ah, at least the “Muslim personal law,” generally applicable in all parts of the country. However, that ambition did not materialize, and since that time up to October 1999, when some northern states of Nigeria began to expand the application of Shari’ah into the realm of criminal law,41 only the personal aspects of Islamic law—dealing with such issues as marriage, divorce, inheritance, guardianship, legitimacy, and intestacy—were applicable, and only in the northern states of Nigeria.

Notably, during the era of Bello the issue of the constitutional status of Shari’ah did not generate any national controversy.42 Most probably, this was due to the fact that apart from some tolerable aspects incorporated into the penal code, the harsh criminal punishments of Shari’ah were not adopted nor practiced. However, when his ambition to extend Shari’ah to all parts of Nigeria was pursued by his successors in the 1970s, 1980s, and 1990s, it became a big constitutional-political issue. From the way the “ambition” or “struggle” is being pursued, it seems the attitude of some Nigerian Muslims is captured by the following statement:

[T]he only way that a Muslim can show his sincerity in his belief in Allah and in Mohammed, is to struggle, wherever he is, for the supremacy of the Shariah, to the point of sacrificing his dear life. Death in the struggle for the Shariah is the supreme

39 Quoted in Ajayi (n 2). Emphasis added by author.
40 Id. Emphasis added by author.
42 The application of Shari’ah was not mentioned in the federal Constitution or in the Constitution of the constituent regions of Nigeria, except the constitution of the northern region. Even so, the regional constitution did not authorize the full application of Islamic law. See Constitution of the Northern Region of Nigeria 1963 (Cap 1, Laws of Northern Nigeria 1963, Sections 54 and 55).
achievement for which every Muslim aspires. It is the greatest service one can ever render to Allah, and, therefore, to humanity.  

In the early 1970s, Nigeria’s military authorities who had been in power since 1966 when the military ended the civilian democratic government (in power since independence in 1960), set out to give the country a new constitution. They set up a Constitution Drafting Committee (CDC)—composed of people from all parts of the country and religious persuasions—and a Draft Constitution was produced in 1976. That Draft Constitution was presented before a Constituent Assembly, constituted by the military government, for consideration and “ratification,” and it was debated between 1977 and 1978. Importantly, during this period, there was a lot of debate, not only at the meetings of the Constitution Drafting Committee and Constituent Assembly, but also in the press, on the “Sharī’ah Question”—specifically, the constitutional status of Sharī’ah. Essentially, the main positions in the debate may be classified into anti-Sharī’ah and pro-Sharī’ah.

The anti-Sharī’ah elements (largely Christians) argue, essentially, that Sharī’ah should be allowed only a limited role in the Nigerian multi-ethnic and multi-religious society and should not enjoy a dominant constitutional status. In short, it should be confined to the personal arena and apply only to Muslims: just the same way it was applicable during and after the colonial era. Martin Dent, formerly a district officer under the Northern Nigerian Government, argued that it was important for both the Christian and Moslem religions to be treated equally in Nigeria. Elaborating, he pointed out that “in matters of law, Islam demanded from its adherents more than what Christianity demanded from its votaries.”  

He then noted:

In general, the practice of Christianity is not affected by the civil or criminal code laws. It can co-exist with any reasonably just system that is not avowedly atheist. Islam, on the other hand, required Muslims to follow a set of given laws. . . The government of the late Sardauna (whom no one could accuse of being anti-Muslim), set up a study group of learned experts in Muslim law which visited modern Muslim countries such as the Sudan and produced a report on the strength of which the then Northern Government replaced the whole of Shariah criminal law by a comprehensive Criminal Code.

In summary, Dent suggests that the Sharī’ah criminal system of justice should not be applicable in Nigeria. Similarly, Christopher Abashiya opines: “It seems to me that the scope of Shariah should be confined to Muslim personal matters” in order to eliminate, to a certain degree at least, the problem of having separate courts for Muslims in all

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44 The CDC was headed by an eminent Nigerian lawyer, Chief Rotimi Williams.
46 Dent (n 45). The Sardauna was the Premier of the Northern Region Ahmadu Bello. Cf. his later pro-Sharī’ah actions and statements (stated in the text above).
CONSTITUTIONALISM AND SHARĪ’AH

legal matters. In the end, it is perhaps correct to say that the position of the anti-Sharī’ah people is well-captured and summarized in the contribution of Chief Rotimi Williams before the Constituent Assembly:

Some of the commentators [on the “Sharī’ah Question”] have said that we have not gone far enough in ensuring the development of Islamic law. I suspect that those who say this are not prepared to make the type of compromises which are essential to the formulation of a federal constitution and indeed the survival of Nigeria as a united country. During the debate in the Constitution Drafting Committee, the attention of members was drawn to the fact that Islamic law provides a system of jurisprudence capable of dealing with all types of justiciable matters in modern society. But it must be remembered that Nigeria is a secular State and whilst the nation should be prepared to accommodate all religious faiths it ought not to do anything which is calculated to impose a system of laws associated with a particular religion upon people who do not believe or practice the faith which is the basis of that religion. Moreover, there must be give and take in our efforts to establish a stable federation in which all of us wish to live as brothers irrespective of our religious beliefs.

To sum up, Rotimi’s argument, like that of other Sharī’ah opponents, is that while it would be wrong for Nigerians, in making a federal constitution, to “close our eyes to the fact that the lives of some millions of Nigerians are regulated by the rules of Sharī’ah,” its application and practice in Nigeria should be confined to personal matters in the larger interest of a multi-ethnic and multi-religious united Nigerian state. In other words, Nigeria should remain a secular state.

On the contrary, the pro-Sharī’ah elements, who are mostly Northern Nigeria Muslims, argue that Sharī’ah should constitutionally become a dominant source of Nigeria’s law and the supreme law of the state; or, as a minimum, the Nigerian Constitution should allow Muslims to be governed by all aspects of Sharī’ah. Specifically, all civil and criminal aspects of Sharī’ah should be applicable in Nigeria, and appropriate institutions—particularly courts of law—should be constitutionally created at both state and federal level to support this. The views of Alhaji Yahya Gusau and Ibrahim Sulaiman are representative of the Muslim, pro-Sharī’ah, viewpoint on the “Sharī’ah Question” in Nigeria. Contributing to the debate, Gusau points out that “Shariah means everything to the Muslim” and argued that Muslims in Nigeria “have compromised enough. It is unfair to expect them to do all the giving. Others should also see our point of view and appreciate the fact that we cannot lay

48 The text of Rotimi’s argument was published in the New Nigerian newspaper of November 4, 1977; quoted in Ibrahim Sulaiman (n 43) 59.
50 See Rotimi’s argument published in the New Nigerian (n 48).
51 If Sharī’ah were to become the supreme law of Nigeria, that would mean that Nigeria has graduated into an Islamic State; an unlikely occurrence in a united Nigeria.
The Limited Applicability of Sharī'ah under the Constitution of Nigeria

claim to being Muslims if we cease believing in the Shariah.”52 On his part, Sulaiman dismissed the need for Nigeria to remain a secular state thus:53

The secular argument, which has become universal these days—and is being advanced by some misguided Muslims—is perhaps the most deceitful argument that can ever be advanced when discussing [such] a matter as the future of this country. The argument assumes that the Euro-Christian secular system must be imposed on the country, to the exclusion of the rest of the systems including Islam; that we should all accept colonialism as a valid and legitimate and justifiable imposition and therefore retain its institutions and legacy almost unconditionally; and that because there are Christians, animists and atheists in Nigeria, Muslims must not aspire for a full realization of Islam. The secular argument is therefore fundamentally a calculated blackmail against Islam. . .54

In the end, the Constituent Assembly agreed on a compromise position on the “Sharī'ah Question”: essentially, that Sharī'ah may be applicable in states where it may be deemed necessary, but only in the area of personal law, and that Sharī'ah courts including, appeals instances, may be established by any state of the Nigerian federation that needs them to administer the Muslim personal law.55 Importantly, this agreement was incorporated into the Constitution of Nigeria 1979.56

This compromise position largely held sway until the 1980s, when Nigeria again sought to make a new constitution. In the Constituent Assembly, which debated the Draft 1989 Constitution of Nigeria,57 the “Sharī'ah Question” became so volatile, delaying the work and progress of the body until the Federal Military Government withdrew its discussion from the Assembly.58 Furthermore, in the 1990s when the country yet again embarked upon another round of constitution-making, the debate on the constitutional status of Sharī'ah was again reignited. In the end, the position in the 1979 Constitution of Nigeria did not change and this is reflected in the current Constitution of 1999. For now this is the

52 Quoted in Ibrahim Sulaiman (n 45) 60.
53 See Ibrahim Sulaiman (n 45) 62–63.
54 In another forum, he repeated this point as follows: “It is a fact that Islam is directly opposed to secularism, for secularism has no relevance to Islam. . .” See Ibrahim Sulaiman (n 43) 53. In effect, he believes Nigeria should be an Islamic State. (Note that I.K.R. Sulaiman and I. Sulaiman is the same person, using inconsistent initials).
55 Ultimate appeals would still be handled by a secular Court of Appeal (though by a specialist panel—1999 Constitution, s. 247(a)) and the Nigerian Supreme Court (final court of appeal).
56 See Oba (n 5) 840.
57 The 1989 Constitution of Nigeria never came into force (although it was given the force of law by a military decree); it was abandoned in place of a draft 1995 Constitution that was never a law of the country, as it remained a draft document until the 1999 Constitution (a near verbatim reproduction of the 1979 Constitution of Nigeria) was made and brought into force.
position. But there is nothing to suggest that the debate has ended nor is there any reason to believe that there will be any significant change in the future.

V. THE 1999 CONSTITUTION OF NIGERIA AND SHARĪ‘AH

The central concern of this section is to show the limited applicability of Sharī‘ah under the current Constitution of Nigeria. Importantly, this can be seen both from the constitutional provisions and from judicial decisions interpreting the relevant provisions. While it is possible to deal with both perspectives together, for the sake of convenience and clarity it is proposed to consider them here each in turn.

A. Constitutional Provisions on Sharī‘ah

Nigeria attained independent statehood on October 1, 1960 with a Westminster-style written Constitution. The country became a republic in 1963 under a Republican Constitution made by the representatives of the people in Parliament. Importantly, neither of these Constitutions mentioned the word “Sharī‘ah” in its provisions. As Oba has correctly stated, “Islamic law was mentioned in the Nigerian Constitution for the first time in the Constitution of the Federal Republic of Nigeria, 1979. Before then, Islamic law was entirely a regional affair.” As already indicated, the provisions of the 1979 Constitution on Islamic law are the same as those contained in the current Constitution of 1999. In this section, the relevant provisions of these two Constitutions will be considered, although it must be borne in mind that the 1999 Constitution is the one presently in force.

The preamble to the 1999 Constitution declares the philosophy behind its provisions. It states that the people of Nigeria have “firmly and solemnly resolved to live together in unity and harmony as one indivisible and indissoluble sovereign nation under God” and that the constitution is made “for the purpose of promoting the good government and welfare of all persons in our country, on the principles of freedom, equality and justice, and for the purpose of consolidating the unity of our people.” Following this philosophy, Section 1(1) of the Constitution proclaims that “this Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.” Section 1(3) reinforces this provision by declaring that “if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail,
and that other law shall, to the extent of the inconsistency, be void." This is exactly the provision which already figured in Section 1(1) and (3) of the 1979 Constitution of Nigeria.

Importantly, Section 1(1) and (3) of Nigeria’s 1999 Constitution contrasts with the constitutions of Islamic states such as Iran, Iraq, and Afghanistan, which give Islamic law a supreme position in the constitutional scheme. For example, Ch. 1, Arts. 2 and 3 of the Afghan Constitution of 2004 provide that “the religion of the state of the Islamic Republic of Afghanistan is the sacred religion of Islam,” and that “in Afghanistan, no law shall contravene the tenets and provisions of the holy religion of Islam.” To be sure, this provision is a core value or basic article of the constitution that is not amenable to amendment. Similarly, Art. 2 of the Iraqi Constitution of 2005 provides, inter alia, that “. . . Islam is the official religion of the state and it is a fundamental source of legislation”; and that (a) “No law that contradicts the established provisions of Islam may be established.” In effect, Shari’ah seems to be the supreme law or constitution of Afghanistan and Iraq.

As already suggested, Section 1(1) and (3) of Nigeria’s Constitution make clear that Nigeria is not an Islamic state. In fact, the Constitution proceeds to declare the secularity of the Nigerian state in Section 10 thus: “The Government of the Federation or of a state shall not adopt any religion as State Religion.” More importantly, this provision helps to achieve equality as well as social harmony in the country, in line with the preamble of the Constitution. According to one commentator, states (such as Iraq and Afghanistan) whose constitutions are “theologically based” “subordinate non-Muslim peoples to the socio-moral-legal system of Islam. For the Muslim, in Iraq, there is a unity between law, religion, and society. The state privileges Islam and the Arab, both of which together serve as the

64 Chapter 10, Art. 1 of the Constitution provides: “The provisions of adherence to the fundamentals of the sacred religion of Islam and the regime of the Islamic Republic cannot be amended.”
65 The constitution was approved by a referendum on October 15, 2005, replacing an interim constitution known as the Law of Administration for the State of Iraq for the Transitional Period (which was in operation since March 8, 2004).
66 The Basic Law (constitution) of Saudi Arabia declares explicitly that Shari’ah is binding and that all legislation repugnant to Shari’ah is unenforceable. See Royal Decree No. A/90, Article 1 (reprinted in Nicola H. Karam (tr), Business Laws of Saudi Arabia (2002) 4.1-3, 4.1-4. Cf. Section 1(1) and (3) of Nigeria’s Constitution 1999.
67 It has been observed that “over the last thirty years, a number of Muslim countries have adopted constitutions containing provisions requiring the law of the state to be consistent with the norms of Sharia, meaning Islamic law.” See Clark B. Lombardi and Nathan J. Brown, “Do Constitutions Requiring Adherence to Sharia Threaten Human Rights? How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law” (2006) 21 American University International Law Review 379, 379.
foundation of State identity and governance.” Not so in Nigeria: there is a clear separation between state and religion, thus achieving parity for all religious faiths.

Specific provisions of the Nigerian Constitution on Shari'ah clearly demonstrate the limits of Shari'ah in the Nigerian constitutional system. These can be found mainly in the constitutional provisions dealing with the judiciary, most of which are briefly considered below. As indicated earlier, the 1999 Constitution of Nigeria permits the application of Shari'ah in states which desire it. Specifically, Section 275(1) of the Constitution provides that “there shall be for any State that requires it a Sharia Court of Appeal for the State.” The court shall consist of: “(a) a Grand Kadi of the Sharia Court of Appeal; and (b) such number of Kadis as may be prescribed by the House of Assembly of the State” (Section 275(2)). Of course, the existence of a Shari'ah Court of Appeal presupposes the existence of Shari'ah (lower) courts—called in Northern Nigeria as Area Court or Upper Area Court, depending on their grade.

By virtue of Section 6(4)(a) of the 1999 Constitution, the House of Assembly of a state may establish courts, other than those specifically mentioned in the Constitution (Section 6(5)), with subordinate jurisdiction to that of a state High Court. Such courts may be conferred with jurisdiction for the hearing and determination of civil causes and/or jurisdiction for the investigation, inquiry into, or trial of persons accused of offenses against the laws of the state (Section 286(1)(a–b)). Even so, the constitutional limits must be respected. Furthermore, as part of the federal judiciary, the constitution specifically established a Shari'a Court of Appeal. Section 260(1) provides that “there shall be a Sharia Court of Appeal of the Federal Capital Territory, Abuja (FCT), which shall consist of: (a) a Grand Kadi of the Sharia Court of Appeal; and (b) such number of Kadis of the Sharia Court of Appeal as may be prescribed by an Act of the National Assembly (Section 260(2)).”

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69 See Backer (n 68) 51. This view is in agreement with what Oba, a Nigerian Islamic legal scholar, has said: “The Christian makes a distinction between secular and spiritual aspects of life. . . . The Islamic approach is that religion is a comprehensive package. Everything falls into the realm of religion. There is no difference between the secular and the spiritual.” See Oba (n 5) 845.

70 Under Islamic Law there is no separation between state and religion. For an informative discussion on the nature of Islamic law, see Tony Weir (tr), Konrad Zweigert and Hein Kotz, An Introduction to Comparative Law (3rd ed. Oxford University Press, Oxford 1998) 303–312.

71 Section 6(2) of the constitution vests the judicial powers of a state of the federation of Nigeria in specifically named state courts (see Section 6(5)). Importantly, under Section 6(5)(k) of the Constitution, the judicial powers of a state of the federation of Nigeria extends to “such other court as may be authorized by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly [state legislature] may make laws.” The courts named in Section 6(5) are the only superior courts of record in Nigeria (see Section 6(3)).

72 Section 6(5) lists the courts established by the Constitution for the federal government as well as for the state governments: the Supreme Court of Nigeria; the Court of Appeal; the Federal High Court; the High Court of the Federal Capital Territory, Abuja; a High Court of a State; the Shari’ah Court of Appeal of the Federal Capital Territory, Abuja; a Shari’ah Court of Appeal of a State; the Customary Court of Appeal of the Federal Capital Territory, Abuja; and a Customary Court of Appeal of a State. Other courts may be established pursuant to Section 6(5)(j) & (k).

73 See also section 6 of the Constitution (particularly, section 6(1) & (5)). Note that the Shari’ah Court of Appeal of the FCT does not have a nationwide jurisdiction (only within the FTC). This is consistent with the constitutional approach of treating the FTC in most cases as if it is one of the states of the federation.
For appointment into the office of Grand Kadi or Kadi of a Shari’ah Court of Appeal (whether of a state or of the FCT) it is required that:

(a) [a candidate] is a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years and has obtained a recognized qualification in Islamic law from an institution acceptable to the National Judicial Council; or

(b) he has attended and has obtained a recognized qualification in Islamic law from an institution approved by the National Judicial Council and has held the qualification for a period of not less than twelve years; and

(i) he either has considerable experience in the practice of Islamic law; or

(ii) he is a distinguished scholar of Islamic law.

Appeals from Shari’ah Courts of Appeal (state and FCT) may be brought before the (Federal) Court of Appeal and ultimately the Nigerian Supreme Court. In this regard, it is important to note that the Constitution provides that the Justices of the Court of Appeal (excluding the President of the Court of Appeal) shall be not less than forty-nine “of which not less than three shall be learned in Islamic personal law” (Section 237(2)(b)).

Moreover, in exercising his constitutional powers of appointment of Justices into the Court of Appeal and the Supreme Court, the President of the Federation of Nigeria is required to have regard to the need to ensure that there are among the holders of such offices persons learned in Islamic personal law (Section 288 (1)). For this purpose, a person shall be deemed to be learned in Islamic personal law if he is a legal practitioner in Nigeria and has been so qualified for a period of not less than fifteen years in the case of a Justice of the Supreme Court or not less than twelve years in the case of a Justice of the Court of Appeal, and has in either case obtained a recognized qualification in Islamic law from an institution acceptable to the National Judicial Council (Section 288(2)(a)).

As to the role of the Court of Appeal in the administration of Islamic law, Section 240 gives the court jurisdiction to receive appeals from, among others, the Shari’ah Court of Appeal of the FCT, Abuja, and the Shari’ah Court of Appeal of a state. Such appeal shall lie as of right “in any civil proceedings before the Shari’ah Court of Appeal with respect to any question of Islamic personal law which the Shari’ah Court of Appeal is competent to decide” (Section 244(1)). Importantly, as could be observed, the jurisdiction of the Court of Appeal here does not extend to criminal proceedings, as Islamic criminal law is not part of the law constitutionally allowed to be applied in Shari’ah Courts and Shari’ah Courts of Appeal. For the avoidance of doubt, the constitutionally allowed jurisdiction of a Shari’ah Court of Appeal of a state is clearly set out under Section 277, which stipulates:

(i) The Sharia Court of Appeal of a State shall, in addition to such other jurisdiction as may be conferred upon it by the law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in accordance with the provisions of subsection (2) of this section.

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74 See Sections 261(3) & 276(3). The only difference is that under Section 276(3)(b) (for states), ten and not twelve years post-qualification is required.

75 Three members are also required to be learned in customary law (Section 237(2)(b)).
(2) For the purposes of subsection (1) of this section, the Sharia Court of Appeal shall be competent to decide –

(a) any question of Islamic personal law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;

(b) where all the parties to the proceedings are Muslims, any question of Islamic personal law regarding a marriage, including the validity or dissolution of that marriage, or regarding family relationship, a founding or the guarding of an infant;

(c) any question of Islamic personal law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a Muslim;

(d) any question of Islamic personal law regarding an infant, prodigal or person of unsound mind who is a Muslim or the maintenance or the guardianship of a Muslim who is physically or mentally infirm; or

(e) where all the parties to the proceedings, being Muslims, have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question.

Equivalent provisions are made under Section 262 for the Sharī‘ah Court of Appeal of the FTC, Abuja. Under the 1979 Constitution of Nigeria the equivalent provision is contained in Section 242(2). 76

Furthermore, for the purpose of exercising any jurisdiction conferred upon it by the Constitution or any other law, the Court of Appeal shall be duly constituted if it consists of not less than three Justices of the Court (Section 247), and in the case of appeals from a Sharī‘ah Court of Appeal, if it consists of not less than three Justices of the Court learned in Islamic personal law (Section 247(1)(a)).

Importantly, the totality of all of the foregoing provisions leaves no one in doubt that in Nigeria’s constitutional democracy Sharī‘ah is allowed to operate only in the personal or private arena. More importantly, by limiting the application of Sharī‘ah to defined civil matters, the constitution avoids the application of certain Sharī‘ah criminal punishments that are generally considered objectionable and inconsistent with certain international standards—particularly human rights standards. In effect, the provisions help to assure effectively to all Nigerians the human rights guaranteed in Chapter IV of the Constitution, including freedom of religion and the freedom from torture, as well as inhuman and degrading punishment.

It should be emphasized that the jurisdiction of a Sharī‘ah Court of Appeal does not go beyond the Islamic private law arena granted to it by the constitution. In consequence, other civil law matters (such as land matters) are outside the jurisdiction of the Court, and cognizable in the secular courts—e.g., the High Court of a state—(Sharī‘ah Court is a religious court). 77 As the next sub-section shows, this position has been upheld in a long line of cases decided by Nigerian courts.

76 Reproduced from Section 11 of the Northern Nigeria Sharī‘ah Court of Appeal Law (Cap 122, Laws of Northern Nigeria 1963).

All in all, it is important to note that Nigerian Islamic legal scholars appreciate the limited scope of Shari‘ah under the Nigerian Constitution. Commenting on the Shari‘ah provisions of the constitution, Sulaiman has correctly surmised that under the constitution Shari‘ah is “reduced to the narrow confines of personal status.”

B. Nigerian Constitution and Shari‘ah: Case Law

The Nigerian Constitution of 1999 is based on a strict separation of the legislative, executive, and judicial powers of government both at the federal and state levels. Accordingly, Section 6 of the Constitution vests judicial powers in the courts established for the federation and for the states. Importantly, the Constitution provides in Section 1 thereof that all authorities and persons in Nigeria are subject to the supremacy of the constitution. As the guardian of the constitution, the superior courts of Nigeria have upheld the sanctity of the constitutional provisions in various cases, but for present purposes the focus will be restricted to cases related to the scope of application of Shari‘ah in Nigeria. In this regard, it is equally true that there is a long line of cases in which the limited application of Shari‘ah under the Nigerian Constitution has been restated and upheld by the Nigerian courts.

During the military era in the 1980s and 1990s, the military government of Gen. Babangida attempted to expand the scope of the jurisdiction of a Shari‘ah Court of Appeal under the then 1979 Constitution of Nigeria (as amended) by deleting the word “personal” in Section 242 of the Constitution. The critical question raised by this amendment was whether the scope of application of Shari‘ah has thereby been expanded beyond Muslim personal matters. This question arose in Muninga v. Muninga, where the (Federal) Court of Appeal held that “notwithstanding all the amendments the provision of Section 242(2) of the 1979 Constitution is still the law.” Similarly, in Korau v. Karau, where the issue was whether the Shari‘ah Court of Appeal has jurisdiction to entertain an appeal dealing with the question of title to land, having regard to the deletion of the word “personal” in Section 242 of the 1979 Constitution, the Court of Appeal held that once the issue of appeal is title to land simpliciter the Shari‘ah Court of Appeal has no jurisdiction and this position has not changed by virtue of the amendments. The court stated in categorical terms:

There can be no doubt that the jurisdiction of the Shari‘ah Court of Appeal throughout this country is still governed by the provisions of section 242(2) of the 1979 Constitution of the Federal Republic of Nigeria as amended. There are some legislative interpolations here and there from . . . 1986 . . . but in my considered view the position remains the same. The Supreme Court [of Nigeria] of recent knowing fully well of the existence of

78 Ibrahim Sulaiman is at the Centre for Islamic Legal Studies, Ahmadu Bello University, Zaria, Northern Nigeria.
79 Ibrahim Sulaiman (n 43) 54.
80 See Constitution of Nigeria 1999, Sections 4, 5, and 6. See also Chapters V, VI, and VII of the Constitution (dealing respectively with legislative, executive, and judicial powers).
81 The purported “amendment” was effected by military decrees, first in 1986 and later in 1993—Constitution (Suspension and Modification Decree) No. 26 of 1986; Constitution (Suspension and Modification) Decree No. 107 of 1993.
84 [1998] 4 NWLR (Pt 545) 212.
all the amendments of this country’s Constitution including Decree No. 107 of 1993 decided that the provision of Section 242(2) of the 1979 Constitution as amended is the relevant provision to apply in respect of the jurisdiction of the Sharia Court of Appeal of the States. See Umara v. Kareem (1996) 1 NWLR (Pt. 379) P. 539 at 541. Since the Supreme Court held that the jurisdiction of a Sharia Court of Appeal is limited to the matters provided under section 242(2) . . . of the 1979 Constitution as amended despite the existence of Decree No. 107 of 1993 I will hold that any subsequent alterations . . . did not add or subtract anything. Those alterations do not increase or enlarge the jurisdiction of the Sharia Court of Appeal of a State.\textsuperscript{85}

The Court of Appeal reiterated the same view in the more recent case of Maida v. Modu.\textsuperscript{86} Importantly, in Magaji v. Matari,\textsuperscript{87} the Supreme Court of Nigeria specifically approved the Court of Appeal decision in Korau regarding the limited jurisdiction of the Sharī'ah Court of Appeal. As the court authoritatively stated, “the intention of the constitutional provision which is very clear is to confine and limit the exercise of the jurisdiction of the Sharī'ah Court of Appeal to subject-matters of Islamic personal law. The intention cannot be subverted by strained construction of the provision to give it unintended meaning.”\textsuperscript{88}

More importantly, in Maida, Muntaka-Comassie, JCA pertinentely stated that the “new 1999 Constitution of the Federal Republic of Nigeria does not in any way improve the jurisdiction of the Sharī‘ah Court of Appeal in this country.”\textsuperscript{89} This is true, as the Constitution, like the original 1979 Constitution before it, expressly speaks of “Islamic personal law.”\textsuperscript{90} In effect, the foregoing case law remains valid under the (current) 1999 Constitution. Support for this view can be found in the recent case of Maishanu v. Manu\textsuperscript{91} which relates to the construction of equivalent provisions of the 1999 Constitution of Nigeria. The case raised the issue whether a Sharī‘ah Court or Sharī‘ah Court of Appeal has jurisdiction to hear and determine cases which concern title to land simpliciter, and it was unanimously held by the Court of Appeal that no such jurisdiction was granted under the 1999 Constitution. In the words of the court:

The jurisdiction of the Sharia Court of appeal of a state is constitutional and prescribed in section 277(2) (a-e) of the Constitution of Nigeria 1999. On a fair construction of the section, the jurisdiction of the lower court is confined to and limited to all questions of

\textsuperscript{85} Korau v. Karau (n 84), 222–223 per Muntaka-Comassie, JCA.

\textsuperscript{86} [2000] 4 NWLR (Pt 651) 99, 112 per Muntaka-Comassie, JCA.

\textsuperscript{87} [2000] 8 NWLR (Pt 670) 722.

\textsuperscript{88} Id.

\textsuperscript{89} Maida v. Modu (n 86) 112.

\textsuperscript{90} Under the 1989 Constitution and the 1995 draft Constitution, there was a little extension of the jurisdiction of a Shari‘a Court of Appeal into “other civil matters where all the parties are Muslims.” However, neither of these constitutions ever came into force, and, as has been seen, such extension does not appear in the present 1999 Constitution of Nigeria.

\textsuperscript{91} [2007] 7 NWLR (Pt 1032) 42.
what is termed "Islamic personal law," which is Islamic personal status, regarding the matters prescribed in subsection 2(a-e) of section 277 of the Constitution.92

Increasingly the supremacy of the Nigerian Constitution—specifically its superiority over Sharī‘ah—is being respected by the Shari‘ah Courts and Shari‘ah Courts of Appeal.93 To date there is only one isolated case where a Shari‘ah court declared that “Sharia is above the Constitution of Nigeria.”94 After a hearing on the first day, there is no evidence that the proceedings were continued thereafter. The case related to criminal prosecution under Islamic law that is not permitted by the constitution, all the more so as the accused was a sitting state governor.95 From the foregoing case law, it is clear that the Shari‘ah Court’s claim was unfounded.96

VI. CONCLUSIONS

The 1999 Constitution of Nigeria is currently the basis of democratic rule and the rule of law in the country. It is the supreme law of the country and all governmental powers derive from it. To be valid, all laws and governmental acts must conform to its prescriptions; otherwise they are null and void ab initio (see Section 1(1) and (3)). The Nigerian Constitution allows only a limited application of Shari‘ah in the country: Shari‘ah applies only in civil matters—specifically in the private arena (i.e., Muslim personal law). In other words, the criminal aspects of Shari‘ah are not part of the Nigerian constitutional system.

Furthermore, despite the presence of a large number of Muslims in the population of the country, Nigeria is not an Islamic state, as its constitutional provisions make the constitution, and not Shari‘ah, the supreme source of law. This position is all the more significant if, as some claim, Nigeria is taken to be a Muslim majority state: it shows that it is possible for Muslim states to separate religion from the state, respect constitutionally guaranteed human rights97—which are based on universal standards on human rights such as the 1966 international covenants on human rights98—and comply with international

92 Id., 51 per Tsamiya JCA.
93 See, by example, the proceedings and judgment of the Shari‘ah Court of Appeal of Sokoto State quashing the conviction of Safiyatu Hussaini by the Upper Sharia Court Gwadabawa—reproduced in Ostien (ed) (n 41).
95 Section 308(1) of the 1999 Constitution of Nigeria grants immunity to a sitting state governor from civil and criminal proceedings before all courts in Nigeria.
96 For details on the criminal case, see Ebeku (n 41) 173–174.
human rights conventions, such as the Convention on the Elimination of All Forms of Discrimination against Women 1979, while practicing the Muslim religion.

In the end, it is remarkable that, notwithstanding occasional religious riots and continuing debate on the place of Sharī'ah in Nigerian constitutionalism, the country is still united and there is presently no major threat of a breakup as a result of irreconcilable religious differences. Importantly, this can be attributed to the limited applicability of Sharī’ah in Nigeria’s constitutional democracy; a position that is unlikely to change significantly in the future. Thus, Nigerian constitutionalism may offer some lessons to Muslim or Islamic countries the world over.

99 Respect and protection of human rights (including women’s rights) is a major problem in some Islamic states such as Afghanistan. See Jennifer Kristen Lee, “Legal Reform to Advance the Rights of Women in Afghanistan within the Framework of Islam” (2009) 49 Santa Clara Law Review 531.

100 A three-day conference was held in Nigeria in July 2004 on the theme “Implementation of Shariah in a Democracy: The Nigerian Experience.” The Conference was organized by the Centre for Islamic Legal Studies, Zaria, Nigeria, and two International organizations, and was sponsored by the United States Institute of Peace (USIP) and the U.S. State Department. The report of the conference notes: “Nigerian jurists, scholars, and clerics are engaged in an ongoing dialogue among themselves, with the international Muslim community, and with Nigerian Christians about the appropriate scope of—and limitations on—Shariah in Northern Nigeria.” See USIP, Applying Islamic Principles in Twenty-first Century: Nigeria, Iran, and Indonesia (USIP, Washington, DC 2005), 9 (Special Report No. 150).

101 Most recent religion-related riots in Nigeria include the Boko Haram massacre of July-August 2009 and the Jos massacre of January and March 2010. In Boko Haram case, the massacre was caused by an Islamic sect led by Mohammed Yusuf. The sect claims that it was opposed to Western education, and would like to enthrone “pure” Islamic education. They killed many people in some parts of northern Nigeria who would not convert to Islam and the Police and other security forces brutally crushed them. However, there is a strong evidence of resurgence of the terrorist group. Importantly, the group had no support from mainstream Nigerian Muslims. See Joe Boyle, “Nigeria’s ‘Taliban’ enigma” BBC News (London, July 31, 2009). Regarding the Jos incidents, although they had religious undertones, it was generally more of an ethnic-related and politically-motivated violence than religious uprising. See, by example, BBC News, “Nigeria religious riot bodies found in village wells” BBC News (London, January 23, 2010).
Constitutionalism in the Maghreb
Between French Heritage and Islamic Concepts

THIERRY LE ROY

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1. INTRODUCTION

The religious and political institutions of the Maghreb have had to continually face Islamist influences. The dominating three countries in the region followed separate paths in dealing with these influences. Algeria fought the Islamist parties, sometimes with military force, before settling on a “reconciliation” policy; Tunisia followed, more or less, the line fixed by President Habib Bourguiba, who fought against Islamic conservatism, and whose successor closely controls how religion is interpreted and taught; and Morocco deals with Islamism in its own way: the King himself, as “Commander of the Faithful,” is in charge of religious affairs, increasingly so with the strengthening of Islamist influences. These three different paths are three policies with the same goal: the political control of religious affairs.

Evaluation of the constitutions, the international human rights standards to which they are committed, and the constitutional rules and mechanisms requires a deeper look into the subject. What influence do constitutions in the Maghreb have on the rule of law? How do constitutional law and Islamic law combine? Can we still speak about a French legal model in the Maghreb? Those are the points that might be clarified in this brief review of the constitutional experience—if not of constitutionalism—of three countries in North Africa—Morocco, Algeria, and Tunisia. This has been done bearing in mind the work of jurists such as the member of the French Council of State, Louis Fougère, who served first as a legal advisor to the King of Morocco (1948–1953), then as a counsel in administrative affairs to the governments of Bekkaï and Balafrej (1955–1959) and later, in the 1960s, also in constitutional affairs. ²

Since the original version of the article was written, major political upheavals have occurred in most of the Maghreb countries. As a result of the events commonly known as

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1 The author thanks Ivor Rawlinson for his assistance with the English version of this article.
2 Fougère also later worked for the King of Afghanistan.
the “Arab spring,” two of them, Tunisia and Morocco, have committed themselves to processes leading to quite new Constitutions. How this will affect the main conclusions of this article is difficult to foresee. Again, constitutionalism has to do with the evolution of political reality, which seems to be heading—at least in the countries under consideration, and rather unexpectedly—toward a more diminished role of Islam and Islamic law in public life.

II. CONSTITUTIONS IN THE MAGHREB—HISTORICAL PRECEDENTS

Like many other countries in the Arab-Muslim world or in Africa, the countries of North Africa welcomed their independence with constitutions that often followed French traditions. Tunisia in 1959, Morocco in 1962 (the year following the accession to the throne of Hassan II), and Algeria in 1963 all adopted texts dealing with the constitutional foundations of the state. The concepts behind these texts went back much further. For example, in Morocco there had been a constitutionalist movement in evidence as early as 1906. However, in some cases these constitutional texts were stillborn: in Ahmed Ben Bella’s Algeria, the first constitution was suspended already in its first month.

The significance of these first constitutions had more to do with a need to legitimize governments (for instance, Bourguiba vs. the Bey) than with establishing a democratic legislative power (instead of the one of the ‘ulamā’, for instance). The goal was more to strengthen young states (for instance, the Kingdom of Mohammed V with the appearance of a parliamentary regime) than to preserve citizens’ rights. But, in every case, the role of the constitution was less legal than symbolic or programmatic. When referring to Algeria’s first years after independence, one could even speak of a “renunciation of constitutionalism.”

Nevertheless, these countries of North Africa have all, little by little, given in to the wave of constitution drafting. Whether it was for the purposes of internal politics, or to ease their integration into an international community ever more fond of constitutions, leaders continually revised their constitutions. Five new constitutions succeeded one another in Morocco from 1962 until 1996. A rudimentary constitution that only regulated the relations between the main organs of state was implemented in Algeria in 1965, and was followed by new charters or constitutions in 1976, 1989, 1996, and 2008. Tunisia promulgated constitutional laws in 1959, 1987, 1995, 1998, 2002, and 2008. The fact that the North African countries revised their constitutional texts as much as they did suggests that their governments believed in their normative or political value, or conceivably in both.

When they proceeded to the revision of their constitutions, the countries of North Africa followed the new fashion of incorporating declarations of principles, with a preference for the 1966 UN conventions, which were seen by them as less embarrassing than the 1948 Universal Declaration of Human Rights. The first constitutional texts had been of little relevance to ordinary people, as they almost exclusively dealt with the organization of the political decision-making process at the level of the highest state organs. Little by little, substantial preambles and declarations of principles found their way into North African constitutions—they were less exhaustive than those in other parts of Africa and therefore

partly considered as more realistic. There are nevertheless thirty articles dedicated to “Rights and Liberties” in the current Algerian Constitution and seventeen in the Tunisian. There are references to the Universal Declaration of Human Rights, or at least to the “principles and the objectives of the Charter of the United Nations,” as well as to the ratified international agreements regarding the protection of human rights in the Algerian Constitution, and to the universal concept of human rights in the Moroccan and Tunisian Constitutions. Incidentally, the term “fashion” is appropriate, because it is noticeable, even in the content of these preambular texts, that there are hints of what was fashionable at the time; for example, the references to economic liberalism in the Algerian Constitution.

More significantly for the cause of constitutionalism, it should be noted that these declarations of principles make reference to the mechanisms designed to guarantee their implementation, namely to constitutional courts or councils. These mechanisms were established hesitantly at first, as in the Tunisian decree of 1987, which created the constitutional council with the mandate to give “recommendations” to the President of the Republic on constitutional issues. But the cautious approach evidenced by the decree soon gave way to a growing recognition that the recommendations of the Tunisian constitutional council needed to be given legally binding character, which was later achieved by virtue of the Constitutional Law of 1998. In 1989, a modest constitutional council was created in Algeria, which was especially given the right to monitor the proper conduct of national elections. In 1992, Morocco boldly replaced the Constitutional Chamber of the Supreme Court with a constitutional council, which is competent to review the constitutionality of ordinary statutes.

Thus, theoretically, the elements of modern constitutionalism are present in the countries of the Maghreb. The governments subscribe to the supremacy of the constitution that binds the executive and legislative branches in the exercise of their powers and sets out the principles and values of a universal character which, together with the provisions relating to the separations of powers, constitute the relevant parameters for the review of the constitutionality of state action, the so-called bloc de constitutionnalité.

III. MAGHREB CONSTITUTIONS AND THE RULE OF LAW—A DIFFICULT RELATIONSHIP

Research in the Arab world has focused for more than twenty years on constitutions and the rule of law there. Work by the Centre d’études et de Documentation Economique, Juridique et Sociale (CEDEJ) in particular, successor in 1968 of the Ecole Française du Droit in Cairo, shows that these new constitutions did not remain for long as mere paper documents. For example, they showed their value in regard to the laws concerning the succession of rulers in the Gulf States, or to the case law of the Egyptian Supreme Constitutional Court on electoral questions.

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7 Bendourou, “Conseils constitutionnels” 236–240.
There are no such examples in the Maghreb. While it is fair to say that the influence of constitutional law is evident in the relations between the political actors, it hardly exists in the relationship between the government and its citizens.

Certainly, the political players want to comply with the system. When the current Presidents of the Republic in Algeria and Tunisia were confronted with the constitutional provisions limiting the number of their mandates, they applied for constitutional revisions to remove the limits legally. In November 2008, the Algerian Constitutional Council, when endorsing the ad hoc constitutional revision of that year, actually said that its decision was preceded by a long collective discussion, with the following rationale:

The amendment, the object of which is the establishment of the principle of the reeligibility of the President of the Republic, . . . consolidates the rule of the free choice of the people of its representatives as announced in Article 10 of the Constitution, and reinforces the normal functioning of the democratic system, which orders that the holder of the president’s mandate necessarily hands it back, at the end of the term, to the people [who are] entitled to evaluate, in full sovereignty, the way it has been executed, and to decide to hand it over to him again or to deprive him of its confidence . . . It [i.e., the amendment] does not inflict any damage on the general principles governing the Algerian society or the rights and freedoms of the citizen, nor does it affect in any way the fundamental equilibria of the powers and institutions.10

Those in power seem keen to ensure that the letter of the constitution remains close to political reality. This helps to explain the successive changes in the Moroccan Constitution,11 which reflect a desire, characteristic of a constitutional monarchy, to comply with the legal limitations on parliamentary power. There have to be very exceptional circumstances—as was the case in Algeria in 1992, when the assembly was dissolved and the executive power was stripped of all constitutional power to legislate—before a violation of the constitution is accepted as the only possible way out. One could also refer to the case of the state of emergency in Morocco between 1965 and 1970. A similar concern about form is also perceptible in the way constitutional courts speak about themselves.12 Even when there is no pertinent case law that could be used as the basis of the argument, the constitutional courts readily speak of procedural guarantees that are applicable to constitutional litigation, such as the confidentiality of the private sitting of judges, or the adversarial principle.

10 “L’amendement qui a pour objet d’instituer le principe de la rééligibilité du Président de la République . . . consolide la règle du libre choix du peuple de ses représentants énoncée à l’article 10 de la Constitution et renforce le fonctionnement normal du système démocratique qui commande que le détenteur d’un mandat présidentiel le remette impérativement à son échéance au peuple à qui il appartient d’apprécier, en toute souveraineté, la façon dont il a été exécuté et de décider de lui renouveler ou de lui retirer sa confiance . . . Il ne porte aucunement atteinte aux principes généraux qui régissent la société algérienne, aux droits et libertés du citoyen, ni n’affecte d’aucune manière les équilibres fondamentaux des pouvoirs et des institutions.” Opinion no. 01/08 A.RC/CC of 09 Dhout El Kaada 1429 (November 16, 2008) Journal Officiel de la République Algérienne No. 63, 5 ff. (translated by the editors).


12 This is evident in the case law of the constitutional councils, which can be consulted via the website of the Association des Cours Constitutionnelles Ayant en Partage l’Usage du Français, www.accpuf.org.
However, it is necessary to emphasize that in this particular context form is not—as in Hegel’s famous dictum, “Form ist die höchste der Freiheiten”—synonymous with freedom or individual liberty. On the contrary, constitutional formalism as it is understood and applied by the constitutional courts with regard to the political actors mostly favors the executive power, and, as the case may be, its parliamentary majority. One can see this when it comes to putting constitutional rules into effect. Examples are the introduction of a presidential right of dissolution of parliament, or of a bicameral system only in order to weaken parliamentary control; or the limitation of the competence of parliament in the Algerian Constitution. Several cases decided by the constitutional courts also reflect this tendency. In its 1995 decisions regarding the regulation applicable to the House of Representatives, the Moroccan Constitutional Council opposed, in the name of the letter of the constitution, the establishment of a procedure of resolutions that the government would have used for controlling parliament. The Council’s decisions privileged the individual rights of Members of Parliament over and above those of the groups; it also refused to impose a quorum rule for the parliamentary vote. The decision 37/94, which annulled a fiscal law because its adoption had not followed the constitutionally required parliamentary procedure, constitutes one of the rare cases in which a law was struck down on procedural grounds.

These authoritarian tendencies are ambiguous, however, because one can observe at the same time the development of the rights of the opposition. This may occur when constitutions put an end to a single-party regime, e.g., in Algeria where other political parties were recognized in 1997. This does not mean full freedom for the opposition parties, since numerous restrictions are placed upon them. There is a similar ambiguity regarding the dual nature of the executive power, as evidenced by the role of the prime minister in the Moroccan Constitution and in constitutional practice. Authoritarianism rears its head when it comes to the question of access by the opposition to constitutional jurisdiction. The access is limited to the President of the Republic in Tunisia and to the president and presidents of the parliamentary chambers in Algeria. In Morocco, since 1992, a petition to the constitutional council may be filed by a quarter of the members of the Assembly, and thus in fact by the opposition. The impartiality of the judges toward the executive powers may be doubtful, given the rules for the composition of the court and the control of the executive over the appointment of the judges in all three countries.

The role of the constitution in the relationship between citizens and government is not as positive. Although the creation of constitutional courts and the recognition of their decisions as binding have strengthened the supremacy of the constitution, these changes—in Algeria in 1989 and in Tunisia as late as 1998—are not enough to make constitutionalism effective.

The first weakness lies in the constitutional principles themselves, as they often remain imprecise. They often explicitly require laws for their implementation, leaving the parliaments, rather than the judges, with the responsibility of defining rights and liberties.

The second weakness comes from the mechanisms whose purpose is to ensure that laws are subject to constitutional principles. The main factor limiting the rights of citizens is the lower courts’ lack of competence, in all three countries, to assess a law’s constitutionality. However, the fundamental principles can also be found in ratified international agreements. In France, it is in this way that fundamental principles are introduced to the courts. At least one decision regarding the electoral code, written by the Algerian Constitutional Council on August 20, 1989, admitted that the principle of gender non-discrimination, introduced from international agreements into domestic law, had acquired an authority superior to that of the existing laws, and authorized every Algerian citizen to take advantage of it before the courts.
Developments toward constitutionalism have not been the same in all three countries. A recent assessment of the Algerian Constitutional Council stated that the number of binding decisions it had given in fifteen years was a very modest seven. Not one of them concerned the rights of citizens: the institution is restricted to the role of an electoral arbiter. On its part, the Tunisian Constitutional Council has scarcely had any effect on the executive power when consulted by it, despite the fact that its recommendations are now binding. This is because the Council, in cases where the conformity of a normative act with the constitution is not obvious, is allowed to use the more flexible concept of “compatibility” in order to uphold a law whose constitutionality in the strict sense seems rather doubtful. It should be noted that at least one of the court’s recommendations, in 1997, declared an amendment by a Member of Parliament unconstitutional. It considered the amendment to be in violation of the principle of the separation of powers established in the introduction to the constitution.

Finally, Morocco offers the most developed case law, with relatively generous conditions of referral and review powers not possessed by the other constitutional courts. But the Moroccan Constitutional Council nevertheless prefers to proceed cautiously, as is illustrated by the above-mentioned decision of 1994 which, upon the application of the opposition against a law allegedly violating fundamental liberties guaranteed by the constitution and by the international agreements ratified by Morocco, annulled the law exclusively on the ground that its adoption had not followed the required parliamentary procedure, without addressing the issues raised by the opposition in relation to the alleged violation of civil liberties.

Despite the national differences, one can thus conclude that these countries are all proceeding very carefully into the new field of constitutionalism. In other words, it is too early to judge from an analysis of the case law to which extent constitutional law is becoming incorporated into law that is of direct use to citizens, and whether it exercises an effective influence on the state. The potential exists, but so far, preference is given to more informal monitoring processes, for example, the human rights high councils that were established in the early 1990s in all three countries.

IV. THE ROLE OF ISLAM AND ISLAMIC LAW IN THE CONSTITUTIONS OF THE MAGHREB

Although constitutional courts have not yet dealt with it, the question arises in the Maghreb as well as in the rest of the Arab-Muslim world as to how the primacy of the Sharī‘ah can be reconciled with Western-style constitutionalism. Two closely intertwined issues have to be addressed in this context.

The first issue concerns the differences between traditional legislation in Muslim countries and modern Western legislation. These differences are particularly important in the regulation of the individual status and rights of women, as well as in criminal law, particularly in the treatment of apostasy and the role of corporal punishment. They come to the fore when a Muslim country wishes to subscribe to international declarations and conventions regarding human rights, which are inspired by Western norms. In this respect, the situation of the Maghreb countries, which have long-standing ties with the West, is not
Constitutionalism in the Maghreb

the same as that of a country like Afghanistan, which only recently has come under considerable Western pressure to adapt its legislation to modern human rights.

The second issue which interests jurists and constitutionalists in particular is how this difference can be reconciled. In juridical terms, how can a hierarchy of norms be organized when the sources of law are so diverse, reaching from rules laid down in religious texts to legal principles and obligations derived from the instruments or conventions of international law? The combination seems simple, even when the constitution expressly refers to these two sources, because the constitution is interpreted by a single institution. But this is not always the case. Above all, in the Muslim world, the question of whether the Shari’ah can be interpreted at all, and if so to what extent, is itself being debated.

Theoretical debate on this point is certainly not absent in the Maghreb. There are different approaches, because Tunisia and Algeria underwent a secularization of political and civil society that Morocco did not. In Tunisia, one can even find a certain Islamic reformism which tends to regard the Shari’ah as a human product. These Muslim countries and their intellectuals are familiar with Ash’ari and Mu’tazili theologies, i.e., literalism and rational hermeneutics applied to the Qur’an and to the Sunnah. “They realize that law can be subject to a superior standard as well as be affected by a despotic government. There is a strong tradition of ‘ulamā’. There are recent moves by governments to develop the ijtihād, the independent interpretation of the Islamic law. This is an objective of the Algerian High Islamic Council.

These debates naturally have repercussions in the political sphere, where Islamism is very present, as well as in the legal sphere, because a wide area of civil legislation is inspired by Shari’ah. But they do not affect the institutions or extend into the constitutional field, perhaps because Islam inspires the civil law more than the constitutional and administrative law, or perhaps because in these countries there is a consensus not to get bogged down in insoluble contradictions by asking questions of principle. It is as if there was a consensus to consider, as Ghassan Salame suggested, the framework of political life as a “simple institutional arrangement”; “as the involuntary fruit of an indecisive balance of power rather than the idealised embodiment of the thought of philosophers.”

Three conclusions can be drawn about the divergence between secular law and religious-inspired law in the countries of the Maghreb: their constitutions make ample reference to Islam; but compliance of the legislation with the Shari’ah is not explicitly required; at the same time, laws can be inspired by the Shari’ah without meeting any constitutional obstacles.

In these constitutions, the designation of an Islamic state with Islam as its official religion (in Morocco, Art. 6; in Algeria, Art. 2; and in Tunisia, Art. 1), is reflected in the attributes of the various authorities. The head of state in Algeria and Tunisia must be Muslim. The King of Morocco is “Commander of the Faithful” (Art. 19). Religious institutions can

17 Ghassan Salame, Democraties sans démocrates (Fayard, Paris 1994).
have their place in the state, as does the High Algerian Islamic Council, the High Council of Ulemas of Morocco, or the Ministries of Awqaf. Islamic morality can be imposed on institutions (Algeria, Art. 9). At the same time, religious pluralism is recognized; the Moroccan Constitution guarantees the “free exercise of the cults” and the Algerian Constitution declares the “inviolable” freedom of conscience. Finally, political parties have to “respect the values and the fundamental constituents of national identity” (Algeria), at the same time as they are “forbidden to build themselves up on a religious basis” (Tunisia, Art. 8; Algeria, Art. 42).

On all these points, there are convergences, but also differences in historical development and political strategy. In Morocco, the building of the state, of the nation, and of Islam, historically coincided. In Tunisia, the legislation under Bourguiba distanced itself from the Shari’ah, though not from Islam. Legislation in Algeria and Morocco has to do with the way in which Islamist extremism had to be faced.

While the influence of the Shari’ah cannot be underestimated, the fact remains that the constitutions of the countries of the Maghreb do not require the express compliance of legislation with the Shari’ah, as do those of Egypt, Pakistan, Iran, the Gulf States, or Afghanistan. The Algerian Constitution’s ban of practices opposed to Islamic morality is not of the same order. Moreover, there is no mechanism to ensure the Islamic character of legislation. The High Islamic Council, mentioned earlier, has no such role; nor do the constitutional councils, since there is no reference to the Shari’ah or even to customary law in the relevant constitutional provisions that lay down the criteria against which the constitutionality of legislation has to be measured.

One does not find the same kind of arrangement in the Maghreb countries that one finds in Egypt, for example, where the 1980 Constitution, in Art. 2, makes the principles of the Shari’ah the main source of law. This places the constitutional judge in a potentially delicate situation. It invites the courts to supplement the written laws with subsidiary sources that are, according to the civil code itself, custom and the Shari’ah.

If North African constitutional courts were confronted with a similar situation, how would they respond? It remains uncertain whether they would act in the same way as the Egyptian Supreme Constitutional Court, avoiding any Shari’ah reference as long as it had not given rise to implementation through a law. The Court feels entitled to interpret customary law in a way which is compatible with constitutional principles; there are few cases in which it is up to the court to decide between the two. In Algeria, one would not expect the constitutional council to impose the Shari’ah. It is difficult to say what would happen in Tunisia or in Morocco, because the highest authority entitled to interpret the Shari’ah, implicitly or explicitly, is the head of state, whom the courts are not ready to contradict.

Nevertheless, laws can be inspired by the Shari’ah, in particular those concerning the legal status of individuals, family law, and the status of women. This has become more common from the 1970s onward. A good example is the Algerian Family Code of 1984. But the laws can also leave the Shari’ah far behind, as Morocco showed with its Family Code of 2004.

The conformity of civil law with Shari’ah does not meet any constitutional obstacles, possibly because the declarations of principles added to the constitutions remain, so far, too

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18 Waqf (pl. awqaf) is a religiously inspired, charitable endowment to provide assistance to the poor.
imprecise to provide a sufficient basis for a verdict of unconstitutionality. As noted earlier, constitutional councils are reluctant to take decisions based on principles like gender equality.

Judges and public officials also try to avoid any confrontation by looking for harmonizing interpretations. The classic example concerns apostasy, the abandonment of the Muslim religion, something that the Sharī'ah—at least according to the dominating, conservative interpretations—sanctions with capital punishment. Case law bypasses this in each of the countries; Tunisia only deals with the civil effects of apostasy in marriage and inheritance (Court of Cassation, 1966), and Morocco sanctions infringements by members of the Baha’i sect only with a prison sentence.

These harmonization efforts are likely to continue. The countries in question are endowed with relatively old judicial institutions, and have been more exposed to Western influence than the rest of the Arab-Muslim world. The existence of strong, i.e., customary or tribal, mechanisms of conflict resolution alongside the formal judicial institutions would probably highlight the contradictions between Sharī'ah and modern, written legislation, including the constitution. This contrasts with the situation in countries which were never colonized and thus conserved their informal mechanisms of conflict resolution, such as Northern Yemen or Afghanistan.

For various reasons, the countries of the Maghreb seem to be taking a more peaceful way forward than the one followed in Afghanistan, to judge by the debates at the time of the adoption of its constitution in 2004. The confrontation between the religious traditions, supported as they are by Islamism on the one hand, and the principles, rights, and values promoted by the international community, on the other, is no less intense in the Maghreb than it is in the rest of the Islamic world. There are two main differences, however. First, such confrontation has a longer history than in other Muslim countries. Second, the political class does not seem to be ready, or perhaps mature enough, to leave to the judges—even constitutional judges—the power to determine what in the Sharī'ah may be subject to (dynamic) interpretation, how to interpret it, and how to harmonize this interpretation with other sources of law and legislation. It was therefore not surprising that the King of Morocco, when presenting the Qur’ānic bases of the completely new family code in 2004, assumed all these roles himself.

V. THE IMPACT OF FRENCH HERITAGE

It is necessary, finally, to say a word about the French heritage, even if the French legacy is more often denied than openly assumed. Following the French tradition, the rule of law has little to do with constitutionalism in the Maghreb countries.

The Maghreb constitutions are built, mainly, on the model of the French constitutions, particularly the Constitution of 1958. The “rationalized parliamentary government,” then imposed in France by General de Gaulle after decades of short-lived governments and régime d’assemblée seemed to be suitable for these countries. Their elites often had some parliamentary experience, but the ascendancy of the authority of the head of state was necessary and required a certain consensus. In the three constitutions, the powers of the parliament are defined in the style of the institutions of the Fifth Republic in France, as regards the limitation of the domain of the parliamentary statute versus the regulatory power of the

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executive, the initiation of legislation, the right of the head of state to dissolve parliament, the “checks and balances” resulting from a bicameral system, and so forth. The judiciary has difficulties finding its proper place within the separation of powers established by these constitutions. The head of state is given powers to deal with exceptional circumstances. In a broader perspective, as was mentioned in section II of this article, it can be said that the drawing up of constitutions has more to do with the strengthening of the state than with the definition and protection of citizens’ individual rights.

At the same time, the parliamentary system remains a reality, which in the Moroccan experience is more than just a theoretical one. Thanks to an already long parliamentary history and to the institution of the prime minister leading a government that is answerable to parliament, the notion of parliamentary government is already well-established in the country. It is this experience which French constitutionalists recommended—unsuccessfully—to the Afghan rulers in 2004, just as they did in 1964. They thought that this system would strengthen the state more effectively than a strong presidential system deprived of a stable parliamentary majority. Lastly, perhaps related to the historic French example, the executive branch’s control of the observance by parliament of the constitutional limits of its legislative powers helped pave the way for the control of constitutionality.

One should not, however, overestimate French influence, even if a summary made in 1993 of the “circulation of the French legal model” by Philippe Ardant considered that constitutional and public law was the domain where French law had most marked the states of the Arab world. French law still had very little influence over civil law in the Maghreb.

The French influence can be seen in the importance given to the principle of the hierarchy of norms, whereas the concept of constitutionalism was rather neglected. Like the Ottoman Empire, France has had experience of constitutions without constitutionalism. The control of the constitutionality of laws arrived quite late, and, unlike in the Anglo-Saxon countries or the German Federal Republic, would not be exercised by the courts. Constitutional courts do not, in North Africa, act as supreme courts, as their Egyptian equivalent does. All the countries of the Maghreb, once independent, have followed this model, which reserves little place for constitutionalism.

France has since progressed. Since 1971, the French Constitutional Council has extended the parameters of constitutional review—and, by this, the bloc de constitutionnalité—first to the preamble of the constitution, then to the principles of constitutional value built up by its own case law. The constitutional revision of 2008 has only most recently created the possibility for the highest courts of the civil and administrative jurisdiction—the Cour de Cassation and the Conseil d’Etat—to submit legislative provisions to the constitutional council for a review of their constitutionality. This reform reflects an opening to external influences, in particular as a result of the jurisprudence of the European Court of Human Rights.

But will these developments cross the Mediterranean, thanks to the maintained links, through the Association of the French-speaking constitutional courts? French constitutional

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judges consider their colleagues in Algeria and Tunisia less independent than themselves, causing mistrust and distanced relations. The jurists of the Maghreb might begin looking in the other directions for inspiration, toward the Anglo-Saxon countries and to the experience of other Muslim countries confronting Islamism, from Egypt to Afghanistan.

Constitutionalism in the Maghreb might yet be renewed. Caution is called for in assessing a developing situation, but these countries seem to approach the most difficult questions of constitutionalism with a certain degree of wisdom. While they asserted their commitment to the rights declared universal by organizations of the international community, particularly the United Nations, they did not hastily and blindly amend the legislation they had inherited from history and religion, with perhaps the exception of Bourguiba’s Tunisia.

French influence has bequeathed to the Maghreb the concept of secularism. Secularism is part of the political debate in all three countries, as the political class is very concerned with regard to the control of religious movements and their potentially destabilizing effect on the political system. However, the drafters and interpreters of laws and constitutions have not sought confrontation with Islamic movements in the legal field. If they find themselves in a predicament in the future, it is likely that they will stick to the views that emphasize the tolerant nature of Islam and affirm its compatibility with modern human rights concepts.

\[24\] An example of the opposite approach comes from Mayotte, the tiny territory belonging to the French Republic in the Indian Ocean. It is only through a referendum planned for abandoning of laws and particular judicial practices that are against French republican principles.
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Beginning on January 25, 2011, a popular uprising and the subsequent overthrow of the government of President Mubārak led to fundamental constitutional change. On February 13, the Supreme Council of the Armed Forces announced that the 1971 Constitution would be suspended, both houses of parliament dissolved, and that the military would rule for a transition period. A month later, a constitutional referendum relating to some articles of the 1971 Constitution was passed with an overwhelming 77.2 % majority of votes. Then, on March 30, 2011, the Supreme Council of the Armed Forces announced a constitutional declaration (concise interim constitution) that includes the amendments endorsed in the earlier referendum. According to Art. 60 of this document, a new parliament shall elect a constitutional assembly composed of 100 members who will be tasked with the drafting of a new permanent constitution for the country that will need to be endorsed in a popular referendum. These developments have triggered controversial debates over, among other aspects, the role of Islam in the future constitution. This article looks back into the legal history of Egypt in order to provide an informative basis.

1 The approved reforms included a limitation on the presidency to at most two four-year terms, a change in the eligibility criteria for the presidency disqualifies any Egyptian who has dual nationality or is married to a non-Egyptian, judicial supervision of elections, a requirement for the president to appoint a deputy, a commission to draft a new constitution following the parliamentary election, easier access to presidential elections by candidates—via 30,000 signatures from at least 15 provinces, 30 members of a chamber of the legislature, or nomination by a party holding at least one seat in the legislature, and restrict the ability to declare and renew a state of emergency.

2 The role of Islam has not fundamentally been changed in the interim constitution which states that “The principles of Islamic law are the principal sources of legislation.” (Art. 2 sentence 2).
I. RELIGION AND SOCIETY

Throughout history, religion has always been seen as an undeniably significant factor in shaping organized systems of governance whenever and wherever they have existed. Although a growing tendency toward separating state from religion has continued to flourish in modern times, a reflection of prevailing religious beliefs and values in a society is still likely to be apparent in the basic laws and constitutions of modern states. At the time being, any examination of a correlation between a state constitution and a specific religion would certainly trigger a major debate and might even provoke further inquiry into the question to which extent religion, as a fundamental base for the constitutional system of any concerned country, affects the operation of that system. The overreaching experiences of human beings and their ongoing struggle over political power have, in fact, made them adhere to religion at certain times and separate it from the political process at other times.

In fact, when examining this phenomenon, historical experience suggests that religious beliefs are central to almost all human communities. It also shows that the overreaching, dominating role of the clergy has, over time, produced authoritarian religious institutions and increased the scope of their power, not only in religious affairs, but also in political matters and even beyond. It is indeed a dominating power that religious authorities have continuously enjoyed and, therefore, fought to maintain over time under different circumstances, sometimes by using whatever means available at their disposal, both intellectual and physical. In addition, history demonstrates that the increased interference of religious institutions in the running of a state’s affairs had to be confronted at some stage.

II. SECULARISM AND LIMITING THE POWER OF THE CLERGY

With the development of societies, there was a natural reaction to the clergy’s detrimental presence and increasingly powerful status: a reaction that materialized in the advent of secularism as a new movement aimed at limiting the influence of the religious institutions in the running of state affairs and bringing about a new mechanism under which new political actors would not just share, but effectively assume the reins of power. Hence, from a constitutional perspective, history shows us that the degree of association between state and religion has evolved over time, either gradually or dramatically, to the extent that, in modern times, a growing tendency favoring the separation between them has emerged in many parts of the globe, paving the way for secularism to establish itself as a base for the political and constitutional systems of government in many countries. Nevertheless, such separation has been perceived in different ways to the extent that secularism was occasionally understood as being anti-religion or anti-God, while at other times it was looked at as a neutral system that the state adopts in dealing with its subjects, irrespective of their religions.


With the existence of such diverse views on the role of religion within systems of government, it seems that part of the problem here, in both religious and secular traditions, is the lack of an agreement on the terminology. This dissonance is a consequence of different intended meanings for the words religion and secularism. This situation has led to the existing divergence of views between Western and Muslim cultures in this specific area.

In traditional, hard-line Islamic thought, it is common to use the word “secularism” and *kufr* (meaning “non-belief in God”) interchangeably. Therefore, a secularist is a non-believer in God, or *kāfir*, and should be treated as such. On the other hand, in Western societies a different view on secularism has developed over time and has come to widely recognize secularism as a neutral system that is not anti-God or pro-God; but rather as a system that somehow separates religion and state, and meanwhile guarantees equal treatment by the state for all people, believers and non-believers alike, without discrimination against any of them on the basis of religion. A secular state then means a non-religious, not an irreligious, state. In light of that proposition, both equality and religious tolerance are seen as essential components to what we may call a secular state.6

III. THE CASE OF EGYPT

In Egypt’s case, the influence of religion has always been apparent throughout its history, even in most of the state’s regulatory framework.7 When examining the Egyptian constitutional

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6 Among those who reject secularism in Islam is the prominent contemporary Muslim scholar, Sheikh Yusuf al-Qaradawi. In “Al-Hulul al Mustawradah wa Kayfa Jā'at 'alā Ummatinā” (“How the Imported Solutions Disastrously Affected Our Ummah”), he concluded that secularism may be accepted in a Christian society but it can never enjoy a general acceptance in an Islamic society. Christianity is devoid of a Shari‘ah or a comprehensive system of life to which its adherents should be committed. The New Testament itself divides life into two parts: one for God, or religion, the other for Caesar, or the state: “Render unto Caesar things which belong to Caesar, and render unto God things which belong to God” (Matthew 22:21). As such, a Christian could accept secularism without any qualms of conscience. Furthermore, Westerners, especially Christians, have good reasons to prefer a secular regime to a religious one. Their experience with “religious regimes”—as they knew them—meant the rule of the clergy, the despotic authority of the church, and the resulting decrees of excommunication and the deeds of forgiveness, i.e., letters of indulgence. For Muslim societies, the acceptance of secularism means something totally different, as Islam is a comprehensive system of worship (‘ibādah) and legislation (Shari‘ah), the acceptance of secularism means abandonment of Shari‘ah, a denial of the divine guidance and a rejection of Allah’s injunctions. It is indeed a false claim that Shari‘ah is not proper to the requirements of the present age. The acceptance of a legislation formulated by humans means a preference of the humans’ limited knowledge and experiences to the divine guidance: “Say! Do you know better than Allah?” (2:140). For this reason, the call for secularism among Muslims is atheism and a rejection of Islam. Its acceptance as a basis for rule in place of Shari‘ah is downright *riddah*. Sheikh Yusuf al-Qaradawi, “Al-Hulul al Mustawradah wa Kayfa Jā'at 'alā Ummatinā,” 113–14, available at http://islamicweb.com/beliefs/cults/Secularism.htm, accessed September 21, 2009.


7 “Because the role of religion in Euro-American culture differs so greatly from that in ancient Egypt, it is difficult to fully appreciate its significance in everyday Egyptian life. In Egypt, religion and life were so interwoven that it would have been impossible to be agnostic. Astronomy, medicine, geography, agriculture, art, and civil law—virtually every aspect of Egyptian culture and civilization—were manifestations of religious beliefs.” See Emily Teeter and Douglas J. Brewer, “Religion in the Lives of the Ancient Egyptians,” http://fathom.lib.uchicago.edu/1/777777190168/, accessed September 21, 2009.
experience in this context, we could easily detect that Egyptians, by nature, have always been more religious than a secular society, which is reflected in the political structure as well as the constitutional system. Throughout Egyptian history, religion has always been perceived as indispensable to the ordinary man, almost in every aspect of his life. The religious roots in the Egyptian tradition are even much deeper than in other parts of the world. For thousands of years, Egyptians have continued to believe in God and the divine power. Perhaps it is interesting to recall that in ancient times, the Pharaohs not only supported religious practices in their societies but even went as far as to declare themselves as gods, simply to ensure that their people would worship them and show them absolute obedience and respect at all times. The people's spiritual perception of the Pharaoh required them to consider certain formalities in running the state's affairs including the Pharaoh's interaction with the ruled people. Consequently, he or she was almost forced to create and increasingly rely upon a religious body, which gradually became highly influential to the extent that it sometimes threatened the Pharaoh's image and power.

When examining the religious nature of the Egyptian society, it is also interesting to observe that with the advent of subsequent divine revelations—Judaism, Christianity, and Islam—Egypt responded successively to each one of these religions very genuinely, promptly, and positively, which confirms that Egyptians have always been responsive to, and accepting of, religious traditions. Islam arrived in Egypt at an early stage of the Islamic conquest, as early as the seventh century C.E., and has since then established itself as the dominant religion of the country.

From the arrival of Islam in Egypt until the beginnings of the rule of the Muḥammad ʿAlī's dynasty at the beginning of the nineteenth century, basic Islamic notions had already been very influential, profoundly inspiring the society practically without any manifest disturbance. With such a perceptible influence of religious rule it is very unlikely to trace any evidence of the emergence of secular trends prior to that date. Actually, it was not until Muḥammad ʿAlī's rule that the emergence and accommodation of such secular trends within the Egyptian religious society seemed to appear and continued to exist as a consequence of his reform policies and increased interaction with the West. Perhaps, it was an unexpected consequence at the time due to the fact that Muhammad ʿAlī's intentions were largely influenced by Islamic political motivations with an eye on the khilāfa over the Muslim world and the ultimate goal of reviving the Ottoman Empire and modernizing its structure.

Since Muḥammad ʿAlī's era up till now, we have seen various highs and lows in the movement toward separating religion from the state led by Egyptian intellectuals. These Egyptian disciples of enlightenment thinking, who often interacted with the West and drew from its secular teachings, have exerted a great deal of effort to liberate the political process from religion. In so doing, they have usually been under attack from different actors, who perceived and portrayed the liberation of the political order from religion as an act of the devil. The principal provokers of such attacks initially included the religious institutions followed by the laymen and sometimes the political authorities.

The aspiration of the religious institutions to preserve their power explains why these institutions would always be expected to take a strong position in challenging secularism all the way. Public opinion in any religious society is so sensitive to religious teachings that it can easily be misled about the idea of secularism; hence, it can be influenced and motivated against that movement. Finally, what is so interesting is that the state's rulers could be at one time in favor of secularism and at other times be against it, based on their changing political motivations and objectives.

For example, when President Muḥammad Anwar al-Ṣādāt first assumed power in 1971, he led a trend to modernize and restructure the state's political and constitutional systems
in a manner largely influenced by Islamic terms. He gave unprecedented state support to the then-growing Islamist movements. Perhaps because the coalition with Islamist movements did not produce the political results Sādāt had hoped, he reverted to his old policies (until shortly before his dramatic assassination in 1981): he publicly adopted a secular approach encouraging the separation of religion from politics by making it clear that there must be no role for religion in the political process.

IV. ISLAMIC NORMS GAIN CONSTITUTIONAL VALUE: A MODERN TREND TOWARD INTEGRATION

Today, the problem of accommodating political liberalization from religion, or the idea of secularism within religious communities, is no longer confined to the traditional religious notions that resist any attempt at modernization by the separation of religion and state. Rather, a modern, striking, and vitally important element has now been introduced, and eventually included, in this battle, i.e., the ongoing, wide-ranging movement of affirming the religious nature of the state and incorporating Islamic law into the constitutional documents of some countries where Islam is the major religion. In today’s world, there are approximately twenty-two states, with combined populations exceeding six hundred million, that constitutionally declare that Islam is the official religion. In terms of cultural and geographical breadth, the state Islamic religion clause is the most widespread of all possible constitutional formulations regarding Islam.

As of 1971, Egypt has become one of the nation states in the Arab region that adhered to that growing constitutional movement within the Islamic world in favor of incorporating Islamic Sharī'ah into the basic law of the country. Indeed, such important constitutional policy did not occur in a vacuum. Nor was it arrived at suddenly. Rather, it was produced in response to a series of equally significant developments that eventually had a considerable effect on the society from parallel historical, political, and religious dimensions.

Historically, it was not until the middle of the nineteenth century that Egypt began experimenting with written constitutional texts, generally in an effort to confront serious and simultaneous fiscal and international crises with the creditors. The early constitutional experiments did not always raise questions about the relationship between the constitutional text and Islamic Sharī'ah. This was partly because constitutions presented themselves as either consistent with or irrelevant to the application of Islamic law.

In the more recent past, however, there have been some developments, not only in Egypt, but in the wider region. Official claims of implementing the principles of Islamic Sharī'ah have now come to be incorporated into constitutional texts derived far more from European than Islamic legal traditions. The precise formula varies from time to time and state to state, but in most constitutions a juristic paradox is created. On the one hand, the constitution presents itself as the fundamental law of the state and ultimately the expression of the will of a sovereign people; it therefore becomes the law which makes other laws possible. On the other hand, the references to the Islamic Sharī'ah imply (and sometimes

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explicitly state) that a higher or prior law exists.⁹ Egyptian constitutional texts, as well as many other Arab constitutional texts seem to aggravate this paradox for obvious reasons.¹⁰

At the forefront of that paradox emerges the issue of defining and implementing Islamic law in states that honor Islamic Sharī’ah. Unlike standard legislation that is traditionally associated with a body of legal rules produced by a legislative authority within specific formalities and procedures, Islamic law is not initially legislated or codified; it is a jurists’ law derived from the fiqh (understanding of Islamic law or Islamic jurisprudence) developed by the mujtahidūn (Islamic jurists) based on their understanding of the religious texts and sources. In that context, Islamic Sharī’ah—especially as it has come to be understood in recent years—entails not merely general principles, but also very specific rules. Nonetheless, it does not always do so in a way that determines political structure. Although Islamic Sharī’ah is commonly referred to for the sake of simplicity as “Islamic law,” even by Muslims, its nature is more different, broader, and deeper than that might imply. It is better perceived as a method or even a code (based upon religious principles) designed to inform and regulate the conduct of Muslims in all aspects of life, including social, commercial, domestic, criminal, and political affairs, as well as devotional practices. Yet despite such comprehensiveness, Islamic Sharī’ah does not provide explicitly for a specific framework or a particular legal and governmental system. At such a juncture, while some might view Islamic Sharī’ah as incomplete, it is perhaps fairer to view it as flexible, leaving details of the political and legal order—including its procedural as well as substantial aspects—to be determined by Muslims as circumstances dictate, within the broad basic principles of the Sharī’ah.

In addition, the constitutional texts often intensify the paradox when they imply not merely that the Sharī’ah must guide interpretation, but that it supersedes all other legal rules—including, perhaps, the constitution itself. This paradox is not merely theoretical or abstract: much contentious political debate (sometimes resorting to violence) has centered on the proper relationship between the legal order devised by human beings and that derived from divine sources.

Furthermore, in any system of government that upholds Islamic Sharī’ah, a primary important question should be posed. Does Islamic Sharī’ah constitute a presupposed body of substantive rules from which state-enacted legislation should be developed? If the answer is yes, then Islamic Sharī’ah would be considered as a body of supra-legislative norms; hence, state-positive legislation would not be valid unless it conforms to Islamic Sharī’ah. State-enacted legislation is required to conform to Islamic Sharī’ah; however, Islamic law does not acquire validity unless it is incorporated into the state-enacted legislation. This, in fact, suggests that Islamic law on the one hand and state-enacted legislation or secular law on the other, reflect two different autonomous legal orders.

Here, two important issues must be addressed: First, how did Egyptian constitutional texts take the form of inscribing Islamic Sharī’ah? Second, what have been the practical effects of adopting such provisions?

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⁹ In fact, a comparable kind of confusion seems to be widespread in many other constitutional traditions wherein it is not uncommon to argue that the constitution itself is bound by prior or higher principles. In addition, it is widely accepted to argue that constitutions assume certain constitutional principles and must be interpreted in their light. See John Finn’s argument in Constitutions in Crisis: Political Violence and the Rule of Law (Oxford University Press, New York 1991).

¹⁰ See Adel Omar Sherif and Nathan J. Brown, “Inscribing the Islamic Shari’a in the Arab Constitutional Law” in Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (eds), Islamic Law and the Challenges of Modernity (Altamira Press, Walnut Creek 2004).
In discussing these issues, it is important to recall that for almost two centuries, with the emergence of an active movement to restructure the constitutional systems of the Arab region, the early architects of comprehensive constitutions in Egypt (and other parts of the Arab world) were largely satisfied with incorporating symbolic declarations of the prominent role of Islam in the newly promulgated constitutional documents by ultimately stating that Islam is the religion of the state, or by introducing some provisions referring to Islam. However, this had little effect on the constitutional and political practice. But as time went by and popular movements grew in intensity and belligerence, seeking independence and liberation from European invading powers, what emerged as a result was a new and active role for religious institutions (such as Shari’ah courts and institutions of learning), which started to debate the relationship between Islam and the political order, as well as the relationship between positive and Shari’ah law. Yet as such movements continued to develop and Egyptian politics grew increasingly ideological, the symbolic provisions related to Islam were deemed inadequate. Due to the strong religious nature of the society and continuing religious influence, it was no longer enough to simply refer to Islam as the state religion, but lengthy catalogues of principles often grew to include references to the Islamic heritage and values which the state should honor.

Within these lines, a very significant step took place when the 1971 Constitution came into force, including Art. 2, which provides for Islamic Shari’ah to be a principal source of legislation. This was further developed when Art. 2 was subsequently amended in 1980 to provide for Islamic Shari’ah to be not only a principal source, but the principal source of legislation. This provision has been maintained unchanged in the interim constitution promulgated by the Supreme Council of the Armed Forces on March 30, 2011.

The effect of having such a constitutional provision is to suggest a very different basis for the legal order. Rather than the constitution sanctioning Islam as an official religion and observance of the Islamic Shari’ah in specific areas, some juristic interpretations of this provision imply that the Shari’ah supersedes the positive legal order—including, potentially and by implication, the constitution. If the Shari’ah is a principal source—or even the principal source—of legislation, then it becomes possible to argue that it forms the fundamental legal framework. Indeed, it is noteworthy in this regard that constitutional texts tend to refer to the Shari’ah as a basis of legislation that would include all legal enactments, including laws, decrees, administrative regulations, and arguably the constitution, rather than as a basis of laws (qawānīn), which would only refer to a specific category of legislation, which includes statutes or laws passed by parliament or their equivalent.

It is, therefore, not surprising that the constitutional provision in question has emboldened those who seek the Islamization of the political order. Such language makes it possible to challenge legislation that does not seem to be in conformity with Islamic Shari’ah principles on constitutional grounds. In short, it makes it possible—through constitutional jurisprudence—to make the principles of the Islamic Shari’ah a supra-constitutional order.

V. THE JUDICIAL CONTRIBUTION TO THE DEBATE

Following the aforementioned constitutional developments and with the arrival of the new version of Art. 2 in 1980, it was incumbent upon many actors in the society to interact with one another in order to articulate the modern notion of Islamic constitutionalism as suggested by such a constitutional invention. The members of the judiciary were at the forefront of this movement.

Due to the complexity of the judicial structure in Egypt and the coexistence of a wide range of trends and schools of thought within the judiciary, courts of law have diverged
significantly in their understanding of the new constitutional policy. With the exception of the Supreme Constitutional Court that has frequently shown a highly developed and liberal interpretation of Art. 2 in light of the basic guarantees of human rights and freedoms, other courts have occasionally adopted a narrower, more restrictive approach in developing their understanding of Islamic norms by adhering to a somewhat classical interpretation of Islamic Sharī‘ah. This classical interpretation could ultimately be supported by either relevant or irrelevant justifications. Some of the courts’ decisions were highly criticized and even considered, at some point, to be irrational, ill-founded, and contradicting the true tenets of Islamic law.

With the evolving role of the Supreme Constitutional Court of Egypt in the constitutional interpretation process, the Court has, over the last two decades or so, demonstrated an outstanding performance in interpreting Art. 2 through exercising its power of judicial review in constitutional issues. The Court’s jurisprudence has to a great extent liberated the judicial literature from subscribing to traditional formats and in fact has restored many sound interpretations of Islamic notions, putting them back on track, in a way that helps us understand how a constitutional system in a religious country could accommodate everyone without any discrimination against anyone on the basis of religion. The Court’s approach is truly remarkable and has the potential to influence the jurisprudence of other Arab countries. In fact, the pioneering role of Egypt’s legal system means that the Egyptian tradition and experience in the legal and judicial areas are closely observed by other judicial systems and governments within the region.

VI. THE SUPREME CONSTITUTIONAL COURT AND ART. 2 OF THE CONSTITUTION

Challenges to the constitutionality of legislation for its nonconformity with Art. 2 of the Constitution began shortly after the Constitution was ratified in 1971. However, a comprehensive view of Art. 2 was not developed until the text was amended in 1980 and the

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11 On the role of the Supreme Constitutional Court (SCC), see Baber Johansen (n 8) 881–96.
12 Among cases that invited a wide discussion and disagreement in this regard are the famous Naṣr Ḥāmid Abū Zaid matrimonial separation case (Cassation Cases Nos. 475, 478, and 481 for the 65 Judicial Year, decided on August 5, 1996, published in the Technical Office for the Court of Cassation’s Compendium of Decisions, the 47th Year Collections, Part 2, 1134); the Bahā‘is and religion conversion cases (Administrative Judicature Court of the Council of the State (First Circuit) Case No. 7403 for the 60th Judicial Year, decided on April 24, 2007; Administrative Judicature Court of the Council of the State (First Circuit) Case No. 4886 for the 60th Judicial Year, decided on May 29, 2007; the High Administrative Court (First Circuit) Case No. 13496 for the 53rd Judicial Year, decided on February 9, 2008; the High Administrative Court Case No. 14589 for the 53rd Year, decided on February 9, 2008: yet these cases are not published in the official decisions collections of the Council of the State). Also among those issues was an advisory opinion that supported the religious institution’s power to censor audio and audiovisual materials focusing on Islam (The Fatwa (advisory opinion) of the General Assembly of the Advisory Opinion and Legislative Departments of the Council of the State No. 121 on February 10, 1994, issued on February 2, 1994, published in the special volume on Selective Fatwas of the General Assembly of the Advisory Opinion and Legislative Departments of the Council of the State in 50 Years 1947–1997).
The Supreme Constitutional Court was called upon to give its binding interpretation to the meaning of text in a number of constitutional cases.\textsuperscript{14}

The rulings of the Supreme Constitutional Court in this area indicate that the court has established three fundamental assumptions on which its jurisprudence and binding interpretation of the meaning of Shari’ah principles within the constitutional framework are based.\textsuperscript{15} The first of these is that Art. 2 and the remaining articles of the 1971 Constitution form an organic whole. The second assumption is that the constitutional obligation imposed upon the legislature to adhere to Islamic Shari’ah, in accordance with Art. 2, is prospective and not retrospective in nature. Finally, the Court is of the view that the application of Shari’ah principles in constitutional litigation must be based on a distinction between its definitive and non-definitive sources.\textsuperscript{16} Perhaps the most important one of these foundations is the first one, which is the unity of the Egyptian Constitution.

A. The Unity of the Constitution

The unity of the constitution is a prevailing theme that runs throughout the jurisprudence of the Supreme Constitutional Court. In laying down this principle, the Court ruled that the exercise of the power of judicial review requires a rigid constitution ensuring the supremacy of its provisions over other inferior rules. In principle, a constitution is perceived as a living instrument that copes with an advanced democratic system, protects individual liberties, lays the foundations for their development, balances power between the different branches of government within a framework of checks and balances, advances societal values, and promotes openness, human talent, and scientific research.

In the Court’s view, a constitution does not simply reflect norms of a mandatory character, but rather it substantiates advanced concepts which, in their entirety and taken together, are expected to establish new patterns of behavior, subject in all their forms to the rule of law. Constitutional limitations, if adequately observed, will ground all aspects of power in the will of the people, thereby furthering their effectiveness and eliminating any and all deviations therefrom.

Furthermore, a constitution may ensure a better understanding of the relationship between the state and its citizens. It may also fail to match their expected aspirations. However, in both cases, the constitution must remain at the apex of all other rules, being the paramount law of the land. This principle has been incorporated into the preamble of the 1971 Constitution, which proclaims the determination of the people to vigorously ensure its protection and the duty of all authorities to comply with its provisions.

\textsuperscript{14} On the SCC’s Art. 2 jurisprudence, see Chapter 11 in Clark Benner Lombardi, \textit{State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari’ah into Egyptian Constitutional Law} (Brill Academic Publishers, Leiden 2006) 201–69.

\textsuperscript{15} A very interesting argument on Art. 2 of the Egyptian Constitution and the Supreme Constitutional Court jurisprudence can be found in Kilian Bälz’s article on the secular reconstruction of Islamic law: “The Egyptian Supreme Constitutional Court and the ‘Battle over the Veil’ in State-Run Schools” in Baudouin Dupret, Maurits Berger and Laila al-Zwaini (eds), \textit{Legal Pluralism in the Arab World} (Kluwer Law International, London 1999).

\textsuperscript{16} A comprehensive digest of judicial rulings addressing Islamic Shari’ah issues in the jurisprudence of the Supreme Constitutional Court of Egypt is published in the recently printed Arabic volume \textit{Collection of the Principles adopted by the Supreme Constitutional Court in Forty Years 1969–2009}. This volume is published by the court on the occasion of celebrating its fortieth anniversary.
This view of the constitution leads the Supreme Constitutional Court to deny the supremacy of a particular constitutional text over the remainder of the constitution. Instead, the Court has insisted that constitutional provisions do not clash with one another, but collectively form an interrelated, organic whole, to be expounded by coordinated methods of construction that preserve and protect society-oriented values.\textsuperscript{17}

In the Court’s view, the constitutional provisions are to be understood as a coherent, harmonized body of rules, reconciled and brought together to the extent that none of them is to be viewed as standing in isolation of the other.

Undoubtedly, this rule extends to Art. 2 of the Constitution and therefore, Islamic Shari‘ah should always be perceived in a way that assures its harmony with other constitutional requirements. Hence, Art. 2 shall not be used to undermine the rest of the text; instead, the various provisions of the Egyptian Constitution must be viewed as a homogenous whole.\textsuperscript{18}

\textbf{B. The Prospective Nature of Art. 2}

The second foundation is that relating to the prospective nature of Art. 2. The Supreme Constitutional Court has ruled that the binding obligation to derive legislation from the principles of Islamic Shari‘ah applies only to the future. Legislation passed before the 1980 amendment cannot therefore be contested on constitutional grounds as violating Islamic Shari‘ah. The Court established this principle in early constitutional litigation back in the 1980s. The constitutional issue in question concerned the usury, or \textit{ribā}, issue and the question whether charging the University of Al-Azhar interest on commercial debt violated Islamic Shari‘ah, and hence contradicted the constitution.\textsuperscript{19}

\textsuperscript{17} See Constitutional Case No. 23 of the Fifteenth Judicial Year, decided the February 5, 1994. In this case the constitutional issue was brought directly before the Court by the petitioner, who challenged the validity of Arts. 76 and 77 of the constitution. Art. 76 empowers the parliament to nominate the candidate for office of president, while Art. 77 provides that the term of the presidency is not restricted by any time limit, but is open-ended, entitling the occupant of this office to be reelected indefinitely. The petitioner asserted that both articles violate public rights and freedoms and, in particular, deny the right of every citizen to equal treatment before the law and the right to elect and be elected. The Court concluded, for the reasons explained above, that it lacked jurisdiction over these claims.

\textsuperscript{18} This same understanding was advocated by the drafting committee for the 1980 constitutional amendment. The committee’s report stated that “it is evident that any provision in the Constitution should be interpreted in harmony with, not in isolation of, other provisions. This is also applied to the interpretation of the amended Article Two of the Constitution . . . ” See the above-quoted Constitutional Case No. 23 of the Fifteenth Judicial Year, decided the February 5, 1994 (n 17).

\textsuperscript{19} Constitutional Case No. 20 of the First Judicial Year, decided on May 4, 1985. Background information on the case: a judgment of the Administrative Judicature Court of the Council of the State had ruled against Al-Azhar University during the 1970s, charging the university interest on commercial debt. The proceedings in this action had seen the rector of the university, together with the minister of \textit{awqāf} and the dean of the university’s Faculty of Medicine, ordered to pay a creditor the balance of the price of surgical instruments supplied to the university. The trial court had also ordered the university to pay interest on this amount at the rate of 4 percent, starting from the date of filing the action. The ruling was based on Art. 226 of the Civil Code, adopted by the parliament in 1948, which imposed post-judgment interest on nonpayment of debt. When this ruling was appealed before the High Administrative Court, the rector of Al-Azhar challenged the constitutionality of Art. 226 and received a permission from the appellate court to file his constitutional allegation before the SCC. He then filed the Constitutional Case No. 20 for the first judicial
Legal observers expected that the Court would either uphold the provision in question or declare it unconstitutional. Instead, the Court issued a ruling rejecting the claim of unconstitutionality while avoiding a ruling based on its interpretation of the Islamic Shari‘ah. The judgment of the Supreme Constitutional Court (issued on May 4, 1985) established an important legal principle within its apparently narrow ruling. The critical point involved the Court’s approach to the temporal limits of the application of Art. 2, and to the question of whether it could be applied retroactively. The Court reviewed the drafting committee’s report defining the meaning of the 1980 amendment and concluded that the requirement that all legislation be consistent with the Shari‘ah was meant to apply only from the adoption date of the constitutional amendment, that is May 22, 1980. All legislation passed after that date must be consistent with the Shari‘ah as well as other constitutional requirements. The Court held that Art. 2 is a limitation on the legislature, which must determine for itself whether legislation adopted before May 22, 1980, is consistent with Islamic Shari‘ah. By implication, the Court would review all contested legislation enacted after that date for consistency with the Shari‘ah and hence the constitution.

Based on this concept, the Court ruled that the true purpose of the amendment was to limit the legislative power of the legislature, which logically could only be exercised on future occasions. Yet the Court did not free the legislature of any responsibility for ensuring that pre-1980 legislation conformed to Shari‘ah principles. On the contrary, the Supreme Constitutional Court imposed a political responsibility on the legislature to initiate new legislation to amend such existing legislative texts that are clearly in contradiction to the principles of Islamic Shari‘ah. Both existing and future legislation, eventually, have to be consistent with Islamic Shari‘ah.

This understanding, in fact, was supported and confirmed by a statement from the Report of the General Committee of the People's Assembly, dated September 13, 1981, presented to and approved by the Assembly on September 15, 1981, in which the Committee explained that the amendment meant to mandate the revision of laws in effect before the application of the Constitution of 1971, and to amend these laws in such a manner as to make them conform to the principles of Islamic Shari‘ah.

It should be noted that although the SCC failed to reach the ribā issue in Al-Azhar case, it had dealt with it substantively, soon after, in the Constitutional Case No. 93 for the 6th judicial year, decided on March 18, 1996. In this case, a company was late in payment of its taxes and was, therefore, assessed a late penalty in the form of interest on its obligation. The tax agency proceeded to confiscate the company’s property in order to pay the obligation and late penalty; then the company claimed that this interest is ribā, prohibited by the Qur‘ān. The Court determined that Art. 2 was applicable and that the agreed peremptory norm of Shari‘ah was that ribā is defined as “an agreement between a creditor and debtor to extend payment deadline in return for additional interest money.” When the Court examined the transaction in question, however, it found that there was no agreement between creditor and debtor. The company had not borrowed money for which an extension had been requested. The Qur‘ānic prohibition, therefore, did not apply to this transaction, which led the Court to reject the unconstitutionality allegation.

The report added that the departure from the present legal institutions of Egypt, which go back more than one hundred years, and their replacement in their entirety by Islamic Shari‘ah, require patient efforts and careful practical considerations. Consequently, the change of the whole legal organization should not be contemplated without giving the lawmakers a chance and a reasonable period of time to collect all legal materials and amalgamate them into a complete system within the framework of the Qur‘ān, the Sunnah, and the opinions of learned Muslim jurists and imāms.
The non-retroactivity application of Art. 2 was first decided in the Al-Azhar case in 1985 but has since become a well-established principle of judicial review, echoed in all subsequent cases dealing with this article, especially those that pertained to legislation adopted prior to the 1980 constitutional amendment.

C. The Distinction between Definitive and Non-Definitive Norms of Islamic Shari‘ah

The third principle is that relating to the distinction between definitive and non-definitive norms. This is the final and most complex principle developed by the Court, based on an evaluation of the normative content of Shari‘ah rules. In essence, the Supreme Constitutional Court has held that Shari‘ah-based norms have different values: such norms are either definitive or non-definitive. In defining Islamic Shari‘ah principles, the Court ruled that definitive principles are Islamic norms that are not debatable, either with respect to their source or their precise meaning. Such definitive norms must be applied. All other Islamic norms are non-definitive in that they are susceptible to different interpretations and—due to their nature—changeable in response to the exigencies of time, place, and circumstance. This flexibility in the eyes of the Court reflects not a defect in the Shari‘ah but a strength, because it allows the principles to be adapted to changing realities and ensures their continued vitality and elasticity. Only in the realm of Islamic non-definitive norms may the legislature intervene to regulate matters of common concern and serve relevant interests. It must do so consistently with basic Islamic norms, the aim of which is the preservation of religion, reason, honor, property, and the human body. The legislature may develop different practical solutions to meet changing societal needs. The Supreme Constitutional Court regards the bulk of Islamic non-definitive norms as highly developed, intrinsically (essentially) in harmony with changeable circumstances, rejecting rigidity, and incompatible with absoluteness and obstinacy.

Arriving at the best non-definitive rule requires the exercise of *ijtihād*; that is the governing process of determining the best applicable rule within non-definitive norms. *Ijtihād* within the non-definitive provisions in Shari‘ah is a process of reasoning to deduce practical rules to regulate the lives of the people and serve their best interest. It should, therefore, cope with the context of events prevalent at the time. While the legislature might choose a specific interpretation as the basis of legislation, it cannot give that interpretation the status of binding doctrine, except for those who accept it. The Court’s jurisprudence is based on the view that such a broad range of possible interpretations is a sign of divine mercy that encourages Muslims to think and discuss, diminishing the possibility of human error. The existence of non-definitive norms is also a means to ensure that Islamic Shari‘ah will constantly develop and provide the flexibility to accept the *ijtihād* of responsible people in order to realize the best interest of the people.

Therefore, when invoking Islamic Shari‘ah, the Court first searches for definitive norms, and if none exist, considers the *ijtihād* that is consistent with the challenged legislation and serves the interest of the people. Then the Court examines the goals of the legislation in question. Finally, the Court determines whether or not the challenged provision is consistent with the interests of the people, and determines its constitutionality in accordance with the conclusions reached on this point.22

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22 See the *niqāb* case; Constitutional Case No. 8 of the 18th Judicial Year, decided on May 18, 1996. See also Nathan J. Brown and Clark Benner Lombardi, “The Supreme Constitutional Court of Egypt on Islamic
Egypt, by its very nature and history, has always been a religious country. Religious values, teachings, and traditions are well-established in the social fabric and have therefore shaped the constitutional system to an extent that reveals how influential Islamic Shari‘ah has become in the state constitution. In addition, Egypt has in recent years followed a modern trend that is becoming widespread in Islamic countries, i.e., the incorporation of references to Islamic Shari‘ah into state constitutional documents. In defining Islamic Shari‘ah rules and the scope of their implementation, a new important actor has emerged. The Supreme Constitutional Court, despite broadening the discretion of the legislature when enacting state law, has nevertheless taken control of the authoritative interpretation of Art. 2. It has declared its commitment to the principles of Islamic Shari‘ah by which the court and all other powers and individuals shall abide. Nonetheless, the Supreme Constitutional Court reserves for itself the right to determine the substance of these rules. This means that the power of providing authoritative interpretation of Islamic law has somehow, and to a great extent, been transferred from independent jurists to the court.

However, it should be noted that the endeavors exerted by the court in this regard, which are associated with the three basic elements it has established for rendering its binding interpretation of Art. 2 of the 1971 Constitution (namely the unity of the constitution, the prospective applicability of Art. 2, and the distinction between definitive and non-definitive norms of Islamic Shari‘ah), have helped the court establish a new theory for interpreting Islamic Shari‘ah and *ijtihād* in the Modern Islamic state. Yet, the theory is not fully developed and additional endeavors and—assuming that the next permanent constitution of the country will remain in this line of tradition—contributions from the court will be needed to establish a more robust, modern theory in future jurisprudence.
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I. INTRODUCTION

Turkey is one of the relatively few Muslim-majority countries that have officially declared themselves “secular.” A recent study shows twenty such countries among a total of forty-six Muslim-majority states. Of those, thirteen explicitly mention the word “secular” in their constitution, while the remaining seven can also be considered secular states since they have no established religion, although the word “secular” does not appear in their constitutions. A closer look suggests that of the twenty, six are former Soviet Union states (Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan) and two others are former Soviet-bloc countries (Kosovo and Albania). Eight are African states, formerly colonies of secular Western powers. In the core Muslim areas of the Middle East, only Turkey, Syria, and Lebanon—its religiously mixed country—qualify as secular states.¹ No doubt, Turkey is the earliest and the most radical example of this category, as will be illustrated below.

II. THE DEVELOPMENT TOWARD SECULARISM SINCE THE NINETEENTH CENTURY

The Ottoman Empire, the predecessor of the Republic of Turkey, was not a theocratic state, although Islam was the established religion. First, the religious class had no corporate personality and autonomous identity of its own vis-à-vis the state. The personnel of religious services were just the servants of the state, like other state officials, dependent on it for their appointments, salaries, and dismissals. Second, due to the paucity of public law rules in the Islamic Shari’ah, there has always been a large area in the Ottoman Empire for secular or

man-made laws, especially in matters of government and administration. Thus, it is signifi-
cant that one of the greatest Ottoman sultans, Süleyman the Magnificent, is called, in
Turkish, Süleyman the lawmaker, or the legislator (Kanuni).

It is also noteworthy that the secularization of the Ottoman Empire started in the nine-
teenth century, in the era called the “Reform” period (Tanzimat). Some Western laws, par-
ticularly the penal and commercial codes, were adopted on the basis of French laws, and the
administrative system was reformed again, largely inspired by the French model, while most
of the civil law relations (notably, personal status, marriage, divorce, and inheritance)
remained based on the Shari‘ah. The Constitution of 1876—the first in the Muslim
World—established Islam as the religion of the state; however, it declared that the free exer-
cise of all known religions in the Ottoman lands and the continuation of the privileges
granted to religious communities were under the guarantee of the state (Art. 11). The
Constitution also recognized the principle of the equality in rights and duties regardless of
religious and sectarian differences (Art. 17), and declared that all subjects of the Ottoman
state would be called “Ottomans,” regardless of religious and sectarian differences (Art. 8).

The 1924 republican Constitution, prepared by the National Assembly, dominated by
Kemalists, but before the installation of a single-party regime and the launching of a radical
secularization program, declared Islam as the state religion (Art. 2) and empowered the
Grand National Assembly to implement “the provisions of the Shari‘ah” (Art. 26). These
and the other religious references (such as those in the oaths of the President of the Republic
and of the deputies), were removed from the Constitution in 1928, and secularism was
incorporated in Art. 2 in 1937 as one of the basic characteristics of the Republic, together
with the other five principles of Kemalism: republicanism, nationalism, populism, statism,
and revolutionism.

The Constitutions of 1961 and 1982 followed the same tradition and declared secular-
ism as one of the fundamental characteristics of the state in both their Arts. 2. Furthermore,
both constitutions took strong precautions to protect the secular nature of the state. For
example, the last paragraph of Art. 24 of the 1982 Constitution, which was identical with
the last paragraph of Art. 19 of the 1961 Constitution, states that “no one shall be allowed
to exploit or abuse religion or religious feelings, or things held sacred by religion, in any
manner whatsoever, for the purpose of even partially basing the fundamental social, eco-
nomic, political, or legal order of the state, or the purpose of obtaining political or personal
benefit or infl uence.” Similarly, Art. 68 (Para. 4) of the 1982 Constitution, like its predeces-
sor, states that “the statutes and programs as well as activities of political parties shall not
conflict with . . . the principle of the democratic and secular Republic.” Parties that violate
this provision would be permanently dissolved by the constitutional court (Art. 69,
Paras. 5 and 6).

Art. 174 of the 1982 Constitution, which was identical with Art. 153 of the 1961
Constitution, provides special protection for the secularizing reform laws of the 1920s and
the 1930s, according to which “no provision of the Constitution can be construed or inter-
preted as rendering unconstitutional the Reform Laws indicated below, which aim to raise
Turkish society above the level of contemporary civilization and to safeguard the secular
character of the Republic, and which were in force on the date of the adoption by referen-
dum of the Constitution of Turkey.” These laws, although they can be changed or repealed
by the legislature, cannot be nullified by the constitutional court. Thus, in a sense, they are
put above ordinary legislation, even if they are not elevated to the level of constitutional
norms. Among the laws enumerated in the article are those on the unification of the educa-
tional system (i.e., the abolition of religious schools), civil marriage, adoption of interna-
tional numerals, adoption of the Latin-based Turkish alphabet, the prohibition of the
wearing of certain garments and of the use of certain titles, and the wearing of hats. In addi-
tion, in the preamble and the main text of the constitution, as well as in many other laws,
Secularism in Islamic Countries

there are numerous references to secularism and Mustafa Kemal Atatürk's principles and reforms. For example, education should be carried out “in the direction of Atatürk's principles and reforms” (Art. 42). The state shall take the necessary measures to ensure that the youth shall be raised “in the light of positive science, in the direction of Atatürk's principles and reforms” (Art. 58). The Directorate of Religious Affairs shall perform its functions “in the direction of the principle of secularism” (Art. 136). Even a new institution—the Atatürk Supreme Council of Culture, Language, and History—was created by the 1982 Constitution in order “to research, propagate, and disseminate Atatürkist thought and Atatürk's principles and reforms” (Art. 134).

The secular system of government is sanctioned not only in the constitution, but also in many laws. Since the adoption of the Swiss Civil Code in 1926, even areas such as personal status, family law, and the law of inheritance, which have proved to be most resistant to secularizing efforts in other Muslim countries, have been regulated by entirely secular provisions. Until 1991, Art. 163 of the Criminal Code criminalized propaganda that sought to establish the fundamental social, economic, political, or legal order of the state on religious principles—in other words, Islamist propaganda. Even after the abolition of Art. 163, another article of the Criminal Code (Art. 312) has been used by the courts as an umbrella clause to punish this kind of act. Art. 312 criminalized incitement to enmity and hatred on the basis of differences of social class, race, religion, sect, and region. Many well-known public figures with Islamist leanings, including Prime Minister Recep Tayyip Erdogan and former Prime Minister Necmettin Erbakan, were sentenced to prison terms for allegedly violating this article. Art. 312 was amended on February 19, 2002. As amended, such expressions constitute a criminal offense only if they create a threat to public order. The new Criminal Code that went into force on June 1, 2005 brought about a further improvement by establishing the criterion of a “clear and present danger.”

III. THE DISTINCT CHARACTER OF TURKISH SECULARISM

Indeed, secularism, together with republicanism, Turkish nationalism, and a highly centralized unitary state, has been one of the main pillars of the Kemalist ideology. It is commonly agreed, however, that Turkish secularism (or laïcité) developed in ways that are significantly different from the prevailing notions of secularism in Western democracies. In the West, secularism is basically understood as the separation of state affairs and religion. It is also commonly accepted that this implies the absence of a state religion or an established church, freedom of religion and conscience for all citizens regardless of religion and sect, full equality before the law and access to public office, again, regardless of religion and sect, the absence of a legal requirement for state acts to conform to religious rules and injunctions, and the separation of institutions performing religious services and government activities. Some Western democracies do not meet even these minimal conditions. Thus, the constitutions of Norway and Denmark declare the Evangelical-Lutheran Church as the established church, and the Greek Constitution of 1975 declares the Eastern Orthodox Church as “the prevailing religion in Greece.” In England, the King (or the Queen) is the head of the Anglican Church. The Irish Constitution of 1999 and the Polish Constitution of 1997 also contain references to Christianity. Despite these seemingly significant differences in constitutional formulas on church-state relations, it remains a fact that religion no longer plays a determining role in the public life of the advanced industrial democracies. 

Differences in state policies toward religion, even among secular states, have led scholars to distinguish between different conceptions of secularism. Thus, Charles Taylor distinguishes between secularism based on a “common ground strategy” and secularism defined as “an independent political ethic.” While the former aims at establishing “a certain ethic of peaceful coexistence,” and “a state which is evenhanded between religious communities, equidistant from them,” the latter leads to the exclusion “of religion altogether from the public domain. The state upholds no religion, pursues no religious goals, religiously-defined goods have no place in the catalogue of ends it promotes.”

Similarly, Ahmet Kuru distinguishes between “passive secularism” and “assertive secularism.” Passive secularism, which corresponds to Taylor’s common ground model, requires that the state plays a passive role in avoiding the establishment of any religion, but . . . allows for the public visibility of religion. Assertive secularism, in contrast, means that the state excludes religion from the public sphere and plays an “assertive” role as the agent of a social engineering project that confines religion to the private domain. Thus, passive secularism is a pragmatic political principle that tries to maintain state neutrality toward various religions, whereas “assertive” secularism is a “comprehensive doctrine” that aims to eliminate religion from the public sphere.

In this typology, Turkey is clearly the leading example of assertive secularism. The Kemalist founders of the Turkish Republic conceived of secularism not as the simple separation of the state and religion, but as a “comprehensive doctrine,” as a total way of life guided by rational and scientific thought. In this sense, Kemalist secularism was heavily influenced by the nineteenth-century French positivist philosophy of Auguste Comte and others. As such, it is based on both modernist and civilizational philosophical foundations. Modernist in the sense that it believes in an inevitable evolution from backward traditional societies based on religious dogmas to developed modern societies based on science and reason. It is civilizational in the sense that it posits a fundamental difference between Islam and Christianity. Since Kemalist secularism regards Islam as an all-encompassing doctrine that regulates every aspect of life and recognizes no difference between the state and religion, unlike Christianity, stricter state controls on religious activities are needed in Muslim societies than in Christian societies. It will be shown below that both postulates are strongly reflected in the Turkish Constitutional Court’s rulings on secularism.

Even though Turkey, together with France, is presented as the leading example of assertive secularism, there is a fundamental difference between these two countries, and Turkey deviates significantly from the standard model of secular state. As opposed to the strict separation between the church and the state in France, in Turkey all religious services are performed by a state institution, namely the Directorate of Religious Affairs. The Directorate, dating back to 1924, was elevated to the level of a constitutional body by both the 1961 and the 1982 Constitutions. Under Art. 136 of the latter, “the Directorate of Religious Affairs

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that is within the general [public] administration performs the duties specified in its special law, in the direction of the principle of secularism, remaining outside all political views and thoughts and aiming at national solidarity and integration. The Directorate is fully funded through the state budget and its personnel are civil servants just like all other civil servants. Moreover, Art. 89 of the Law on Political Parties prohibits political parties from pursuing the aim of ending the public status of the Directorate, under the sanction of closure. Thus, Turkish secularism appears as a system of state-controlled religion, rather than the separation of the state and religious institutions.

The constitutional court, in a ruling under the 1961 Constitution, held the official status of the Directorate to be compatible with the principle of secularism. In the view of the court,

... because of the special characteristics of the Christian religion, the separation of the state and religious affairs in the sense of the independence of the Church is acceptable. Since in the Western states the exploitation and abuse of religion does not produce the same result as in our country... the independence of the Church does not pose a threat to the order of the state. Whereas Islam not only regulates religious beliefs pertaining to the conscience of individuals but also all social relations, historical experiences teach us that such a limitless and uncontrolled freedom of religion and the concept of an independent religious organization poses extremely grave dangers for our country.\(^6\)

The constitutional court reiterates the same view in a more recent ruling, arguing that the fundamental objective of the constitution was the Turkish nation's attainment of "the level of contemporary civilization" and many restrictions foreseen by the constitution are justified by this fundamental objective.\(^7\) Both decisions clearly reflect the civilizational concept of secularism referred to above. Needless to say, this is an extremely reductionist approach, since neither Christianity nor Islam is a monolith, and both produced very different interpretations in different times and places.

Another irony is that, despite the assertive character of Turkish secularism, the 1982 Constitution made the teaching of "religious culture and ethics" compulsory at primary and secondary schools, although it had been optional before then. It is a further irony that this was done under the military regime of 1980–1983, even though the military is generally viewed as the staunchest defender of Kemalist secularism. The purpose was probably to teach an official and "enlightened" version of Islam. In practice, however, these courses turned into the inculcation of the teachings of the dominant Sunni sect to the consternation of the minority heterodox Alevi sect. In 2007, the European Court of Human Rights found the present way of teaching of such courses in violation of the European Convention of Human Rights, even though it did not reject compulsory religious courses in principle.\(^8\)

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\(^6\) Constitutional Court decision, E.1970/53, K.1971/76, October 21, 1971, AMKD (Constitutional Court Reports), No. 10, 60–70.


\(^8\) European Court of Human Rights, Case of Hasan and Eylem Zengin v. Turkey, Application No. 1448/04, October 9, 2007.
IV. THE TURKISH CONSTITUTIONAL COURT AS DEFENDER OF ASSERTIVE SECULARISM

The Turkish Constitutional Court has always been one of the principle defenders of assertive secularism. The Court’s modernist or positivistic conception of secularism can be most clearly seen in its following reasoning: The Court argued that “secularism has separated religiosity and scientific thought” and speeded up the march toward civilization. In fact, secularism cannot be narrowed down to the separation of religion and state affairs. It is a milieu of civilization, freedom and modernity whose dimensions are broader and whose scope is larger. It is Turkey’s philosophy of modernization, its method of living humanly. It is the ideal of humanity. . . The dominant and effective power in the state is reason and science, not religious rules and injunctions. . . It is the last stage of the intellectual and organizational evolution of societies. . . In a secular order religion is saved from politicization, ceases to be an instrument of government, and left to the individuals’ conscience, its real and respected place. Thus, science and law become the basis of political life.9

With this Comteian reasoning considering secularism “the last stage in the intellectual and organizational evolution of societies,” the Court annulled a law designed to lift the ban on headscarves at universities. Clearly, this notion of secularism recognizes a legitimate place for religion only in the “individuals’ conscience,” and denies it any role in the public sphere.

The assertive character of Turkish secularism is at odds with the religious values of a majority of Turkish population. In a nationwide survey in 1999, 96.9 percent of the respondents described themselves as Muslims; only 3 percent did not belong to any religion. Similarly, very high percentages of the respondents stated that they worshipped regularly. Additionally, 91 percent reported that they fasted everyday in the month of Ramadan. Of the male respondents, 84.2 percent attended Friday prayers, and 91.9 percent religious holiday prayers. However, the percentage of those who regularly pray five times a day is much lower, at only 45.8 percent. To be sure, high degrees of religiosity do not necessarily mean support for political Islam or a Shari’ah-based government. The same survey puts the percentage of Shari’ah supporters at 21.2.10 Interestingly, there seems to be a significant decline in the support for Shari’ah in recent years. Thus, a 2006 follow-up survey by the same scholars gives this figure as only 8.9 percent. The latter survey showed that 76.2 percent of the respondents were opposed to a Shari’ah-based state, and 14.8 percent did not answer or had no opinion.11 The decline in the Shari’ah support is also supported by three other surveys conducted by TÜSES,12 a leading social democratic think tank. Thus, while their 1996 survey showed the percentage of the Shari’ah supporters as 26.7, this figure dropped to 19.8 in 1998 and 9.9 in 2002.13 Furthermore, it may be argued that all pro-Shari’ah voters may not necessarily favor the literal application of all Shari’ah rules. When asked about the more specific rules of the Shari’ah, the approval rate fell considerably. For example, while the

12 I.e. Türkiye Sosyal Ekonomik Sosyal Araştırmalar Vakfı, or Turkish Foundation for Social, Economic and Political Research Foundation.
1999 Çarkoğlu-Toprak survey shows the total of pro-Shari‘ah voters as 21.2 percent, only 10.7 percent were in favor of polygamy, 13.9 percent were in favor of divorce in accordance with Islamic rules, and 14 percent favored the application of Islamic rules in matters of inheritance.\(^{14}\)

Thus, the conflict in Turkey seems to be not on the principle of secularism, but between the two conceptions of secularism referred to above as passive secularism and assertive secularism. Since the transition to a plural party system in 1946–1950, the center-right parties (Democratic Party, Justice Party, Motherland Party, True Path Party, and now the Justice and Development Party, AKP) have consistently favored some version of passive secularism, and they have enjoyed a clear superiority at the polls.\(^{15}\) In a country with a strong majority of devout and socially conservative Muslims, this is not at all surprising. On the other hand, the Turkish center-right parties, including the present governing party, the AKP, have never repudiated secularism in the sense of the separation of the state and religion. Thus, it is stated in the AKP’s Program that “secularism allows people of all religions and beliefs to practice their religion in peace, to express their religious convictions and to live accordingly, but also allows people with no religious beliefs to organize their lives in their own direction. Therefore, secularism is a principle of freedom and social peace.”\(^{16}\)

Similarly, Prime Minister Erdoğan stated that the AKP

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\ldots \text{while attaching importance to religion as a social value, does not favor a style of politics based on religion, the transformation of the state on an ideological basis, and organization on the basis of religious symbols. Politics based on religion, using religion as an instrument, and pursuing an exclusionary policy in the name of religion will harm both social peace and political pluralism, as well as religion. There is a very serious difference between being a party which attaches importance to religion and to the pious people and accepts the social functions of religious values, and being a party which aims to transform the society by force with the aid of the state apparatus by transforming religion into an ideology.} \]

V. RECENT CONTROVERSIES ON SECULARISM

Against this understanding of passive secularism, assertive secularism also has strong supporters in Turkey, notably: the second largest political party, The Republican People’s Party (CHP), the military, the constitutional court and a large part of the judiciary in general, much of the mainstream media, and academia. This alliance has been able to frustrate the moves of the past and the present center-right governments to relax some of the strict

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14 Çarkoğlu ve Toprak, Türkiye de Din, Toplum ve Siyaset, 16.
15 In the fourteen general parliamentary elections between 1950 and 2002, the voting percentage of the right parties ranged between 55.7 and 68.5. The average vote percentage of the right parties over these years is 63.0, while that of the left parties is 34.3: Ergun Özbudun, “Changes and Continuities in the Turkish Party System” (2006) 42 Representation 129–131. In the 2007 parliamentary elections, the total vote for the right parties approached 80 percent.
ultra-secularist practices. As in many other countries, the conflict between the two sides has centered on “policies toward religion in schools because both attach importance to shaping the worldview of the younger generation.” More particularly, three such issues are those of the headscarf ban, the Imam Hatip schools, and the Qur’an courses.

A. The Headscarf Issue

The root of the headscarf issue goes back to the mid-1980s. As a response to the practice of some university administrators prohibiting the wearing of a headscarf at the universities, and the rulings of the Council of State that functions as the highest administrative court upholding their practice, the then-majority party, ANAP, passed a law (No. 3511) in 1988 allowing female university students “to cover their hair and their necks because of their religious convictions.” The law was challenged by the then-President of the Republic Kenan Evren, and the constitutional court found it unconstitutional in its ruling referred to above (n.7), arguing that in a secular system laws cannot be based upon religious rules and injunctions.

Upon the annulment of the law, the ANAP majority made a second attempt by passing a law (No. 3670) on October 25, 1990 to lift the headscarf ban at the universities. The new law stipulated that “attire is free at the institutions of higher education so long as it is not against the laws in force.” This time the main opposition party (Social Democratic Populist Party) challenged the law before the constitutional court. The court ruled on April 9, 1991 that the law was not unconstitutional, but it had to be interpreted in the light of the court’s earlier decision. The court argued that the term “laws in force” also included the constitution itself, and since it was already established that the wearing of headscarf was against the constitutional principle of secularism, the new law could not and did not abolish the ban.

The AKP government made no attempt to lift the headscarf ban during its first term of office. Prime Minister Erdoğan and other party spokesmen often stated that there was a social consensus for the lifting of the ban, but not an “institutional consensus,” obviously referring to the opposition of the CHP, the military, and the judiciary, and promised that they would seek to obtain institutional consensus as well. Indeed, survey research has shown that over 70 percent of the respondents (76.1 percent in 1999 and 71.1 percent in 2006) were in favor of lifting the ban at universities. An institutional consensus, however, has never materialized.

The headscarf issue, dormant during the first term of the AKP government, suddenly became the number one issue of the political agenda in early 2008. Erdoğan, in a press
conference in Madrid, stated that the ban should be lifted even if the headscarf is used as a political symbol. He added that there was no need to wait for the adoption of a new constitution and that the problem could be solved by a simple, “one sentence,” constitutional amendment. The Prime Minister’s statement was strongly criticized by the CHP, but surprisingly supported by the second largest opposition party, the ultra-nationalist MHP. Following intensive talks between the two parties, they agreed on an amendment proposal concerning Arts. 10 and 42 of the Constitution. The change in Art. 10 concerning equality involved the addition of the phrase “in the use of all kinds of public services.” Art. 42 on the right to education was also changed by adding a new paragraph: “No one shall be deprived of his/her right to higher education for any reason not explicitly specified by law. The limits on the exercise of this right shall be determined by law.” The amendment was passed by a large majority (411 votes), including the deputies of AKP, MHP, and the Kurdish nationalist party DTP and some independents.

The secularist opposition (CHP and the Democratic Left Party) took the matter to the constitutional court, and on June 5, 2008, the court annulled the amendments on the grounds of their alleged incompatibility with the principle of secularism referred to in the unamendable Art. 2 of the Constitution. The court’s decision led to a heated debate among politicians and constitutional scholars, since Art. 148 of the constitution limits the court’s competence regarding constitutional amendments to a merely procedural (i.e., not substantive) review. Moreover, the constitution limits such review to three specific procedural aspects, namely, whether the amendment is proposed and adopted by requisite numbers and whether it is debated twice. The constitution has no explicit or implicit rule allowing the court to review the compatibility of a constitutional amendment with the first three unamendable articles of the constitution. Thus, the court’s interpretation amounts to an almost complete usurpation of the constituent power by the constitutional court and an extreme example of “juristocracy.”

To add insult to injury, on March 14, 2008, the chief Public Prosecutor of the Court of Cassation started prohibition proceedings against the AKP, based on Arts. 68 and 69 of the constitution. He claimed that the AKP had become the focal point of anti-constitutional activities intended to undermine the secular character of the Turkish Republic. On July 30, 2008, the constitutional court announced its ruling on the AKP case. Even though a majority of the judges (six out of eleven) voted in favor of banning the party, the qualified majority (three-fifths or seven members out of eleven) required by the constitution for party dissolution was not obtained. Therefore, the party was not banned, but ten members concluded that the AKP has become a focal point of anti-secular activities, and decided to deprive it of half of its state funding, a sanction provided by the constitution for less severe violations. Interestingly, one of the main grounds for sanctioning the AKP was the constitutional amendment mentioned above.

Indeed, the AKP case is not the only example of the court’s assertive secularist approach with regard to the closure of political parties. The court so far has closed down five political

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parties on account of their alleged anti-secular activities. These are the National Order Party (20.05.1971), Turkey Peace Party (25.10.1983), Freedom and Democracy Party (23.11.1993), Welfare Party (16.01.1998), and the Virtue Party (22.06.2001). Clearly, Turkish rules and practices on the prohibition of political parties deviate enormously from standard European rules and practices. This was emphatically stated in a recent opinion by the Venice Commission on party closures in Turkey.  

B. The İmam Hatip Schools Issue

The issue of the İmam Hatip 26 schools followed a similar trajectory, although it never reached the constitutional court. After a quarter of a century (1924–1949) of a total absence of formal religious education, the İmam Hatip schools were opened in 1949 in the last year of the CHP government, as a response to growing societal demands activated by the transition to a multi-party system. Initially, they were intended to be vocational high schools to train imāms and hatips. They were state schools attached to the Ministry of National Education and followed the same curriculum as regular state high schools with the addition of religious subjects. In time, their numbers increased rapidly under almost all governments and their graduates were able to enter into any university department provided that they passed the highly competitive university entrance exams according to the same criteria for the graduates of the regular high schools.

The situation changed radically with the so-called “post-modern coup” of February 28, 1997. The new coalition government backed by the military sought to marginalize the İmam Hatip schools in two ways. First, by introducing eight-year compulsory education, it closed down the junior high school grades of these schools, as well as those of all other vocational high schools. Second, and more important, by changing the rules on the university entrance exams, it... made it almost impossible for the graduates for İmam Hatip schools to enter universities, with the exception of departments of theology. When the February 28 coup was staged during the 1996–1997 academic year, the İmam Hatip schools were at their peak with 511,502 students, which constituted 10 percent of all secondary and high school students. As a result of these two particular policies, the number of students at these schools decreased to 64,534—an 87 percent drop—by the 2002–2003 academic year.  

The AKP government made an attempt in the spring of 2004 to improve the status of the İmam Hatip school graduates by adopting a law (No. 5171, dated May 13, 2004) changing certain provisions of the law on Higher Education. The new law aimed at equalizing the chances of the graduates of all vocational schools (including those of İmam Hatip schools) at the university entrance exams, putting them on the same footing as the graduates of regular high schools. The law was met with a fierce reaction by the ultra-secularist circles.

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26 İmam Hatip means “prayer leader” or “preacher.”

27 Kuru (n 1) 194.
and vetoed by President Sezer. Sezer’s reasoning was an ideological manifesto of assertive secularism. Thus, he argued that

. . . the aim of the Atatürk revolution is to catch the age of enlightenment and to modernize Turkish society. The basis of the revolution is the principle of secularism. The principle of secularism is the foundation stone of all values that form the Republic of Turkey. . . Secularism is a civilized way of life that is the basis of a conception of freedom and democracy developed under the guidance of reason and in the light of science, as well as of nation-building, independence, national sovereignty and the ideal of humanity.  

Although the AKP majority in parliament could easily override the presidential veto by simple majority, it chose not to do so, since the president had the right to take the matter to the constitutional court after its readoption, and the court was most likely to agree with the president. Interestingly, this abortive attempt is cited as evidence in the Chief Public Prosecutor’s indictment against the AKP as an action undermining the principle of secular state.  The AKP government’s attempt to relax the strict regulations on the Qur’an courses, imposed in the aftermath of the February 28 intervention, met a similar fate in the face of the opposition by President Sezer and the Council of State.

**VI. CONCLUSION**

Thus, the conflict between the conservative passive secularists and the assertive secularists that occupy a dominant position in major state institutions such as the military and the judiciary has dominated the Turkish political scene in the last decade, with no end in sight. It is most unlikely that the present Turkish system of assertive secularism can serve as a model in any other part of the Muslim world. If, on the other hand, Turkey manages to reach a reasonable compromise on some version of passive secularism, it could indeed be an inspiring model demonstrating the compatibility of Islam, democracy, and secularism.

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30 Kuru (n 1) 196–98.
I. INTRODUCTION
Āyatollāh Khomeinī’s leadership of the Islamic revolution and his creation of the Islamic Republic of Iran in 1979 was not entirely a novelty in the history of Iran. European observers were surprised to find Shī’ite religious jurists as leaders of the first modern revolution in Asia, Iran’s constitutional revolution of 1906. In fact, the Shī’ite jurists played an important role in the construction of Iran’s constitutional order and legal system throughout the twentieth century.

This article will discuss the substantial contribution of the Shī’ite jurists to constitutional and legal developments in twentieth-century Iran in three crucial phases. In the first phase, they had a significant impact on the making of Iran’s first constitution in 1906–1907 as objectors rather than drafters of the 1907 Supplement to the Fundamental Law. Much more important and much less known is the contribution of the Shī’ite jurists to the judiciary reforms from 1927 to 1939 and their crafting of Iran’s Civil Code, which remains in force until today. In the third phase, beginning with the Islamic revolution of 1979, the Shī’ite jurists are exclusively the architects of the constitutional order of the Islamic Republic of Iran.

II. THE EMERGENCE OF SHĪ’ITE CONSTITUTIONALISM IN THE EARLY TWENTIETH CENTURY
Shī’ism was exposed to Western constitutionalism later than Sunnī Islam, and for decades made no significant response to it. Prototypically, Islamic constitutionalism appears in the writings of a group of Islamic modernists among the reformist bureaucrats, notably Khayr al-Dīn Pāshā in Tunisia and Namık Kemal in Turkey, who participated in the drafting of the Tunisian Constitution of 1861 and Ottoman Constitution of 1876 respectively, and argued that representative, constitutional government captured the spirit of Islam. This argument was also forcefully made by the Iranian consul in Tblisi, Yūsuf Khān Mostashār al-Dauleh, in
a short tract published in 1871, *Yek kalemeh* (One Word), but without any particularly Shi‘ite inflection. In this period, Ahmad ibn Abi Diya‘f, another Tunisian bureaucrat and drafter of its constitution, based his constitutionalist reading of Islamic history on his remarkable intuition that the Sharī‘ah imposed a limitation upon autocratic monarchy, or in his words, “monarchy limited by law (qānūn),” was indeed the normative form of government in Islam after the pristine caliphate. It was violated in some historical periods but was restored by the great Ottoman dynasty. Similar assertions were made by the proponents of constitutionalism in Iran three decades later. One pamphleteer asserted that constitutional government had been founded by the Prophet Mu‘hammad and was first demanded from the rulers of Europe by the returning crusaders who discovered it as the secret of the Muslim's success; and a leading journalist claimed it as the pristine form of government in Islam that had subsequently been forgotten by Muslims.

The peculiarity of Iran as the only Muslim country where Shi‘ism was the established religion left an indelible mark on the character of Islamic constitutionalism in general as it developed in the twentieth century. By the nineteenth century, what distinguished the Shi‘ite from the Sunni branch of Islam was a firmly institutionalized clericalism in the form of a powerful Shi‘ite religious institution—a hierarchy, to use Max Weber’s term—that was independent of the state. Unlike the Ottoman constitutionalists who needed to persuade the Sultan directly, the Iranian constitutionalist also had the option of turning to the Shi‘ite hierarchy. As a result of the conscious strategy of the constitutionalist movement to draw in the leaders of the Shi‘ite hierarchy in order to pressure the Shāh into granting Iran a constitution, the aims of the movement were presented as fully consistent with Islam, and implicitly with the interest of the hierarchy to limit the power of the autocratic state. Therefore, from the very beginning of the movement demanding a constitution from the Shāh in the spring of 1905, the demand was couched in religious terms. An early open letter by one of the main constitutionalist secret societies in May 1905 demanded the limitation of the powers of governmental and religious authorities according to the Sharī‘ah, and in January 1906 C.E. (Dhū‘-l-Qa‘dah 1323 A.P.), Mo‘azzam al-Dīn Shāh (1896–1907) ordered the prime minister to establish a “governmental house of justice” (adālatkhāneh-ye daulatī) in order to “implement the ordinances of the sacred sharī‘at... in such a way that all classes of the subjects (ra‘īyyat) be equally treated” and draft a constitutional charter “according to the laws (qawānīn) of the incumbent shar‘.” Eyn al-Douleh, the reactionary prime minister, procrastinated, and by the time the bylaws of the house of justice had been drafted and endorsed by the king in the summer of 1906, popular demand had escalated into nothing short of a constitution. It took a few more months of intense popular pressure and a different prime minister, however, to have a constitution drafted. It is interesting to note that the term mashrū‘eh (literally, conditional) for constitutional government, emanating from the Ottoman Empire, was resisted even after the constitution was signed by Mo‘azzam al-Dīn Shāh on his deathbed at the end of December 1906, and that his successor, Moḥammad ‘Alī Shāh, resisted the term

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and proposed “shari‘ah-permissible” (mashrū‘eh), instead of mashrū‘eh. Furthermore, the Majles representatives almost acquiesced in accepting the term. In February 1907, however, the new monarch was prevailed upon to issue a decree confirming that Iran was now included among the constitutional states. The constitutionalists were nevertheless forced into a defensive position almost immediately, as a result of the emergence of a traditionalist movement in opposition to the Majles to be discussed presently, and even two years later, in a pamphlet entitled Lālān (The Dumb), the Shaykhi leader and clerical constitutionalist Teqat al-Eslām Tabrizī would feel constrained to affirm, in defense of the new constitutional order, that the “Iranian constitutionalism” (mashrū‘iyat) was not to imitate foreign constitutionalism and “does not wish any (reprehensible) innovation (bed‘at) to occur in religion.” Nor was the original demand for a reformed judiciary forgotten. In January 1911, the Rūznāmeh-ye Majles (Parliamentary Gazette) could reaffirm that “the judiciary (‘adliyyeh) is the soul of constitutionalism and the primary cause of the creation of constitutional government and national sovereignty.”

The defining features of Islamic constitutionalism during the first decade of the twentieth century thus bore the distinctive mark of Shi‘ism. This formative Shi‘ite contribution was occasioned by the prominence in the Constitutional Revolution (1906–1911) of the Shi‘ite jurists who assumed national leadership against the Shāh and autocracy and consequently generated a deeper and more serious constitutional debate about Islam. All the major issues and problems concerning the place of Islam in a modern constitutional order surfaced in this public debate in the new free press during the process of constitution-making and judicial reforms. Foremost among these was the problem of the conformity of legislation with the Shari‘ah—or what, following the British colonial legal language, was to become the “repugnancy clause” in the 1956 Constitution of the Islamic Republic of Pakistan. The problem came to light as soon as the Majles set up a drafting committee to complete the Fundamental Law early in 1907.

Shaykh Fażlollāh Nūrī (d. 1909), one of the three high-ranking mujtahids of Tehran who had led the popular protest against the Shāh, fell out with the constitutionalists and launched a traditionalist movement in opposition to the Majles. His objections were quickly accepted by the clerics who remained in the constitutionalist camp. The illusion of the identity of Islam and constitutionalism was further shaken as the secularizing implications of constitutional law and parliamentary legislation became clear with the discussion of proposals for judicial reform in the Majles, but it was never given up, and was in fact made more robust by being transformed into Nūrī’s proposal for ‘shar‘t’, or “Shari‘ah-permissible,” constitutionalism (mashrū‘eh mashrū‘eh). Although few of these problems were definitively or satisfactorily resolved by it, the idea of shar‘t constitutionalism became clearly defined and elaborated.

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8 Cited in Ājūdānī (n 2) 205.
9 Cited by Zarang (n 5) 126.
10 Art. 198(1) of the Constitution of Pakistan (1956) stated that “No law shall be enacted which is repugnant to the injunctions of Islam as laid down in the Holy Qur‘ān and Sunnah . . . and existing laws shall be brought into conformity with such injunctions.”
As distinct from secular constitutionalism, this form of Islamic constitutionalism considered the Shari‘ah a firm limitation on government and legislation. The core idea of Shari‘i constitutionalism was embodied in Art. 2 of the 1907 Supplement to the Fundamental Law, which declared: “At no time must any legal enactments of the National Consultative Assembly . . . be at variance with the sacred principles of Islam . . . .” Furthermore, a committee of no less than five religious jurists of the highest rank (mojtahedin-e terāz-e avval) was given the power to “reject, repudiate, wholly or in part, any proposal which is at variance with the sacred laws of Islam.” Furthermore, Art. 27 of the Supplement made the validity of all legal enactments conditional upon their conformity with the standards of the Sacred Law (shar‘iyyāt), and further stated that the judiciary power “belongs to the shar‘i courts in matters pertaining to the Sacred Law and to civil courts in matters pertaining to customary law (‘urfīyyāt).” Art. 71 made the administration of justice in matters of the Sacred Law (umūr shar‘iyyah) the prerogative of the “just mujtahids,” and Art. 83 of the Supplement required the approval of the hierocratic judge (hākim-e shar‘) for the appointment of the prosecutor general by the king.

The committee of five mujtahids was never formed because the great majority of Shi‘ite jurists selected by the Second Majles (1909–1911) in several rounds considered it beneath their dignity to accept, and the majority of clerical supporters of the Majles withdrew from politics in disillusionment. Only two politically ambitious clerics in the Majles, Sayyed Ḥasan Modarres and Ḥājj Mirzā Yahyā, the Imām-e Jom‘eh of Khū’y, performed the supervisory role of ensuring consistency of legislation with the Shari‘ah in a fashion, without formally instituting a committee.

III. THE HISTORICAL ROLE OF THE SHI‘ITE JURISTS IN LEGAL MODERNIZATION IN THE 1920S AND 1930S

Iran’s legal order in the nineteenth century comprised two distinct elements. Customary (‘urfī) law was administered by the governors, holders of state-land (tuyūl) and village headmen, and the royal court, the Divānkhāneh, was the highest court of the realm. The bulk of judiciary functions, however, was carried by the courts of the religious jurists, the mujtahids, known as maḥāżer-e shar‘. The ubiquitous outcry was directed against the complete lack of organization in the state judiciary (‘adliyyah), on the one hand, and on the other, the chaos created by the contradictory verdicts (nāsikh wa mansūkh) of the shar‘i courts in the absence


12 Nor did the Supplement recognize the principle of secularism in its bill of rights: the freedom to publish ideas (Art. 18), to form associations (Art. 21), and to learn and teach sciences and crafts (Art. 18) were made contingent to being in conformity with the interest of the established religion. However, Art. 79 concerning “political and press misdemeanor (taqīrāt),” which presumable cover cases relating to Arts. 18 and 20, requires a trial by jury and not by any shar‘i court.

of any judiciary hierarchy and appeal system. And there was broad consent, if not unanimity, that the remedy to the deplorable conditions of both state and religious courts was the rationalization of judiciary procedure and the unification of judiciary organization.

The first decade of the constitutional era witnessed the emergence of the nucleus of a modern legal profession. Mirzā Ḥasan Khān Moshir al-Molk, who later inherited his father’s title of Moshir al-Daula and still later assumed the surname Pirniyā, founded a new School of Political Science in Tehran in 1899 and wrote a textbook on International Law (Hoqūq-e beyn al-melal) for it, served as Minister of Justice in several constitutional governments, and became the major architect of the new court system set up in 1911.14 Moḥammad ‘Ali Khan, son of Dhoḵā’ al-Molk,15 who taught at the new School of Political Science in Tehran like his father and later inherited the latter’s title and chose Furūghi as his surname, wrote the first book in Persian on constitutional law in 1906. Moḥammad ‘Ali Khan Dhoḵā’ al-Mulk served as Minister of Justice after Moshir al-Daula, from December 1911 to June 1912, and again from August 1914 to April 1915.16 Moḥammad Moṣaddeq al-Saltāneh, later Moṣaddeq, also taught at the School of Political Science after obtaining his doctorate in Switzerland and entering politics and joining government. The quintessential law professor at the School of Political Science and later the Faculty of Law of the University of Tehran was, however, Moṣṭafā Khān, Mānṣūr al-Saltāneh, later called ‘Adl. Although he served as the caretaker (kafīl) for the Ministry of Justice in several cabinets, teaching law and writing legal textbooks remained Mānṣūr al-Saltāneh ‘Adl’s true passion, and he lived to train the next two generations of Iranian lawyers.

The founders of the Iranian modern legal profession were completely dependent on the religious jurists for judiciary reorganization.17 In March 1911, Ḥasan Pirniyā, Moshir al-Daula, whose earlier efforts at judiciary reform had been frustrated,18 accepted the portfolio of the Ministry of Justice once more.19 He had agreed to do so only after Sayyed Ḥasan Modarres, acting informally in the Majles as “the mujtahid of the highest rank,”20 assured him of his full support and cooperation. Moshir al-Daula was convinced that it was impossible to pass a judiciary reform bill in the face of the traditionalist clerical opposition that considered the Sharī‘ah the only legitimate law, and instead devised the strategy of authorizing the Majles Judiciary Committee to draft a law for the government to enforce provisionally. With great difficulty he persuaded the Majles to allow this.21 The Committee included some clerical jurists, notably Sayyed Moḥammad-Reżā Sādāt-Afjā’ī, Sayyed Nasrollāh Taqawi (Sādāt-Akhawī), and Sayyed Moḥammad Fāṭemi-Qomi, and met in the evenings in either Moshir al-Daula’s or Modarres’s house alternately.22 On July 18, 1911 C.E. (21 Rajab 1329 A.P.), the Majles Judiciary Committee passed its provisional law on judiciary organization, which was passed on to the government for implementation. In November 1911, as

14 He later served as Prime Minister four times between 1915 and 1942.
15 This is how he is identified on the title page of his book.
16 All the more so as some of the reactionary governors, for instance in Fars in 1909, continued to hold their own customary courts and obstructed judiciary reform. H. Amin, Tārikh-e hoqūq-e Īrān (Dā’erat al-Ma‘āref-e Īrān, Tehran 2003 C.E./1382 A.P.) 491.
20 Zarang (n 5) 191.
22 Zarang (n 5) 184–85.
Moshīr al-Dauleh was leaving office, another drafting committee that included Dhokā’ al-Molk Forūghī, Taqawi, and Fātemi-Qumi, completed the Qānūn-e osūl-e Mōhākemāt-e Ḥoqūqī (Law of the Principles of Civil Procedure). Dhokā’ al-Molk, who succeeded Moshīr al-Dauleh as Minister of Justice in December 1911, ordered its implementation. The twin law of procedure in criminal law was completed during the prolonged closure of the Majles following the Russian occupation of northern Iran (1911–1914), but the government ordered its implementation on a provisional basis.23 Forūghī’s other clerical advisors included Mirzā Ṭāher Tonekābonī and Shams al-‘Olamā’ Qarīb-Gorgānī. In March 1917 C.E. (Jumādā I, 1335 A.P.), the cabinet passed Qānūn-e Jazā-ye ‘Orfī (Customary Penal Law) as a decree-law.

Modarres stated his reason for supporting judiciary reform, which was undoubtedly shared by all the other clerical jurists who took an active part in it: “The content of civil and criminal matters is what is given in the law (qānūn) of Islam, and one must not give away even a poppy seed’s worth of it . . . We must take the content of judicial laws from our religious rules, and the procedure for their execution from the general laws of the world.”24 In other words, Islamic procedural law was defective and needed to be modernized by following the rest of the world—i.e., the West—but the substantive content of the laws to be modernized through codification was to be taken entirely from the Shi‘ite jurisprudence (fiqh). If they disagreed with the first part of the proposition, the law professors engaged in the legal reforms did not dare say so in public. In fact, the traditionalist clerical opposition was so strong that the reformers confined their codification to procedural law.25 Furthermore, despite the cogent argument of the reformers that the penal provisions of the Sharī‘ah had been in abeyance for centuries, Modarres insisted on provisions for a special shar‘ī criminal court.26

The reformers had accepted the principle that the substance of the codified laws should not diverge from that of Shi‘ite jurisprudence, and even in the subsequent phase of legal modernization, respected it. The opening article of the Qānūn-e Mojāzāt-e ‘Omūmī (Public Penal Law) of 1926 C.E. (1304 A.P.), passed shortly after Reżā Shāh Pahlavi had ascended the throne, justified the stated penalties as necessary for the maintenance of order, and allowed the application of the shar‘ī penalties to those “crimes discovered and persecuted according to Islamic standards.”27 In the 1930s, Moşaddeq’s son-in-law, Aḥmad Matin-Daftari, prepared the draft of a new and thoroughly modern penal law, but it was buried in the drafting committee.28 Although the second part of Art. 1 of the 1926 law was intended to be a dead letter and remained so, it was only in 1973 C.E. (1352 A.P.) that it was quietly removed by an amendment.29

Returning to the situation in 1911, while working alongside his clerical colleagues in the drafting committee, Modarres was in a strong enough position to keep the modern law experts in check. All the same, the grand mujtahids of Najaf who had critically supported the

23 Furūghī (n 21) 731.
24 Cited in Zarang (n 5) 186.
25 Nor did the secular courts dare use the term hukm for their verdict for quite some time. See Furūghī (n 21) 730–32.
26 Id. 169.
28 Id. 238.
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constitutionalists during the restoration of autocracy (June 1907–July 1908) were not taking any chances, and one of them, Āyatollāh 'Abdollāh Māzandarānī, wrote to the Majles Speaker Mo’tamen al-Molk, who was the brother of Moshir al-Dauleh, expressing his alarm at the rumors that the new draft law of judiciary organization would violate Art. 27 of the Supplement to the Fundamental Law by making the verdicts of the shar‘i courts subject to appeal. He stated that any appeal from “the shar‘i verdict of an authoritative mujtahid is illegitimate according to the principles of the Ja‘farī madhhab [Twelver Shi‘ism],” and asked that his letter be read in the Majles and responded to so as to relieve his “terror and anxiety.”

The letter was read out in the Majles on May 23, 1911 C.E. (24 Jumādā I, 1329 A.H.), and the Majles replied that Art. 27 would be respected and “the verdicts issued by the shar‘i courts will be definitive and final, and would not be referred to the courts of appeal and cassation.”

In the end, the 1911 provisional Law of Judiciary Organization accommodated the judicial authority of the Shi‘ite jurists copiously. The lowest courts of arbitration (ṣulḥiyah) were to be run by a judge of customary law (called the amin-e ṣolḥ), who received the petitions in the first instance. The court also had another judge called (ḥākim-e ṣolḥ), however, who was an apprentice-jurist knowledgeable in the Shari‘ah, to whom the first judge could refer the case if he deemed fit. The next level of the hierarchy was dual and comprised the courts of the first instance (ibtidā‘i) and the shar‘i courts. The shar‘i courts consisted of a mujtahid-president (Īākim), and two assistant judges close to the rank of ijtihād. The courts of first instance had a president and two other judges, one of whom, interestingly, had to be knowledgeable in Shi‘ite jurisprudence. The appeal system for the two sets of courts was different. Appeal courts of second instance (isti‘nāf) were to be set up in Tehran and four of the provinces. The shar‘i courts were to hold extraordinary gatherings of religious judges of the province to deal with appeals as well as possible dismissals and replacements of the clerical judiciary personnel. All judges of the shar‘i courts, including the mujtahid-presidents, were to be licensed state employees. P ace the assurance given to Āyatollāh Māzandarānī by the Majles, this introduced an appeal system against the verdicts of the shar‘i courts, and it barred the mujtahids who did not work for the Ministry of Justice from holding courts. Attorneys-at-law were also to be recognized and licensed by the Ministry of Justice. Finally, provisions were made for a highest court of appeal, a Court of Cassation (tamīz) for the whole country to be set up in Tehran.

The issue of overlapping jurisdiction of the secular and shar‘i courts had been hotly debated in the Majles, but it was not clearly discussed and settled in the 1911 Law of Judiciary Organization. The shar‘i courts had exclusive authority over cases of marriage and divorce, bankruptcy, appointment of supervisors to religious endowments (awqāf), and cases that could only be settled by shar‘i proof or taking the oath. The courts of first instance were not categorically barred from dealing with shar‘i matters, however, and were only required to refer the cases to the shar‘i courts in cases of “ignorance [of] the shar‘i norms or

30 Quoted in Zarang (n 5) 196–97.
31 Id.
33 Id. 15, 60–61.
34 Id. 47–58.
35 Zarang (n 5) 198–202.
36 They were required to include at least one judge knowledgeable in Islamic jurisprudence.
instances of their applicability.” (Art. 143) Complicated and vague arguments for resolving cases of overlapping jurisdiction gave priority to “the shari’i courts of the just mujtahids” in principle, but Art. 148 procedurally resolved them in favor of secular courts in cases of “original mutual consent” to submit the case to them. Moaddiq interprets this “mutual consent” to be implicit in the parties not initially challenging the jurisdiction of the secular courts. In practice, however, the scarcity of qualified secular judges probably led “to the referral of most cases to the shari’i courts.”

One of the first judges of the appeal circuit for the Kermān province, Nāzem al-Eslām, reports that the scribes who kept the records in the houses of the mujtahids, which were the shari’i courts, and occasionally dabbled in representing parties to the case, had become the new lawyers and assumed the title of attorney-at-law. The deplorable state of the reformed judiciary more generally is the subject of biting satirical poems by an insider, Adib al-Molk Farahānī.

The 1911 Law of Judiciary Organization also established the separation of the functions of the judge and the prosecutor in the courts of first and second instance and cassation. The office of the public prosecutor was designated by the French and Arabic terms parquet and mudda’i al-‘umām, which were later persianized into dādsetān. It is interesting to note, in retrospect, that the introduction of the office of the public prosecutor raised the issue of the “authority of the jurist” (velāyat-e faqīh) as it was understood at the time and before Khomeini’s theory of theocratic government. Already in 1907, when the concept was being introduced in the discussion of the section on judiciary organization in the Supplement to the Fundamental Law, a number of Majles deputies found that the authority now being granted to prosecute on behalf of the public belonged in fact to the jurists as deputies of the Hidden Imam. This objection had been overruled by requiring, as we have seen, the permission of the [unspecified] hierocratic judge (ākim-e shar’) for the appointment of prosecutor general in Art. 83. The 1911 law also implicitly recognized the Shi‘ite traditional authority of the jurist. The jurisdiction of the public prosecutor included cases affecting the insane and minors. Concerning the insane and minors without legal guardians, who were by default subject to the authority of the jurist according to Shi‘ite jurisprudence, “the prosecutor should first inform the just and fully qualified mujtahid before interfering.”

The implementation of the provisional laws of 1911 and the subsequent ones did not go far, and its limited effect beyond Tehran is doubtful. This, at any rate, was the justification given by Ali-Akbar Dāvar in 1927 for the dissolution of the judiciary and the sweeping modernization of judiciary organization and codification of Iranian law. In February 1927, Dāvar took over the Ministry of Justice and, ignoring Moaddiq’s plea that the judiciary (‘adliyyeh) was the soul of the Constitutional Revolution, announced its dissolution. The Sixth Majles (1926–1928), the last one to be elected relatively freely under Reżā Shāh, gave Dāvar extraordinary powers for three months to set up a uniform modernized national judiciary by executive decrees. When the new judiciary was inaugurated in April 1927, a significant number of clerics (at least six) were among the first appointed judiciary cadre of some forty
judges and prosecutors.\textsuperscript{44} By the latter part of 1929, the judiciary cadre had expanded to about 260, including seven clerics in the highest court, the Court of Cassation, of whom three were mujtahids.\textsuperscript{45} Only two regular hierocratic judges of shar‘i courts are mentioned by ‘Āqeli, but a new kind of ḥākim-e shar‘ also appears as integrated into the hierarchy of secular courts in four instances.\textsuperscript{46}

Hand in hand with complete reorganization, Dāvar embarked on a major program of codification, with formal legislation amounting to the rubber-stamping of the codes by the Majles, which Dāvar and Reżā Shāh’s other aides had succeeded in taming completely. Dāvar himself chaired the all-important commission for drafting a new civil code and invited Moṣṭafā ‘Adl (Manşūr al-Saltaneh) to join it. Clerical jurists were especially prominent in that committee, however, and dominated the codification. Sayyed Naṣrollāh Taqawi (Ṣādāt-Akhwāri) and Sayyed Moḥammad Fāṭemī-Qumi, who had advised Forūghī on the preparation of a civil code in the earlier decade and who were secretly in fear of traditionalist clerical opposition,\textsuperscript{47} also joined the committee. The other clerical jurists who were recruited by Dāvar for the drafting committee were Moḥsen Sadr (Ṣadr al-Ashrāf), Shaykh Moḥammad Reżā Irvānī, Moḥammad ʿAlī Kāshānī. Two other clerical jurists, Shaykh ʿAlī-Bābā ʿAlīkānī and Sayyed Moḥammad Kāẓīm ʿAṣṣār, were added on the recommendation of the leading mujtahids of the Shi‘i hierocracy, Fāṭemī-Qomi led the team in the completion of Book I of the Civil Code, which met with the approval of the leading authority of the Shi‘i hierocracy, Grand Ayatollah Shaykh ʿAbd al-Karim Ḥāeri-Yazdi, and received a bejeweled walking staff from Reżā Shāh in recognition of his leading role.\textsuperscript{48} New members were added to the committee for drafting the subsequent Books of the Civil Code: the young modern law professors, Aḥmad Matīn-Daftāri, Javād ʿĀmerī, and Shaykh Moḥammad Taqi ʿAbdoh-Borūǰerdī (the latter was a cleric who taught Shi‘i jurisprudence at the University of Tehran), as well as a clerical judge, Shaykh ʿAbd al-ʿAlī Lotfī, who later discarded his clerical robe and served as Moṣaddeq’s Minister of Justice from July 1952 to August 1953. Two other clerical jurists who joined the drafting committee are noteworthy for their active participation in the Constitutional Revolution: Afjā’ī, who had, like Taqawi, been an active constitutionalist since 1906 and a draftsman in the earliest legal reforms, and Shaykh Asadollāh Mamaqānī, the author of an interesting early justification of constitutionalism from the viewpoint of Shi‘i jurisprudence, Maslak al-imām fi salāmat al-Islām (Istanbul 1910 C.E./1328 A.P.), who later discarded his clerical robe and became Minister of Justice in 1944.

The drafting commission vigorously produced the cornerstone of Iran’s modern law, the Civil Code. The Book I of the Civil Code was to be approved by the Majles in 1928 C.E. (1307 A.P.) with the deputies rising instead of casting votes. In October 1933, Reżā Shāh decided to move Dāvar to the Ministry of Finance. Moḥsen Sadr, who had reluctantly discarded his clerical robe to remain in the judiciary, took over the Ministry of Justice for the

\textsuperscript{44} B. ʿĀqilī, Dāvar va ʿadliyyeh (Tehran 1990 C.E./1369 A.P.) 161–73.
\textsuperscript{45} Id. 167, 173–74.
\textsuperscript{46} Id. 179–83. One ḥākim-e shar‘ for the lower court of Rasht, one for an arbitration court, and two for the appeal courts of the provinces of Isfahan and Fars. ʿĀqilī’s list may well be incomplete, and there were probably more such judges integrated to the new system of state courts since 1911, but such appointments discontinued before long.
\textsuperscript{47} Furūghī (n 21) 733.
\textsuperscript{48} Gheissari (n 18) 54.
next four years, and passed Book II and III of the Civil Code through the Majles in 1935 C.E. (1314 A.P.).

The shar’i courts were left in limbo, alongside the modernized judiciary hierarchy of state courts. Partial appellate jurisdiction over shar’i courts had been given to the secular courts in 1922 and 1926. In 1929 the Majles passed a law explicitly prohibiting the shar’i rules of procedure, as they were incompatible with the rationalized judiciary procedures transplanted from the West. The final blow came with the law of the shar’i courts in 1931 C.E. (1310 A.P.), which restricted their jurisdiction as special courts narrowly to disputes over marriage and divorce, and to the appointment of trustees and guardians (under the supervision of the attorney general). Furthermore, cases could only be referred to them by secular courts with the authorization of the attorney general, and their verdicts had to be sent back to the referring secular court and be pronounced by it. This law can be taken to mark the end of the shar’i courts in Iran. Though they were never formally abolished, there is no mention of them in the reorganization of the Ministry of Justice in 1936 or in any subsequent legislation.

Dāvar’s Civil Code no longer alluded to the old theoretical dualism. Although it began with a statement of principles that were a verbatim translation from the French Civil Code, it nevertheless included much of the Shi’ite personal status and contract law in substance. The procedural informality of what Weber called Kadi justice was put aside and all parties accepted the necessity of hierarchical organization of courts, and the separation of the functions of the judge and the prosecutor became firmly established. In substance, however, the codifiers had remained faithful to Modarres’s principle, and Iran’s Civil Code bore the unmistakable mark of the clerical jurists who created it. According to Shāygān, except for the first ten general articles adopted from the French Civil Code, “the methodology and composition of the Civil Code consists almost entirely in imitation without alteration from Islamic jurisprudence and its classification system.”

### IV. THE SHI’ITE JURISTS’ NEW CONSTITUTIONAL MONARCHY

A new approach to the reception of constitutionalism in the Muslim world appeared when the Muslims of India decided to have their own modern state and created Pakistan. It was the

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49 The final version of the Civil Code, which remains in force after minor modifications after the Islamic revolution of 1979, was passed by the Majles in 789 articles on September 16, 1939, with 378 articles being added on June 23, 1940. See A. Banani, *The Modernization of Iran* (Stanford University Press, Stanford 1961) 74.

50 Dāvar had already announced in his inaugural reform speech in February 1927 that the jurisdiction of the shar’i courts would be restricted mainly to marriage and divorce. ‘Āqilī (n 44) 144.

51 Banani (n 49) 78–79. The 1911 Law of Judiciary Organization, as we have seen, refers to the shar’i courts as (mahādir shar’iyya). Traditionally, an important function of these courts had been the registration of marriage, divorce, and property deeds. With the withering of their jurisdiction, this function appears to have been assimilated to that of the offices of the public notaries in the civil law systems, and many of the courts (mahādir) in the hands of the mujtahids or their clerks seem to have been converted to Offices of Public Notaries integrated into the new Ministry of Justice on the basis of an experimental law of registration of documents in 1929. The new Public Notaries were almost exclusively clerics (there was only one layman among the 23 listed for Tehran by ‘Āqilī. ‘Āqilī (n 43) 186. With the passing of the permanent Law of Registration of Deeds and Property in March 1932 C.E./Isfand 1310 A.P., however, these clerics too were forced to discard their garb or find alternative employment. Banani (n 48) 72–73.

52 Banani (n 49) 71–72; ‘Āqilī (n 44) 188.

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result of pouring the Qur’an and hadith into the framework of a systematic total ideology like Marxism. They can be defined as “ideological constitutions,” which have led to some confusion of categories, such as juxtaposing the modern constitutional notion of national sovereignty to scriptural texts to prove the superiority of God over the nation, resulting in the declaration of God’s sovereignty, as in the 1956 Constitution of Pakistan, the first “Islamic Republic” in history. Mawdūdī and his Jama’at-i Islāmī, which pushed for the declaration, had a very limited influence on the content of that constitution but generated a new and ideologically powerful idea that the state should be an “Islamic state” and its constitution should be based on the scriptural sources of Islam. This idea of the embodiment of an Islamist ideology in a Shari’ah-based constitution became a major goal of the ideologues of the Islamic revolution in 1979.

Ayatollah Khomeini as a revolutionary leader did not attach much value either to ideology or to constitution-making, and was at one point prepared to accept a draft constitution that did not mention his theory of the velāyat-e faqīh (mandate of the jurist). He changed his mind, however, and entrusted the radical revision of the draft to his close aide, Ayatollah Mohammad Ḥoseyni Beheshti, who was keenly interested in ideology and firmly convinced that the new order created by the Islamic revolution should be an ideological state. In an important lecture delivered on the eve of the referendum on the 1979 Constitution, Beheshti reflected on the theoretical foundations of the proposed constitution. The fundamental error of Iran’s first revolution, the Constitutional Revolution, he argued, was to call the new order it created “constitutional” (mashrūṭeh), a concept that was “borrowed and did not pertain to the Islamic culture.” The historic mission of the current [Islamic] revolution was to base the constitution on a correct ideological (maktabī) conception of Islam and thereby to convert the “people” to the ummah (community of believers). “The ummah,” furthermore, “from the perspective of the Islamic ideology and the foundations of belief and practice in Islam, inevitably needs the Imamate.” It follows that “the management of society deriving from the ummah and imamate is based on the ideological school (maktab).”

A. Overview of the Institutional Developments in the Islamic Republic of Iran

Consequently, the 1979 Constitution of the Islamic Republic of Iran is an “ideological constitution”: Islam was simply put in the place of the dominant ideology in the constitutional documents, being explicitly conceived as its ideological basis in the preamble. The Shari‘ah, which had appeared in Iran’s first (non-ideological) constitution as a limitation to the Legislative Power, now came back with a vengeance to swallow the modernized state and its constitution. An appendix consisting of a number of traditions (hadiths) pertaining to its most important articles demonstrated that the 1979 Constitution of the Islamic Republic of Iran was partially derived from the Shi‘ite scriptural sources, and its Art. 4 declared that all laws must be based on the “Islamic standards” (mavāzīn-e eslāmī) (i.e., norms of the Shari‘ah), and any laws found inconsistent with those standards are null and void, including the constitution itself. The critical function of nullification of all proposed and existing laws found

57 S.A. Arjomand, “Constitution of the Islamic Republic” 6 Encyclopedia Iranica (Mazda Publishers, Costa Mesa, CA 1992) 150–58 for further details. The appendix containing the scriptural citations has,
inconsistent with Islamic standards was given to the six clerical jurists of the Guardians Council. The Guardians Council was thus given the function of protecting the ideological foundations of the Constitution of the Islamic Republic of Iran.\(^{58}\)

Khomeini’s legacy should be considered an additional factor to the ideological character of the Constitution of 1979. He was the charismatic leader of the Islamic revolution, and issued many of the early revolutionary decrees as the “Deputy of the [Hidden] Imam”\(^{59}\) (and not a jurist), and his manual of jurisprudence, \textit{Tābrīr al-Wasilah}, was declared the law of the land. He did not, however, show much direct interest in constitution-making in 1979, and entrusted the constitutional translation of his idea of the Mandate of the Jurist (\textit{velāyat-e faqīh}), to his clerical lieutenants, Montazeri and Beheshti.\(^{60}\) But in the last year and a half of his life, Khomeini was forced to deal with the constitutional crisis that resulted from shortcomings of the 1979 Constitution, and initiated a number of significant measures to constitutionalize his amplified notion of the “Absolute Mandate of the Jurist.”

In January 1988, in a letter to the then-President Sayyed `Ali Khamene’i, Khomeini stated that government in the form of the God-given absolute mandate (\textit{velāyat-e moqāla}) was “the most important of the divine commandments and has priority over all derivative divine commandments . . . [It is] one of the primary commandments of Islam and has priority over all derivative commandments, even over prayer, fasting and pilgrimage to Mecca.”\(^{61}\) This ruling was followed by a decree creating the Council for the Determination of the Interest of the Islamic Order (\textit{Majma’-e Tashkhiṣ-e Maslahat-e Nežām-e Eslāmī}) (hereafter the \textit{Maslahat Council}) a month later,\(^{62}\) which was hailed as “the most important of all the achievements of the revolution.”\(^{63}\) In April 1989, shortly before his death, Khomeini ordered the revision of the Constitution of 1989 with regard to seven specified items, including the issue of leadership and the constitutional recognition of the new \textit{Maslahat Council}.\(^{64}\)

\(^{58}\) This was not accidental but the result of following the \textit{conseil constitutionnel} of the 1958 French Constitution, which was in turn influenced by Hans Kelsen’s idea of a constitutional court as “the Guardian of the Constitution” in the late 1920s.

\(^{59}\) The term derived from the traditional notion of “general deputyship” (\textit{neyābat-e ‘āmmeh}) of the Hidden Imam has not made its way, and has been replaced in the discourse of the Islamic Republic of Iran by near-equivalent terms, \textit{valī-ye amr}, or \textit{valī-ye faqīh}, which I have rendered as “theocratic monarch.”

\(^{60}\) The concept had traditionally been defined narrowly as the authority in matters of ḥisba devolving on the jurist by default—that is, in cases where the principal was lacking or deficient. Khomeini expanded it into a theory of theocratic government based on the mandate of the jurist to rule. S.A. Arjomand, \textit{The Turban for the Crown: The Islamic Revolution in Iran} (Oxford University Press, New York 1988) 178.


\(^{62}\) Id. 465.
It is worth recalling these details of Khomeinī’s final legal revolution because the subsequent constitutional developments in Iran are not intelligible without them. The Assembly of Leadership Experts met the day after Khomeinī’s death, and elected President Khāmene’ī as Khomeinī’s successor, the Leader of the Islamic Republic. Except for “Imam,” all of Khomeinī’s political titles were transferred to Khāmene’ī. This was the most remarkably smooth succession in the history of world revolutions. The swift election of Khāmene’ī was unconstitutional, however, as he did not have the rank of marja‘iyyat as required by Arts. 107 and 109 of the 1979 Constitution which was still in force when he died.65

Be that as it may, the constitutional framework of post-Khomeinī Iran is an important example of the system of collective rule that typically follows the death of the charismatic leader of revolution. I have called the regime that emerged in Iran a system of rule by clerical councils. It has a Leader (rahbar) and three distinctive organs. The Leader is a theocratic monarch ruling in the name of God with more extensive powers than any constitutional monarch or elected president in the world. In addition to his extensive constitutional powers, the absolute mandate of the jurist entitles him to issue “governmental ordinances” (akhkām-e ḥokūmati), and he has done so at some critical points. The office is generally recognized as being incompatible with democracy. The official line that it is an elective office because the clerics of the Assembly of Experts who elect the Leader are themselves popularly elected would still privilege a very small social group, the Mullahs, over the vast majority of the lay population, thus making democracy or rule by the people questionable. Furthermore, the system extends beyond these councils and includes the Judiciary Power, and the Special Court for Clerics directly responsible to the Leader.

B. Rule by Clerical Councils

1. The Guardian Council

The Guardian Council was the most important of the clerical Councils established by the Constitution of 1979. Its greatest power was the determination of the conformity of all bills passed by the Majles with the Islamic standards, given exclusively to the six clerical jurists, and with the constitution, shared by all its twelve members (Art. 96). This important exclusive right, and the increasing subservience of the lay lawyers in the kingdom of the jurists after the constitutional amendments of 1989, made the clerical jurists of the Council its dominant members. In the first quarter-century of its existence (1980–2005), the following Āyatollāhs served as the clerical jurists of the Guardians Council under a powerful Secretary (dabīr), after whom the Council should appropriately be named:

1. Lotfollah Šafi (Secretary) 1980–1988
2. Ahmad Jannati (Secretary since 1992) 1980–

65 The jurists who attained the highest rank in the Shi‘ite hierocracy were considered the “sources of imitation” (marāje‘-e taqlid) for the lay followers in religious ritual and ethics. The Constitution of 1979 required the rank of marja‘iyyat for the Leader of the Islamic Republic, and for membership in an alternative Leadership Council, which, however, was eliminated in Arts. 107 and 109 of the 1989 amended Constitution. The Council for the Revision of the Constitution, however, carelessly retained the phrase, “or Leadership Council” in the title of Chapter 8 of the amended constitution.
The Guardian Council was also given the power to interpret the constitution. Its constitutional interpretations required a majority of two-thirds of all its members (Art. 98). Āyatollāh Loṭfollāh Šāfī Golpāygānī, son-in-law of Grand Āyatollāh Golpāygānī, was an excellent traditionalist Shi‘ī jurist and seemed destined to preside over the birth of a distinctive Shi‘ī constitutional jurisprudence. The Šāfī Council (1980–1988) did act as an instrument of the rule of law by giving reasons for vetoing the bills passed by the Majles and by its responses to questions about constitutional interpretations from a variety of governmental organs. A basis was thus established for the creation of a distinctive constitutional jurisprudence in the Islamic Republic of Iran. The Council sought to rein in some of the excesses of Revolutionary Courts by declaring a bill giving their judges leeway to draw on the sources in Shi‘ī jurisprudence, including Khomeini’s manual, at variance with Arts. 36 and 167 of the Constitution in a series of Council Decisions from June 1981 to May 1982, and the Council Decision of September 7, 1981 C.E. (16 Shahrīvar 1360 A.P.) declared purges of government employees for (alleged) membership in the Freemasonry illegal. The Council’s attempt to protect private property rights created the thorniest of constitutional issues and the most serious deadlock with the Majles. Beginning with the Council Decision of August 20, 1981 C.E. (29 Mordad 1360 A.P.), the jurists of the Guardian Council adduced a Qur’ānic verse, a hadīth and a jurisprudential rule, to invalidate government expropriation of urban land. Āyatollāh Šafī also issued a fairly large number of responses to questions about different articles of the constitution emanating from governmental authorities and organs. Only a few can be mentioned as examples. In a 1981 response regarding Art. 4 of the Constitution, the Council required the judiciary to refer any laws and regulations judges considered in violation of Islamic standards to it. In another 1981 response to the Minister of Justice and the Majles Speaker, the Council maintained that Art. 69 required the full public broadcasting of the Majles proceedings, and a 1982 response to the Prime Minister and Minister of Education interpreted Art. 30 to allow the creation of private universities as well as schools.

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67 Id. 1: 68–69.
68 The vast majority of constitutional responses collected in 2001 are issued by Šafī, and only a handful by Jannati, who had by then been the Council Secretary for at least as many years as Šafī. See J. Mansūr (ed), Naẓariyyāt-e taʃfīr va mashyarati-ye shūrā-ye negahbān darbāreh-ye qānūn-e asāsī (Ministry of Culture and Islamic Guidance, Tehran 2001 C.E./1380 A.P.).
69 Id. 125–26.
70 Id. 146–49.
71 Id. 133–34.
The new Guardian Council constitutional jurisprudence was, however, stillborn. Its protection of property rights provoked the constitutional crisis of the 1980s, which Khomeini eventually resolved by the institution of the Majlahat Council despite the protest and resignation of Şafi. Furthermore, the scope and impact of the Council’s constitutional jurisprudence under Şafi were extremely limited compared to those of the Egyptian Supreme constitutional court in the same decade. In the 1980s, Egypt’s Supreme Constitutional Court firmly prevented decentralization of control and mutual reversals (tahātur) to result from the 1980 declaration of the principles of the Shari’ah as the main source of legislation in the amended Art. 2 of the constitution. To reduce the predictability of law and thus jeopardize the stability of the judiciary system, the Supreme Constitutional Court also considered this statement of the principle of Islamic normativity addressed to the legislature and not the judges, and placed it within the overall framework of the coherence of the entire corpus of constitutional and ordinary laws, thereby consolidating its own unique constitutional jurisprudence. The Şafi Council had none of these ambitions, and could not even unify the two requirements of constitutionality and conformity to Islamic standards as its six lay members were barred from consideration of the latter.

The Guardian Council also had a secondary and somewhat incidental function that was soon to eclipse its primary functions. It was also given the power to supervise the presidential and Majles elections. This incidental feature of its French model, supervision of elections, suggested the Council of Guardians as an instrument of political control to Iran’s ruling elite after the death of Khomeini and the end of his charismatic leadership. It is true that the Council of Guardians was used as an instrument of political control during the institutionalization of clerical domination under Khomeini, too. Also, from the beginning, the Council of Guardians took its supervisory power to mean the vetting of the candidates for the Majles on whose qualifications the constitution had been silent. But the proportion of Majles candidates rejected while Khomeini was alive was about 15 percent; the proportion jumped to over a quarter after his death. In 1991, the Council exercised its authority to interpret the Constitution according to Art. 98 to assert that “the supervision mentioned in Art. 99 of the Constitution is approbatory (istiwābī) and applies to all stages of the electoral process,

72 Arjomand (n 55) Ch. 2.
74 This was the result of the assimilation, in the original draft Constitution of 1979, of the Council of Guardians to the French Conseil Constitutionnel as defined in the 1958 French Constitution.
75 During the first presidential elections that took place a month after the ratification of the Constitution with no clear guidelines for the supervision of elections, the Council of Guardians approved the candidacy of 106 and rejected only 18, mostly Leftists. The Guardian jurists must have regretted this lenience, which allowed Bani-šadr to become Iran’s first president. In the next presidential elections in July 1981, they were more strict in determining when a candidate was among “the religious and political figures (rijāl)” and a “believer in the bases of the Islamic Republic of Iran,” with such vaguely defined qualities as management capability, trustworthiness, and piety (Art. 115). From then on in each presidential election, only a handful of men would meet the Council of Guardians unspecifi ed criteria: 4 out of the 238 in 1997, 10 out of over 800 in 2001, and 7 out of 3010 in 2005.
including the approval or rejection of the qualification of the candidates.” Under fire from Khatami and the reformists, the Council was forced to restrain its rejection of candidates for the 2000 elections, but in 2004 and 2008 it again rejected nearly a third of the candidates. Eighty-eight incumbent Majles deputies were rejected in 2004, and the great majority of the known reformers were among the some 2,250 candidates rejected out of a total of 7,597 in 2008. With the arbitrary and blatant abuse of the Council’s supervisory power, as one newspaper put it a few years ago, the eligibility to run for elections is “no longer a right but a privilege.”

In the constitutional amendments of 1989 a new gate-keeping function in the selection of the clerical elite itself was given to the clerical jurists of the Council of Guardians: the supervision of the elections for the Assembly of Leadership Experts (amended Art. 99).

The Council used these powers to disqualify over 40 percent of the candidates for the Assembly in the 1990 election and about two-thirds in the 1998 and 2006 elections.

The political gate-keeping function of the Guardian Council thus grew in importance at the expense of the Council’s constitutional jurisprudence ceased in the 1990s. The Council refused to give any reasons for disqualifying candidates for all elected offices, including the presidency, nor any legal arguments for vetoing legislation. Instead, its original function of guarding the ideological foundations of the regime is overburdened by the new gate-keeping function that seriously vitiated its capacity for judicial review. The Jannati Council in the present decade largely abandoned it and became fully engrossed in the political control and manipulation of the elections. Owing to the absence of a written jurisprudence remotely comparable to the jurisprudence of the Egyptian and other constitutional courts (or the Supreme Court in India and the United States), it can be stated categorically that the Guardian Council has made no contribution to institution-building in the Islamic Republic of Iran.

2. The Ma‘ālat Council

Another important reason for this failure is that the Ma‘ālat Council, the other major clerically dominated organ of the regime, has outgrown the confines of Khomeini’s original terms of institution which stipulated that it “should not become a power alongside the other [three] Powers,” and even its expanded scope in the constitutional amendments of 1989, and became a new legislative body of some importance until the disgrace of its chairman, Hashemi-Rafsanjani, for opposing the fraud in the presidential elections in 2009. Unlike the Council of Guardians, the Ma‘ālat Council can alter the disputed bills referred to it and is under no obligation to return them to any other organ. Furthermore, it began its independent lawmaking immediately by changing items of legislation other than those subject to disagreement between the Council of Guardians and the Majles. Nevertheless, according to the Council
of Guardian’s constitutional interpretation of October 15, 1993, “no legislative organ has the right to annul or rescind an enactment of the Mašlaḥat Council.” Notable instances of legislation by the Mašlaḥat Council include an April 1991 law establishing a High Disciplinary Court for Judges, and the addition of a momentous article with seven clauses to the divorce law in November 1992, which took two unprecedented steps beyond Shi’ite jurisprudence: the appointment of female “advisory judges” (Clause 5), which paved the way for the amendment, in April 1995, of the law of judiciary appointment to allow appointment of women as judges, and the introduction of alimony (Clause 6). The July 1994 law of military courts and the May 1995 law of governmental punishments concerning smuggling and foreign currency should also be mentioned.

The legislative power of the Mašlaḥat Council came under reformist attack after their victory in the parliamentary elections of 2000. In May 2002, the Mašlaḥat Council issued a statement in response to an article in the reformist newspaper, Nourūz, which had cited a number of instances of its legislation as unconstitutional. The Mašlaḥat Council reaffirmed the constitutionality, with the Leader’s permission, of its legislation in matters other than disputes between the Council of Guardians and the Majles. This legislative power, it claimed, was implied in Clause 8 of the amended Art. 110 of the Constitution, which gave the Mašlaḥat Council responsibility for “solving the difficulties of the regime that cannot be solved through ordinary channels.” The argument seemed logical, but it could only reinforce the growing conviction among some of the leading reformists by that time that their goal of democracy was not achievable within the framework of the existing constitution.

3. The Assembly of Leadership Experts

The last major clerical council, the Assembly of Leadership Experts, has limited legislative power. The critical importance of the Assembly of Leadership Experts had been demonstrated by its swift choice of Khomeini’s successor. In its internal regulations passed in 1983 (Arts. 1 and 19), the Assembly had set up a seven-man Investigation Committee to supervise the conditions and comportment of the Leader on a continuous basis. This Committee was

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83 Hāshemi (n 77) Vol. 2: 659.
85 Hāshemi (n 77) Vol. 2: 467.
87 Hāshemi (n 77) Vol. 2: 658, n.1.
88 Nourūz (March 21, 2002). It should be noted that the Mašlaḥat Council includes the six clerical jurists of the Council of Guardians are mujtahids. It should be pointed out that the creation of the Mašlaḥat Council has in fact increased the power of these jurists who have been included among its member from the very beginning. The jurists of the Council of Guardians now wear two hats. As one of them once boasted, “I have one responsibility in the morning, another in the evening. My responsibility in the morning is to speak according to the shari‘ah [in the Council of Guardians], my responsibility in the evening is to see the public interest [in the Mašlaḥat Council]!” Cited in S.A. Arjomand, “Authority in Shi‘ism and Constitutional Developments in the Islamic Republic of Iran” in W. Ende and R. Brunner (eds), The Twelver Shia in Modern Times: Religious Culture & Political History (Brill, Leiden 2001) 301, 324.
89 Id.
90 However, as Āyatollāh Javādī-Āmolī rightly points out, it can exercise it independently of the Leader, unlike the Mašlaḥat Council. “A Javādī-Ămulī, ‘Jāygāh-e feqhi-ĥoqūqi-ye majles-e khebregān’” (1998 C.E./1377 A.P.) 8 Ĥokūmat-e Eslām 10, 12.
further given the responsibility of “supervising the administrative organization of Leadership in coordination with the Leader.”91 With its enhanced power of dismissal, and the mechanism for continuous vigil in the form of the Investigation Committee, the Assembly of Leadership Experts has become an influential organ in the collective conciliar clerical rule.92

C. Islamization of the Judiciary and Its Limits

One of the aims of the constitutional revision of 1989 was to centralize judiciary power, and to that end, it replaced the Supreme Judiciary Council with a single Head of the Judiciary Power, a mujtahid to be appointed by the Leader for five-year terms (amended Art. 157) in order, among other things, to reorganize the judiciary and implement the functions enumerated in Art. 156 (amended Art. 158), which included “supervision over the proper execution of laws” and “measures to prevent occurrence of crime and reform of the criminals.”

The Chief Justice of the Supreme Judiciary Council under Khomeini, Āyatollāh Mūsavī-Ardabīlī, had sought to rationalize the chaos arising largely from the new Islamic criminal law and the verdicts of the revolutionary courts. In accordance with Art. 161 of the Constitution, the Supreme Judiciary Council used the pre-revolutionary law of June 1949 on the uniformity of judicial process with its added clauses of July–August 1958 as the basis of its rulings that were binding on all the courts.93 This modest measure of successful Islamization of the law, however, stands in sharp contrast to the failure of effective Islamization of the Judiciary after Khomeini’s death, when Āyatollāh Mohammad Yazdi held the newly created position of the Head of the Judiciary from 1989 to 1999. To combat the chronic shortage of religious jurists and a mounting backlog of cases, the June 4, 1994 C.E. (15 Tir 1373 A.P.) Law of General and Revolutionary Courts abolished the position of prosecutors and the appeal system in an attempt to revert to the Qāḍī courts as prescribed in the Shi‘ite law in the form of the “general courts” (dādgāhhā-ye ‘omūmī, called ‘āmm when first instituted prior to the 1994 law) presided over by a single Islamic judge-prosecutor. The attempt, however, was confused and contradictory because it presumed the bureaucratic framework of the Iranian state and the conversion of Shi‘ite law to the law of the state. The office of the Prosecutor General was kept even though there were no public prosecutors, and at the same time his authority in matters concerning the ḫisba was transferred to the heads of the city and provincial branches of the Ministry of Justice, thereby mixing administrative and judiciary authority (Art. 12—Observation [tabširah]). Furthermore, the finality of the verdict of hierocratic judges according to the Shi‘ite law, insisted upon by Āyatollāh Māzandarānī in 1911, was ignored and appeals were allowed in a broad range of cases (Art. 26), with the executive regulations pursuant to that law setting up appeal courts in provincial capitals (Art. 5).

The result of the Islamization by the creation of the so-called general courts was generally chaotic. The chronic shortage of judges with the requisite training in Shi‘ite jurisprudence, furthermore, made any further Islamization unlikely. There were only 5,000 judges for 10,000 positions, while recognized institutions produced only 600 graduates a year, and only a small

91 Hāshemī (n 77) Vol. 2: 59–60.
92 See Arjomand (n 55) Ch. 2 for further details.
proportion of these come from the madrasas or can become mujtahids.\textsuperscript{94} Āyatollāh Sayyed Maḥmūd Hāshemi-Shāhrūdī, who succeeded Yazdī in 1999, declared the judiciary he was taking over to be a wreck (vīrāneh), seventy years behind other institutions, and promised major reforms and reorganization.\textsuperscript{95} During the decade he served as the head of the judiciary, 1999–2009, Shāhrūdī carried out a number of measures to reform the judiciary devastated by his predecessor’s rash and ill-conceived Islamization.

Shāhrūdī sought direct support of the Maṣlaḥat Council for dealing with the situation,\textsuperscript{96} and reintroduced the division of courts into criminal (keyfāri), family and personal status (madānt), and civil and commercial (ḥuqūqi). He also passed separate laws of procedure (dādraš) for each, and reintroduced the differentiation between the offices of judge and prosecutor, as well as reintroducing specialized courts and an appellate system.\textsuperscript{97} The law of October 2002, reestablishing the lower (dādsarā) and appellate courts, passed the Majles as a very extensive amendment to the 1994 Law of General and Revolutionary Courts, compounding the overall confusion regarding the 1994 Law. To give some clarity to the new law, Āyatollāh Shāhrūdī, as the Head of the Judiciary, issued the Amended Regulations of the Law of General and Revolutionary Courts on January 29, 2003 C.E. (9 Bahman 1381 A.P.). The motive for keeping “general courts” in the title of the law while they were being abolished can only be to deny the failure of Islamization, but it does not help the general requirement of clarity of laws.

It is interesting to note that in his statement on judiciary empowerment, Shāhrūdī does not fail to note that the Head of Judiciary is responsible only to the theocratic monarch (vali-ye amr), and not to the Majles or the president, and that the Majles has no power of interpellation over him or any judge or official or the judiciary.\textsuperscript{98} But here is the rub. The Leader used the judiciary to fight the reformers in the Majles and the press, promoting intelligence officers and torturers as special judges, and using the Special Court for the Clergy for disciplining the privileged social stratum of the Islamic Republic. The trials in 1999 of the Interior Minister, ‘ Abdollāh Nūrī, and of Hojjatol-eslām Moḥsen Kadīvar, were particularly spectacular, but the courts continued to operate and have put thousands of dissident clerics behind bars.\textsuperscript{99}

Āyatollāh Shāhrūdī emphasized the importance of specialized consultation within the judiciary and instituted regular sessions of expert judges in towns and provincial capitals to answer questions and requests for guidance by the courts under jurisdiction. The first set of sessions dealing with problems in criminal law arising from the new Islamic penal code and the laws and regulations of revolutionary courts were held from 2000 to 2002 in district branches of the Ministry of Justice. The selection of their procedures published for the instruction of judges suggests that a bureaucratic mechanism was put in place for the rationalization of legal process. Shāhrūdī also strengthened the Legal Office (edāreh-ye hoqūqi) of the Judiciary and instituted a Research Center in Jurisprudence (Markaz-e Taḥqiqāt-e Fiqhī)

\textsuperscript{94} Ett elā'āt (Teheran November 30, 1999).
\textsuperscript{95} Ett elā'āt (Teheran November 23, 1999).
\textsuperscript{96} Ett elā'āt (Teheran July 10, 2000).
\textsuperscript{98} Id. Vol. 2: 35.
to answer inquiries from the courts and provincial branches of the Ministry of Justice. The Center draws on the ruling (fatwās) of the seven designated “sources of imitation,” including the Leader, Āyatollāh Khāmene’i, but does so alongside the rulings of other living marāji’ as well as those of the late Āyatollāhs Khomeini and Khū’ī and the classics of Shi’ite jurisprudence. This Research Center, like the Legal Office of the Ministry of Justice, follows Art. 167 of the Constitution, consistently upholding the priority of ordinary laws over Shi’ite jurisprudence. The resort to the latter is thus residual, along the lines provided for by the Egyptian Civil Code of 1948 and the Afghan Constitution of 2004. Furthermore, it is usually inconclusive, as the fatwās presented to supplement ordinary laws are often contradictory, and categorical instructions seem to be provided only when a pertinent positive law is found additionally. Indeed, the latter seems to make the fatwās redundant. For example, four out of five fatwās produced in response to the question of whether women can be judges according to the Sharī‘ah gave a negative answer but were overruled by the Legal Office of the judiciary, which cited an ordinary law on the appointment of women as judges. In short, in the kingdom of the jurists, state law prevails over the Shi’ite jurisprudence, whose residual validity is seen as a source of legal uncertainty and effectively minimized through the guidance provided by the advisory centers of the judiciary.100

Āyatollāh Shāhrūdī considered his Islamic-style judicial development suitable for exportation to the rest of the Muslim world. He appointed judiciary attachés to embassies in some Muslim countries, and signed an agreement for judiciary cooperation with Qatar in April 2008.101 Shāhrūdī, however, disapproved of stoning for adultery as prescribed by the Shari‘ah, and thought the judges can and should commute it to other forms of punishment in the public interest (mašlahat).102 His conception of judiciary organization was a managerial one, of an administrative hierarchy in which judges are subjected to the authority of the district and provincial directors (modirān)—a far cry from the traditional autonomy of the Qādī. In addition, he had at his disposal a High Disciplinary Court for Judges set up by a Mašlahat Council enactment in 1991 to discipline the judges, as the Leader disciplines the clerics by means of the parallel and presumably model Special Court for Clerics. Nor did Āyatollāh Shāhrūdī fail to remind the directors of these branches of the judiciary that they were the representatives of the Supreme Jurist and the theocratic monarch.103

V. FAILED ATTEMPTS AT DEMOCRATIC REFORM

The growth of the post-Khomeini clerical, conciliar rule has been directly at the expense of the one clearly democratic organ of the regime, namely the Majles. It has been systematically weakened by the Guardian Council, harassed by the politicized judiciary, and at decisive moments, neutered by the Leader. This was the case when he defeated the reformist Sixth Majles just as it was beginning, by ordering it to stop debating the press law, and the Majles Speaker obeyed his order as the Leader’s hokm-e hokūmatī. Nevertheless, the attempts by President Moḥammad Khâtāmī (1997–2005) to reform the political and legal structure of the Islamic Republic of Iran did have some modest effect and merit a brief discussion. Participation had been a major component of his Khâtāmī’s perestroika, or restructuring


102 Instances of stoning have nevertheless occurred despite his disapproval.

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project, for political development. He argued that “the most evident channel for participation is the election of the Councils,” meaning the village, town, and provincial Councils envisioned in the Constitution of 1979. The law on the organization and elections of the councils had been passed in December 1996 (under President Hashemi-Rafsanjani), and Khatami promised to have the councils established. The elections took place in February 1999, as Khatami had promised, and gave his supporters another landslide victory with over four-fifths of the popular vote. On the first anniversary of his now epic presidential victory, May 23 (Khordad 2), Khatami addressed the gathering of some 107,000 elected members of the village and town councils in Tehran, again emphasizing the importance of political development and the need to struggle for “the consolidation of Islamic democracy and popular government (mardom-salar).” He noted that sacred terms such as “revolution,” “freedom,” “Islam,” and “leadership” are not the monopoly of any group. The Leader was pointedly absent, and his message was read by the director of this bureau. In the course of the year, the councils elected some 718 mayors, and have been slowly defining their functions in relation to central government.104

In retrospect, the creation of the councils must be considered his single, most remarkable achievement in democratization. Their elections are relatively free, as the central government has neither the interest nor the knowledge to vet the candidates, except in Khuzestan, where Arab ethnic separatists gained control of the councils, and possibly other provinces where ethnic separatists present a threat. The councils have injected great vitality into local politics, and have become centers of local lobbying with connections to the Ministry of the Interior and the Majles. One can go further and assert that the local councils have had a major impact on the Majles and have turned it into a platform for the promotion of local interests.105 They have also reinforced the trend toward increasing provincial autonomy. Following the creation of the province of Ardabil, the large province of Khorasan was split into three, and the lobbying through the councils in Bojnurd, the new capital of Northern Khorasan, as well as through other new capitals, played a major role in this.106 The Municipal Council of Tehran soon became a training ground for national politicians. It was from the Tehran Municipal Council that Sa’id Hajjarian engineered the landslide victory of the reformists in the Sixth Majles in 2000, and where he was tragically and almost fatally shot on the eve of Nowruz. The Council served as the springboard for President Ahmadinezhad in the presidential elections of 2005 and 2009.107

Khatami’s modest attempt at constitutional reform, by contrast, had no success. In 1998, he appointed a Commission for the Implementation of the Constitution and constitutional supervision, citing Art. 113 of the Constitution. Art. 113 was one of the few unchanged from the original draft modeled on the 1958 constitution of the French Fifth Republic, which makes the protection of the constitution one of the president’s main duties. The Commission did not display much energy. It avoided confronting the Guardian Council and the judiciary,

104 Arjomand (n 88) 329.
105 This has been the result of the fractured nature of parliamentary representation in the absence of political parties, which would presumably have national rather than local platforms, and the severe weakening of the Majles as national legislature by the Council of Guardians and the Ma‘labat Council.
which, under Āyatollāh Hāshemī-Shāhrūdī, was putting forward its own claim to constitutional interpretation.

On September 1, 2002, the president introduced a bill to curb the Council’s power of approbatory supervision based on its own constitutional interpretation of 1991 that miscarried, as it was predictably vetoed by the Council of Guardians. Khātamī then introduced a second bill aimed at increasing the powers of the president as the guardian of the constitution according to its Art. 113. It is interesting to note that it was presented as an amendment to a 1986 law put through by the then-President Khāmene’ī, which tried to increase the power of the president against the prime minister, almost certainly with no inkling that he would one day be the Leader curbing the power of the president! Khātamī’s bill was passed by the Majles in April 2003. It too was promptly rejected by the Guardian Council. The Commission was cautious and conservative, wishing to remain strictly within the confines of the constitution, and its bill was consequently too timid to make a significant difference. It missed the opportunity to make the bold first step toward introducing a form of judicial review under the aegis of the president, which seemed technically possible, 108 by couching the bill in administrative rather than judicial terms. The proposed presidential commission was to be given the power of “inspection” to determine violations of the constitution and was not explicitly given jurisdiction to hear cases of human rights violations. Only obliquely and at the end was the president given the power to provide a budget for compensating victims of human rights violations. Despite all the talk of reform, the global wave of the human rights revolution had evidently passed the Iranian shores without a ripple. But even this feeble attempt to provide administrative redress for human rights violations was too much for the Guardian Council. In April 2004, a despondent Khātamī wrote about his dashed hopes to the relentless Guardian Council, and withdrew his bill. 109

VI. CONCLUSION

The three phases this article has surveyed can be considered the three stages in the transformation of ḥaqīqāt into qānūn, or of Shi‘ite law from “a jurists’ law” to state law or the law of the land. During the making of Iran’s first constitution, 1906–1907, the Shi‘ite jurists had a significant impact as objectors rather than drafters of the 1907 Supplement to the Fundamental Law. In the next four years, however, they significantly participated in the drafting of the laws on the organization of the judiciary and ensured their substantive conformity to Shi‘ite jurisprudence despite radical reform of the procedural law. In this first phase of Shi‘ite constitutionalism surveyed, the ṣharī‘a(t) appeared as a limitation to government and legislation. There was never a presumption that it should be the basis of the constitution itself. Islam was

108 The author had urged the Office of the President, through Deputy-President Abtahī, and a number of reformist members of the Majles, to do so. In its internal communications and drafts, the Commission had also sought to draw on the president’s oath of office, which makes him the guard (pāsdār) of the Islamic order and the constitution (Art. 121). Taking the terms “guard” (pāsdār) and “guardian” (negahbān) as synonymous, the president could conceivably have strengthened his responsibility for the implementation of the constitution in Art. 113, and staked a bolder claim to constitutional interpretation at the expense of the Council of Guardians than the more assertive head of the judiciary did. The judiciary’s counter-argument, however, was that the Law of 1986 had been superseded by the constitutional amendments of 1989. H. Mehrpur, Waţifeh-ye doshwār-e nezārat bar ejrā-ye qānūn-e asāsi (Nashr-e Ťaleh, Tehran 2005 C.E./1384 A.P.) 20.

109 Id. 77–88.
considered a part of the larger issue of constitutional governance and not as the basis of the
constitution.

The Shi’ite jurists also played a prominent role in the creation of Iran’s Civil Code in the
late 1920s and 1930s. Given the pro forma character of the passing of the Civil Code by the
Majles and complete formality of legislation, this active participation in codification was a
very effective way of assuring the substantive conformity of the most important corpus of
Iranian law, the Civil Code, with the Shi’ite law which made unnecessary the formation of the
committee of the five mujtahids of the highest rank of Art. 2 of the Supplement to the
Fundamental Law.

Khomeini’s success in leading the Islamic revolution of 1979 on the basis of his theory of
Mandate of the Jurist turned Iran into a veritable kingdom of the jurists, its official designa-
tion as a republic notwithstanding. The Shi’ite jurists who accepted his theory rewrote the
Constitution of Iran in 1979 and amended it in 1989, and they have led the reconstruction of
Iran’s legal order since the revolution. There was a major change in the constitutional culture
of the Middle East in this third phase. In the two earlier phases, there had never been a pre-
sumption that Islam and the Shari’ah should be the basis of the constitution itself. The idea of
Islam as the basis of constitution did not occur to the clerical jurists of the first three decades
of the twentieth century. That idea was born later and outside Iran in the ideological stage of
Middle Eastern constitutional history that began in Pakistan and Egypt. With the importa-
tion of Islamic political ideologies to Iran during the Islamic revolution of 1979, a radical shift
took place from the idea of Islam as a limitation to that of Islam as the basis of the Constitution
of the Islamic Republic of Iran.

Not surprisingly, this fundamental change has gone hand in hand with considerable cler-
icalization of the judiciary. The attempt to Islamize the organization of the judiciary and judi-
cial procedure in the 1980s, however, was a failure and has been reversed in the last decade,
proving the wisdom of the earlier generation’s admission of the procedural inadequacy of
Islamic law. What seems more surprising is that Shi’ite jurisprudence occupies only a residual
place in the legal order of the Islamic Republic of Iran. This paradox is more apparent than
real because the Shi’ite jurists of the first two phases had already Islamized modern Iranian
law in substance, albeit without any ideological fanfare and without any theory of theocratic
government.
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I. INTRODUCTION

Pakistan emerged as an independent state on August 15, 1947, the same day as its neighbor India. As a matter of law, the newly emerged state owed its existence to the provisions of a British act of parliament, the Indian Independence Act of 1947, which came into effect on July 18, 1947. This act not only granted independence, but also determined the shape of the new nation's legal system immediately following independence. Section 18(3) of the Indian Independence Act provided for the continued validity of all colonial laws. For a British parliament to make provisions for the content of a legal system of an independent state would seem to run counter to the very notion of sovereignty, were it not for Section 6 of the same act, which provided in clear terms that “The legislature of each of the new Dominions shall have full power to make laws for that Dominion, including laws having extra-territorial operation.” Having been granted full powers to pass any law, Pakistan—at least as a matter of law—was a fully independent and sovereign state at the stroke of midnight of August 15, 1947. In actual practice, however, it was Section 18(3), rather than Section 6, of the Indian Independence Act that would occupy the more prominent role in the development of Pakistan’s legal system. For almost ten years, until the adoption of the Constitution of 1956, the country was governed by the provisions of the 1935 Government of India Act, as modified by the Indian Independence Act, and any law passed by the Constituent Assembly, which also acted as the country’s legislature during this long period of transition. The odd result was that Pakistan, having come into existence after a long and hard struggle to establish a homeland for India’s Muslims, continued to be governed by a legal system that had

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1 Section 7 of the Indian Independence Act of 1947 provided that: “As from the appointed day [August 15], His Majesty’s Government in the United Kingdom have no responsibility as respects the government of any of the territories which, immediately before that day, were included in British India.”

been adopted with hardly any modifications from its colonial past. There was no tabula rasa, with the slate being wiped clean of the vestiges of colonialism at the earliest opportunity following independence, to be replaced by Islamic law, or an Islamic form of government, in whatever shape.

Was the decision to continue to be governed by colonial laws made by default, or had this result been planned by the founders of Pakistan? What was the vision of Muḥammad ‘Alī Jināḥ, the “sole spokesman” for British India’s Muslims, for the legal system of Pakistan, and for the role of Islam therein? These questions may seem academic, given that Pakistan has been independent for over sixty years, were it not for the fact that there is still no political consensus on the role of Islam in the legal system. The lack of consensus becomes visible in the frictions and controversies that accompany any measure designed to introduce even minor changes to the Islamic criminal laws promulgated in 1979, or in the debates over the introduction of an Islamic banking and finance system.

Common to all these debates is a historical perspective, an interpretation of the past to legitimize the present. On one side of the spectrum are those who argue that Pakistan had been founded as an “ideological state,” to be governed by Islamic law. From this perspective, any attempt to change this legacy would amount to a denial of the legitimacy of the state itself, a betrayal of those Muslims who had been willing to sacrifice their lives for the creation of an Islamic state. Conversely, there are those who argue that although Pakistan was founded as a homeland for the Muslims of British India, it was conceived as a secular rather than a religious state. Writing in 1955, some eight years after Pakistan gained independence, G. W. Choudhury observed that the failure to adopt a constitution was due to the fact that “the framers of the constitution were faced with the problem of producing a document that would be satisfactory to secularists and sectarians alike.”

Given the pivotal role of Jināḥ in the creation of Pakistan, and the fact that his legacy continues to be relevant in contemporary debates over the development of its legal system, his case for the creation of Pakistan will be examined first. This will be followed by an examination of the role of Islam in the drafting of Pakistan’s three constitutions from 1947 to 1973.

II. THE QUEST FOR PAKISTAN

As in few other cases, the events surrounding the creation of Pakistan radiate into the present. The most prominent position in these events is occupied by Muhammad ‘Alī Jināḥ, the Qā’id-i Aʿẓām, the founder of Pakistan and President of the All-India Muslim League, which he led from 1936 until his death in September 1948. In contemporary Pakistan, his role as the sole spokesman of the Indian Muslims in the years before independence is undisputed. Buildings are named after him, the currency bears his image, and the government of Pakistan hosts a Jināḥ website. What is disputed is Jināḥ’s vision of Pakistan itself. As observed by Akbar Aḥmad, “Paradoxically, the self-consciously secular Pakistan People’s Party (PPP)
and the right-wing Jamā’at-i Islāmī both claim Jināh as their hero.”8 The paradox of Jināh, it
is frequently asserted, stems from the fact that his “ideas about Pakistan remained vague.”9
In her groundbreaking study of Jināh’s quest for Pakistan, Ayesha Jalal concludes that “by
deliberately keeping the demand for “Pakistan” vague, and its territories undefined, Jināh
had made it possible for his followers to exploit the League’s communal line without having
to face its implications: the partition of the Punjab and Bengal.”10

A. Jināh’s Thoughts on Constitutionalism and Islam

Jināh’s statements during his brief tenure as Governor-General of Pakistan, a position which
he assumed by virtue of Section 5 of the Indian Independence Act, do lack any commit-
tment to the wholesale transformation of the legal system in the name of Islam. Those who
stress that Jināh never intended to create an Islamic state derive support from one of the few
speeches of his that contained a semblance of a legislative agenda following independence.
In his presidential address to the Constituent Assembly of Pakistan on August 11, 1947,
Jināh set out a list of priorities for the Assembly, which was, as he reminded them, “now a
Sovereign Legislative body and you have got all the powers.”11 The first duty was “to main-
tain law and order, so that the life, property and religious beliefs of its subjects are fully
protected by the State.”12 This was followed by appeals to combat bribery and corruption,
black-marketing, nepotism, and bribery, and to “wholly and solely concentrate on the well-
being of the people, and especially of the masses and the poor.”13 Although Jināh’s admoni-
tions on corruption still remain relevant sixty years later, it is Jināh’s pronouncement on
Hindu-Muslim relations in Pakistan that receives the most attention in debates over Jināh’s
vision of Pakistan. Flagged by himself as the most important part of his speech, with the
words “I cannot emphasize it too much,” it occupies more than half of his address to the
Constituent Assembly. Touted by some historians as Jināh’s Gettysburg Address, his speech
has attained an iconic status in the historiography of Pakistan, serving as a secular counter-
weight to the Islamic provisions of the Objectives Resolution.14 It is worth quoting from it
at length, since it provides not only insights into Jināh’s vision for Pakistan, but also an
explanation for his reluctance to define the future shape of Pakistan’s Constitution:

Now, if we want to make this great State of Pakistan happy and prosperous we should
wholly and solely concentrate on the well-being of the people, and especially of the
masses and the poor. If you will work in co-operation, forgetting the past, burying the
hatchet, you are bound to succeed. If you change your past and work together in a spirit
that everyone of you, no matter to what community he belongs, no matter what relations
he had with you in the past, no matter what is his colour, caste or creed, is first,

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8 Akbar S. Ahmad, Jinnah, Pakistan and Islamic Identity: The Search for Saladin (Routledge, London
1997) 193.
9 Id. 177.
10 Ayesha Jalal, The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan (Cambridge
11 Muhammad Ali Jinnah (Muhammad ‘Alī Jināh), Quaid-i-Azam Mahomed Ali Jinnah: Speeches as Governor-
12 Id.
13 Id.
14 See Ahmad (n 8) 173.
second and last a citizen of this State with equal rights, privileges and obligations, there will be no end to the progress you will make. I cannot emphasise it too much. We should begin to work in that spirit and in the course of time all these angularities of the majority and minority communities, the Hindu community and the Muslim community—because even as regards Muslims you have Pathans, Punjabis, Shias, Sunnis and so on; among the Hindus you have Brahmins, Vashnavas, Khatris, also Bengalees, Madrasis, and so on—will vanish. Indeed if you ask me this has been the biggest hindrance in the way of India to attain the freedom and independence and but for this we would have been free peoples long, long ago. No power can hold another nation, and especially a nation of 400 million souls in subjection, nobody could have conquered you, and even if it had happened, nobody could have continued its hold on you for any length of time but for this. Therefore we must learn a lesson from this. You are free; you are free to go to your temples, you are free to go to your mosques or to any place of worship in this State of Pakistan. You may belong to any religion or caste or creed—that has nothing to do with the business of the State . . . We are starting in the days when there is no discrimination, no distinction between one community or another, no discrimination between one caste or creed and another. We are starting with this fundamental principle that we are all citizens and equal citizens of one state . . . Now, I think we should keep that in front of us as our ideal and you will find that in course of time Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in a political sense as citizens of the state.  

A day later, Jinnah inaugurated the Pakistan Constituent Assembly, in the presence of the outgoing Governor-General, Lord Mountbatten. He delivered a short speech, aimed largely at assuring those British civil servants who had transferred into the service of the Pakistani government that they would be treated fairly:

As servants of Pakistan, we shall make them happy and they will be treated equally with our nationals. The tolerance and goodwill that great Emperor Akbar showed to all the non-Muslims is not of recent origin. It dates back thirteen centuries ago when our Prophet not only by words but by deeds treated the Jews and Christians, after he had conquered them, with the utmost tolerance and regard and respect for their faith and beliefs. The whole history of Muslims, wherever they ruled, is replete with those humane and great principles which should be followed and practiced.

Religious tolerance and the need to protect non-Muslim minorities is a recurring and consistent theme in Jinnah’s public statements as Governor-General of Pakistan. This issue had become a serious concern when millions of Hindus and Muslims embarked on the

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15 “Presidential Address to Constituent Assembly of Pakistan on 11th August, 1947” in Jinnah (n 11) 8–9.
16 “Speech on the Inauguration of the Pakistan Constituent Assembly on 14th August, 1947” in Jinnah (n 11) 15. Jinnah’s speech was received favorably by the Hindu members of the Constituent Assembly. In his response to Jinnah, Kiran Sankar Roy, on behalf of the Congress Party, stated that “if the Pakistan which you have in mind means a secular democratic State, a State which will make no difference between a citizen and a citizen, which will deal fairly with all, irrespective of caste, creed and community, I assure you that you shall have our utmost co-operation.” Quoted in Mohammad Jafar, I. A. Rehman and Ghani Jafar, Jinnah as a Parliamentarian (Afsar Associates, Islamabad 1977) 354.
largest transfer of populations between two states in the history of the twentieth century. The exodus of Hindus from Pakistan was accompanied by news reports of countless atrocities committed against Indian Muslims, described by Jinnah a year after independence as “pre-planned genocide” and “the Punjab and Delhi holocaust.” In a speech given at a large rally in Lahore on October 30, 1947, Jinnah again stressed that “the tenets of Islam enjoin on every Mussalman to give protection to his neighbours and the minorities regardless of caste and creed.” Widespread rioting and attacks on Hindus, who had remained in Sindh and its capital Karachi, prompted more speeches on the need to protect minorities, and strongly worded condemnations of their Muslim attackers:

I once more want to impress upon all Muslims that they should fully cooperate with the Government and the officials in protecting their Hindu neighbours against these lawless elements, fifth columnists and the cliques who are responsible for creating these disturbances, and restore trust and confidence amongst all the communities.

Though the protection of minorities occupies a central place in his public pronouncements, Governor-General Jinnah also made frequent references to Islam. These occur principally in three contexts: democracy, national unity, and social justice. The theme of democracy is reflected in a speech given to the “Sibi Darbar,” a gathering of tribal elders, in Baluchistan. Jinnah had decided to set up a special Governor-General’s Advisory Council for the province, stating that:

In proposing this theme, I have had one underlying principle in mind, the principle of Muslim democracy. It is my belief that our salvation lies in following the golden rules of conduct set for us by our great law giver, the Prophet of Islam. Let us lay the foundations of our democracy on the basis of truly Islamic ideals and principles. Our Almighty has taught us that “our decisions in the affairs of the State shall be guided by discussions and consultations.”

Islam as a guarantor of social justice is the second consistent theme in Jinnah’s speeches as Governor-General. For instance, in a speech in Chittagong, Jinnah endorsed the view that “Pakistan should be based on sure foundations of social justice and Islamic socialism which emphasises equality and brotherhood of man.”

References to Islamic social justice also formed part of a speech delivered on the occasion of the opening of the State Bank of Pakistan. In the course of the speech, Jinnah denounced Western economic systems, stating that “we must work on our destiny in our own way and present to the world an economic system based on true Islamic concept [sic] of equality of manhood and social justice.” As far as banking itself was concerned, Jinnah

17 “Message to the Nation on the Occasion of the First Anniversary of Pakistan on 14th August, 1948” in Jinnah (n 11) 157.
18 “Speech at the Dacca University Convocation on 24th March, 1948” in Jinnah (n 11) 88.
19 Id. 31.
20 “Message Sent to the Refugees on the Occasion of Tour of the Riot-Affected Areas in Karachi on 9th January, 1948” in Jinnah (n 11) 41.
21 “Speech at Sibi Durbar on 14th February, 1948” in Jinnah (n 11) 56.
22 “Speech at the Public Reception at Chittagong on 26th March, 1948” in Jinnah (n 11) 98.
23 Id.
declared he would “watch with keenness the work of your [State Bank] Research Organisation in evolving banking practices compatible with Islamic ideals of social and economic life.”

The most important, and also most difficult, issue was the role of Islam in unifying the country, and in creating a Pakistani national identity. The only obvious common denominator between the people of West and East Pakistan was their identity as Muslims. If they were meant to be united in a common Pakistani national identity, distinct from “Hindustan,” only their shared religion could provide a bond. It is especially in the speeches given during his first and only visit to East Pakistan that Jinnah repeatedly stressed the common bond created by Islam. Thus, at a mass rally held in Dacca on March 21, 1948, Jinnah stated:

Islam has taught this, and I think you will agree with me, that whatever else you may be and whatever you are, you are a Muslim. You belong to a Nation now; you have carved out a territory, vast territory, it is all yours; it does not belong to a Punjabi or Sindhí, or a Pathan, or a Bengali; it is yours.

Achieving national unity through the medium of Islam sits uneasily with the hope that religious identities would disappear from the political life of Pakistan. Some hints on how Jinnah thought the contradiction could be reconciled are contained in two of Jinnah’s radio broadcasts, intended to introduce the new state of Pakistan to the peoples of Australia and the United States. In the Australia broadcast, Jinnah explained the role of Islam in unifying East and West Pakistan, stating that:

... the great majority of us are Muslims. We follow the teachings of the Prophet Mohammad (may peace be upon him). We are members of the brotherhood of Islam in which all are equal in rights, dignity and self-respect. Consequently, we have a special and a very deep sense of unity. But make no mistake: Pakistan is not a theocracy or anything like it. Islam demands from us the tolerance of other creeds and we welcome in closest association with us all those who, whatever creed, are themselves willing and ready to play their part as true and loyal citizens of Pakistan.

In a similar message to the people of the United States, Jinnah stated that the Pakistani constitution

... will be of the democratic type, embodying the essential principles of Islam. Today, they are as applicable in actual life as they were 1,300 years ago. Islam and its idealism have taught us democracy. It has taught equality of man, justice and fair play to everybody. We are the inheritors of these glorious traditions and are fully alive to our responsibilities and obligations as framers of the future constitution of Pakistan. In any case Pakistan is not going to be a theocratic State—to be ruled by priests with a divine mission. We have many non-Muslims—Hindus, Christians and Parsis—but they are

25 “Speech at a Public Meeting Attended by Over Three Lakhs of People at Dacca on 21st March, 1948” in Jinnah (n 11) 84.
26 “Broadcast Talk to the People of Australia Recorded on 19th February, 1948” in Jinnah (n 11) 58.
all Pakistanis. They will enjoy the same rights and privileges as any other citizens and will play their rightful part in the affairs of Pakistan.\footnote{27 “Broadcast Talk to the People of the United States of America on Pakistan, Recorded in February, 1948” in Jinnah (n 11) 65.}

What emerges from these speeches and statements is a vision of Pakistan as a state founded on the basis of Islam, but not meant to be an Islamic state. Equally, the majority of its citizens acquire the right to citizenship on the basis of their religion, namely Islam, though their rights as citizens are not defined in religious terms. The role of Islam as a source of law seems to be reduced to that of legal ethics, social justice, and other general aspirations. Such an interpretation of Jinnah’s vision leaves a bland taste for many Pakistanis, since it seems to ignore the “intense religious fervour and zeal for an Islamic state on the part of the Muslim masses, [without which] Jinnah could not have achieved Pakistan.”\footnote{28 Khalid Bin Sayeed, Pakistan: The Formative Phase, 1857–1948 (2nd ed. Oxford University Press, Karachi 1968) 11.} Neither does it sit well with the many judicial dicta that endorse the view that Pakistan was created as an “ideological state.” One representative statement is that of Chief Justice Nasim Shah, who wrote in 1990:

> But I also cannot overlook the glorious struggle waged by millions of Muslims to establish this Islamic state of Pakistan and the heart-rending sacrifices made by them for bringing into being this great polity wherein they could fulfil their cherished wish of conducting their affairs in accordance with the Injunctions of Islam, as enshrined in the Holy Qur’an and Sunnah.\footnote{29 Aziz Begum v. Federation of Pakistan [1990], Pakistan Legal Decisions 1990 Supreme Court 899, 913.}

Why would Jinnah have fought for the creation of a state for Muslims, but not for an Islamic state? It should not come as a surprise that the answer to this question is closely linked to Jinnah’s views on constitutional law. Jinnah was a brilliantly successful lawyer, who “was the most versatile of advocates, practicing with equal success before civil and criminal courts, original and appellate sides of the High Courts, and last but not least, before the highest tribunal of the Commonwealth, the Privy Council.”\footnote{30 Syed Sharifuddin Pirzada, Some Aspects of Quaid-i-Azam’s Life (National Commission on Historical and Cultural Research, Islamabad 1978) 27.} Even the most unfavorable portrayals describe him as “a man of unassailable personal honesty and financial integrity, his canons were sound law and procedure.”\footnote{31 Larry Collins and Dominique Lapiere, Freedom at Midnight (Simon and Schuster, New York 1975) 116.} His knowledge of the colonial legal system was almost complete. As a barrister, he had practiced it; as a Bombay Presidency Magistrate, he had applied it; and as a member of the Indian Legislative Council, he had helped to shape it.\footnote{32 Jinnah’s knowledge of the colonial legal system was almost complete, since in contrast to many other participants in the Indian independence movement, he had not spent any time in a British Indian jail.}

A reading of the speeches of Jinnah and the resolutions of the Muslim League suggests that the demand for Pakistan as a homeland for Indian Muslims was conceived not so much by a desire to establish the primacy of Islamic law or the establishment of an Islamic state, but by the desire to prevent Muslims from becoming a religious minority, discriminated against by a Hindu majority. This outcome would be inevitable, if ever there was self-rule
and democracy in a united India, since Hindus vastly outnumbered Indian Muslims. Jināḥ himself called the creation of Pakistan as the “only just, honourable and practical solution of the most complex constitutional problem of this great sub-continent.” 33 It is possible to go a step further. Jināḥ and the Muslim League had rejected the idea of unified India, not just because Muslims would be in a numerical minority, but because independent India would be a religious state, a Hindu Rāj. In 1940, in his famous address to the 27th session of the Muslim League at Lahore, which adopted the “Pakistan Resolution,” Jināḥ emphasized that “Muslim India cannot accept any Constitution which must necessarily result in a Hindu majority Government. Hindus and Muslims brought together under a democratic system forced upon the minorities can only mean Hindu Raj.” 34

Jināḥ’s conviction that a Hindu-majority government would of necessity mean a “Hindu Rāj” was a crucial element in his case for Pakistan. The Indian National Congress had consistently maintained that it was not a communal organization and did not represent only Hindus, an assertion disputed by Jināḥ. Following the elections under the Government of India Act of 1935, Congress governments were formed in six British Indian provinces, and, according to Jināḥ, all six of them embarked on the setting up of a Hindu government. 35 In his address to the 26th session of the Muslim League, held in Patna in 1938, Jināḥ observed that “the High Command of the Congress is determined, absolutely determined, to crush all other communities and cultures in this country, and to establish Hindu Raj.” 36 Evidence for this charge, Jināḥ asserted in the same speech, could be found in Muslim children being forced to sing the Bande Mataram song as a quasi-national anthem, which “is idolatrous and worse—a hymn of hatred for Muslims.” 37 Similarly, Jināḥ castigated the hoisting of the Congress flag on public buildings, the use of Hindi in preference to Urdu in the bureaucracy and in schools, 38 and Gandhi’s plans for primary education. “His [Gandhi’s] ideal is to revive the Hindu religion and to establish Hindu Raj in this Country, and he is utilizing the Congress to further this object.” 39 Jināḥ was supported in these claims by other members of the Muslim League. The rise of Nazi Germany provided opportunities for comparisons, such as the one made by Professor ‘Abd al-Sattār Khayri, who stated at the same session that

33 “Broadcast Speech from the Pakistan Radio, Lahore on 30th October, 1947” in Jinnah (n 11) 32.
35 Congress ministries were formed in July 1937 in Madras, Bombay, the Central Provinces, Bihar, Orissa, and the United Provinces. A few months later this pattern was followed in the North-West Frontier Province, with Assam joining the list in October 1938. These eight Congress governments stayed in power until the end of 1939, when they resigned in protest at British India’s entry into World War II. See S. M. Burke and Salim al-Din Quraishi, Quaid-i-Azam Mohammad Ali Jinnah: His Personality and His Politics (Oxford University Press, Karachi 1997) 222.
36 Pirzada (n 33) 2:305.
37 Pirzada (n 33) 2:305. The secretary of state for India at that time agreed with Jināḥ’s views, stating that to expect Muslims to cherish the Bande Mataram was like expecting the “Czechs, or Poles, joyfully to exclaim ‘Heil Hitler.’” Quoted in Burke and Quraishi (n 33) 226. Congress responded to these charges, dropping the singing of the Bande Mataram and abandoning the flying of the Congress tricolor from public buildings. Id. 225.
38 Jināḥ’s insistence on making Urdu the lingua franca of Indian Muslims was followed by its adoption as the official language of Pakistan. This decision proved quite divisive, especially in Sindh and East Pakistan, where the demand for recognition of local languages eventually turned into calls for provincial autonomy and independence.
39 Pirzada (n 33) 2:306.
“in India, Mr. Gandhi was the leader of the Hindu Jews.”40 The following year, at the 27th session of the Muslim League, Sir Abdullah Harun “warned the Hindus that if the Muslims in Hindu provinces were not justly treated, the Hindus in the Muslim Provinces would be treated in the same way in which Herr Hitler treated the Sudetans.”41 Jinâh distanced himself from these statements, describing them as not in keeping with the dignity and prestige of the Muslim League, but remained firm in his belief that Hindu-majority rule would invariably lead to a Hindu Raj.42 In 1941 he observed that “when we talk about Pakistan, we are called fanatics; but when they talk about Hindustan, Hindu Raj for the whole of India, they are liberals and nationals.”43

By 1943 Jinâh had assembled a body of evidence to substantiate his claim that any Hindu-majority government would lead to a Hindu religious state.44 His focus was Gandhi, whom he accused of having set up a number of institutions for the propagation of Gandhian, that is, Hindu, values.45 According to Jinâh these included the Gandhi Ashram, “to serve as the Vatican of Gandhism and the Capital of the Congress,”46 the Gandhi Harijan Seva Sangha, “to consolidate the Depressed Classes as integral parts of Hinduism and to prevent their conversion to Islam or Christianity,”47 and the Gandhi Khadi Prathisthan, “to preach the cult of the spinning wheel and Khadi or hand-woven cloth, which is worshipped as a fetish.”48 Gandhi’s alleged deputies were depicted in emotive language as “Zone Dictators, like their Nazi counterparts of District Fuehrers,” “Deputy Mahatmas,” “confirmed Cardinals of Gandhism, believers in the Gandhian Principles and Gandhian Dictatorship,” and “the Frontier Gandhi, Abdul Ghafar is in charge of the Hinduization influence and emasculation of the martial Pathans—the bugbear of the dreamers of Hindu Raj.” In one particularly pointed statement, Jinâh claimed that whenever Gandhi talks “of democracy, you mean Hindu Raj, to dominate over the Muslims, a totally different nation, different in culture, different in everything. You yourself are working for Hindu Nationalism and Hindu Raj.”49

Jinâh’s concerns that an independent, unified, self-governing India could transform itself into a Hindu Râj were founded on the principles and hallmarks of constitutional law as they presented themselves to him in the first half of the twentieth century. True independence would not admit to any restriction on the power of the people to adopt or amend

40 Id. 317.
41 Id. 344.
42 Id. 317.
43 Pirzada (n 33) 370.
44 By the late 1930s, the officers of the Muslim League had compiled three reports detailing instances of mistreatment of Muslims in provinces ruled by Congress. The main thrust of the charges was that the Congress government consistently discriminated against Muslims in cases of communal strife. Examples included prohibition of cow-slaughter and the bringing of false criminal charges against Muslims. See Stanley Wolpert, Jinnah of Pakistan (Oxford University Press, Oxford 1984) 169.
45 By the 1940s, Mahatma Gandhi had become the Muslim League’s favorite adversary, with some election campaigns being fought solely on an anti-Gandhian platform. In 1943, the Muslim League’s campaign during by-elections in the North-West Frontier Province consisted of “dressing up a rather aged stork in a dhoti, with big spectacles on its beak . . . leading it through the city [of Peshawar] in a procession with a ticket marked ‘Mahatma Gandhi’ . . . It was a cruelly true caricature.” Cited from Governor Cunningham’s letter to Viceroy Wavell of November 9, 1943, in Jalal (n 10) 116 n. 138.
46 Pirzada (n 33) 2:412.
47 Id.
48 Id.
49 Id. 2:415.
a constitution according to their wishes and desires. The very essence of true independence and democracy made safeguards for minorities by definition ineffective and impossible. Once independence was gained, there would be no fetters on the Hindu majority to impose a Hindu Rāj on the Muslim minority, as was summarized in one sentence by Jinā’ī while dismissing Gandhi’s assurances that Muslim interests would be properly safeguarded in a Constituent Assembly for a united India: “Brother Gandhi has three votes and I have only one.”

With no prospects for any solid legal guarantee for its rights within a unified India, the only possible avenue for India’s Muslims lay in the creation of a sovereign, self-governing state or states, in which Muslims, and not Hindus, formed the numerical majority. For Jinā’ī there was no other legally acceptable solution if Muslims were to be protected against the risk of living under a Hindu Rāj. While the Muslims of the majority provinces would be able to escape the threat of a Hindu Rāj, there was no such option for those Muslims who were to remain in India’s Hindu-majority provinces. Asked about his advice to Muslims who were forced to remain in India, Jinā’ī’s predictions were mixed. He began his response by stating that they had nothing to be afraid of, but then proceeded with a pessimistic outlook, predicting that “the Mussalmans in India have yet to go through a number of ordeals, sufferings and sacrifices. Their future will remain dark for some years to come and thick clouds will be hanging over them.”

From 1940 until independence, Jinā’ī and the Muslim League never wavered in their demand that the Muslim-majority areas should be sovereign and self-governing, in the sense that they would have the right to frame their own constitutions.

What made Jinā’ī so pessimistic about the possibility of establishing a legal framework for a united India that would provide adequate safeguards for Muslims and prevent the emergence of Hindu Rāj? A partial answer can be found in his experiences as an elected member of the central colonial legislatures, constituted under the provisions of the Indian Council Act of 1909 and the Government of India Acts of 1919 and 1935. It was here that he experienced firsthand that in a parliamentary setting, the numerical majority mattered, and nothing else. The potentially oppressive character of majority rule manifested itself dramatically for Jinā’ī in the infamous Rowlatt legislation, which consisted of the Criminal Law (Emergency Powers) Act of 1919 and the Indian Criminal Law (Amendment) Act of 1919. The acts departed in many respects from basic principles of criminal justice, as embodied in both English and British Indian law. The colonial government argued that these measures were required to combat the threat posed by revolutionaries and other violent agitators against the government. The Legislative Assembly, formed under the provisions of the Indian Council Act of 1909, consisted of thirty-seven official (i.e., appointed by the government) and thirty-two elected, nonofficial members. Despite unanimous opposition from the latter group, the legislation was passed. At the end of the debate, Jinā’ī vented his frustration over the inability of a united phalanx of elected members to prevail over the government majority:

Amendment after amendment has been moved and been rejected. I am beginning to think, my Lord, at the end of these two days, whether it is not a sheer waste of public time that these amendments should be formally talked about in this fashion and rejected.

50 Pirzada (n 33) 2:332.


52 For an account of Jinā’ī’s early politics, see Ian Brymant Wells, Ambassador of Hindu-Muslim Unity: Jinnah’s Early Politics (Permanent Black, Delhi 2005).
Perhaps it would be better, my Lord, in the interest of the public time if the Government declared once for all that these are the small minor amendments of yours which we are prepared to accept, as to the rest we have made up our mind and therefore, if you like to go on you can go on, but we have got the majority and they are going to be rejected. If that were declared, it would save a lot of time and put an end to this agony—it must be an agony to the Government, certainly it is an agony to me, to see this mockery of debate going on for two days and every amendment rejected.  

On March 29, 1919, a few days after the Rowlatt Bill had become law, Jinnah resigned from the Imperial Legislative Council, submitting that the passing of the bill “has clearly demonstrated the constitution of the Imperial Legislative Council, which is a legislature but in name—a machine propelled by a foreign executive” and that “a Government that passes or sanctions such a law in times of peace forfeits its claim to be called a civilised Government.” He stood for and was reelected to his seat in the Legislative Assembly four years later.

His experience in the colonial legislature also helped shape Jinnah’s views on the relative democratic potential of Hinduism and Islam. From the 1920s onward, both Muslim and Hindu members of the Legislative Assemblies proposed various social reform measures, usually aimed at their own communities. Occasionally, there was cross-religious agreement on particular measures, most famously in the case of the Child Marriage Restraint Act of 1929. When first introduced, the bill was only to apply to Hindus, but after Jinnah’s intervention, it was extended to all communities. Jinnah observed a stark contrast between the relative ease with which social reform legislation aimed at the Muslim community passed through the imperial legislative assemblies and the considerable difficulties faced by Hindu social activists, who hardly ever succeeded in translating their bills into laws. Muslims were able to persuade the legislative assemblies to pass a number of laws whose principal aim was to improve the legal position of Muslim women. The Muslim Personal Law (Shari’at) Application Act of 1937 strengthened the ability of Muslim women to claim their shares of inheritance under Islamic law, while the Dissolution of Muslim Marriages Act of 1939 extended the grounds on which a Muslim woman could seek divorce from her husband. In contrast, even seemingly simple measures as the one to allow intercaste marriages among Hindus foundered on the opposition of Hindu nationalists.

During the 1930s, Jinnah became openly disdainful of Hinduism, singling out the caste system with its seventy million untouchables as particularly obnoxious, and asserting that Muslims had learned democracy 1,300 years ago: “It is in our blood, and it is as far away from the Hindu society as are the Arctic regions.” Contrasting the democratic merits of Hinduism and Islam, he continued:

You tell us that we are not democratic. It is we, who have learned the lesson of equality and brotherhood of man. Among you, one caste will not take a cup of water from another. Is this democracy? Is this honesty? We are for democracy. But not the

53 M. Rafique Afzal, Selected Speeches and Statements of the Quaid-i-Azam Mohammad Ali Jinnah (University of the Punjab, Lahore 1966) 105.
54 Id. 112.
56 A detailed history of the reforms of Muslim personal law in British India during the 1930s and 1940s can be found in Tahir Mahmood, The Muslim Law of India (Law Book Company, Allahabad 1980).
57 Sagade (n 54) 41.
democracy of your conception, which will turn India into a Gandhi Ashram. One society and nation will, by its permanent majority, destroy another nation or society in permanent minority—all that is dear to the minority.\footnote{Pirzada (n 33) 2:414.}

If the very hallmarks of sovereignty made constitutional safeguards for the Muslim minority of a united India impossible, they also made any firm, legally enforceable commitments for the shape of Pakistan's future constitution impossible. Pakistan would need to exist before its people could adopt a constitution. Indeed, any firm promise on the shape of Pakistan's constitution would have destroyed the very foundations of Jināḥ's case for an independent homeland for India's Muslims. After all, if Jināḥ could promise Pakistan's future citizens a particular constitution prior to independence, the same right would have to be conceded to Congress. And in such a scenario, Congress's assurances that Muslim interests would be safeguarded in independent India, regardless of their numerical inferiority, could not be dismissed as mere propaganda. As a result, it was not a deliberate vagueness but the consistent application of principles of constitutional law that made it impossible for Jināḥ to make any firm promises regarding the constitution of Pakistan:

I have no doubt in my mind that a large body of us visualize Pakistan as a people's government. Either you seize it by force or get it by agreement. But until you get it—whether it is from a foreign nation or whether it is from our own government—the question as to the constitution and the form and system of government does not arise . . . Let us first agree that there shall be two Indias. Then the constitution-making body will be elected by some system from the people, and it is the people who will choose their representatives to go to the constitution-making body . . . The Constitution of Pakistan can only be framed by the millat [nation] and the people. Prepare yourselves and see that you frame a Constitution which is to your heart's desire. There is a lot of misunderstanding. A lot of mischief is created. Is it going to be an Islamic Government? Is it not begging the question? Is it not a question of passing a vote of censure on yourself? The Constitution and the Government will be what the people will decide.\footnote{Id. 2:424. Quoted from Jināḥ's Presidential Address at the 30th Session of the All-India Muslim League, Delhi, April 24–26, 1943.}

As a result of Jināḥ's position, the Muslim League never framed or endorsed a draft constitution for Pakistan.\footnote{In June 1947, Jināḥ received an unsolicited draft constitution from Professor H. Rahman of the University of Dacca. It envisaged Pakistan as an Islamic Socialist Republic and contained a blend of socialist and Islamic provisions. There is no record of Jināḥ's reaction. The text of the draft is reproduced in Jinnah Papers (n 50) Series 1, Vol. 2, 349.} The closest the Muslim League ever came to adopting such a document was in 1943, when a section of the Muslim League proposed that the party should "declare that the future Constitution of Pakistan would be based on the Quran." Following Jināḥ's presidential address, as quoted above, the resolution was not moved.\footnote{Pirzada (n 33) 2:440.}

In short, three results flowed from Jināḥ's understanding of sovereignty: First, it required the creation of Pakistan as the only possible legal mechanism to protect Muslims from the risk of Hindu Rāj. Second, it prevented Jināḥ from making any firm promises on the shape of Pakistan's future constitutional set-up. Finally, it forestalled the guarantee of rights to the

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58 Pirzada (n 33) 2:414.
59 Id. 2:424. Quoted from Jināḥ’s Presidential Address at the 30th Session of the All-India Muslim League, Delhi, April 24–26, 1943.
60 In June 1947, Jināḥ received an unsolicited draft constitution from Professor H. Rahman of the University of Dacca. It envisaged Pakistan as an Islamic Socialist Republic and contained a blend of socialist and Islamic provisions. There is no record of Jināḥ’s reaction. The text of the draft is reproduced in Jinnah Papers (n 50) Series 1, Vol. 2, 349.
61 Pirzada (n 33) 2:440.
non-Muslim minorities in independent Pakistan. In just one sentence, Jinnah neatly identified the third issue as indeed the essential constitutional problem of Pakistan: “The only question is that of minorities.”62 This was a legislatively insurmountable problem, he believed, inherent in the very characteristics of sovereignty and self-government. All Jinnah and the Muslim League could do was to give assurances, to assert that as Muslims they were bound to respect the rights of minorities and that any civilized government would see to the protection of minorities:

The minorities are entitled to get a definite assurance or to ask, “Where do we stand in the Pakistan that you visualize?” That is an issue of giving a definite and clear assurance to the minorities. We have done it. We have passed a resolution that the minorities must be protected and safe-guarded to the fullest extent; and as I said before, any civilized Government will do it and ought to do it. So far as we are concerned, our own history and our prophet have given the clearest proof that the non-Muslims have been treated not only justly and fairly but generously.63

In 1947, just three months before independence, Jinnah reiterated this. Asked by a Reuters reporter about his views on the protection of minorities, Jinnah replied:

There is only one answer. The minorities must be protected and safeguarded. The minorities of Pakistan will be the citizens of Pakistan and enjoy all the rights, privileges and obligations of citizenship without distinction of caste, creed or sect, and I have no doubt in my mind that they will be treated justly and fairly . . . The collective conscience of parliament itself will be a guarantee that the minorities need not have any apprehensions of any injustice being done to them. Over and above that, there will be provisions for the protection and safeguard of the minorities which, in my opinion, must be embodied in the Constitution itself. And this will leave no doubt as to the fundamental rights of the citizens, protection of religion and faith of every section, freedom of thought, expression and association and protection of their cultural and political life.64

B. Competing Views

Jinnah’s assurances that in a future Pakistan non-Muslim minorities would be treated fairly were founded on his belief that Islam was inherently tolerant. This argument did not convince the Hindu and Sikh minorities in the Punjab and Bengal, however, who when given the choice on June 20, 1947, overwhelmingly voted in favor of dividing their provinces in order to avoid being governed by a Muslim majority.65 Throughout the 1940s communal tensions had been rising, and by 1946 there was open conflict between Hindus and Muslims, especially in Bengal and Punjab, but also in other parts of British India. In December 1946, Winston Churchill asserted in the Indian Debate of the House of Commons that “it is certain that more people have lost their lives or have been wounded in India by violence

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62 Id. 2:425.
63 Id.
64 Jinnah Papers (n 50) Vol. 2, 845.
65 Jalal (n 10) 287.
since the interim government under Mr. Nehru was installed in office four months ago by the Viceroy, than in the previous 90 years.66

Although Jinnah avoided any firm promise to create an Islamic state, the Muslim League regularly used religious appeals in its provincial elections campaigns during the 1940s, and it also endeavored to bring Islamic scholars into its ranks. These attempts were only partially successful. In October 1945 the Muslim League managed to convene a conference in Calcutta of several prominent members of the ‘ulamā’. The outcome of this conference was the founding of the All-India Jamā’at-i ‘Ulamā’-i Islam, which organized party conferences in support of Pakistan.67 Its president, ‘Allāmah ‘Uthmānī, later became a member of the Pakistan Constituent Assembly, having run on the Muslim League ticket in the elections of 1946.

The Muslim League’s success in wooing some members of the ‘ulamā’ cannot obscure the fact, however, that prior to independence the majority of orthodox Islamic parties and groups were opposed to the creation of Pakistan. From the perspective of the present, the opposition of conservative Muslim groups seems almost paradoxical: Why would a conservative, orthodox Muslim be opposed to the idea of Pakistan? The precise reason for the rejection of Pakistan varied, but all of them shared misgivings about Jinnah’s secular stance, his refusal to promise the creation of an Islamic state, and his commitment to social reform legislation.

The Deoband School, the most influential of all “traditional” Muslim institutions in nineteenth- and early twentieth-century British India, was anti-British and pro-Congress. Founded in 1867 by Mawlānā Muḥammad Nanawtānī, a veteran of the 1857 uprising against the British, the school’s goal was “to train well-educated ‘ulama dedicated to scriptural Islam.”68 Deoband graduates had become prayer leaders, writers, and teachers, often founding new schools based on the model of their alma mater. As a result, Deoband’s “traditional, orthodox and conservative”69 approach to Islam spread throughout British India, and by the beginning of the twentieth century seminaries inspired by its philosophy existed in places as far apart as Peshawar and Madras. In 1919, followers of the Deoband school founded the Jāmi’at al-‘Ulemā’-i Hind, an organization that quickly managed to attract ‘ulamā’ from other intellectual traditions. The Jāmi’at’s main concern was the preservation of the Shari‘ah, followed by liberating India from foreign occupation.70 In order to achieve the latter, the Jāmi’at stood for a united Indian nationalism, meaning, according to its President Mawlānā Ahmad Madani, that

... we, the inhabitants of India, in so far as we are Indians, have one thing in common and that is our Indianness which remains unchanged in spite of our religious and cultural differences. As the diversities in our appearances, individual qualities and personal traits and colour and stature do not affect our common humanness, similarly

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66 Quoted in Wolpert (n 43) 303.
68 Metcalf (n 4) 35.
70 Id. 70.
our religious and cultural differences do not interfere with our common associations with our homeland.\textsuperscript{71}

The demand for the creation of Pakistan was dismissed as a British plot, designed to split the Muslims of India into three groups,\textsuperscript{72} and liable to leave the Muslims who remained in India a weak and ineffective minority. Jinnah’s argument, that the presence of a Hindu minority in Pakistan would constitute an effective check against the mistreatment of the Muslim minority in India, was rejected as totally opposed to Islam. According to the Jami‘at al-‘Ulamā‘-i Hind, “the very idea of maltreatment, meted out by a Muslim Government to a people who had done nothing wrong, was obnoxious and contrary to the tenets of the Shari‘ah.”\textsuperscript{73} Jinnah was accused of exploiting the “fair name of Islam for the worldly gain of the Muslim vested interests, which, knowing full well that the ignorant Muslim masses could only be won over by appealing to their religious emotions, had given the slogan that in united India Islam would be in danger.”\textsuperscript{74}

On the other end of the spectrum of Muslim opposition to the creation of Pakistan were the Ahrars, a small, Punjab-based movement of nationalistic, socially conservative activists, who, while close to Congress, offered to shift their support to the Muslim League if Jinnah promised that Pakistan would be an Islamic state. His refusal to make such a pledge led them to label Jinnah as the “Kafir-i Azam,” the “great infidel,” and to reaffirm their links with Congress.\textsuperscript{75} In Pakistan, the Ahrars rose to prominence in the years immediately following independence, when they instigated a violent campaign against the Ahmadiyyah Muslim Jama‘at, a Punjab-based sect founded by Mirza Ghulam Ahmad at the end of the nineteenth century.\textsuperscript{76} Following the death of its founder in 1909, the Ahmadies were viewed with increasing suspicion by orthodox Muslim groups, some of whom charged them with heresy, largely because they accorded the status of a prophet to their founder Mirza Ghulam Ahmad. By the 1930s the Ahrars had become the principal opponents of the Ahmadies, declaring them infidels, and launching at times violent campaigns against them.\textsuperscript{77}

Another important group in the Islamic opposition was the Jamā‘at-i Islāmī, founded by A. Mawdudi in 1941. Unlike the Ahrars, Mawdudi was not aligned to any of the political parties because he rejected the concept of territorial nationalism as inimical to Islam’s vision of a universal community of believers. He aimed at “making true Muslims of the faithful in India as a whole, a task which made him a considered opponent of the League’s ‘Pakistan.’”\textsuperscript{78}

\textsuperscript{71} From Mawlana Madani’s presidential address at the annual session of the Jami‘at al-‘Ulamā‘-i Hind at Jaunpūr in June 1940; quoted in Faruqi (n 68) 103.

\textsuperscript{72} The Muslims of the North Western and Eastern parts of British India would belong to Pakistan, whereas the third group would remain as a minority in India.

\textsuperscript{73} Faruqi (n 68) 113. The Jami‘at al-‘Ulamā‘-i Hind also believed that the division of India would hamper its missionary activities, which could only succeed in an atmosphere of communal harmony and peace. Id. 114ff.

\textsuperscript{74} Faruqi (n 68) 117.

\textsuperscript{75} Jalal (n 10) 91. A second condition was to the effect that Jinnah should publicly declare Ahmadies infidels and expel them from the Muslim League.

\textsuperscript{76} For an accessible history of the Ahmadi movement, see Ayesha Jalal, Self and Sovereignty: Individual and Community in South Asian Islam since 1850 (Routledge, London 2000) 290ff.

\textsuperscript{77} For a full account of the Ahrār-Ahmadi controversy, see the Report of the Court of Inquiry Constituted under Punjab Act II of 1954 to Enquire into the Punjab Disturbances of 1953 [“Munir Report”] (Government of Punjab, Lahore 1954); Jalal (n 74) 356ff, 408.

\textsuperscript{78} Jalal (n 75) 456.
Despite its opposition, the Jamāʿat-i Islāmī shifted its headquarters to West Pakistan following independence and commenced an intense campaign to transform Pakistan into an Islamic state. The success of this campaign can be judged by the fact that by the beginning of 1948, Jinnāḥ felt compelled to state during an address to the Sindh High Court Bar Association:

I cannot understand why this feeling of nervousness that the future constitution of Pakistan is going to be in conflict with Shariʿat Law? There is one section of the people who keep on impressing [on] everybody that the future constitution of Pakistan should be based on the Shariʿat. The other section deliberately want to create mischief and agitate that the Shariʿat Law must be scrapped.

III. ISLAM AND PAKISTAN’S CONSTITUTIONS

Jinnāḥ’s firm application of principles of public law to the “most complex constitutional problem” of the subcontinent made the creation of Pakistan the only just solution. The continuation of the colonial legal system, by virtue of Section 18(3) of the Indian Independence Act, was thus a temporary measure, to provide for legal continuity. Did Jinnāḥ anticipate any radical changes to the colonial legacy of laws? There is no evidence that Jinnāḥ or, for that matter, the Muslim League in any of its resolutions ever rejected the colonial legal system as a whole. Individual laws came under attack, demands for constitutional reforms were made, and increasingly, in the early 1940s, calls for social justice as well, but a wholesale repeal of the colonial laws was never demanded. Jinnāḥ’s famous Fourteen Points, formulated during the March 1929 meeting of the Muslim League, included the demand that a constitution for independent India should “embody adequate safeguards for the protection of Muslim culture and for the protection and promotion of Muslim education, language, religion, personal laws and Muslim charitable institutions . . .” The concern for the protection and promotion of Muslim personal law, rather than the demand that Muslims should be governed by Islamic law, remained the Muslim League’s policy until the creation of Pakistan. On the whole, Jinnāḥ had no bones to pick with the edifice of colonial laws. Just one day before independence, while proposing a toast to the health of His Majesty King George VI during a banquet held in honor of Lord Mountbatten, Jinnāḥ reminded his audience that “the British genius and those Britshers who ruled India for over a century did so to the best of their judgment and have left their marks in many spheres of life and

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79 For an overview of the literature on the rise of political Islam in Pakistan, see Asaf Hussain, Islamic Movements in Egypt, Pakistan and Iran: An Annotated Bibliography (Mansell Publishing, London 1983).
80 Quoted in Leonard Binder, Religion and Politics in Pakistan (University of California Press, Berkeley 1961) 100.
81 Jinnāḥ had been invited to comment on the draft of the Indian Independence Act, 1947. His detailed comments, dated July 3, 1947, do not refer to section 18(3) of the act. However, Jinnāḥ asked for a redraft of clause 6(2), remarking that “It is presumed that the legislatures of either Dominion would be competent inter alia to pass any Act which may be repugnant to the provisions of the Indian Independence Act, 1947 or to amend or repeal this Act. This may be clarified by a suitable amendment of the clause.” See Jinnah Papers (n 50) Series 1, Vol. 2, 79.
82 Afzal (n 52) 304.
83 This lack of religious zeal meant that the majority of orthodox Muslim groups refused to support the Muslim League and its demand for Pakistan.
especially the judicial system, which has been the greatest bulwark and safeguard for the rights and liberties of the people.”

The provisions of the Indian Independence Act did not make Pakistan an Islamic state, but conversely, neither did any of its provisions prevent the Constituent Assembly from steering a course toward Islamization of the colonial legacy. As Jinnah had stated at the beginning of his famous address to the Constituent Assembly on August 11, 1947, they were “now a Sovereign Legislative body” with “all the powers.” While Jinnah had been able to defer any decision on the Islamic character of Pakistan, the Constituent Assembly had to face the question squarely. As it were, the demarcation of the role of Islam in the legal system of Pakistan proved difficult. Having escaped the threat of living under a Hindu Rāj, the people of Pakistan now had to determine what role, if any, religion should play in their newly founded state.

Jinnah and the Muslim League began their preparations for the task of drafting a Pakistani constitution at a late stage. It was only on the last day of May 1947 that Jinnah received a Note on the Appointment of an Expert Committee for Pakistan Constituent Assembly. Drafted by Mir Maqbūl Maḥmūd, it proposed the setting up of a committee of experts, which would start working on the constitution. Maḥmūd’s note offers a revealing insight into the issues that mattered most in this process, namely, the role of Islam, the protection

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84 Jinnah (n 11) 12.
85 Nor did the Indian Independence Act of 1947 make India a Hindu Rāj. Jinnah’s irritation at the fact that the new Dominion of India was not called “Hindustān” (the land of the Hindus), became visible in an exchange of letters with India’s first Governor-General, Lord Mountbatten. In September 1947, Mountbatten invited Jinnah to become the honorary president of an exhibition of Indian art in London. Its announcement was to include the explanation that “the Exhibition includes exhibits from the Dominions of India and Pakistan.” Jinnah rejected the invitation because of the use of the name “India,” writing, “It is a pity that for some mysterious reason Hindustan have adopted the word “India” which is certainly misleading and is intended to create confusion.” He suggested that in order to avoid misleading people, the description should read “exhibition of Pakistan and Hindustan art.” This proved unacceptable to Mountbatten, and in the end Jinnah accepted the invitation. Jinnah Papers (n 50) Vol. 5, 358. Ayesha Jalal views the Muslim League’s protests against the name “Union of India” as a “commentary perhaps that Jinnah never quite abandoned his strategy of bringing about an eventual union of India on the basis of Pakistan and Hindustan.” Jalal (n 10) 293. From the perspective of the international community, India was regarded as the successor of the Indian Empire, which had been a charter member of the United Nations, and inherited its original membership. Pakistan’s application for membership was approved by the General Assembly on September 30, 1947. The only opposition to its application came from Afghanistan. See Russell H. Fifield, “New States in the Indian Realm” (1952) 46 AJIL 3, 454.
86 It could probably be argued that the only limitations on the sovereign powers of the Constituent Assembly existed in relation to the rights of the non-Muslim minorities. However, these were not legal, in the sense of enforceable, but consisted of assurances given by both the Muslim League and Jinnah as its president and as the Governor-General of Pakistan. Jinnah never tired of giving these assurances. For instance, in an address to army officers, he stated that “As regard the Government of Pakistan, I again reiterate with all the emphasis at my command that we shall pursue our settled policy in this respect and we shall continue to protect the life and property of minorities in Pakistan and shall give them a fair deal. We do not want them to be forced to leave Pakistan and that as long as they remain faithful and loyal to the state they shall be entitled to the same treatment as any other citizen.” Jinnah (n 11) 24–25.
87 Id. 7.
88 Director of the Chambers of Princes Secretariat. He submitted detailed advice on constitutional and legal issues arising under the partition of Pakistan.
of minorities, social welfare, and the competition with the drafters of the Indian Constitution:

It will be necessary to bear in mind that any proposals adopted by the Pakistan Constituent Assembly should not conflict with the basic Islamic injunctions, should be fair to the minorities, compare favourably with any proposals adopted by the Hindustan Constituent Assembly, and should appeal to the imagination and help to raise the standard of living of the poorer classes... Pakistan would be the largest Islamic country in the world. It is desirable that its constitution should embody the best features of the constitutions of all Islamic countries. The study of these constitutions shows that it would be advisable to make available to the Committee the advice of a sound and liberal scholar of Islamic religion, such as Ghulam Bhik Nairang or Syed Fazal Shah (brother of Sir Mehar Shah) or Maulana Abdul Hamid Badayuni, whose opinion should be sought when required and may prove a help and not a hindrance to the setting up of a progressive constitution.89

IV. THE 1956 CONSTITUTION

The Constituent Assembly convened for the first time just a few weeks before independence, on July 26, 1947.90 Eighteen of its sixty-nine members belonged to religious minorities.91 In accordance with the provisions of the Indian Independence Act of 1947, the Assembly also acted as the dominion's legislature. It was a fully sovereign body, and there were no limits whatsoever on its powers to draft and adopt whatever constitution it desired. With Jinnah's untimely death in September 1948, just thirteen months after independence, and with the country having to deal with a multitude of serious challenges, caused by the influx of refugees, lack of money, and concerns over Kashmir, the Constituent Assembly commenced its task slowly, perhaps even reluctantly. Having gained independence completely, with no strings attached, the Constituent Assembly now had to fill the ideological void by drafting a constitution that would reflect the aspirations of the Pakistani people.

89 Jinnah Papers (n 50) Series 1, Vol. 1, 965.
90 Rather awkwardly, there was no Pakistani Constituent Assembly when the Indian Independence Act, came into force in 1947. Art. 19(b) of the act defined references to the Pakistani Constituent Assembly as “in relation to Pakistan, to the Assembly set up or about to be set up at the date of the passing of this Act under the authority of the Governor-General as the Constituent Assembly for Pakistan.” Owing its existence to the act of a colonial power sat uneasily with the sovereign functions to be carried out by the Assembly.
91 The members of Pakistan’s first Constituent Assembly had been determined through provincial elections in 1946–47. All Muslim seats except one were held by members of the Muslim League. The Muslim League was only open to Muslims. The twelve million Hindus who remained in Pakistan after partition were represented by twelve members of the Congress Party, while the Schedules Castes (low-caste Hindus) were represented by three members of the Congress Party and one representative of the Schedules Castes Federation. Christians and Parsees did not have any representation in the Constituent Assembly. See Richard Symonds, The Making of Pakistan (Faber and Faber, London 1950) 97–99. Jinnah defended the refusal of the Muslim League to open membership to non-Muslims even after independence by claiming that “The time has not yet come for a national organisation of that kind. Public opinion among the Muslims of Pakistan is not yet ready for it. We must not be dazzled by democratic slogans that have no foundation in reality.” Quoted from Jinnah’s interview with BBC’s Robert Stimson on December 9, 1947; cited in Afzal (n 52) 450.
As foreseen in Maḥmūd’s note to Jināḥ quoted above, the role of Islam in the Constitution of Pakistan proved most controversial.

The Constituent Assembly’s first concrete step toward the framing of a constitution was the adoption of the Objectives Resolution on March 12, 1949. It was meant to serve as a broad blueprint to guide the Constituent Assembly in its task, and at the same time it signaled that Pakistani leaders took the framing of a constitution seriously. After all, the Indian Constituent Assembly had completed a first draft of a constitution by early 1948, and would adopt the Constitution of India on November 16, 1949. The Objectives Resolution was also meant to appease religious groups, who had been clamoring for the creation of an Islamic state. Introducing the Resolution, Prime Minister Liyāqat ‘Alī Khān explained that

Pakistan was founded because the Muslims of this sub-continent wanted to build up their lives in accordance with the teachings and traditions of Islam, because they wanted to demonstrate to the world that Islam provides a panacea to the many diseases which have crept into the life of humanity today.  

The Islamic provisions were vigorously and unanimously opposed by the non-Muslim members, who took issue with the claim that Pakistan was founded as an Islamic state. The leader of the Congress Party, S. C. Chattopadhyaya, demanded a secular constitution, arguing that any other approach would reduce non-Muslims to second-class citizens. In his view, the Objectives Resolution amounted to a betrayal of the minorities, a breach of the promises made by Jināḥ, and a defeat to the ‘ulamā’:

Now what will be the result of this Resolution? I sadly remind myself of the great words of the Quaid-i-Azam that in state affairs the Hindu will cease to be a Hindu; the Muslim shall cease to be a Muslim. But alas, so soon after his demise what you do is that you virtually declare a State religion! You are determined to create a Herrenvolk. It was perhaps bound to be so, when unlike the Quaid-i-Azam—with whom I was privileged to be associated for a great many years in the Indian National Congress—you felt your incapacity to separate politics from religion, which the modern world so universally does. You could not get over the old world way of thinking. What I hear in this Resolution is not the voice of the great creator of Pakistan, the Quaid-i-Azam (may his soul rest in peace), nor even that of the Prime Minister of Pakistan, the Honourable Mr. Liaquat Ali Khan, but of the Ulemas of the land.  

The Islamic provisions of the Objectives Resolution, overwhelmingly supported by the Muslim members of the Constituent Assembly, had an air of haphazardness about them. The Resolution opens with the statement:

Whereas sovereignty over the entire universe belongs to God Almighty alone and the authority which He has delegated to the State of Pakistan through its people for being exercised within the limits prescribed by Him is a sacred trust; This Constituent

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93 Id. 970.
Assembly representing the people of Pakistan resolves to frame a constitution for the sovereign independent State of Pakistan.  

By establishing that sovereignty was to be exercised within the limits prescribed by Islam, the Constituent Assembly had in effect limited its own powers. The future constitution would have to be in accordance with Islam. The justification for this self-imposed limitation was the claim that God exercises sovereignty over the entire universe. The Constituent Assembly was conducting its exercise of sovereignty, namely, drafting a constitution, by way of delegated authority, as a “sacred trust.” It is not without irony that the idea of Pakistan being a “sacred trust” was first mooted by Jinnah in a speech delivered in East Pakistan, the province in which a quarter of the population were Hindus. Imploring his audience to identify themselves as Muslims and Pakistanis and not according to ethnicities, Jinnah argued that the creation of Pakistan had been achieved “by the grace of God and with His help,” which “now is a sacred trust in your hands, i.e. the Muslim League.” This phrase would appear again, a few days later, when Jinnah stated that “the Muslim League has won and established Pakistan and it is the Muslim League whose duty it is now, as custodian of the sacred trust, to construct Pakistan.”

From the perspective of the minorities, the link between sovereignty and Islam was a ground for concern. By definition they could not be a party to this sacred trust between the Muslim League and God. Equally disconcerting was the linking of some basic rights with Islam. The Objectives Resolution provided that the constitution should observe “the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam.” In his address, Liyāqat ‘Alī Khān explained that by qualifying these principles with reference to Islam, they “have been further defined by giving to them a meaning which, in our view, is deeper and wider than the usual connotation of these words.” Even taken at face value, his argument led to an incongruous result, since none of the other basic rights mentioned in the Objectives Resolution had attached to them any reference to Islam. If the principle of social justice was to be given a meaning as enunciated by Islam, why was the fundamental right to equality, as provided for in the very same document, not given a deeper and wider connotation?

In actual practice, the most influential Islamic provision of the Objectives Resolution turned out to be the least controversial, namely, that “the Muslims shall be enabled to order their lives in the individual and collective spheres in accord with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah [sic].” The use of the term “enabled” seemed to indicate that Muslims should be given the option of living their lives in accordance with Islam, rather than being forced to do so. This was in line with the colonial approach, which had allowed religious communities to be governed by their respective religiously-based systems of family law. As it turned out, throughout the 1980s and early

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94 Id. 23–24.
95 Jinnah (n 11) 86.
96 Id. 91.
97 Choudhury (n 91) 24–25.
98 In the early phase of his political career, Jinnah had openly campaigned for a system of family law that would have allowed anyone to opt out of their religiously-based family laws and to be governed by a uniform, secular civil law. In 1912, in an attempt to extend the provisions of the Special Marriage Act to all communities, Jinnah argued in the Legislative Assembly that “if there is a fairly large class of enlightened, educated, advanced Indians, be they Hindus, Muhammadans or Parsis, and if they wish to adopt a system of marriage
1990s, individual judges would rely on this provision in order to invalidate statutes as being “repugnant to Islam.” Until then, however, the impact of the Objectives Resolution on the development of Pakistan’s legal system was limited. The Constituent Assembly had not acted as a legislative body when the Resolution was adopted, and it therefore lacked any legal force. Until 1985, when it was incorporated into the Constitution proper as a new Art. 2A, the Objectives Resolution served as a preamble to the Constitutions of 1956, 1962, and 1973.

Having adopted the Objectives Resolution against the wishes of its minority members, the Constituent Assembly embarked on the task of drafting a constitution. It turned out to be an arduous and controversial undertaking. The difficulties inherent in defining the Islamic character of Pakistan’s constitutional order were compounded by the fact that there was a deepening chasm between the representatives of East and West Pakistan. The two units of Pakistan were separated by more than one thousand miles—by ship it was quicker to get from Karachi to Marseille than to Dacca—and the physical divide was matched by differences in culture, language, customs, and economic conditions. In a first step, the Constituent Assembly set up a Basic Principles Committee, charged with “the task of recommending the principles on which the future Constitution of Pakistan should be based.”

Its draft constitution, presented to the Constituent Assembly in September 1950, was unfavorably received by both the Islamists and East Pakistan’s politicians. The draft constitution’s provisions on Islam were slim: the Objectives Resolution was to serve as a preamble, and there was to be “compulsory teaching of the Holy Quran to the Muslims.” Islamists had approved the Objectives Resolution, and their presence in the Constituent Assembly in the form of an advisory board, called the Board of Ta’limat-i Islāmiyyah, meant that until then there had been no agitation in favor of an Islamic state. However, when published, the interim report contained “no more than the Government of India Act plus the Objectives Resolution as preamble, and the requirement that all Muslims must study the Qur’an.” The publication of the report sparked violent protests by Islamists, which culminated in serious disturbances, especially in Punjab, in 1953.

A second draft constitution followed in December 1952. Its Islamic provisions were elaborate: a chapter on “Directive Principles of State Policy” enjoined the state to eliminate *ribā*, to prohibit “drinking, gambling and prostitution in all their various forms,” to promote and maintain Islamic moral standards, to promote the understanding of Islam, and to bring “the existing laws into conformity with the Islamic principles.” None of these

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which is more in accord with modern civilisation and ideas of modern times, more in accord with the modern sentiment, why should that class be denied justice unless it is going to do a serious harm to the Hindus or Musalmans in one way or the other.” Quoted in Syed Sharifuddin Pirzada, *The Collected Works of Quaid-e-Azam Mohammad Ali Jinnah* (East and West Publishing Company, Karachi 1984) Vol. 1, 37.

99 Report of the Basic Principles Committee (Karachi, 1952) 1. A committee of experts in Islamic law had been formed to advise the committee. See Binder (n 79) 159.

100 Choudhury (n 91) 34.

101 Binder (n 79) 201.

102 Many of the victims of the Punjab Disturbances, as they came to be known, were Ahmadis, who, it was alleged by Islamists, were heretics.

103 *Ribā* denotes the charging of interest in a financial transaction, such as a loan. The precise translation and indeed meaning of the term *ribā* is, however, considered controversial. In Pakistan, the campaign to ban *ribā* has been highly visible but largely unsuccessful. See Parvez Hassan and Azim Azfar, *Moving Toward an Islamic Financial Regime in Pakistan* (MA Islamic Legal Studies Program, Cambridge 2001).

104 Choudhury (n 91) 72.
directives could be enforced in a court of law, but the draft constitution provided in a separate chapter, headed “Procedure for Preventing Legislation Repugnant to the Quran and the Sunnah,” a mechanism to ensure that all legislation was in accordance with Islam. This mechanism envisaged the setting up of a “Board consisting of not more than five persons well versed in Islamic Laws,” which would examine a law on the basis of Islam. Its recommendations could be overturned by a simple majority of a joint sitting of the two houses of parliament. Thus, the Islamic repugnancy clause only applied to prospective laws but left the legacy of colonial laws undisturbed.

While these provisions satisfied the Islamists, the second draft constitution sparked protests from West Pakistan, which took objection to the parity envisaged by the draft. The controversies and disputes surrounding the delicate matter of the Islamic character of the newly founded state were matched by an even equally serious disagreement about the relations between East and West Pakistan. The former was the more populous of the two units, and if ever there were national elections based on an adult franchise, East Pakistan’s politicians would in all likelihood be in control of the government of Pakistan. The attempts to reconcile the conflicting interests and jealousies between East and West Pakistan in a constitutional document proved to be a major stumbling block on the road toward a constitution for the Islamic Republic of Pakistan.

A third draft constitution was framed by the Constituent Assembly in the course of 1953 and 1954. Intensely watched by the world press, the Constituent Assembly reconvened on October 7, 1953, and a month later the first legally binding decision was taken, though in the absence of the Hindu members, who had walked out in protest: on November 7, 1953, Pakistan became an “Islamic Republic.” A year later, on October 6, 1954, the Constituent Assembly adopted the third draft constitution. It retained the requirement that the legislature should not “enact any law which is repugnant to the Holy Quran and the Sunnah” but provided that “the Supreme Court alone should have jurisdiction for determining whether or not a particular law is repugnant to the Holy Quran and the Sunnah.” Amendments to the 1973 Constitution, carried out in 1981, have followed this scheme by providing for the establishment of a Federal Shari’at Court and a Shari’at Appellate Bench of the Supreme Court with exclusive jurisdiction to review existing laws on the basis of Islam.

The third draft constitution was favorably received by the Pakistani press, and even the Jama’at-i Islami, the main Islamic party, approved of it as being in accordance with Islam. Just days before the Constituent Assembly was to reconvene, Governor-General Ghulam Muhammed announced its dissolution, stating that “the Constituent Assembly as at present constituted had lost the confidence of the people and could no longer function.”

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105 Id.
106 Following independence, the Muslim League’s hold over East Pakistan’s politics became increasingly tenuous. In April 1954, provincial elections in East Bengal removed the Muslim League almost completely from the provincial Legislative Assembly, which was now dominated by a coalition of Bengali parties united under the slogan “Bengal for the Bengalis.” After a spate of violence around Dacca, the provincial government was dismissed and East Bengal was ruled directly from Karachi. See Ardat W. Burks, “Constitution-Making in Pakistan” (1954) 69 PSQ 544.
107 Choudhury (n 91) 199.
108 Binder (n 79) 361. The Sindh High Court had held the dissolution of the Constituent Assembly to be unconstitutional but was overruled by the Supreme Court. See Ian Talbot, Pakistan: A Modern History (St. Martin’s Press, New York 1998) 129.
A second Constituent Assembly, whose members were elected from the existing provincial legislative assemblies, approved a fourth draft constitution on January 8, 1956. This document was promulgated on March 23, 1956. The 1956 Constitution adopted some of the Islamic features of the first draft constitution. The Objectives Resolution became the preamble, and the Islamic provisions contained in the Directive Principles of State Policy remained largely unchanged. The same applied to the qualifications of the head of state, who had to be a Muslim, and to the repugnancy clause. The latter, however, had become wider, providing that no law should be enacted that was contrary to Islam, but also that existing legislation should be brought into conformity with the injunctions of Islam. This seemingly stringent provision was, however, rendered legally ineffective because it could not be enforced by a court. Instead, it was to be implemented by a board of experts who would report their recommendations to the National Assembly within five years. There was no obligation on the National Assembly to adopt these recommendations. This rather tame Islamization measure, rather oddly, was approved by the religious parties, including the Jamaā‘at-i Islāmī, which had by then become wary of the Supreme Court being given jurisdiction to carry out this exercise. Chief Justice Muḥammad Munir had shown his secular credentials in his Report on the Punjab Disturbances, issued in 1954, which had roundly condemned Islamic extremism. Political demands and agitation for the adoption of Islamic laws, rather than the insistence on enforceable repugnancy clauses, was to be the new aim of the ‘ulamā’. In this ambition, they have singularly failed; until the present, their representation in legislatures has been small.

V. THE 1962 CONSTITUTION

The 1956 Constitution’s life ended abruptly on October 7, 1958, following a coup d’état instigated by General Ayyūb Khān, who was declared chief martial law administrator by President Iskandar Mirzā. In his proclamation to the nation, Mirzā condemned the events that had taken place during the two years of constitutional rule as a “ruthless struggle for power, corruption, the shameful exploitation of our simple, honest, patriotic and industrious masses, the lack of decorum and the prostitution of Islam for political ends.” The prospect of general elections, and with it the threat of an East Pakistani Prime Minister, must be added as another reason for the abrogation of the 1956 Constitution. The 1956 Constitution was replaced by a Laws (Continuance in Force) Order, 1958, which in turn was replaced by the Basic Democracies Order, promulgated on October 27, 1959. Ayyūb Khān introduced a new political system, which he called “basic democracies.” It consisted of several tiers of indirectly elected representatives and was meant to integrate rural populations with regional and national development projects. The basic democracies system was based on Ayyūb Khān’s view that the vast majority of Pakistanis were not ready for

109 A sentence was added to the Objectives Resolution to the effect that Jināḥ had desired Pakistan to be a democratic state based on Islamic principles. This sentence was dropped from the text of the Objectives Resolution as contained in the 1973 Constitution.

110 Binder (n 79) 372.


112 Choudhury (n 91) 482.

a full-blown democracy, and that they “required tutors and guides, and not political leaders who exploited their historic fears and suspicions.”\textsuperscript{114} Islam was regarded with similar suspicion: It seemed to divide rather than unite the nation, and Ayyūb Khān made no attempt to appeal to the common denominator of Islam in his dealings with East Pakistan.\textsuperscript{115} After four years of martial law a new constitution came into force on March 1, 1962.

The Islamic provisions of the 1962 Constitution were largely modeled on the pattern of its 1956 predecessor, but there were important differences in that many references to Islam had been omitted. Most glaring was the change in the official name of the country: the Islamic Republic of Pakistan had become simply the Republic of Pakistan.\textsuperscript{116} Pressure from Islamists forced Ayyūb Khān to introduce some amendments in 1963 to make the constitution more visibly Islamic. In the text of the Objectives Resolution as incorporated in the 1962 Constitution, for instance, the original provision that “the authority exercisable by the people within the limits prescribed by Him is a sacred trust,” had been shortened to “the authority exercisable by the people is a sacred trust,” thereby removing any religiously based limitation on the sovereignty of the people. In 1963 the original version of the Objectives Resolution was reinstated, now again affirming that the law-making power of the people was to be limited by reference to Islam. Equally, Ayyūb’s attempt to rename the country as simply the “Republic of Pakistan” had to be reversed; the same Constitution (First Amendment) Act of 1963 restored it as the “Islamic Republic of Pakistan.” Despite these cosmetic concessions, Ayyūb Khān’s 1962 Constitution held firm on the provision that “no law shall be repugnant to the teachings and requirements of Islam as set out in the Holy Quran and Sunnah and all existing laws shall be brought in conformity with the Holy Quran and Sunnah.”\textsuperscript{117} Along with other Islamic provisions, it was contained in a chapter on “Principles of Policy” and thus unenforceable. An Advisory Council of Islamic Ideology was to prepare annual reports on the Islamic legitimacy of new and existing laws, but such advice was not binding.\textsuperscript{118} In addition, the 1962 Constitution provided for the setting up of an Islamic Research Institute,\textsuperscript{119} which was to “undertake Islamic research and instruction in Islam for the purpose of assisting in the reconstruction of Muslim society on a truly Islamic basis.”\textsuperscript{120} The establishment of the Islamic Research Institute was part of a deliberate attempt to wrestle from the Islamists, chiefly Mawlānā Mawdūdī’s Jamā’at-i Islāmi, the monopoly over the interpretation of Islam. Headed by Faḍlur-Rahmān, an internationally known and respected scholar of Islam, the Islamic Research Institute propagated a modernist, rational interpretation of Islam.\textsuperscript{121} Ayyūb Khān’s attempt to inculcate a modern vision of Islam was accompanied by reforms of Muslim personal law\textsuperscript{122} and the imposition of

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\textsuperscript{114} Lawrence Ziring, “From Islamic Republic to Islamic State” (1984) 24 AS 935.
\textsuperscript{116} In fact, the name had already been changed by presidential order to a simple “Pakistan” shortly after the coup d’etat, on October 11, 1958. \textit{Id.} 195.
\textsuperscript{117} Art. 1 of Principles of Policy, 1962 Constitution.
\textsuperscript{118} See Part 10, Chapter. 1, 1962 Constitution.
\textsuperscript{119} Since 1980, the Islamic Research Institute has been part of the International Islamic University, Islamabad.
\textsuperscript{120} Art. 207, 1962 Constitution.
\textsuperscript{122} The most significant legal intervention came in the form of the Muslim Family Laws Ordinance of 1961, which reformed some aspects of Islamic family law, principally to improve the legal position of women.
government control over Islamic charitable trusts. Throughout his tenure, Ayyūb Khān was locked in battle with the Jamā'at-i Islāmi, imprisoning its leader Mawdūdī several times and attempting to dissolve the party altogether.

While managing to keep the upper hand against the Islamists, Ayyūb Khān was not so successful in the conflict with India over the disputed territory of Kashmir. Pakistan's attempt to gain control over the Indian state of Jammu and Kashmir in the summer of 1965 quickly escalated into a full-blown war with India, which saw both countries' forces entering each other's territory. The short war, which started on September 6, 1965, and ended about two weeks later with a ceasefire, marked the beginning of the end of Ayyūb Khān's regime. His opponents saw in the ceasefire a humiliating defeat for Pakistan, and long-held grievances erupted in civil unrest, especially in East Pakistan. The founding of the Pakistan People's Party (PPP) in 1967 served to unite popular opposition to the regime in West Pakistan, but failed to unite the country. In East Pakistan, Mujībur-Raḥmān's 'Awāmmī League dominated the political landscape with an increasingly insistent demand for provincial autonomy. On March 25, 1969, Ayyūb Khān resigned from office and handed over power to the army chief of staff, General Yahyā Khān. The handover was in direct violation of his own 1962 Constitution. Yahyā Khān was to rule Pakistan until December 1971. By then, East Pakistan had seceded from Pakistan in a bloody civil war to become the independent nation of Bangladesh, and Zulfiqār 'Ali Bhutto and his PPP had emerged as the main political force in West Pakistan.

The secession of East Pakistan was triggered by the first national elections based on a direct adult franchise in the history of Pakistan in December 1970. Prior to this, Yahyā Khān had abrogated the 1962 Constitution and declared martial law. He had initiated a process to frame a new constitution by promulgating a Legal Framework Order on March 30, 1970. It envisaged the adoption of a new constitution by the National Assembly following the elections. The National Assembly was never convened, however. The overall winner of the elections was East Pakistan's 'Awāmmī League, meaning that for the first time in Pakistan's history the West would be governed by a party based in the East. Negotiations among Yahyā Khān, Bhutto (whose party had won the majority of seats in West Pakistan), and Mujībur-Raḥmān broke down in March 1971. West Pakistani troops attempted to quell the popular uprising in East Pakistan, triggering another refugee crisis, with as many as seven million Bengalis fleeing to India. A government-in-exile was established in India in April 1971, following a declaration of independence by Bangladesh on March 26. Yahyā Khān's regime managed to retain what they regarded as East Pakistan by force until the end of 1971, when the civil war escalated to a war between India and West Pakistan. In the course of two weeks of war, “Pakistan lost half its navy, a third of its army and a quarter of its airforce.” On December 16, 1971, the Pakistani commander, General A. A. K. Niyāzī, surrendered unconditionally in Dacca. Four days later, Yahyā Khān handed over the post of President and Chief Martial Law Administrator to Bhutto.


123 This aspect of Ayyūb Khān’s policy against Islamists’ institutions tends to be overlooked, but see Jamal Malik, “Waqf in Pakistan: Change in Traditional Institutions” (1990) 30 Die Welt des Islams 63–97.

124 Talbot (n 107) 208.

125 Id. 212.
VI. THE 1973 CONSTITUTION

Because of his party's success in West Pakistan in the 1970 elections, Zulfiqar 'Ali Bhutto did not have to rely on martial law for long. In April 1972 an Interim Constitution was introduced, and on August 14, 1973, following an occasionally acrimonious debate, the National Assembly in its capacity as Constituent Assembly adopted the 1973 Constitution for what remained of Pakistan. The basic structure of nonjusticiable constitutional provisions urging the state to bring all laws into conformity with Islam and a provision for the setting up of an advisory body on Islamic law was replicated in Pakistan's third constitution. The 1973 Constitution contained a separate chapter headed 'Islamic Provisions' that provided for the setting up of a Council of Islamic Ideology. Again, as in previous constitutions, the council had essentially only an advisory role and enjoyed no inherent jurisdiction to ensure that its recommendations were acted upon by parliament. Further, and in direct continuation of the approach taken in the previous two constitutions, no law could be challenged by way of judicial review on the ground that it had been found to be repugnant to Islam by the Council of Islamic Ideology.

On July 5, 1977, Bhutto was removed from power by a coup d'état led by General Muhammad Zia-ul-Haq's declaration of martial law. The subsequent introduction of a wide range of legal measures marked the beginning of the first serious attempt by a government to Islamize the legal system of Pakistan. The promulgation of the Hudud Ordinances introduced Islamic criminal law for the first time since it had been gradually displaced in favor of English criminal law during British colonial rule. However, Zia's main contribution to the Islamization of laws was to create an institutional mechanism to Islamize the legal system independently from parliament. For the first time a special court was set up with the express purpose of judicially reviewing certain parts of the legal system to determine whether those parts were in accordance with Islamic law.

VII. ISLAM AND THE LEGAL SYSTEM, 1947–1977

The controversies and political turmoil surrounding the rise and fall of three constitutions, an interim constitution, and numerous draft constitutions within the first twenty-five years of Pakistan's existence obscure the fact that there was nevertheless a great degree of stability in the area of substantive laws. The colonial legacy of codified laws, made applicable to the Dominion of Pakistan by virtue of Section 18(3) of the Indian Independence Act of 1947, remained largely intact throughout this period. Section 18(3) provided that:

Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall as far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf.

The contemplated adaptations were made by the Pakistan (Adaptation of Existing Laws) Order, 1947 and by the Adaptation of Central Acts and Ordinances Order, 1949. Successive constitutions contained articles providing for the continuance of existing laws. Art. 224(1) of the 1956 Constitution, Art. 225(1) of the 1962 Constitution, and Art. 280(1)

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126 See Arts. 227 to 231 of the 1973 Constitution.
of the 1972 Interim Constitution all provided for the continuation of preexisting laws in substantially the same form as Art. 268 of the present 1973 Constitution. This provides that all existing laws should, subject to the Constitution, continue in force, so far as applicable and with the necessary adaptations, until amended or repealed by the appropriate legislation. The continuation of existing laws also applied to periods of martial law, each of which was governed by a Laws (Continuance in Force) Order or similar law. Such legislation was promulgated in 1958, 1969 (see Proclamation of Martial Law) and 1977, and provided for the continuation of the main body of substantive law during the martial law period.

The colonial legal system had restricted the application of Islamic law to the area of family laws. Largely based on a substantial body of case law from British Indian courts and the Privy Council, it had seen some statutory interventions in the 1930s. The Muslim Personal Law (Shari’at Application) Act, 1937 had reduced the role of customary laws, while the Dissolution of Muslim Marriages Act, 1939 had introduced a number of grounds under which a Muslim wife could seek a judicial dissolution of her marriage. These statutes continue to be in force today, but are now to be read in conjunction with the Muslim Family Laws Ordinance, 1961, which introduced procedural safeguards for the protection of the rights of women whose husbands either married a second time or sought to effect a *jalāq* divorce.127

Throughout the 1950s and 1960s the role of Islamic law was confined largely to the area of family law. The first express attempt by the higher judiciary to break down the barrier between an essentially secular legal order and an Islamic society occurred in the context of a challenge to the imposition of martial law by Ya’ya Khān in 1969. A challenge to the legality of convictions imposed by the military courts set up during Ya’ya Khān’s martial law enabled the Supreme Court of Pakistan to examine the constitutional validity of the imposition of martial law. In the Court’s decision handed down in 1972, Chief Justice Ḥamūdur-Rāmān declared the coup d’état illegal because it had violated the 1962 Constitution, and in doing so referred for the first time in the legal history of Pakistan to the Objectives Resolution as a source of constitutional law. Having refuted the infamous *Dosso* decision, in which the Supreme Court had validated the coup d’état of Ayyūb Khān, Justice Rahman held *obiter dictum* that:

In any event, if a grund-norm is necessary for us I do not have to look to the Western legal theorists to discover one. Our own grund-norm is enshrined in our own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objects Resolution passed by the Constituent Assembly of Pakistan on the 7th of March 1949... This has not been abrogated by any one so far, nor has it been departed or deviated from by any regime, military or Civil. Indeed, it cannot be, for it is one of the fundamental principles enshrined in the Qur’an.129

Justice Ḥamūdur-Rāmān developed from this a principle of sovereignty based on the idea of trusteeship, in which the body politic becomes a trustee for the discharge of sovereign

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127 Prior to the promulgation of the Muslim Family Laws Ordinance of 1961, a Muslim husband could divorce his wife by simply uttering three times the word *jalāq*, meaning “repudiation.”

128 *The State v. Dosso* (1958) PLD 1958 SC 533 (Supreme Court of Pakistan).

functions. According to the Qurʾān, this trusteeship consists of a plurality of persons, which “negates the possibility of absolute power being vested in a single hand.”  

Raḥmān’s reliance on Islamic law is significant. In spite of the fact that he began his deliberations about Pakistan’s grundnorm with an “if,” he nevertheless formulated in very certain terms a constitutional theory in which basic principles of Islamic law were “immutable” and “unalterable” norms. The idea of a basic structure for Pakistan’s legal system based on Islam that would survive any attempts to change “the written laws” as Justice Alvin Robert Cornelius had called them in Dosso, would impose a two-fold test on the validity of a legal revolution: First, was the revolution successful, that is, had it been accepted by the people? And second, was the new legal order in accordance with the norms of Islam?

The emergence of Islam in constitutional cases was accompanied by occasional appearances of Islamic law outside the area of family law. Throughout the 1960s and 1970s a growing number of judges interpreted existing statutes in the light of Islam, or filled the gaps in the existing body of statutory law with Islamic law. However, the number of these cases was small, and until 1977, the role of Islamic law in the legal system of Pakistan remained largely confined to the area of family law.  

VIII. CONCLUSION

Jināḥ’s quest for the creation of an independent homeland for those Indians living in Muslim-majority provinces was a success, albeit one that came at a price, namely, the division of Punjab and Bengal along religious lines. By definition, Jināḥ’s approach could not include a clear vision of the constitution of this new state. His demand for the creation of Pakistan was founded on what he called the sound principles of constitutional law: true independence, of necessity, included the right of the people to frame a constitution according to their own desires. With no limitations on this power, a Hindu majority would always opt for a Hindu Rāj, and the only protection against this result was for Muslims to be settled in a truly independent state themselves. Therein lay the hope and also the paradox: If the shape of a united, independent India could not be guaranteed, neither could it be guaranteed for the independent state of Pakistan.

The independent state of Pakistan faced a difficult predicament: The new homeland for British India’s Muslims had been founded not in the name of Islam, but in opposition to a Hindu Rāj. Islam as a common denominator of Pakistani citizenship, while superficially sufficient and inclusive, would of necessity exclude non-Muslims. This might not be much of a concern in contemporary Pakistan, given the small size of the non-Muslim communities, but it was a very real issue in the East Pakistan of 1947, where every fourth citizen was a Hindu. Conversely, ignoring Islam in the definition of the newly founded state would be to thwart the aspiration of the Muslim masses, millions of whom had left India for an Islamic Pakistan. Jināḥ’s visions of what an independent Pakistan would look like were of little help to those charged with the task of framing the new constitution. Jināḥ had always insisted that it was up to the people to choose whichever constitution they desired. He expressed hopes and expectations—that Pakistan would be a democracy and not a theocracy, that minorities would be treated fairly, and that the poor would see an improvement in their lives—but he refused to bind the sovereign powers of the Constituent Assembly in any way.

130 Id. 183.
131 For a review of these cases, see Martin Lau, The Role of Islam in the Legal System of Pakistan (Brill, Leiden 2006).
Any such attempt would have destroyed his legal case for the creation of Pakistan: If it was possible to bind the Constituent Assembly of independent Pakistan in any way, the same possibility of restriction would have to be conceded to the Constituent Assembly of a united, independent India, so as to prevent it from becoming a Hindu Rāj. On August 14, 1947, the Dominion of Pakistan came into existence, devoid of any constitutional shape save what the British parliament had provided for it. Its only legal hallmark was also its most important one: It was a truly independent state and could adopt whatever constitution and legal order it desired.

It is thus of no surprise that the framing of Pakistan’s Constitution was fraught with tensions and difficulties. The uncertainties surrounding the role of Islam, compounded by the territorial division of the country itself, split into a western and eastern half, meant that it took nine long years to arrive at a seemingly acceptable constitutional compromise. The coup of 1958 exposed the fragility of the 1956 Constitution, but even Ayyūb Khān’s martial law, tempered by a façade of democracy, could not hide the cracks in the constitutional edifice. Even Ayyūb Khān had to concede secular ground to the Islamists, by amending his 1962 Constitution to bring it closer to an Islamic order.

Pakistan, born out of the partition of British India along religious lines, experienced its own partition in 1972, when the common denominator of Islam proved too weak a link to keep East and West Pakistan united. East Pakistan became Bangladesh, its nation and citizenship based not only on Islam, but also on a shared national language and culture. West Pakistan was now able to define itself more easily as a territorial unit, but Islam remained an important focal point for the creation of a national identity. Even without East Pakistan, the country remained divided along ethnic and linguistic lines.

Pakistan’s constitutional history between 1947 and 1977 is marked by the difficulties inherent in demarcating the role of Islam in a modern democracy. While Islam had to be retained as a legal foundation for nationhood, its legal reach had to be limited. Pakistan’s founding elites had no taste for living in a theocracy. The resulting tension was eased by carefully constructed constitutional provisions, which conceded the supremacy of Islamic law, while retaining the power of the state to determine the content and reach of these Islamic laws. Promises to render the legacy of colonial laws more Islamic were reduced to unenforceable constitutional directives, confined to a preamble, or assigned to advisory councils and Islamic research institutes.

This strategy worked with varying degrees of success until 1977, when another coup d’état brought to power Zia‘ul-Ḥaq. Rather than attempting to confine Islam to a carefully managed niche of the legal system, Zia‘ul-Ḥaq took advantage of it. His argument that all previous governments had failed in the task of making Pakistan a truly Islamic state encountered little resistance: After all, if Pakistan was founded as a homeland for British India’s Muslims, could it be anything but an Islamic state? The legacy of Zia‘s Islamization has proven pervasive. The judicial review of legislation on the basis of the “injunctions of Islam” has increased the power of the judiciary, and the promulgation of Islamic criminal laws can only be reversed in the name of Islam.
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Constitutionalism, Islam, and National Identity in Malaysia

ANDREW HARDING

This article seeks to examine, over time, the complex and evolving relationship of liberal constitutionalism, Islamic law, and nationalism in Malaysia’s multiethnic and legally bifurcated polity. In recent years the relationship between these ideas has become increasingly contested as the post-independence political settlement, in turn based on positions developed during the colonial period, begins to unravel. Malaysia shows that there are no easy answers to the problems created by the tangled interaction of religion, law, and politics. Following a historical introduction, the article proceeds to outline the contemporary position in which the bifurcated legal order has become the main arena for conflict over these problems.

I. HISTORICAL INTRODUCTION

Islam came to Malaysia in the fourteenth century by means of Arab merchants and Sufi missionaries. When the Malacca sultanate was created in the early fifteenth century, its Hindu founder, Parameswara, converted to Islam. The royal houses of the Malay states, which culturally and politically derived from the Malacca sultanate, linked themselves symbolically with the Arab mainstream Islamic tradition, attempting in general to base their laws and governments on Islamic principles and adat. Hence, the Ruler of a state was head of both adat and Islam, and this remained true from the Malacca sultanate onward and throughout the period of colonial rule. Nonetheless, during these times there was no sharp distinction between adat and Islam. It was simply not conceived that adat and Islam could be in

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1 The author wishes to thank Jan-Michiels Otto, Nadia Sommerveld, and Amanda Whiting for their comments on earlier and related drafts, and for assistance, insights, and encouragement. Some of the material here is taken from the author and Amanda Whiting’s joint paper cited at (n 45).

2 I.e., Malay custom.
In reality, however, some adat principles actually contradicted Islamic law, especially with regard to the position of women and in general one could claim that the restraining influence of adat prevented the full adoption of Islamic law.

Islamic law played an important role as the personal and religious law of Muslims (family law, religious law relating to mosques, waqf, zakāt, and so on) while adat played an important role in criminal law and in cases of property and inheritance, but only marginally in family law. There were no customary courts, and conflicts were usually judged by the kadi (Muslim judge) with opportunity to appeal to the Sultan-in-Council. Although the nineteenth-century legal systems of Malaya are described as Islamic, they were often very far in practice from the Islamic ideal, but this generally depended on the power and the inclination of the Ruler of a state (styled “Raja” or “Sultan”), as well as on the extent of adherence to adat. The legal system as a dualistic whole comprising Islamic law and adat continued to exist until the coming of the British administration at the end of the nineteenth century, after which the degree of legal pluralism further increased with the migration of people from South China and from the Indian subcontinent throughout the second half of the nineteenth and first half of the twentieth century.

The British established “indirect rule” throughout the Malay states, which were protected states during the colonial period, and now form nine of Malaysia’s thirteen states (the other four—Penang, Malacca, Sabah, and Sarawak—having been British colonies from the late eighteenth or early nineteenth centuries). Under the treaties concluded between the British Crown and the Rulers of the Malay states, the Ruler was obliged to receive and act on the advice of the Resident, except in relation to matters pertaining to “Islam and Malay custom.” With their field of influence having become limited to “Islam and Malay custom,” the Malay ruling class started to embark upon regulating Islamic matters. To this purpose they used two British-introduced instruments: the State Councils and the positive law (Orders in Council). Much of the institutionalization of Islam in Malaysia took place under the auspices of the British.

The eventual outcome (by about 1920) was a system that could be called “colonial legal dualism,” in the sense that judicature was divided between the English common law and Islam/adat. Common law became the general law, but Islamic law and Malay adat existed.

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2 Adat perpatih was the democratic and matrilineal adat that was brought to Negeri Sembilan by immigrants from Minangkabau, West Sumatra. The more common form of adat, which can be characterized as authoritarian and patrilineal, was known as adat temenggong.
3 “In general” because the relation between adat and Islamic law varied and still varies a lot, depending on the state in question. In Negeri Sembilan, for example, adat played, and still plays, an important role, while Islamic law is preeminent in Kelantan.
5 Singapore, Penang, and Malacca constituted the Straits Settlements between 1842 and 1941.
6 The British advisor under Treaty provisions.
7 Mohammad Hashim Kamali, Islamic Law in Malaysia: Issues and Developments (Ilmiah Publishers, Kuala Lumpur 2000) ch.2; and for the treaties themselves, W.G. Maxwell and W.S. Gibson (eds), Treaties and Engagements Affecting the Malay States and Borneo (Truscott, London 1924).
under its aegis together with Chinese customary law and other forms of customary and religious law. This description began to apply to the various Malay states at different dates between 1874 and 1920 and it was only after 1920 that English law penetrated to such an extent that the description became wholly accurate. English-style legal institutions and legal principles were gradually introduced either through legislation or through judicial interpretation. Islamic law remained as the personal and religious law of Muslims. In general, adat no longer played a role in criminal law after its replacement by the Federated Malay States’ Penal Code of 1915. The Malay Rulers did not in general resist the introduction of English legal institutions in the form of common law principles, courts, and English-style legislation and governance. Indeed several of them owed their thrones to British intervention in internal conflicts. In the Straits Settlements colonies, English law was also introduced as the general law, but modified in its application to the different communities. An important exception was that Islamic law was, by statute, applied as personal law for Muslims.

However, the Malay Rulers did to some extent attempt to resist British attempts to integrate the nine Malay states and only four states joined the Federation of Malay States (FMS) in 1895, namely Selangor, Negri Sembilan, Perak, and Pahang. The other five were known under the name “Unfederated Malay States,” namely Johor, Kelantan, Terengganu, Kedah, and Perlis. The process of progressive federalization caused internal resistance because it was considered to be a disguised attack on the sovereignty of the Rulers rather than on Islam as such, which was in fact unaffected by the 1895 federalization and subsequent forms of centralized control.

In the period between the 1870s and 1920, the main effect of British intervention on Islam was that it tended to concentrate religious power in the hands of the ‘ulama’ or religious scholars, who depended directly on the Ruler for their positions and were referred to as Kaum Tua (Old Group). As an indirect consequence of British colonial intervention a recognizable split began to appear between these conservative religious scholars (Kaum Tua) and Muslim activists (Kaum Muda), who threatened the position of the Kaum Tua from about 1900 onward. The Kaum Muda (Young Group) had strong links with the Middle East, Cairo in particular. In opposition to the Kaum Tua, which often associated with the ruling class, the Kaum Muda sought to achieve independence. They wanted to bring down established authority and introduce Islamic modernism in its stead. In the judgment of a British District Officer who studied adat extensively in the early twentieth century, it is likely that the Kaum Muda would have caused Islamic law to replace adat as the general law if British intervention had not checked it.
Notwithstanding these developments, there appears to have been a lack of politicization of the Malays in terms of a perception of their own unity or unity with the Muslim *umma* during this period. These ideas would only surface in any genuinely political form after World War II with the emergence of Islamist politics.

Another result of British intervention was a tendency to formalize the Islamic system of justice as a reaction to the injection of common law institutions, and indeed in the late nineteenth and early twentieth centuries the ruling Malay class and the *Kaum Tua*, under the “guidance” of the British, began the process of codifying the Islamic system. This process included codification of substantive law and “reorganization and rationalization” of the *Syariah* Courts, which had started in the 1890s. Codification of the Islamic law system occurred both in the Malay states and in the Straits Settlements, and in criminal law as well as personal and family law. For example, the 1917 Code of Criminal Procedure of the state Kedah, based on *Sharī'ah*, stipulated that a person who caused severe physical suffering could be punished with *diyyah* (blood money). In 1916 a Religious Council (*Majlis Agama Islam*) was established in Kelantan to ensure proper administration of justice in the field of Islam. This eventually occurred in Kedah in 1948 and in the other Malay states in 1949. It followed the Shafi`i school in its legal interpretations, but in case the results of the interpretations were in conflict with general interests, it could also make use of the Hanafi, Malik, or Hanbali schools. The British made sure that these initiatives were nonetheless generally within the boundaries of what they saw as acceptable judicial practice according to the common law.

The Japanese occupation of 1941–1945 left no legal changes of lasting interest. It contributed, however, to heightened ethnic polarization between Malays and Chinese in particular. Hence, when the British attempted to establish a Malayan Union in 1946, which would have established a unitary state according more or less equal treatment to Malays and non-Malays, a Malay political opposition movement came into existence in which Islam played only a subordinate role to Malay nationalist sentiment: the notion of Malay privileges and its relationship to broader citizenship has in fact proved to be the defining issue in the post-independence polity. In 1948, the Union was replaced by the Federation of Malaya, which consisted of a combination of the former Straits Settlements colonies of Penang and Malacca and the nine Malay states. Under the Federation the Malays were given back some of their pre-war privileges, and crucially the traditional monarchies of the Malay states were retained.

In 1957 the Federation of Malaya achieved independence with the proclamation of the Merdeka (Independence) Constitution. The former British colonies of Sarawak and Sabah in Borneo joined the Federation in 1963 when Malaysia was formed with the addition also of Singapore, which separated from the Federation in 1965.

II. THE MERDEKA CONSTITUTION

The constitution was drafted and adopted in 1957, when Islam was a much more peripheral issue than it is now. The Report of the Constitutional Commission of 1957, a drafting body

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18 “Syariah” is the spelling of *Sharī'ah* normally used in the Malay language.
19 Peletz (n 6) 47–63.
consisting of five Commonwealth jurists under the chairmanship of Lord Reid, a Scottish judge, formed the basis of the Constitution of the Federation of Malaya (1957) (the Merdeka Constitution), and later of the Federal Constitution of Malaysia (1963), which came with the creation of Malaysia by way of amendment of the Merdeka Constitution. 21

Concerning the role of Islam, the constitution entrenched the situation that had applied under British rule in the Malay states: in the federal political system this role was confined to the states and dealt with by the Ruler of a state in consultation with the Religious Council. Islamic law was thus outside the purview of the common law courts, but its sphere of operation was nonetheless ultimately constrained and defined by the British legal structure. In terms of jurisdiction, Islamic law was confined to personal status law for Muslims. In brief, it had no role, or only a ceremonial role, to play in the constitution. It was clear that an Islamic state as such was not contemplated and that the issue of making Islam the official religion of the Federation was merely a symbolic recognition of Malay/Muslim identity. Malaysia was considered an Islamic state only in the same sense that Britain has an Anglican state.

Ironically, none of the Commissioners, who were appointed by their respective governments, was Malayan, and only one of them, the Pakistani Judge Abdul Hamid, was Muslim. It seems likely, however, that the latter was included for his experience of constitution-making in Pakistan. His stance as a dissenter on several issues such as citizenship and fundamental rights was in fact generally based on constitutionalist rather than Islamic principles. In his note of dissent, he did express support, however, for making Islam the official religion of the Federation, which was conceded in spite of some doubts among the Commission, in which a majority was in favor of going no further than the status quo, and which is now the position under Art. 3. 22

Abdul Hamid’s view was in fact in accordance with the position of the multi-party Alliance, the predecessor coalition to the current Barisan Nasional (BN), then led by Tunku Abdul Rahman. The Tunku was in favor of Art. 3 on the grounds 23 that the provision was innocuous; would not prevent the state from being secular in nature; was similar to provisions in constitutions of Muslim countries (Afghanistan, Iran, Iraq, Jordan, Saudi Arabia, and Syria were cited); was found in the constitutions of some of the Malay states; and was agreed to unanimously by the Alliance, which also included non-Muslim parties. 24 The non-Muslims’ acceptance of Islam as the official religion of the Federation was part of a political settlement involving also Malay special privileges and the national language under which they would obtain citizenship and the right to education in their mother tongue. In the constitution Islam was thus proclaimed to be the religion of the Federation when it came into effect on August 31, 1957. 25

21 Fernando (n 20) ch.4.
22 This stipulation, the current Art. 3 of the Constitution, was originally not part of the design made by the Reid Commission but was inserted during the review process in 1957. For further discussion see Fernando (n 20) 136ff and 162. The status quo was simply that Islam would be a state matter and no further provision would be made.
23 Here Justice Abdul-Hamid expressed agreement with the Alliance position.
24 Federation of Malaya Constitutional Commission Report (Government Printer, Kuala Lumpur 1956) 96. Mohammad Hashim Kamali (n 9) 35, comments that “the prevailing climate of opinion in the judiciary and elsewhere in the higher echelons of Government has not shown any decisive shift of policy to alter the original perception of the secular state as was expressed in the constitutional debate fifty years ago.”
Islam as such was in fact little discussed in the drafting process and there was no proposal that an Islamic state along the lines of Pakistan, for example, should be adopted. Despite the apparent failure to address fully in the constitution the religious predisposition of the majority of the population, the 1957 Constitution was approved by the federal and state legislatures and all major interests. Islamic jurists, of whom there appear to have been rather few at that time, appear to have supported secular constitutionalism. For example, the late professor Ahmad Ibrahim (1917–1999), the doyen of Islamic jurisprudence in Malaysia for many years, and founding Dean of the Khuliiyyah of Laws, which is now named after him, at the International Islamic University Malaysia, wrote several pieces from a constitutionalist perspective, even though he was also a fervent advocate of Islamization.\(^2^6\)

However, the Constitutional Commission did not have carte blanche in settling the constitution; it was tied by its terms of reference, agreed in London in negotiations between the Malay leadership and the British Government in 1956. Essentially, their brief was to give constitutional effect to the survival of the existing monarchies (the sultanates of the nine Malay states) and the federal system to which it was linked; political agreements concerning special privileges for the economically disadvantaged Malays; and citizenship and related rights of the non-Malays. The process of federalism, independence, and constitution-making resulted in the special position of the Malays being recognized in terms of special privileges\(^2^7\) as an exception to the general principle of equality before the law.\(^2^8\) Hence, it was Malay nationalism defined in relation to the Chinese and Indian communities, rather than Islam defined in relation to Christianity, Buddhism, and Hinduism that characterized the politics of this period. The constitution that emerged was an entrenchment of a social contract reached between the main communities, and otherwise everything was left more or less as it had been under British rule, albeit with some advances in terms of democracy and constitutionalism generally, for example in the enumeration of fundamental rights.

Since 1946 there have been two political currents among the Malays. The Tunku’s United Malays National Organisation (UMNO) and their non-Malay Alliance coalition partners\(^2^9\) formed the largest political force at the outset and has also dominated the BN. UMNO was formed from an independence movement that opposed the Malayan Union proposal of 1946 and has effectively controlled the government since the first general elections were held in 1955. The Pan-Malaysian Islamic party, Parti Islam Se-Malaysia (PAS), was founded in 1948, but its existence for the time being had little effect. This changed from the early 1970s. Suffice it here to mention that according to Roff\(^3^0\) PAS’s policy covered elements of the thinking of both the old Kaum Tua and the Kaum Muda which, respectively, stresses safeguarding Malay interests and promoting the establishment of an explicitly Islamic polity.

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\(^{2^7}\) I.e., quotas for university places, scholarships, places in the public service, and trade licenses.

\(^{2^8}\) While the Chinese and to a certain extent the Indians controlled business life and the free professions, quotas were introduced that allowed positive discrimination favoring Malays. In the 1957 Constitution, explicit mention was made of this exception to the principle of equality before the law (Art. 8(5), and more generally in Chapter X: Government Services, especially Art. 153).

\(^{2^9}\) I.e., principally the Malaysian Chinese Association and the Malaysian Indian Congress.

\(^{3^0}\) See Roff (n 10) 218.
III. THE POSITION OF ISLAMIC LAW

The historical narrative in sections I and II explains why, in Malaysia, Islam falls within state rather than federal jurisdiction, and deals with personal rather than public law. Islamic law operates as an exception to the common law, the latter being the general law as received (now) under the provisions of the Civil Law Act of 1956, which consolidated earlier similar provisions of different dates for different states. “Law” according to the 1957 Constitution at Art. 160(2) is “written law, the common law in so far as it is in operation in the Federation or any part of it, and any custom or usage having the force of law in the Federation or any part of it”; but Islamic law is explicitly excluded from this definition suggesting, rather oddly, that the constitution-makers did not consider it worth mentioning in this context.

One of the great tasks of Islamic law in Malaysia has been the achievement of uniformity among the state jurisdictions. Since the 1950s, attempts have continued to be made to provide uniformity between the various State Enactments on Islamic law. The states are competent to make material and procedural legislation to support administration of justice according to Islamic law, but their competence is limited to personal and family law and a limited related religious jurisdiction in criminal law. The result is that, while Islam is regarded by many as “official” only in the ceremonial sense (although this position is contested), there are actually fourteen different systems of Islamic religious administration and Islamic law, and each state, with the addition of the Federal Territories, has its own Administration of Islamic Law Enactment and its own Islamic Family Law Enactment.

In each state the Ruler has retained his function of Head of Islam and primarily responsible for the enforcement of adat. He is advised by the Religious Council (Majlis Agama Islam), which is led by a mufti, who is also competent to promulgate fatwās. Since these fatwās are issued by the Religious Council they have official status. Moreover, a few years after independence a State Department for Religious Affairs was established in each state which was responsible for the Syariah courts and other Shari‘ah matters; for the appointment of judges; and for the enforcement of Islamic law in general. According to Peletz, adat was not accorded a place within the jurisdiction of this Department and it “... received no institutional supports in any way comparable to those underwriting Islam.” State legislation concerns, for example, the registration of Muslim marriages and divorces. In these laws Islamic law is not codified; they merely provide the basis for enforcing Islamic law. State laws determine that the legal principles of the Shafi‘i school are applicable.

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31 As explained elsewhere, this criminal jurisdiction is not general but confined to personal law-related issues, e.g., khalwat (close proximity between unmarried persons).

32 Hereafter there will be some generalization because it would be too much to distinguish and cite all the different stipulations of fourteen jurisdictions.


34 See Peletz (n 6) 60.

35 The reference to this school nowadays has consequences especially for fatwā jurisdiction, although the Syariah courts in practice also follow the doctrines of the Shafi‘i school. Even with fatwās it is possible to consider principles of other schools, namely when this is done for the general interest. A fatwā can also involve adat and in some states the Council has to take adat into consideration when fulfilling its function. Fatwās are particularly important when it comes to determining the duties of Muslims. See further Ahmad Ibrahim, The Administration of Islamic Law in Malaysia (IKIM, Kuala Lumpur 2000).
With regard to the position of women, this varies according to whether Islamic law was or was not modified by adat. Under the matrilineal and democratic adat perpatih of Negeri Sembilan, women enjoyed extensive property rights and a married man joined his wife’s family. Adat temenggong, prevailing in other states of Malaysia, was patrilineal and authoritarian in most of its forms and the position of women was the same as their position under Islamic law, except that under the rule of harta sepencarian, divorcing spouses divided, and still equally divide, property brought into the marriage. While something resembling a women’s movement can be discerned in the Straits Settlements from the early twentieth century, it was not until after World War II that women’s rights became a major issue in the Malay states. An incident in 1951, in which functionaries of the ruling party UMNO spread a pamphlet stating that adat law with regard to property was not in accordance with Islam and was not just toward men, stirred feelings of resentment in Negeri Sembilan, where adat perpatih was applied.

In summary, the position of Islamic law in relation to common law, as personal law for Muslims, in fact remained unchanged, notwithstanding the national struggle against the British attempts to form the Malayan Union (1946), the subsequent creation of the Federation of Malaya (1948), and the independence of the Federation with its new Constitution (1957), throughout the period of decolonization. This continues to be largely true even half a century after independence.

IV POST-MERDEKA DEVELOPMENTS: MALAY RIGHTS, ISLAM, AND DEMOCRACY

By the late 1960s the uneven distribution of the benefits of economic development had clearly not been rectified. Rural Malay disaffection surfaced, in what have become known as the “May 13 riots,” following favorable results for non-Malay parties in the 1969 elections, and martial law under emergency powers had to be imposed for almost two years. Religion played no significant role in these events.

The resumption of democratic normality in 1971 was conditional on a renegotiation of the “social contract” concluded in 1957. The special privileges of the Malays were extended and entrenched and placed beyond public debate, and formed the basis of a New Economic Policy designed to give bumiputera (now defined as Malays and natives of Sabah and Sarawak) a 30 percent share in the economy by 1990. In terms of religion and the legal system these measures had the effect of increasing authoritarianism but did not affect the constitutional position of Islam. However, during the 1980s Malaysian society experienced a resurgence of Islam in the wake of the Iranian revolution of 1979. This is referred to as the

36 See (n 4).
37 I.e., division of matrimonial property.
40 Harding (n 25). A. Munro-Kua, Authoritarian Populism in Malaysia (St Martin’s Press, New York 1999).
During this period, the Islamic Party of Malaysia (PAS) was able to make specifically legal claims at the boundaries where Islam and the common law met, working for the establishment of a truly Islamic state, in which only Muslims were to hold political power. At the end of the 1970s, for a short period PAS took over the state government of traditionally Islamic Kelantan. During PAS’s tenure of the state government at that time and again from 1990, PAS promoted Islamization so far as was consistent with state powers.

The Islamic revival in Malaysia signified a challenge for the policy of harmonization with which the government had until then been able to maintain a precarious political and social balance. Events in the Middle East and the development of increasingly powerful Islamic movements in Iran and Pakistan had resulted in a stronger call for Islamization in the political domain. There was, for example, some disquiet among Muslims about the increasing interference by the ordinary courts with the Syariah courts. The closing off of avenues of political debate concerning religion and ethnicity, largely the result of the government’s authoritarian response to the experience of the May 13 riots, had made the courtroom the main arena for resolving conflicts between the religious and secular positions. These legal conflicts have become even more intense since around 2000.

The ruling BN coalition, led by Mahathir Mohamed, who was Prime Minister 1981–2003, took its stand on the basis of Malay political dominance and economic development. With the aim of undercutting PAS’s appeal, it mounted a modest program of Islamization of state and law: in the legal system, where the process of harmonization of Islamic law and institutional reform was intensified; in education, with the creation of the International Islamic University Malaysia and assistance for Muslim students; and in banking, with the creation of an Islamic banking system. Government policy under Mahathir leaned toward “Islamic values” such as discipline, reliability, integrity, cooperation, and hard work, but these norms did not lead to radical changes in the position of Islamic law. The Islamic Family Law (Federal Territories) Act of 1984, for instance, was aimed at unifying and modernizing personal and family law for Muslims, for example in relation to divorce and polygamy; it


42 Mohammad Hashim Kamali (n 9) 8.


44 Referred to in Malaysia and here as the “civil” courts.

45 A. Whiting, “Desecularising Malaysian Law?” in P. Nicholson and S. Biddulph (eds), Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia (Martinus Nijhoff, Leiden 2008). The expansive role of the legal profession in this is further elaborated in A.J. Harding and A. Whiting, “Custodian of Civil Liberties and Justice in Malaysia: The Malaysian Bar and the Moderate State” (2009), a forthcoming book chapter on file with the author. This was written as a contribution to the American Bar Foundation’s project on political liberalism, for which see http://www.americanbarfoundation.org/research/project/32.

46 The Islamic Banking Act of 1983, see Ahmad Hidayat Buang, “Islamic Transactions in Malaysian Courts” in Ahmad Hidayat Buang (ed), Islamic Law in Malaysian Syariah Courts: Practice and Problems (Universiti Malaya, Petaling Jaya 1998) 44.

was speedily copied by various states, but little or nothing was done to increase the actual scope of Islamic law. The attempt made in the 1984 law to create a uniform Islamic family law was found by conservative elements to be too radical in its modernizing measures.48

During the late 1980s and early 1990s and again more recently49 there has been some discussion promoted by senior judicial figures of the development of a “Malaysian common law” which would incorporate Islamic values with other elements or would be based on Islamic law. Ultimately, in practice this discussion has come to nothing; it was pointed out by the legal profession that the common law in Malaysia was already a “Malaysian common law,” as the law had developed from the original English model in line with the legal culture and social facts of Malaysian society; and that the state is secular, not Islamic. But it could hardly be said that Malaysian law had become in any real sense more Islamic: the imprint of British common law remained strong. Indeed, it was only in 1985 that appeals to the Judicial Committee of the Privy Council in London were finally abolished. Under Mahathir, the Westminster system of government based on the 1957 Constitution had, however, become more authoritarian, with successive constitutional and legislative amendments giving more power to the government.50 In 1988 the matter of jurisdiction over Islamic law cases came to a head, when the government decided to restrict the jurisdiction of the civil courts. An amendment to Art. 121 of the Constitution (see below) limited the jurisdiction of the civil courts regarding decisions of the Syariah courts. As a result, Syariah courts were granted much more independence in the field of personal law. This was done in the context of a constitutional crisis over government interference with the judiciary, which had become more activist in the brief period following the abolition of the appeal to the Privy Council.51

The period in question also marks the rise and possibly also the decline of PAS. Having briefly taken over the government of the state of Kelantan in the late 1970s, PAS was able to capture the state again in 1990. After the election victory a coalition of PAS and an anti-Mahathir faction of UMNO took over the administration of Kelantan. They possessed an overwhelming majority in the State Legislative Assembly and PAS’s popular leader, Nik Abdul Aziz Nik Mat, became the Chief Minister. Kelantan subsequently commenced a program to implement Islamic principles in the law and in government policy. These attempts at Islamization first involved some small changes in the rules for the government apparatus,

48 Mohamad Hashim Kamali (n 9) 13. He suggests that a possible reason for the “disobedience” of some states in implementing modernized family law legislation conforming to the original federal law of 1984 can be found in the fact that this law was primarily modelled after the Hanafi madhab of Pakistan and India, while most Malaysian states profess the Shāfiʿi tradition. Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System* (2nd ed. Dewan Bahasa dan Pustaka, Kuala Lumpur 1995) 60, suggest that the fact that making Islamic laws is the prerogative of individual states has indeed resulted in a lack of uniformity, despite attempts made by the federal government to unify the interpretation and the application of Islamic family law.


Constitutionalism, Islam, and National Identity in Malaysia

such as dress codes, which were not directed at Muslims particularly, and stipulations concerning public entertainment and the sale of alcohol. One legislative initiative was however extremely controversial, namely a *hudūd* code of criminal law which introduced Islamic criminal offenses and punishments. In 1993, the State Legislative Assembly unanimously approved the *hudūd* law.52 A chorus of dismay met its passing, not just from lawyers, non-Muslim groups, and political parties, but also Muslim groups such as the Sisters in Islam, who objected vigorously to the discriminatory effect of several provisions against women and its inconsistency with the concept of fundamental rights in the constitution.53 The *hudūd* law of Kelantan was even accused by some (who perhaps had their tongues firmly in cheek and were attempting as they saw it to call PAS’s bluff) of being insufficiently Islamic in that it did not apply automatically to non-Muslims, who were allowed however to opt into the *hudūd* law.

In Terengganu, where PAS took over the state government between 1999 and 2004, a *hudūd* law was also passed. It should also be mentioned that Terengganu PAS Chief Minister, Hadi Awang, was instrumental in the *hudūd* episode. He also twice proposed in parliament a bill providing for the death penalty for Muslims who apostatize. The *hudūd* affairs in these two states developed into a deep conflict between the PAS and the BN.

In the small northern state of Perlis, dominated by the BN, steps were made to solve the “problem of apostasy” by the passing of the *Islamiah Aqidah* (Islamic religious belief) Protection Enactment in 2000. This law (inter alia) empowers the Judge in the Syariah court to make an order to detain, in an Aqidah Rehabilitation Centre, for up to one year, a Muslim who attempts to apostatize and refuses to recant. Until now, this is the most extreme position taken with regard to the issue of apostasy. In none of the states is apostasy punishable with death, although Malaysia adheres to the Shāfiʿi school of law and under this school of law apostasy should be punished with death. The issue of punishing apostasy has thus also become a point of public dispute in Malaysia. There is presently a range of opinion both within the Muslim and non-Muslim communities as to the proper limits of Islamization. To judge by the election results of 2008, the majority view apparently supported by non-Muslims and many moderate Muslims is that Islamization has proceeded far enough. PAS gained votes from the BN, but other, secularist, opposition parties in coalition made even greater gains and took over the state government not just in Kelantan but also in Selangor, Penang, Perak, and Kedah.

From the mid-1990s, these developments placed the federal government in a politically difficult position: it was concerned to isolate PAS, by then (although after the 2008 elections no longer) its main political rival, and appear to be fully Islamic. Thus it maintained a policy of Islamization. At the same time, it did not wish to compromise economic growth, especially in circumstances in which its moral legitimacy might well be questioned from an

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Islamic standpoint. In any case, it could not support *hudud* law without placing great pressure on the inter-racial, inter-religious nature of the ruling BN coalition itself, and without alarming the non-Muslim minorities on whose support it increasingly depended and who had now deserted the BN in large numbers. However, it could also not oppose *hudud* law without appearing to Muslims to be un-Islamic as alleged by PAS.

The electoral successes of PAS and its legislative proposals created a new environment for the discussion of the role of Islamic law in more general terms. In recent years, for example, there was public debate about the concept of an Islamic state, which started in 1999 and intensified and broadened following an announcement by Mahathir in parliament that Malaysia was an “Islamic state.” He went even further to say that Malaysia was a “fundamentalist, not a moderate Islamic state,” and was also a “model Islamic state.” These statements sparked great controversy. Catholic bishops and non-Muslim parties, for example, denounced them as creating a climate of fear and discrimination in a society that has always embraced religious and ethnic pluralism, and as being factually incorrect. On the other side, PAS criticized Mahathir’s statements simply as being false and not according to Islam. An Islamic state, they said, is precisely what they wished to create if they got into power, and what they have been attempting, within the severe constraints of a federal constitution, to implement in Kelantan and Terengganu. For half a century PAS had based its politics on the idea that Malaysia should become an Islamic state. PAS sees the order established by the Federal Constitution of 1957 as secular, un-Islamic, corrupt, and, together with the common law, as an obstacle to the establishment of an Islamic state. PAS, however, was forced to reach political accommodation with other opposition parties (DAP and PKR), which has proved successful in the 2008 elections under the name Pakatan Rakyat Malaysia; it has also since then abandoned its formal claim to an Islamic state.

The constitution in fact has made precious little concession to the notion that the Federation has a Muslim majority. For example, there is no requirement that the prime minister must be a Muslim, even though it is otherwise for state Chief Ministers. Although Art. 3 names Islam as the religion of the Federation, it has until recently always been agreed

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54 An interesting question arises here: what is the basis of political legitimacy in Malaysia? Is it traditional/Islamic, charismatic, legal-rational, or economic/pragmatic? One could say that all these aspects are important for legitimacy or perhaps also that, cynically, those who are in power will use whichever aspect is most suitable in their situation. But it is undoubtedly true that the traditional/Islamic basis of legitimacy has long since been detached from the traditional monarchy.


57 “PAS: Islamic State Agenda is Still on,” *The Star* (Kuala Lumpur April 22, 2008); for the history of this issue, see Farish Noor, *Islam Embedded: the Historical Development of the Pan-Malaysian Islamic Party PAS (1951–2003)* (MSRI, Kuala Lumpur 2004) and Hussin Mutalib (n 41).
that this provision does not in any sense establish an Islamic state, but merely provides for
the religious nature of state ceremony. Art. 3 goes on to say: “but other religions may be
practiced in peace and harmony in any part of the Federation.” Certain scholars now argue
that Art. 3 indicates that the constitution is not secular and that at the least it implies a state
which is neither secular nor theocratic. 58

V. POLITICAL CHANGE AND LEGAL CONFLICT IN THE 2000S

The constitutional debates intensified into profound political struggle during a remarkable
passage of events. Despite the majority’s apparently calm rejection in the 1999 elections of
calls by PAS for reform, that election indicated some surprising developments. Large num-
bers of Malay/Muslim voters (traditional government supporters) were angry with the
­treatment of former Deputy Prime Minister, Finance Minister, and anointed successor to
Mahathir, Anwar Ibrahim, who was dismissed, arrested, and charged with corruption and
sodomy in 1998. They were also dismayed by the fallout from the economic crisis of 1997–
1998, and defected to PAS, which based its campaign on a platform of furthering attempts
to create an Islamic state. As a result, PAS not only substantially increased its representa-
tion in the federal Dewan Rakyat (lower house) from seven to twenty-seven seats, enabling it to
lead the parliamentary opposition for the first time, but also secured or retained control
over two state governments. 59 The post-election period saw the government attempting to
control the spread of support for PAS, for example by restricting the publication of PAS’s
newspaper Harakah to twice-monthly and only for party members; by interfering with the
political content of Friday sermons in the mosques; and by presenting UMNO as the party
of true, moderate, Islam, and PAS as an agent of international terrorism. In the meantime,
PAS itself appeared to be undergoing a predictable but protracted internal power struggle
(which continues) in which the “traditionalists” (principally the ‘ulamā’) are attempting to
reassert themselves against the “young professionals.” 60

Attempts to Islamize the states under PAS control brought constitutionalism and the
common law directly into question. The powers of the states are severely circumscribed to
the extent that implementation of such a program requires the cooperation of the federal
legislature in effecting constitutional amendments which, as matters stand, cannot obtain
the support of the crucial two-thirds majority in lower and upper houses. In fact the federal
opposition coalition itself, the Barisan Alternatif (Alternative Front), inaugurated in 1999
and replaced in 2008 by the Pakatan Rakyat Malaysia (Malaysian People’s Alliance) is made
up of parties that have directly contradictory views on the relationship between Islam, the

58 Abdul Aziz Bari and Farid Sufian Shuaib, Constitution of Malaysia: Text and Commentary (2nd ed. Prentice
Hall, Petaling Jaya 2006) 5–10 and citations therein; also the discussion of Lina Joy below and the contrast-
ing cases of Che Omar bin Che Soh v. Public Prosecutor [1988] 2 Malayan Law Journal 55 and Meor

59 Ironically enough, the political survival of Mahathir, who took over power in 1981 as an advocate of Malay
rights, as well as the survival of the BN in the elections of 1999 is attributed by commentators to the votes
of non-Muslims, compensating for the loss of Muslim votes to the PAS and other opposition parties. The
non-Muslims must have realized that a vote against the BN could have led to the imposition of an Islamic
state by a PAS-led government, although the cooperation of non-Muslims and non-Malay parties of the
“Barisan Alternatif” opposition coalition would have been necessary to actually gain power.

60 The Sunday Times (Singapore June 4, 2000). The statutes of the party in the meantime have been amended
in order to give the traditionalists more power. The PAS has also started a debate about the role of women
in politics.
common law and the constitution. PAS on the other hand is restricted by the need to cooperate with the other opposition parties. The post-September 11, 2001 environment has in general reduced PAS’s appeal in the eyes of the electorate. At the federal and state elections of March 2004 PAS’s position was seriously eroded; it won only six seats in parliament, losing its position as main opposition party to the mainly Chinese Democratic Action Party (DAP); it lost Terengganu, and won its heartland state of Kelantan only by the narrowest of margins following a recount. The BN under the new Prime Minister Abdullah Ahmad Badawi increased its proportion of the vote from 54 percent to 64 percent. This reversal could be ascribed to PAS’s failure to convince voters of its moderate intentions, the lack of any consensus between the opposition parties concerning the Islamic state issue, the subsidence of disquiet over the economy and the Anwar Ibrahim issue, and the “honeymoon” popularity of Abdullah Badawi.

The ḥudūd matter has in effect been resolved by the de facto position that the state ḥudūd laws of Terengganu and Kelantan cannot be enforced due to doubts as to their constitutionality. A case in which the Federal Court was petitioned directly on the basis that the ḥudūd law of Kelantan was beyond the power of a state to enact was taken to the Federal Court by a back-bench UMNO Member of Parliament and Kelantanese lawyer, Zaid Ibrahim, and was dropped in 2006 following the prime minister’s intervention.  

Since the 2004 election there has been an intensified struggle regarding the issue of civil and Shari’ah jurisdiction, based on the 1988 amendment to Art. 121 of the Constitution, and in particular concerning religious conversion. Religious conversion, especially of minors, has always been a sensitive issue in Malaysia, and the authorities are prone to quell public discussion with threats of prosecution under the Sedition Act or detention under the ISA. Two particularly fraught and well-publicized instances—Shamala’s case and Subashini’s case—involved the unilateral conversion to Islam of minor children by their newly converted fathers in the context of divorce and child custody proceedings. In both cases, because of the way that the secular courts interpreted the constitutional jurisdiction

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61 Interestingly, this same lawyer/politician was later (March 2008) appointed Minister for Law but shortly afterward resigned and has now joined the opposition.


63 Especially since the Susie Teoh case—In re Susie Teoh; Teoh Eng Huat v Kadhi of Pasir Mas Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu, Kelantan [1986] 2 Malayan Law Journal 228—in which the court took judicial notice of the “likelihood of a breach of the peace judging from the behaviour of certain sections of the crowd” (at page 229). The appeal court decided, “in the wider interests of the nation,” that the minor’s constitutional religious freedom was a right exercisable by her parent (rather than herself): Teoh Eng Huat v Kadhi, Pasir Mas & Anor [1990] 2 Malayan Law Journal 300. See further Harding (n 62).


the Hindu mothers (Shamala and Subashini) were caught between the jurisdiction of the Syariah courts and the civil courts. Their predicament galvanized civil society organizations into a concerted campaign to secure a legal forum and just legal remedies for those women, and to uphold the supremacy of the secular constitution and its guarantees of equality before the law and religious freedom. The campaign—called “Article 11” after the constitutional religious freedom clause—also drew attention to the impasse created by the courts’ current approach to Art. 121(1A) in situations involving: the plight of bereaved families contesting the alleged conversion to Islam of deceased relatives (involving tussles with state Islamic authorities for custody of the body for burial, and then conflict about the proper law to determine inheritance), instances of contested religious identity (including instances of Islamic authorities forcibly rehabilitating people who claimed they were not, or no longer, Muslims); and the rights of Muslims wishing to renounce Islam (including the highly publicized Lina Joy case).

When the then-Deputy Prime Minister (now Prime Minister) Najib Razak stated in July 2007 that Malaysia “has never been a secular state”—thus echoing former Prime Minister Mahathir’s controversial assertion in September 2001 that Malaysia was already an Islamic state—the Bar Council responded with a lesson in legal history. It instructed the minister that his claim was “startling” since it “ignores the undisputed constitutional history of the country as well as the social contract by which the multi-racial and multi-religious people of this nation came together” and the entire framework of government and justice built upon that constitutional bargain. It concluded the lesson with the assertion: “there is no doubt whatsoever that Malaysia is a secular state.” Similarly, when the Chief Justice made a speech implying that the common law should be brought into line with Islamic law, the Bar Council responded defiantly:

let there be no mistake. Any attempt to dismantle the common law system is a direct attack on our Federal Constitution. It is a backdoor attempt to rewrite it and to move Malaysia towards becoming a theocratic state which our founding fathers and recently our Prime Minister have recognised we are not. It violates the social contract. That it comes from those who ought to uphold the law and the constitution is all the more regrettable.

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66 This article, amended in crisis year of 1988, to prevent forum-shopping as well as appeals to the secular courts from a decision of the Syariah courts, provides that the secular civil courts “shall have no jurisdiction in respect of any matter within the jurisdiction of the syariah civil court.”


69 See the examples above at (n 63) and (n 64).


72 Bar Council Press Statement, “Malaysia is a Secular State” (July 18, 2007).

The case law culminated with the long-awaited decision of the Federal Court in the case of *Lina Joy v. Federal Territory Islamic Council* on May 30, 2007, relating to an attempt by a Muslim woman to change her religion.\(^7^4\) In this case, Art. 3 of the Constitution, stating that Islam is the official religion of the Federation, was elevated to a higher status than Art. 11, which provides for religious freedom. Lina Joy was brought up as a Muslim, but later converted to Christianity. When the plaintiff requested to change her national identity card, the National Registration Department refused to accept her statutory declaration that she was now a Christian, saying that she should obtain further documentary evidence that she was no longer a Muslim, such as a statement of apostasy from the Syariah court. The majority rejected her application for judicial review of the NRD’s decision, deciding that it had acted lawfully. The majority judgement proceeded on the basis that if a Muslim wanted to leave Islam, this was a question of Islamic law, which had its own jurisprudence on apostasy. Art. 3 was said to “have a far wider and meaningful purpose than a mere fixation of the official religion.” Art. 11(1) was interpreted as meaning that Islamic law determined the method of converting into and out of Islam. Under Art. 121(1A) apostasy, as a matter relating to Islamic law, was within the jurisdiction only of the Syariah court. However, a passionate dissent was registered by Justice Malanjum (the only non-Muslim judge hearing the appeal), according to whom it was of critical importance that the superior civil courts should not decline jurisdiction because of Art. 121(1A), which only protected the jurisdiction of the Syariah court in a matter that did not include the interpretation of provisions of the constitution:\(^7^5\) where the restriction of fundamental rights was involved only express authorization would suffice.\(^7^6\)

This case created an unprecedented degree of passion among the public. For many Muslims the suit represented an attack on Islam that could lead to unrestricted apostasy. For many non-Muslims the decision undermined the secular state and their constitutional right to freedom of religion.

The 2008 elections overturned the political configuration of Malaysia. The BN lost its two-thirds parliamentary majority for the first time ever, lost control over five state governments; and obtained only 49 percent of the vote in Peninsular Malaysia. As an indication of opposition gains, the BN won only one parliamentary seat in the Federal Territory, whereas the opposition won 10. The opposition parties now have 82 out of 222 parliamentary seats, of which PAS has 23. Anwar’s Parti Keadilan Rakyat (People’s Justice Party) is now the largest opposition party. The BN hold on government is wafer-thin, and these results represent a rebuff for the BN among non-Malay voters in particular, partly due to its failure to resist over-ambitious Islamization of the legal system, but also because of failure to address reform issues and economic issues. The overall result, despite PAS’s slightly increased representation, is to reinforce the multi-cultural imperative that lies at the roots of Malaysian society and to de-emphasize the Islamic state issue. The rebuff to UMNO was recognized when in April 2009 Abdullah Badawi resigned the premiership in favor of his Deputy Najib Razak.

\(^{7^4}\) The background, cases and a careful commentary on this issue can be found in Thio Li-ann, "Jurisdictional Embroglio: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Federal Constitution" in Harding and Lee (eds) (n 25).


\(^{7^6}\) Id. para. 84.
VI. CONCLUSION

In the political and legal situation in Malaysia as of mid-2011, one recognizes the government's efforts toward inter-ethnic reconciliation and economic development. However, the historical basis and practical consequences of this reconciliation seems not to be accepted by newer generations of Malaysian voters. For centuries Malaysian society has embraced a culture of mutual tolerance, and the principle of non-interference in religious affairs is deeply rooted. Pluralism has been a characteristic of many Islamic societies, but Malaysia is in this respect an outstanding present-day example because the country lies in a part of the world, Southeast Asia, where pluralism is a penetrating fact that deeply influences Islam along with other social phenomena. On the other hand, as has been shown, the position and role of Islamic law in relation to national law has now become a matter of intense political conflict. The 2008 elections have created a new politics on both sides of the political equation, in which Islam is just one of several issues that appear to be profoundly intertwined.

The constitutional balance can be said now to have reverted in some ways to where it was before the tumultuous events following the economic crisis of 1997 and the fall and subsequent rise of Anwar Ibrahim. The 1999 election result, an apparently conservative electoral reaction to those events, appeared to change the nature of the constitutional debate in Malaysia. The 2004 and 2008 election results appear to indicate that an Islamic state of the kind that PAS seeks to create is unacceptable to the generality of Muslim as well as non-Muslim voters. However, the issue of the Islamic state has reemerged in the form of a struggle waged in the courts to define the respective jurisdictions of the civil and Syariah courts.

With this caveat, after the dust of the intense political struggle of 1997–2004 had settled there seemed, at least until the 2008 elections, to be little disturbance of the inter-ethnic, inter-religious, and political alignments and understandings that have been obtained since 1957. To put the position simply, the liberal-democratic order implied in the 1957 Constitution has been partially maintained, not least due to a dogged defense of this order by the legal profession, but with two concessions: exceptional powers to the executive, which embodies Malay nationalism, inter-ethnic accommodation, and economic development at the expense of democratic freedoms; and the privileging of Islam as a religion, and Malay/Muslims as a race (bumiputera) over other races (non-bumiputera) and other religions, at the expense of the democratic principle of equality before the law. Both of these concessions are, however, both problematical and increasingly contested. For example, since 2007 unprecedented and widespread protests by Malaysia's Hindu minority, based on religious and socio-economic discrimination, have taken place and been suppressed by the government.

77 R.W. Hefner and P. Horvatich (eds), Islam in an Era of Nation States: Politics and Religious Renewal in Muslim South East Asia (University of Hawaii Press, Honolulu 1997); Mohammad Hashim Kamali (n 9) 3. It is entirely correct in this context to refer to the “Islam of Java,” “Aceh,” or “Malaysia.”
78 See further, Harding and Whiting (n 45).
If Malaysia manages to reach a new constitutional settlement acceptable both to Islamists and supporters of democratic reform (these are not of course mutually exclusive categories) it will have set a precedent of great interest and importance in the Islamic world and beyond. The success of the legal cultures of Southeast Asia over hundreds of years in absorbing and melding various legal worlds indicates that a syncretic, creative, and peaceful solution to the problem of Islam and constitutionalism is by no means impossible. At present it seems as though such an ideal solution is fraught with both political controversy and intellectual confusion. Nonetheless, the fact of historically peaceful cohabitation of Islam and other conceptions of state and law in the region should not be ignored. The apparent contemporary polarization along religious lines, rendered complex by the new politics of 2008 and beyond, should not obscure this history. There have and continue to be significant skirmishes at the borders, which are expressed principally in terms of legal struggles over territory or “jurisdiction.” These skirmishes, given the extent of public anger on both sides, are clearly far more than a lawyers’ turf war. They seem likely to veer toward even more intense conflict. There are also, however, far-reaching compromises on both sides: Islam largely concedes, in practice and for the time being, that Islamic law is not fundamental in the constitutional order, while the constitutional order concedes that strict equality for Muslims and non-Muslims will not apply.

The Malaysian example is certainly one of conflict, but conflict has existed (apart from the May 13 riots of 1969) until now as purely political and litigious, not violent. Significantly, whereas the 1969 election resulted in ethnic rioting, in 2008 electoral results even more adverse to the government were accepted on all sides without any such incidents, and the democratic verdict remained uncontested. Malaysia is also an example of the possibility of tolerant, progressive, pragmatic, moderate, and consensus-based, if not always strictly democratic or egalitarian, Muslim-led government, and the sustained viability, over a century, of a dualistic legal system. The constitution and the institutions of the common law have indeed provided the means whereby accommodation between two fundamentally contradictory conceptions of legality has been achieved. Whether this will continue to be so remains to be seen.

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PART 3

INSTITUTIONAL CONTROL OF CONSTITUTIONALISM
Models of Institutional Control

The Experience of Islamic Countries

RAINER GROTE

I. INTRODUCTION

With the wave of constitutional and democratic reforms which has taken place in Eastern Europe, Africa, Asia, and Latin America since the late 1980s, the review of the constitutionality of parliamentary legislation and government action by independent judicial bodies has become a hallmark of modern constitutionalism.1 Although some constitutions, namely in socialist countries, continue to assign the task of reviewing the constitutionality of legislation to the supreme political authority, i.e., to parliament or to one of its specialized committees,2 most constitutions today provide for at least some form of judicial review in order to ensure that the legislative and executive branches observe the limits fixed by the constitution for the exercise of their respective powers.

The Islamic countries have been latecomers to constitutional review. Although some early experiments with constitutional review were already made in Iran and in Arabic states early in the twentieth century,3 it is only during the last three decades that the idea

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1 See Michel Fromont, La justice constitutionelle dans le monde (Dalloz, Paris 1996) 7–40.
2 See Art. 62 of the Constitution of the People's Republic of China; Arts 84, 91 of the Constitution of Vietnam. But this tradition also lives on in some liberal democracies where the doctrine of parliamentary sovereignty is still strong, for example in Finland, where the Constitutional Law Committee is primarily competent to issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties: see Section 74 of the Constitution of Finland.
3 The Iranian Constitutional revolution had already set up a committee of five high-ranking religious jurists with the power to review and to strike down any legislative proposal of the National Assembly which was at variance with the sacred laws of Islam, although it became never operative, see Said Arjomand, “The Kingdom of Jurists: Constitutionalism and the Legal Order in Iran” (in this volume); Foroud Shirvani, “A Different Approach to the Control of Constitutionalism: Iran's Guardian Council” (in this volume).
of constitutional review seems to have taken root more generally in the Islamic world. The motives for this development have been varied. In Egypt, the decision to establish a Supreme Constitutional Court owed much to the need to create a judicial system that would be seen by investors as a guarantor of legal stability and of the effective protection of the individual’s rights enshrined in the new constitution, and especially of the rights relating to property. In Iran, the Guardian Council was created in order to preserve the achievements of the revolution and to safeguard the foundations of the Islamic state by ensuring the conformity of all bills passed by the Majles with Islamic principles and the constitution, whereas in Turkey the constitutional court set up under the 1982 Constitution has been given exactly the opposite mission, i.e., to protect the peculiar Turkish brand of secularism which has become known under the name of “Kemalism.”

II. BASIC MODELS OF CONSTITUTIONAL REVIEW

Constitutional adjudication can be integrated into the judicial system in two different ways. According to the first model, the powers of judicial review are exercised by the ordinary courts, with a single Supreme Court at the apex. The ordinary courts decide in every individual case in which doubts arise with regard to the constitutionality of a measure whether the action in question or the statute on which it is based conforms to the constitution or not. If the measure is unconstitutional, it will be quashed; if the enabling statute violates the constitution, the Court will refuse to apply it. The last word on this matter rests with the Supreme Court. Its decisions on the issue of constitutionality bind all other courts via the rule of stare decisis. This is the model which was first developed in the United States in the early nineteenth century. It has later been adopted by other countries belonging to the common law tradition which did not want to follow the UK tradition of unfettered parliamentary supremacy. It has also been embraced by other countries in the Americas, where its implementation has created some problems, however, since these countries generally

In Egypt, the Egyptian Conseil d’Etat already held in 1948 that nothing in Egyptian law prevented the Egyptian courts from addressing the constitutionality of legislation, a bold ruling which might have established early on a tradition of judicial review in Egypt had it not been overtaken by the revolutionary events of 1952. For these and other early experiences with judicial review in Islamic countries, see Chibli Mallat, Introduction to Middle Eastern Law (Oxford University Press, Oxford 2007) 182–185.


5 Said Arjomand, “The Kingdom of Jurists: Constitutionalism and the Legal Order in Iran” (in this volume); Foroud Shirvani, “A Different Approach to the Control of Constitutionalism: Iran’s Guardian Council” (in this volume).


Models of Institutional Control

belong to the civil law tradition and therefore do not attach the same weight to the principle of *stare decisis*, which forms the basis for the functioning of the decentralized system of judicial review in the *common law* countries.\(^9\)

The second model of judicial review rests upon the establishment of one specialized institution in the legal system in which the power to review legislative and governmental action resides. This institution is placed outside the ordinary court system. Its relations with the judiciary can be organized in different ways. It may act as a court of first and last instance in cases concerning the interpretation of the constitution. But it may also act as a constitutional court of appeal for the decisions of the ordinary courts that are based on a certain interpretation of specific constitutional provisions which the applicant believes to be erroneous. The model of a separate constitutional court that specializes in giving authoritative rulings on questions concerning the interpretation of the constitution but is not normally competent to decide private or criminal law matters was first implemented in Austria after World War I. It has been adopted in different forms in Western Europe (Germany, France, Italy, Spain) since World War II.\(^10\) After the collapse of communism, it has become the standard model of judicial review in Central and Eastern Europe, but has also been gaining ground lately in those countries of Asia, Africa, and Latin America which traditionally do not belong to the *common law* tradition. With the establishment of the constitutional court in South Africa, a country whose constitutional and administrative law had previously been shaped mainly by the common law tradition, it has even crossed the borderline between *common law* and *civil law* countries.

In the Islamic world, all these models are present in one form or the other. In the Maghreb and the Middle East, many countries that have experimented with constitutional review during the last two decades seem to have followed, with modifications, the French model of a specialized constitutional jurisdiction, whose main functions consist in the review of the constitutionality of legislation upon the request of the executive or the legislative branch and in the settlement of electoral disputes. Algeria, Morocco, Tunisia, Mauritania, Senegal, and Lebanon belong, among others, to this group.\(^11\) Iran’s Guardian Council, on the other hand, does not fit into this category. While it cannot be denied that the concept of the institution in the early drafts of the 1979 Constitution was influenced by the model of the French Constitutional Council,\(^12\) its composition and the context in which it actually operates exclude any meaningful comparison with the French body. The French Council can only intervene once a statute has been enacted by parliament and if it is requested to do so by one of the constitutional authorities entitled to submit a request to the Council (with the exception of the *lois organiques*, which are subject to automatic review). Its decisions on the constitutionality of the statute are final and binding on all public authorities.\(^13\)

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\(^11\) For the Maghreb countries, see Imen Galla-Arndt, “Constitutional Jurisdiction and Its Limits in the Maghreb” (*in this volume*).

\(^12\) The original conception of the Council of Guardians combined the idea of a committee of clerical jurists or *mojtaheds* with a French style Constitutional Council provided for in the draft constitution submitted by the Bazargan government: see Saïd Arjomand, “Islam and Constitutionalism since the Nineteenth Century: the Significance and Peculiarities of Iran” in Saïd Arjomand (n 6) 53.

\(^13\) See Arts. 61, 62 of the French Constitution of October 4, 1958.
The Iranian Guardian Council, on the other hand, is much more integrated into the legislative procedure: a bill it vetoes on the ground of its inconsistency with the principles of Islam or the constitution can only be enacted by the Majles if the latter votes the amendments requested by the Council; if the Majles refuses to do so, the matter is referred to the Mašlaḥat Council which, unlike the Guardian Council, can itself amend the disputed bill and is under no obligation to return it either to the Majles or the Guardian Council. The decisions taken by the Guardian Council are thus neither final nor binding on the other constitutional organs. With regard to the control of the constitutionality of legislation, the Guardian Council thus functions more as a specialized parliamentary body with certain limited powers than as a judicial body in the strict sense. 15

A substantial number of countries practice the decentralized form of judicial review that allows any court to decide on the constitutionality of the statute or the government action before it, subject to ultimate review by a Supreme Court. Judicial review of this type can be found in Yemen, the United Arab Emirates, arguably Afghanistan, but also in those countries that follow the British model of court organization but live under a written constitution, such as Pakistan, Malaysia, and Nigeria. Egypt belongs with the countries with centralized constitutional adjudication because it is the Supreme Constitutional Court alone that is competent to review the constitutionality of statutes and regulations. However, such review always takes place against the backdrop of concrete litigation, thus removing Egypt from the group of countries where the primary or exclusive focus is on abstract review of legislation. Similarly, Turkey and Indonesia also have implemented the model of a specialized constitutional jurisdiction but they have conferred review functions on their respective constitutional courts which go beyond the powers traditionally associated with a French-style constitutional council and have borrowed in important respects from other European models of constitutional adjudication, including the German one. This is particularly true for the Indonesian Constitutional Court, which, in addition to the review of the constitutionality of statutes has the power to determine disputes concerning the respective scope of the constitutional powers of state organs, to dissolve political parties, to resolve disputes about the results of a general election, and to investigate an alleged serious breach of law by the president and the vice president on any grounds that would disqualify either of them from holding office. However, it also applies to the Turkish Constitutional Court, which has the power to supervise the activities of political parties and to ban parties which do not conform to the Constitution, a power which it has used extensively in practice .21

14 Arjomand, “The Kingdom of Jurists: Constitutionalism and the Legal Order in Iran” (in this volume).
15 Hootan Shambayati (n 6) 118, characterizes the Council of Guardians as a “combination [of] upper house of the parliament and constitutional court.”
16 Mallat (n 3) 186.
17 For Pakistan, see Hamid Khan, “The Last Defender of Constitutional Reason? Pakistan’s Embattled Supreme Court” (in this volume); for Malaysia, see H.P. Lee, “Malaysia: The Politics of the Judiciary” (in this volume).
18 Art. 175 of the Egyptian Constitution.
19 Art. 25 of the Supreme Constitutional Court Act.
20 Art. 24C of the Indonesian Constitution.
21 Shambayati (n 6) 112–117.
III. COMPOSITION OF CONSTITUTIONAL COURTS

Another fundamental issue concerns the composition of the constitutional court and the selection of its members. The approach adopted regarding these issues depends on the basic concept of constitutional adjudication that is embraced by the authors of the constitution, i.e., whether the constitutional court is primarily seen as a judicial or a political body. The prestige and the capacity of the constitutional court to fulfill its role as guardian of the constitution crucially depend on its ability to distance itself from the political branches of government. This would seem to favor a constitutional court composed of judges who have a high legal qualification and are appointed for long, non-renewable terms. In countries where the constitutional review powers are assigned to the ordinary courts, with a Supreme Court at the top of the judicial hierarchy that also acts as final court of appeal in constitutional matters, no doubts arise as to the status of the constitutional court as part of the judiciary and the professional qualifications required from its members. Matters are less clear with regard to European-style constitutional courts. Whereas members of the German Constitutional Court must be specifically qualified for judicial office, in France no such requirement exists. No legal training and professional experience is officially prescribed for council members, and Art. 56 of the Constitution still provides that former Presidents of the Republic shall be ex officio life members of the constitutional council (although since 1962 no former president has ever taken his seat on the council). In its early years the French Conseil constitutionnel used to consist of elder statesmen rather than specialists in law. In due course, however, an adequate mixture of professional lawyers, including academics, and former politicians seems to have been achieved.

Some Islamic countries that follow the French model of constitutional review do not require a special legal qualification from the members of the constitutional council. However, in Tunisia, the three highest judicial officeholders of the country, i.e., the President of the Court of Cassation, the President of the Administrative Tribunal, and the President of Court of Auditors, are automatically also members of the constitutional council. However, most countries that provide for a specialized constitutional jurisdiction today, be it on the French or on some other model, require a formal education in law as precondition for membership in the constitutional court. Court members are usually drawn from the ranks of current and past members of the judiciary, law professors and experienced lawyers. In Turkey, the President of the Republic appoints fourteen of the seventeen justices of the constitutional court from among the candidates nominated by other high courts, including the military courts, the Higher Education Council, and the bar associations, with the other three being elected by Parliament. Iran occupies a unique position in this regard as well because the constitution specifically prescribes the membership of six clerical jurists.

22 Art. 3(2) Constitutional Court Act.
23 Tim Koopmans (n 10) 72.
25 Gallala-Arndt, "Constitutional Jurisdiction and Its Limits in the Maghreb" (in this volume).
26 Art. 4 of the Act on the Lebanese Constitutional Council; Art. 4 of the Act on the Supreme Constitutional Court of Egypt; Art. 16 Indonesian Constitutional Court Act.
27 Art. 4 of the Act on the Supreme Constitutional Court of Egypt; Art. 4 of the Act on the Lebanese Constitutional Council; Art. 2 of the Act on the Syrian Supreme Constitutional Court.
28 Art. 146 of the Constitution of Turkey, as amended by the constitutional revision of September 12, 2010.
in the twelve-member-strong Guardian Council, who have the exclusive competence to
determine the compatibility of proposed legislation with Islamic Law.\footnote{29}

The appointment procedure is of crucial importance to the independence of the
constitutional court judges. In most countries, the task of nominating constitutional court
judges is not left to professional judicial bodies but entrusted to politicians. In the United
States, the right to appoint the judges of the Supreme Court—as well as all other federal
judges—is vested in the President of the United States, who can only exercise this power
with the consent of the Senate.\footnote{30} In Germany, half of the members of the Federal
Constitutional Court are elected by the German parliament, whereas the other half is
elected by the Federal Council, which represents the interests of the state governments at
the federal level.\footnote{31} In France, the President of the Republic, the President of the National
Assembly, and the President of the Senate each appoint a third of the members of the
constitutional council.\footnote{32}

In the Islamic countries, the selection and appointment of constitutional court judges is
one of the major weaknesses in the review mechanisms introduced during the last decades.
Often this process is dominated by the executive, with limited or no influence of parliament
or other elected bodies. In the Maghreb countries, the head of state (President or King)
plays the decisive role in the selection process, although even in Tunisia his monopoly in
appointing constitutional council members has been eliminated.\footnote{33} In Iran, the clerical
members of the Guardian Council are appointed by the Supreme Leader, while the non-
clerical members are appointed by the \textit{Majles} upon the proposal of the Head of the
Judiciary.\footnote{34} However, the head of the judiciary is likely to exercise his nomination powers in
accordance with the wishes of the Supreme Leader, who has appointed him to his office.\footnote{35}
In the \textit{Maslahat} Council, which is competent to settle disputes between the \textit{Majles} and
the Guardian Council, all members are appointed by the Supreme Leader.\footnote{36} In Egypt, the
members of the Supreme Constitutional Court are appointed by decree of the President of
the Republic after consultation of the Higher Council of the Judiciary from among two
candidates, one chosen by the General Assembly of the Court and the other by its Chief
Justice. Thus the Chief Justice, who is appointed by the President, plays an important role
in the nomination process.\footnote{37} In Turkey, the President of the Republic appoints all justices of
the constitutional court from among the candidates nominated by other high courts,
including the military courts, and the Higher Education Council.\footnote{38} But even where, like
in Algeria, Tunisia, or Morocco, parliament is given a formal role in the appointment of
constitutional court justices, this does not necessarily imply a pluralist composition of

\footnote{29} Arts. 91, 96 of the Iranian Constitution of October 24, 1979.
\footnote{30} Art. II Sect. 2(2) US Constitution.
\footnote{31} Art. 94(1) German Basic Law.
\footnote{32} Art. 59 French Constitution.
\footnote{33} Since the constitutional reform of 2002, the Tunisian President appoints four members of the Council
(including the President), while two members are appointed by the President of the Chamber of Deputies
and the Presidents of the three highest courts \textit{sit ex officio} on the Council. In Morocco, the King appoints
six out of twelve Council members, with the remaining six members being chosen by the President of the House of Representatives and the President of the House of Counselors (three each): \textit{see} Gallala,
“Constitutional Jurisdiction and Its Limits in the Maghreb” \textit{(in this volume)}.
\footnote{34} Art. 91 (no. 2) Iranian Constitution.
\footnote{35} Art. 157 Iranian Constitution.
\footnote{36} Art. 112 Iranian Constitution.
\footnote{37} \textit{See} Moustafa (n 4) 198–202.
\footnote{38} Shambayati (n 6) 104.
the court, since in many countries a lack of genuine multi-party democracy will mean that parliament is dominated by the executive. 39

The work of constitutional courts in Islamic countries has also been hampered considerably by the discontinuity in judicial appointments. The Lebanese Constitutional Council has been paralyzed for much of its existence by judges staying on beyond their legally mandated terms and by the incapacity of the political organs to replace them. 40 In Algeria, it took ten months to find a successor to that Council's President in 2001. 41 Similarly, in Yemen the Supreme Court has had great difficulty to recover from the disruption caused by the civil war in 1994, 42 and in Pakistan the independence and sometimes the personal integrity of Supreme Court judges has suffered considerably from the repeated attempts of the country's politicians, and particularly its military rulers, to secure a favorable review of their policies by the Court through the deliberate manipulation of its membership. 43

IV. POWERS OF CONSTITUTIONAL COURTS

A. Review of Legislation

The most common function of constitutional courts today, the one which has come to define the essence of the institution since the landmark decision of the United States Supreme Court in *Marbury v. Madison*, 44 is the constitutional review of legislation. Its introduction has often met with considerable resistance because it was seen as irreconcilable with one of the fundamental principles of democracy, i.e., the sovereignty of the people's elected representatives in the exercise of their lawmaking powers. A number of jurisdictions like the United Kingdom or the Scandinavian countries still are very hesitant—to say the least—to grant their courts the power to strike down parliamentary acts they deem to be inconsistent with some higher (constitutional) law. 45

Judicial review of legislation can be exercised in different manners. 46 The court may intervene either before the relevant piece of legislation is promulgated by the head of state (“preventive norm control”) or after it has been enacted and published in the Official

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39 Gallala-Arndt, “Constitutional Jurisdiction and Its Limits in the Maghreb” (*in this volume*).
40 Mallat (n 3) 191.
41 Mallat (n 3) 188.
42 See Anna Würth, Iris Glosemeyer, Najib Abdul-Rehman Shamiri, “Yemen: A Burgeoning Democracy on the Arab Peninsula?” (*in this volume*).
43 Khan, “The Last Defender of Constitutional Reason? Pakistan’s Embattled Supreme Court” (*in this volume*).
44 1 Cranch 137 (1803).
45 The Human Rights Act 1998 limits the higher courts in the UK to a declaration of incompatibility in cases in which it is not possible to construe a statute in conformity with the human rights guarantees of the European Convention on Human Rights. But the declaration does not affect the validity of the relevant statute. It continues to apply, and it is up to parliament to redress the situation by amending the statute: see John Wadham et al., *Blackstone's Guide to the Human Rights Act 1998* (4th ed. Oxford University Press, Oxford 2007) para. 1.27. In Finland, the Constitutional Law Committee is primarily competent to issue statements on the constitutionality of proposed legislation: see Art. 74 of the Constitution of Finland. While the courts may disapply unconstitutional statutory provisions, this faculty is limited to cases where the violation of the Constitution is evident, Art. 106 of the Finnish Constitution.
Gazette (“repressive norm control”). If the review takes place before the statute has entered into force or even before the bill has finally been adopted, it can only assess the constitutionality of the legislation in the abstract, i.e., without regard to the specific circumstances in which it might be applied. If, on the contrary, constitutional review can only be requested once the legislation has been promulgated, it may take either of two basic forms, i.e., the form of abstract review or the form of concrete review; the latter essentially refers to the determination of the constitutionality of the law in the context of specific litigation in which the outcome of the case depends on the validity of the relevant Act. However, these distinctions are relevant primarily in those legal systems where constitutional review is exercised in accordance with the European model of a specialized constitutional jurisdiction. In the American model of decentralized constitutional review the control of the constitutionality of legislation takes place as “repressive” control in the context of a particular case whose outcome depends on the constitutional validity of the applicable legislation. In fact, there is no particular “constitutional litigation” in the American model at all: constitutional matters may be found in any case and do not receive special treatment.\(^47\)

In those Islamic countries in the Maghreb, in Western Africa, and in the Middle East that have opted for the introduction of constitutional review along the lines of the French model, the emphasis of the review mechanism is on the control of the constitutionality of proposed new legislation. They allow and in some cases require\(^48\) the examination of statutes before they are promulgated or even before they are voted by parliament.\(^49\) Where such forms of preventive review exist, the constitutional council acts more as an advisory body to the organ competent to submit the request for an opinion on the constitutionality of the legislation than as a court in the strict sense, especially if the review applies to mere legislative proposals (draft laws) and is not restricted to bills which have already been voted by parliament.

By contrast, the systems that implement a decentralized model of judicial review normally limit the courts to reviewing the constitutionality of legislation that has already been enacted. Thus the Yemeni Supreme Court, in a case concerning an action brought against the Speaker of Parliament for putting forward unconstitutional legislative projects, dismissed the application that had been filed by two members of the constitutional parliamentary committee on procedural grounds, holding that its power to review the constitutionality of legislation does not extend to draft legislation that has not yet completed the process of its enactment into law.\(^50\) But a number of countries with a centralized constitutional jurisdiction also allow the abstract review of legislation only after its promulgation. In Lebanon, constitutional review can only be requested within a period of fifteen days following the publication of the statute in the Official Journal.\(^51\) In Turkey, the institutions which have standing have to file their petition for the annulment of the contested statute or decree within sixty days of its promulgation.\(^52\)

\(^{47}\) Favoreu (n 46) 41.

\(^{48}\) Following the French model, the review of legislation is automatic with regard to those statutes expressly required by the constitution for the implementation of certain of its provisions, the so-called lois organiques: see, e.g., Art. 81 of the Moroccan Constitution; Art. 123 of the Algerian Constitution.

\(^{49}\) Gallala-Arndt, “Constitutional Jurisdiction and Its Limits in the Maghreb” (in this volume).

\(^{50}\) Chibli Mallat, “Three Recent Decisions from the Yemeni Supreme Court” (1995) 2 Islamic Law and Society 76.

\(^{51}\) See Art. 19 of the Lebanese Constitutional Council Act.

\(^{52}\) Arts. 150, 151 of the Turkish Constitution.
As in Europe, most Islamic countries that have introduced the abstract review of legislation by a constitutional court restrict the right to request a ruling by the court to the highest organs of the executive and legislative branches and, in some limited cases, to the political opposition. In Morocco, for example, a statute may be referred to the constitutional council by the King, the Prime Minister, the Presidents of the parliamentary chambers, and by one-quarter of the Representatives or Councilors. In Turkey the President of the Republic, the parliamentary group of the main party in government, the main opposition party, or one-fifth of the members of the unicameral parliament may petition the constitutional court to annul a statute. A special case is Lebanon, where in addition to the President, the Prime Minister, the Speaker of Parliament—each one representing one of the big confessional groups—and at least ten deputies of the National Assembly, the heads of the religious communities also may exercise this right, although limited to matters of religious law. The regulation of the right to petition the Council thus clearly reflects the sectarian splits within Lebanese society. The most restrictive approach is taken by the Tunisian Constitution, which restricts the right to initiate the abstract review of legislation to the President of the Republic.

While abstract constitutional review may be exercised either prior or posterior to the promulgation of the legislation, concrete review can only take place once a statute or decree has been adopted and is being applied by the authorities and the courts. Concrete judicial review takes place in the context of adversarial litigation. It is on the occasion of its application in a litigated case that the question of the constitutionality of a statute is first raised before it is referred to the constitutional court. Concrete judicial review allows the constitutional court to focus on the issues that have been raised by the parties to the case or by the court before which it is pending. In addition, it will often be easier for the court to assess the constitutional implications of statutory provisions against the background of concrete litigation, once its practical effects have started to become clear.

Whereas in some systems the right to submit a statute for a review of its constitutionality to the constitutional council or court is granted to all courts—examples include Germany and from the Islamic world Egypt and Turkey—in others it is conceived in hierarchical terms and limited to the highest courts. France—which has only recently introduced the right to request a ruling of the constitutional council on statutes of doubtful

53 In France, a petition for the abstract review of statutes may be presented by the President of the Republic, the Prime Minister, the Presidents of the National Assembly and the Senate, and at least sixty members of the National Assembly or the Senate: see Art. 61 of the French Constitution. In Germany, the right to request a ruling by the Federal Constitutional Court on the compatibility of a federal statute or a Land statute with the Basic Law is limited to the federal government, the land governments, and one-third of the members of the Federal Parliament: see Art. 93(1) (No. 2) of the German Basic Law.

54 Art. 81 Constitution of Morocco. This threshold has been lowered to one-fifth of the members of the House of Representatives in the new draft constitution, submitted to referendum on July 1, 2011.

55 See Art. 19 of the Lebanese Constitutional Council Act. In Algeria the President of the Republic and the Presidents of two Houses of Parliament can exercise this right (Art. 66 of the Algerian Constitution); in Senegal: the President of the Republic or at least ten percent of the members of the National Assembly or Senate can exercise this right.

56 Art. 72 of the Tunisian Constitution.

57 Art. 100(1) of the German Basic Law.

58 Art. 29 lit. a of the Supreme Constitutional Court Act.

59 Art. 152 of the Turkish Constitution.
constitutionality for the benefit of the Conseil d'État and the Cour de Cassation—belongs to the second group, and so do the Islamic countries that implement concrete judicial review: in Senegal only the Supreme Courts have the right to refer the question of the constitutionality of a statute to the constitutional court.

The powers of concrete review can be exercised either in a centralized or decentralized manner: in the first alternative, only the constitutional court can take a binding decision on the constitutionality of the statute, while the ordinary courts are limited to referring the contested law to the constitutional jurisdiction. In the second case, any court is free to disregard a law that it deems to be unconstitutional, but this decision is subject to appeal and revision by the constitutional court or the supreme court. Countries with a decentralized system of constitutional adjudication along U.S. lines usually follow the second model. But there are also hybrid systems: in South Africa, the High Court, the Court of Appeals, and any court of similar standing also have the power to issue an order concerning the invalidity of a parliamentary Act, but this order must be confirmed by the constitutional court before it has any force.

B. Protection of Fundamental Rights

One of the most important questions in relation to the definition of the jurisdiction of constitutional courts concerns the access of individuals to the court. While in some constitutional systems this access is still limited to a certain number of elected officials, most constitutional courts today are authorized to deal, in some way or other, with constitutional complaints brought by individuals. This approach favors the active involvement of ordinary citizens in the protection of the constitutional system. It also is in line with the most fundamental aspirations of constitutionalism as it was originally conceived (i.e., as a concept designed to protect the rights of the individual against arbitrary government), as well as the rise of the modern international human rights movement, both of which tend to attach particular weight to the role of the courts, and in particular the constitutional courts, as guardians of the individual rights and freedoms guaranteed by the constitution.

Constitutional complaints brought by individuals can be directed against the constitutionality of the statute or regulation that is applied to them, or they can be used to challenge the unconstitutional manner in which an otherwise constitutional statute or regulation has been interpreted and applied by the administrative authorities or the courts. This distinction is of fundamental importance because only in the second case does the constitutional court have the power to review the jurisprudence of the ordinary courts and to make sure that they do not give a meaning to statutes and regulations which, for example, by conferring unduly wide discretionary powers on the administration, is contrary to the constitutionally guaranteed protection of fundamental rights. Such wide review powers are standard fare in decentralized systems of judicial review where the Supreme Court also acts as the supreme and final judicial instance in matters of criminal and private law. They are much more problematic in centralized systems where the constitutional courts are confined to the binding interpretation of constitutional law issues, while the authoritative

60 As a result of the constitutional reform adopted by Congress on July 23, 2008.
61 Art. 92 of the Senegalese Constitution.
62 Section 167 of the South African Constitution.
63 On both, see Louis Henkin, “Constitutionalism and Human Rights” in Henkin and Rosenthal (n 7) 383–403.
interpretation of private and criminal law is left to the ordinary courts, thus raising difficult questions about the effects of certain constitutional law provisions on the application of normal private and criminal law statutes and causing potentially serious frictions between the constitutional court on the one hand and the ordinary courts, particularly the Supreme Court, on the other. This is one of the reasons why even many constitutional courts of the new generation, in Europe and elsewhere, have not been given the power to review the constitutionality of adjudication in the ordinary courts. This severely restricts the scope of application for the constitutional complaints procedure compared to judicial review in the U.S. system, which includes any law, any official act based on a law, or any other action by a public official that the court deems to be in conflict with the constitution, or compared to the constitutional complaints procedure in Germany, which can be brought against any act of government, including administrative and judicial decisions themselves.

In the Islamic countries, an individual claimant can bring his or her constitutional rights to the court by way of action or exception only in systems where constitutional adjudication is decentralized. This applies to countries like Pakistan and Malaysia, which have organized their judicial systems on the basis of the British model but operate under a written constitution, as well as to countries which have integrated elements of U.S.-style constitutional review into their judicial systems which—as in the case of Egypt—have been organized otherwise along European lines. Here an individual citizen may start litigation by claiming that the application of a particular law violates his or her constitutional rights, regardless of how long ago the legislation was passed, and eventually have this claim adjudicated by the Supreme Court or Supreme Constitutional Court. By contrast, in countries operating along the lines of the French model access to constitutional review is normally withheld from citizens. The constitutional review of legislation takes place upon

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64 For example, the Hungarian Constitution, which has set up one of the most elaborated systems of constitutional jurisdiction in Eastern Europe after the end of communism, allows constitutional complaints against an administrative or judicial decision in a concrete case only if the complaint challenges the constitutionality of the norm(s) on the basis of which the decision has been taken: see Gabor Halmai, “The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court” in Wojciech Sadurski (ed), Constitutional Justice, East and West (Kluwer Law International, The Hague 2002) 193.

65 Section 90 of the German Constitutional Court Act. A practically important consequence of granting the individuals generous access to the constitutional court along the German or U.S. lines is the enormous workload this solution is likely to generate for the court, increasing the need for a mechanism that allows the constitutional court to filter the complaints brought in order to be able to give priority to those cases that are really important for the further development of the law. In the U.S. system, this function is fulfilled by the writ of certiorari, which enables the Supreme Court itself to decide whether or not to take a case, according to sound judicial discretion. In Germany, where the writ of certiorari is unknown, committees of three judges examine the admissibility of the complaint in a preliminary procedure. A complaint can be dismissed at this stage by unanimous vote if it is generally inadmissible in the light of the statutorily fixed conditions for admissibility, or if there is little likelihood of success. Complaints that are not rejected by the committee are passed to one of the main chambers, the Senates, which again can decide that the complaint is inadmissible. A complaint is admitted by the Senate if at least three of its eight members believe that a decision by the constitutional court would clarify a fundamental constitutional question or that the petitioner would suffer a particular severe injury should the court refuse a ruling on the substance of the matter: see § 93 lit. d) (1) German Constitutional Court Act.

66 Mallat (n 3) 185.

67 Mallat (n 3) 209.
the request of a limited number of state authorities and operates automatically, without regard to the practical effects of the legislation in individual cases. The individual plaintiff may neither attack the constitutionality of a statute or regulation directly before the constitutional jurisdiction nor does he have any possibility to have the constitutionality of its application in the ordinary courts checked by the constitutional tribunal. In countries which have introduced the concrete review of legislation upon referral by the courts he may raise the constitutionality of a statute which is applied to him before an ordinary court and then hope that the court may refer the matter to the constitutional court for adjudication; but he does not have a right to have the matter referred to the constitutional court.

Among the Islamic countries in which citizens are permitted to attack the constitutionality of statutes and regulations, the cases of Egypt and Indonesia merit special attention. According to Art. 29 lit. a of the Supreme Constitutional Court Act, if one of the parties to a case before a tribunal or an organ with judicial authority attacks the unconstitutionality of a law or a regulation and the tribunal or organ considers the challenge to be plausible, it shall postpone the decision and grant the party which has raised the challenge a maximum delay of three months in order to petition the Supreme Constitutional Court. The Indonesian regulation, on the other hand, does not require individual citizens to address themselves to the court before they can present a petition for the annulment of legislation to the constitutional court. They may petition the court right away. Section 51 of the 2003 Act on the constitutional court allows persons of Indonesian nationality, community groups practicing customary law and public, and private legal entities to petition the constitutional court for the review of the constitutionality of legislation which allegedly violates their constitutional rights. While this provision considerably relaxes standing requirements in abstract review proceedings and opens constitutional litigation to private citizens and civil society organizations, its application is limited to the review of the law itself. It does not extend to the supervision of the way in which the law is applied by the administrative authorities and the courts in individual cases.

C. Adjudication of Center-Periphery Disputes

Constitutional courts are nowadays typically given the power to resolve conflicts between the center and the regions. This is particularly true in federal systems like the United States or Germany, where the task to ensure compliance with the federal division of powers has traditionally constituted one of their most prominent functions. But the power to intervene in controversies concerning the precise delimitation of the competences assigned to the center and the provinces respectively is nowadays also frequently found in constitutional systems which, while not being federal systems in the strict sense of the word—i.e., with no independent lawmaking powers for the regions—possess a strongly decentralized administrative structure. In Italy, for example, a measure adopted by a regional government on the basis of the autonomy granted to the regions under the constitution may be attacked by the central government as well as by other regional governments on the grounds that it infringes their own constitutionally protected sphere of competence. In a similar vein, the Spanish Constitution of 1978 assigns to the Tribunal Constitucional the responsibility to safeguard the constitutional division of powers between the central government and the

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68 Koopmans (n 10) 168–75.
69 Art. 134 of the Italian Constitution.
so-called autonomous communities (comunidades autónomas), which was introduced into the constitutional system in order to reduce the political and cultural antagonism that has historically existed between certain regions in the North, particularly Catalonia and the Basque Country, and the Castilian center.\footnote{Art. 161 lit. c) of the Spanish Constitution.}

In the Islamic world, the role of constitutional courts and of the judiciary in general as arbiter of federal or quasi-federal disputes is still of limited significance. The reason for this is that many Arab states, as well as Turkey, have implemented a highly centralized model of state organization. There are exceptions to this general rule, particularly at the (geographically speaking) fringes of the Islamic world in countries like Malaysia or Nigeria. A rare case of federalism within the Arab world is the United Arab Emirates, which, in Art. 1 of its Provisional Constitution, expressly describes itself as a federal state. Not surprisingly, therefore, the Supreme Court of the Union has been expressly given the power, in Art. 99 of the Provisional Constitution, to settle disputes between the Emirates or between any one Emirates and the Union government. Controversies concerning the relationship between federal and local law seem indeed to have come up before the UAE Supreme Court in the past occasionally, and seem to have been settled in a manner that avoids any open conflicts between the two levels of government.\footnote{See Mallat (n 3) 195.}

Another country where federal arrangements have been introduced recently is Iraq. The Iraqi Constitution of 2005 speaks of Iraq as a federal state (Art. 1) and confers upon the Federal Supreme Court of Iraq the power to settle disputes that arise between the federal government and the governments of regions and governorates, municipalities, and local administrations, as well as disputes between the governments of the regions and governments of the governorates themselves (Art. 90). However, it remains to be seen how the Iraqi Supreme Court will be able to contribute substantially to the disentanglement of the complex federal-regional relationship set up by the new constitution.\footnote{See Feisal Amin Rasoul al-Istrabadi, “Islam and the State in the Iraqi Interim and Permanent Constitutions” \textit{(in this volume)}.}

D. Conflicts between State Organs (“Separation of Powers”)

In a growing number of countries, constitutional courts are also given the task to adjudicate conflicts between the different branches of the central government concerning the scope of their respective constitutional powers. The nature of these conflicts depends on the structure of the political system. In countries with a presidential government they would primarily relate to the precise definition of the separation of powers between the executive and the legislative branches, for example by ruling on the question of whether an executive decree was properly within the powers of the President or required parliamentary approval under the constitution. In parliamentary systems, they may also include disputes concerning the status and rights of minority parties in parliament and similar issues. While the exercise of judicial review powers in such cases may be considered a valuable contribution to the smooth functioning of the constitutionally defined separation of powers, it may, on the other hand, tarnish the court’s reputation of political neutrality and undermine its authority, directly involving the constitutional court in the power struggle among the main political forces in the country. The United States Supreme Court has therefore adjudicated such issues cautiously, mostly in the context of litigation between private parties in which the
question of whether the executive or legislative power has stayed within its constitutionally defined boundaries on a specific matter popped up incidentally, but the court has been reluctant to accept petitions by political actors for a direct review of measures which those actors alleged to be in violation of their specific constitutional status or powers.73 Other constitutional courts are bolder. The German Basic Law authorizes the constitutional court to intervene directly into conflicts among central government organs in disputes concerning the extent of the rights and obligations of a supreme federal institution or other institutions concerned who have been vested with powers of their own either in the Basic Law or in the rules of procedure of a supreme federal institution.74

In general, the constitutions of Islamic countries are reluctant to provide for a direct role of the constitutional court in disputes between the executive and legislative branch concerning the scope of their respective constitutional powers. An important exception are those countries which, following the French model, have embraced the model of strict separation between the legislative powers of parliament and the regulatory powers of the executive. In this case the constitutional council is normally also given a role in policing the boundaries between the two spheres and, in particular, in determining whether statutes enacted by parliament fall outside the scope of parliamentary legislation as defined by the constitution.75 An even wider role in disputes between the different branches of government is conferred upon the Indonesian constitutional Court. Art. 24C of the Indonesian Constitution authorizes the constitutional court to determine disputes concerning the powers of state institutions granted by this constitution. Separation of powers issues have played a prominent role in the jurisprudence of both the Pakistani and the Malaysian Supreme Court, but most of the time have been resolved in a way that favors the (military or civilian) authorities of the country.76

E. Review of International Treaties

Constitutional courts may also be given the power to review international treaties for their compliance with the constitution. This mechanism is intended to pave the way for the incorporation of treaty obligations and provisions into the domestic legal system by identifying potential constitutional obstacles as early as possible. Under the French Constitution, the Conseil constitutionnel can be petitioned by the President of the Republic, the Prime Minister, or the President of one of the two parliamentary assemblies to rule on the constitutionality of treaty provisions to which France wants to become a party. If the Conseil considers the relevant obligation not to be in accordance with the constitution, the authorization to ratify or approve the treaty may only intervene after the relevant provisions of the constitution have been amended accordingly.77 Those Islamic countries which have established a constitutional council along French lines usually also assign it the competence to check the compatibility of treaty obligations with the constitution.78

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74 Art. 93(1) (No. 1) German Basic Law.
75 See Gallala-Arndt, “Constitutional jurisdiction and Its Limits in the Maghreb” (in this volume); Art. 76 of the Senegalese Constitution.
76 See Khan, “The Last Defender of Constitutional Reason? Pakistan’s Embattled Supreme Court” (in this volume); Lee, “Malaysia: The Politics of the Judiciary” (in this volume).
77 Art. 54 French Constitution.
78 Gallala-Arndt, “Constitutional Jurisdiction and Its Limits in the Maghreb” (in this volume); see also Art. 72 and Art. 97 of the Senegalese Constitution.
F. Referenda and Electoral Disputes

In those countries that do not provide for the creation of special electoral tribunals, the constitutional court may also be assigned an extensive jurisdiction in the settlement of disputes concerning the regularity of parliamentary and presidential elections. Those constitutional jurisdictions in Islamic countries that are modeled on the French Constitutional Council usually have, in addition, the task of monitoring the proper conduct of presidential and parliamentary elections and referendum operations. Similarly, the final decision in disputes about the results of parliamentary and presidential elections in Indonesia lies with the constitutional court. In Iran, the role of the Guardian Council in the vetting of presidential and parliamentary candidates and the verification of election results is even more important today than its involvement in the review of the constitutionality of legislation.

G. Trial of Public Officials

With regard to the trial of high-ranking government officials accused of high treason or another constitutionally defined misdemeanor, the question arises of whether they shall be indicted before the constitutional court or before a specially constituted High Court. In view of the peculiar nature of most of these crimes, which combine political with criminal elements, the establishment of a separate trial body would seem to be more appropriate. This is the solution adopted by the French Constitution, which provides that the President of the Republic and the members of the government are tried for acts of high treason or ordinary criminal acts committed in the exercise of their official functions before the Haute Cour de Justice, which is composed by an equal number of both chambers of parliament. Similarly, the U.S. Constitution confers the exclusive power on the House of Representatives to impeach the president, the vice president, and all civil officers of the United States for treason, bribery, or other high crimes and misdemeanors, and it confers the power on the Senate to render judgment in the cases of impeachment; the Supreme Court, however, has no role in these proceedings. In the Islamic world, those countries that have introduced French-style constitutional jurisdiction usually have not given it the power to try the President and/or other high ranking state officials for violation of their official duties. By contrast, other countries (including Turkey, Syria, and Indonesia) expressly include the impeachment of the highest ranking officials in their constitutional courts’ jurisdiction.

H. Prohibition of Political Parties

Like the trial of elected officials, the non-registration or prohibition of political parties is not generally part of the prerogatives of constitutional courts. Decisions on the registration of political parties are best left to independent electoral commissions and/or electoral tribunals.

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79 Gallala-Arndt, “Constitutional Jurisdiction and Its Limits in the Maghreb” (in this volume); Chapter IV of the Lebanese Constitutional Council Act.
80 Art. 24 C (3) (d) of the Indonesian Constitution.
81 Arjomand, “The Kingdom of Jurists: Constitutionalism and the Legal Order in Iran” (in this volume).
82 Art. 68 French Constitution.
83 Art. I Sect. 2(5), Sect. 3(7), Art. II Sect. 4 U.S. Constitution.
84 Art. 24C (2) of the Indonesian Constitution; Art. 151 of the Yemeni Constitution; Art. 148(3) of the Constitution of Turkey; Art. 15(f) Syrian Supreme Constitutional Court Act.
Prohibitions of political parties outside the election process would accordingly fall into the competence of the administrative courts. However, in order to protect political parties more efficiently against the whims of the executive, a number of constitutions give the constitutional courts the final say in the closing down of political parties. This is true in Germany, for example, where political parties can only be banned from the political process by a decision of the Federal Constitutional Court, which explicitly rules on their unconstitutionality. In the Islamic world, the German model has been particularly influential in Indonesia and Turkey. Since its foundation in 1962, the Turkish Constitutional Court has closed twenty-four political parties for posing a threat either to the secular character of the Republic or to the unity of the nation as defined by Kemalism.

V. EFFECTS OF CONSTITUTIONAL COURT DECISIONS

A fundamental issue that has to be addressed by the constitutional provisions on the status and powers of a constitutional court concerns the legal effects of its decisions. It is quite uncontroversial that in those systems where the constitutional courts have the right to review individual judicial or administrative decisions on constitutional grounds, this right includes the power to quash the decisions as they deem. The distinguishing feature of constitutional courts, however, is their power to nullify, in whole or in material part, legislative provisions they hold to be unconstitutional. In former times, the *erga omnes* effect of rulings adopted by the constitutional court on the issue of the constitutionality of a statute was seen as one the fundamental characteristics that distinguished centralized from decentralized systems of constitutional adjudication. While the constitutional court in a centralized system of judicial review could annul a statute and thus strip it of its validity, courts in a decentralized system along U.S. lines could, it was said, only refuse the application of the statute that they found to be unconstitutional in the particular case they had to decide, while that statute remained valid and therefore applicable in other concrete cases in the future. It has long been recognized, however, that the common law doctrine of *stare decisis*, which recognizes the binding effects of the decisions of the higher courts on the lower courts not only in the concrete case at hand, but in all future cases to which the *ratio decidendi* formulated by the higher court applies, produces very similar results. Coupled with other procedural mechanisms like the so-called class action, which allows courts to combine a multitude of cases whose decision depends on the same legal issue within one action, this principle has, in those cases in which a decision of the Supreme Court is based on the non-application of a statute that it holds to be unconstitutional, virtually the same effect as a formal annulment of the relevant statute.

In most Islamic countries that have set up a specialized constitutional jurisdiction, the binding character of its decision on constitutional issues is expressly recognized, either in

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85 Art. 21(2) German Basic Law.
86 Art. 24 C (1) confers on the Constitutional Court the power to decide on the dissolution of political parties.
87 Art. 69 Turkish Constitution.
88 Shambayati (n 6) 113.
89 H. Kelsen (n 7) 185.
90 This was in principle already recognized by Kelsen (n 7) 189, who nevertheless argued that it was not clear at all whether *stare decisis* applied to the interpretation of a constitution. However, subsequent developments have amply demonstrated that it does.
the constitution itself or in the implementing legislation.\textsuperscript{91} Doubts can arise, especially in those cases where the competence of the constitutional council is limited to giving opinions on the constitutionality of draft legislation upon request by the competent authority, thus conferring upon it a somewhat ambiguous status, oscillating between expert committee and judicial body (see section IV. A. above). Although the trend in recent years has been to strengthen the binding effect of the ruling of constitutional councils,\textsuperscript{92} the scope of that binding effect may still be difficult to ascertain. For example, the Tunisian Constitution defines the jurisdiction of the constitutional council in somewhat ambiguous terms: the task of the council shall be to review draft legislation for its “conformity or compatibility” with the constitution. The use of two alternative standards for the exercise of the review powers can only be to soften the rigor of the constitutional analysis: while conformity requires consistency between the constitutional provisions and the statutory text in all aspects, compatibility may already be found to exist if the main thrust of the legislation is in accordance with the constitution, even if some of its details may not be in strict compliance with the constitutional precepts. The lack of clarity in the criteria to be used in the constitutional review would also seem to weaken the binding effect reached at its end. Another difficulty consists in the fact that the decisions of the constitutional courts in many Islamic countries are not published systematically.\textsuperscript{93} This makes it more difficult for them to establish and consolidate their authority and to fashion a coherent and reliable case law.

\textbf{VI. CONCLUSION}

While a growing number of countries in the Islamic world have experimented with constitutional review in one way or another during the last decades, few genuine institutional innovations have emerged from this experience. The only major exception is the Iranian Guardian Council, which, in view of its roots in the 1906–1907 constitutional revolution, can be seen as the product of an autochthonous institutional development. At the same time, the drafters of the 1979 Constitution turned the Guardian Council into an immensely powerful instrument of the concept of Islamic statehood that had triumphed in the revolution. However, while the Council made some serious efforts to define the basic requirements of an Islamic rule of law and issued some important rulings in its early phase,\textsuperscript{94} its position was fatally undermined by the 1989 reforms that gave the last word in disputes between the Council and the Majles to the overtly political Maslahat Council.\textsuperscript{95} Since then, it has mainly focused on its role in the supervision of the presidential and Majles elections and in the vetting process of presidential and parliamentary candidates. In that capacity, it has built a dubious reputation for itself as a staunch ally of the conservative and reactionary political forces in the Islamic Republic.\textsuperscript{96}

Apart from Iran, the introduction of constitutional review in the Islamic world has largely taken the path of adaptation of foreign models, and in particular of France (namely in the Maghreb countries and Lebanon), the United States (in Egypt and the Arab peninsula),

\begin{itemize}
\item \textsuperscript{91} See Art. 75 of the Tunisian Constitution; Art. 49 of the Egyptian Supreme Constitutional Court Act.
\item \textsuperscript{92} Gallala-Arndt, "Constitutional Jurisdiction and Its Limits in the Maghreb" (in this volume).
\item \textsuperscript{93} See Mallat (n 3) 196.
\item \textsuperscript{94} Arjomand, “The Kingdom of Jurists: Constitutionalism and the Legal Order in Iran” (in this volume); Chibli Mallat, The Renewal of Islamic Law (Cambridge University Press, Cambridge 1993) 146–157.
\item \textsuperscript{95} See Mallat (n 94) 96–107.
\item \textsuperscript{96} Arjomand, "The Kingdom of Jurists: Constitutionalism and the Legal Order in Iran" (in this volume).
\end{itemize}
the United Kingdom (Pakistan, Nigeria, Malaysia), and Germany (Turkey, Indonesia), with modifications to the particular political and cultural contexts of the respective countries. While almost all constitutional review bodies practice some form of constitutional review of legislation or another, most constitutions in the Islamic world still do not provide for access of individuals to constitutional adjudication. While the French model of adjudication that is usually preferred in the French-speaking parts of North and West Africa and the Middle East does not per se exclude the judicial scrutiny of legislation in the light of constitutionally guaranteed fundamental rights, the limitation of the right of application to the highest organs of the state will often prevent that it is effectively used to such effect. Even if the right of application is extended to parliamentary groups, including opposition groups, this does not necessarily imply that it will be vigorously used in defense of individual and minority rights, given the lack of genuine pluralism that still prevails in many legislative assemblies. In such context the constitutional review of parliamentary legislation may even end up tightening the grip of the executive on parliament as the main institutional forum of civil society. Only in those countries where individuals also have the right to apply for the abstract review of legislation can this form of judicial review thus be considered as an effective instrument for the protection of fundamental rights.

But access to judicial review may be denied to individuals in other review systems, too. The constitutional courts in the Islamic world that have a proven record in fundamental rights litigation are few and far between. Egypt is one of the few countries in which individual parties may appear and argue their case before the Supreme Constitutional Court. Not surprisingly, it is also one of a small number of countries where the weapon of judicial review has been used at least occasionally with some measure of success in order to defend basic civil and political rights against government intervention. However, even where access to the courts by individuals is not barred by narrow procedural rules, the judicial avenue may offer little chance of redress against an executive power that can evoke broad and sometimes virtually unlimited emergency powers in order to justify its liberty-restricting measures, as the examples of Pakistan and Malaysia show.

97 Gallala-Arndt, “Constitutional Jurisdiction and Its Limits in the Maghreb” (in this volume).
98 Moustafa (n 4) 182–198.
The year 2011 will probably enter memories and books of history as the year of pro-democratic uprisings in the Arab world. The upheaval started in the Maghreb, more precisely Tunisia, before it spread to other parts of the Arab world, leading to regime change in some countries and triggering civil wars in others. In the Maghreb region, it is in Tunisia and Libya that the upheaval led to dramatic changes like the overthrow of the President of the Republic Ben Ali in Tunisia and the outbreak of a fierce civil war between the Gaddafi regime and the Libyan rebels mainly located in the east of the country. In Morocco, Algeria and Mauritania the governments feel increasingly under pressure to fend off the wave of pro-democracy unrest in North Africa by pledging their support for democratic reforms of the existing authoritarian political structures.

Increasing protests and demonstrations of different sectors of the Tunisian population forced President Ben Ali after more than twenty years of uncontested rule to flee the country. According to Art. 57 of the Tunisian Constitution the definitive vacancy of the office of the President of the Republic was certified by the constitutional council; the President of the Chamber of Deputies became interim president, but only for a maximum period of
sixty days. In the meanwhile, presidential elections were to be held. Nevertheless, under the mounting pressure of the demonstrations in the streets the Tunisian Constitution was finally suspended. Having been adopted and amended during the times of dictatorship under the first and the second president of the Republic, it could not serve as basis for the transition to democracy. The so-called “High Commission for the Realisation of the Goals of the Revolution, Political Reforms and Democratic Transition” has been preparing the elections scheduled for October 23 of a constituent assembly. The elected body will be charged with the drafting of Tunisia’s new democratic constitution.

In Morocco a new constitution was submitted to referendum. This new constitution is supposed to reduce the powers of the king and broaden the power of a democratically elected parliament, although critics have claimed that it largely preserves the dominant position of the King in Morocco’s political system. Also in Algeria President Bouteflika promised to amend the constitution in order to satisfy the pro-democracy expectations of the Algerian people.

Constitutional reform thus enjoys a prominent place in the debates on the future of the Maghreb countries following the “Arab spring.” The potential and actual amendments of the relevant constitutions captivate the attention of all the political actors in and outside the region, since the new or amended constitutions will be the primary tools for the institutionalisation of political change. From this perspective it is helpful to examine the constitutions in the Maghreb before the pro-democratic upheavals. This will explain at least partly the reasons for the unrest and help the reader to put into perspective the size of the challenges the Maghreb countries face in the process of constitutional reform and their prospects for success.

I. INTRODUCTION

All of the members of the Arab Maghreb Union, with the exception of Libya, have established bodies to ensure the protection of their constitutions. Tunisia, Algeria, Morocco, and Mauritania share common historical features. They were colonized by France and had to face similar problems after independence, mainly underdevelopment and the construction

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of a modern nation. In spite of some country-specific characteristics, the process toward the rule of law in the Maghreb shows general similarities. With the exception of Tunisia, the countries referenced in this article have relatively recent constitutions. Algeria, at the end of the 1980s, and Morocco and Mauritania at the beginning of the 1990s, adopted new constitutions in order to respond to the international and national pressure for more democracy and constitutionalism. The establishment of constitutional councils (in French conseils constitutionnels, in Arabic mājālis al-dustūria) as bodies entrusted with the protection of the constitutions has been considered a major step toward that goal. The Maghreb countries followed the French model of constitutional review. The constitutional councils in the Maghreb are intended to ensure the rule of law and the respect of fundamental rights and freedoms. This chapter aims to provide, in a comparative perspective, a detailed overview of these constitutional councils and some examples of their case law in order to assess their contribution to the rule of law.

This chapter begins with a brief historical overview about the protection of the constitution in the Maghreb countries before the establishment of the constitutional councils. Next, the rules related to the constitutional councils will be analyzed. Finally, some of the significant opinions or decisions of the councils will be highlighted. The conclusion will sum up the results of this comparative analysis.

## II. HISTORICAL OVERVIEW

While Morocco, Algeria, and Mauritania’s first constitutions vested the supreme courts with constitutional review powers, Tunisia kept the constitution clearly out of the jurisdiction of the judicial and administrative courts.

Under the Moroccan Constitution of 1962, a chamber entrusted with constitutional review was established within the Supreme Court. The creation of the new chamber reflected the main feature of the first constitution, the establishment of a “rationalized” parliamentary system. The constitutions adhering to the rationalized parliamentarism are designed to strengthen governmental stability and to guarantee a more continuous functioning of the institutions; Lotfi Tarchouna (n 9) 256.

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13 Lotfi Tarchouna (n 9) 251.
14 The concept of “rationalized” parliamentary regime was first used by an emigrant Russian scholar, Boris Mirkine-Guetzewich. It designates a political and constitutional system with particular techniques aimed at making it more difficult for parliament to reverse the government, such as the requirement of special procedures, absolute majority, or the automatic dissolution of parliament. The constitutions adhering to the rationalized parliamentarism are designed to strengthen governmental stability and to guarantee a more continuous functioning of the institutions; Lotfi Tarchouna (n 9) 256.
competence to review the constitutionality of institutional acts before their promulgation, and of the internal regulations of the parliament before their application. Moreover, Art. 103 of the Constitution of 1962 vested the chamber with the jurisdiction to monitor parliamentary elections and referendum procedures. The chamber had a specific status inside the Supreme Court. It was composed of five members chaired by the Chief Justice. The nomination of the members of the constitutional chamber, its organization, and functioning were different from those of the other chambers of the Supreme Court. According to the Chief Justice, the specific status of the chamber was intended to give it a certain political character better adapted to the specific nature of constitutional issues. In spite of its specific function, the constitutional chamber was part of the judicial system, which imposed on it some constraints that conflicted with the very nature of constitutional review. During its existence the constitutional chamber issued about nine hundred decisions, and so paved the way for the next step in the history of constitutional review in Morocco.

The first Algerian Constitution of September 10, 1963 provided for a constitutional council entrusted with the constitutional review of laws and legislative decrees (Arts. 63 and 64). Nevertheless, the council was never operative, since the constitution was suspended due to the turmoil in the region of Kabylie and the coup d'etat of June 19, 1965. As a new constitutional document was then adopted in the form of the National Chart, the constitution was given a secondary place in the hierarchy of norms. The Constitution of 1976 did not maintain the constitutional council. The fifth Front de Libération Nationale (FLN) congress in December 1983 advocated for the establishment of a body which would, under the supervision of the President of the Republic, examine the constitutionality of laws for the purpose of guaranteeing the supremacy of the constitution and fostering democracy in Algeria. Nevertheless, this proposal was not implemented immediately, and the new council was not established until 1989. The creation of the council was one of the innovations introduced to the constitutional order at the time to foster the rule of law in Algeria.

In Mauritania, under the Constitutions of March 22, 1959 and May 20, 1961, and also after the coup of July 10, 1978, a constitutional chamber inside the Supreme Court was vested with the constitutional review of laws and regulations. However, it was almost fully inactive, as it was never requested to examine the constitutionality of laws. The paralysis of

18 The National Charter was adopted by a referendum on June 27, 1976. It established the founding principles of the state. According to Art. 6 of the Algerian Constitution of 1976 the National Charter is the fundamental instrument of reference for the interpretation of every provision of the constitution.
19 Lotfi Tarchouna (n 9) 250.
the constitutional chamber was due to the law imposing the single-party system and to the 1978 military coup d'état.  

Unlike Algeria, Morocco, and Mauritania, the Tunisian Constitution has not entrusted the Court of Cassation with any constitutional review authority. To the contrary, the Court emphasized on many occasions the incompetence of the courts to undertake this kind of control. The long silence of the Tunisian Constitution concerning the constitutional review of laws and regulations was closely linked to the special status it conferred upon the President of the Republic. In fact, the President was considered the real guarantor of the constitution’s superiority in the hierarchy of norms. According to Art. 41 of the Constitution, the President of the Republic is the guarantor of national independence, of territorial integrity, of the respect of the constitution and the laws, as well as the execution of treaties. He sees to the proper functioning of the constitutional public powers and assures the continuity of the state. Nevertheless, Art. 41 does not specify the mechanisms that the President may use in order to fulfill this task. Other provisions of the constitution identify some mechanisms to ensure the respect of the supreme law. For instance, the President can draw the parliament’s attention to a possible constitutional violation (Art. 49). He can also in the same vein address the people or instruct the government to apply the constitution properly (Art. 50). In addition, the President is given some “hard” powers to protect the constitution. He can, for example, refuse to promulgate a law which he considers unconstitutional (Art. 52). But he is obliged to promulgate that law if the parliament adopts it in a second session with a two-thirds majority vote. In addition, the President can bring one or more members of the government before the High Court (Chapter V of the Constitution) for the crime of high treason resulting from the violation of the constitution (Art. 68). The President of the Republic can also protect the constitution using the exceptional measures provided for in Art. 46, which stipulates that: “should imminent peril menace the institutions of the Republic, threaten the security and the independence of the country and obstruct the proper functioning of the public powers, the President may take the exceptional measures necessitated by the circumstances.”

The above-enumerated measures and mechanisms depend on the goodwill of the President and consequently do not offer the required objectivity for an effective protection of the constitution.

The President’s monopoly over the protection of the constitution was almost broken when a draft constitutional amendment providing for a constitutional council was submitted to the National Assembly on February 9, 1971. During the discussion of the draft the government abandoned the proposal concerning the constitutional council with the

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argument that such a council would contradict the constitutional provision entrusting the President of the Republic with the protection thereof.  

The proposal concerning the constitutional council was just a strategic means to calm the vivid debates among scholars of constitutional law and in civil society in the wake of the political processes since 1968, when the Court of State Security was established.  

The lack of constitutional review in Tunisia undermined the protection of fundamental rights, especially because the constitution established the legislature as the main institution responsible for the implementation of those rights.  

In the late 1960s, the government brought an action against some of its opponents before the Court of State Security. While the Court intended to condemn opposition activists on the basis of several laws regarding the exercise of fundamental freedoms, the defendants argued that the laws in question were unconstitutional. But the Court of State Security refused categorically to examine the constitutional validity of these laws, using the argument of the principle of separation of powers.  

Apart from political reasons, the refusal of the Tunisian judges to exercise constitutional review can also be explained by the influence of the French tradition. Since the Revolution, the French tribunals have considered themselves not competent to examine the constitutionality of laws.  

Nevertheless, for the first time in the history of the Tunisian judiciary, the tribunal of first instance in Kairouan rendered a decision on December 24, 1987 stating that judges were competent to examine the constitutionality of laws in individual cases.  

The tribunal argued that constitutional review by exception was inherent in the judicial competence, for the judge was required to apply the law. Without expressly mentioning Art. 65 of the constitution, the tribunal founded its argumentation on its content. In fact, the Kairouan tribunal pointed out that the judge was subject only to the authority of the law, but it understood the word “law” broadly, including the constitution. In addition, the tribunal ruled that the courts were competent to examine the legality of administrative regulations if the matter was raised in a court case and held that constitutional review of laws was a logical consequence of the control of legality of administrative regulations. The court based its opinion on the requirement for judicial oversight in the hierarchy of norms.  

The Court of Appeal of Sousse confirmed the competence of the ordinary judge to exercise the constitutional review of laws if the matter of constitutionality was raised in the context of a case or controversy. Nevertheless, the Court of Cassation voided the decision, firmly stating the incompetence of the judge to exercise the constitutionality of laws.
In Morocco, a discussion about the competence of the ordinary judge to exercise constitutional review could not arise, for the legislation expressly forbids the administrative and civil tribunals to rule on the constitutionality of laws or decrees.36

III. STATUS OF THE COUNCILS AND THEIR COMPOSITION

A. Status

All constitutional councils in the Maghreb are established by the respective constitutions, except the Constitutional Council of Tunisia. The constitutional status guarantees independence as the councils—at least theoretically—are not in their very existence at the mercy of the executive or the legislature. Nor are they part of the judiciary.

Unlike the status of its counterparts in the Maghreb, the status of the Tunisian Constitutional Council has undergone a slow and cautious evolution.37 It was created by Presidential Decree No. 1414 of December 16, 1987, as an advisory body for the President of the Republic. Creating the constitutional council by a decree was vehemently criticized because it made the council dependent on the goodwill of the President.38 The lack of constitutional status denied the Tunisian Constitutional Council the autonomy required to assume an effective and real role in protecting the constitution. Through the Law No. 90-39 of April 18, 1990, the constitutional council subsequently acquired legislative status. It did not receive constitutional status until the constitutional amendment of 1995 (Constitutional Law No. 95-90 of November 6, 1995).

B. Composition

As the constitutional councils have the task to guarantee the protection of the constitution and ensure that the different powers fulfill their responsibilities in accordance with the constitution’s norms and standards, their members must possess full autonomy and independence of the various public authorities. However, the relevant constitutional provisions guarantee this independence only partially.

1. Appointment

Although the head of state is no longer solely competent for appointing the members of the constitutional councils, he still dominates the appointment process in each country. In contrast to other countries of the Maghreb, in Tunisia, the President of the Republic retained the exclusive competence to appoint the members of the constitutional councils until it was finally abolished through the amendment of the constitution in 2002.

When it was established, the Tunisian Constitutional Council was composed of eleven members. The number was then reduced to nine. The members of the constitutional council were all appointed by the President of the Republic. During the discussion of the draft Constitutional Law (1995) and the Institutional Act on the Constitutional Council (1996), some deputies proposed to involve the Chamber of Deputies in the nomination of

36 Art. 25 of the civil procedure code and Art. 25 § 2 of the law No. 41-90 of September 10, 1993 establishing the administrative tribunals.
37 Rafaa Ben Achour (n 24) 126.
38 Id. 127.
the council members. The government rejected the proposal. However, a change to this effect was finally made in 2002.

The members of the constitutional council must have a confirmed competence, irrespective of their age. Four of them, including the president, are appointed by the President of the Republic and two by the President of the Chamber of Deputies; the first president of the Court of Cassation, the first president of the Administrative Court, and the first President of the Audit Office are *ex officio* members of the council. This constitutes a move toward greater independence for the members of the constitutional council from the President of the Republic. Still, one should not forget the almost monolithic composition of parliament that is dominated by a single party. As the President of the Republic is also the chief of the dominant party in parliament, it is improbable that the President of the Chamber of Deputies will appoint members of the constitutional council who do not enjoy the trust of the President of the Republic.

The same remark can be made about Algeria, although the relevant constitutional provisions seem to involve parliament in the nomination of the members of the constitutional council to a greater extent than in Tunisia. The Algerian Constitutional Council is composed of nine members: three (including the president) are appointed by the President of the Republic, two elected by the People’s National Assembly, two elected by the Council of Nation, one elected by the Supreme Court, and one elected by the Council of State.

The Constitutional Council of Morocco is composed of twelve members. Half of them are appointed by the King. Three members are appointed by the President of the House of Representatives, three by the President of the House of Counselors following consultation with the parliamentary groups. The experience of the constitutional council has shown that the presidents of the chambers have little influence on the nomination of the members. The presidents nominate the candidates chosen by the three most important parliamentary groups. This reflects the desire that the distinct political forces in parliament are represented in the constitutional council. However, the members appointed by the King are known for their loyalty to him and to his concept of the exercise of power. The King himself has exhorted the council members to develop case law respectful of the national Arab and Islamic heritage. The members of the constitutional council were considerably dependent on the king, as their terms of office were renewable until the constitutional amendment of 1996.

### 2. Term of Office

The term of office of the members of the constitutional councils in the Maghreb countries varies from one country to the other. With the exception of Tunisia, the mandate is not renewable.

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39 Rafaa Ben Achour (n 23) 457.
40 Art. 75 § 2 Tunisian Constitution.
43 Art. 164 Algerian Constitution.
44 Art. 79 Moroccan Constitution.
46 Omar Bendourou, “Conseils constitutionnels et Etat de Droit au Maghreb,” in Ahmed Mahiou (n 17) 237.
In Morocco, the members of the constitutional council shall serve for a non-renewable term of nine years.\textsuperscript{47} Mauritania opted for the same solution.\textsuperscript{48} The Algerian Constitution confers upon the members of the constitutional council a unique mandate of six years.

Unlike their counterparts in the other Maghreb countries, the members of the Tunisian Constitutional Council are nominated for an office term of three years, which is renewable twice.\textsuperscript{49} It is obvious that the renewability of the term can be a serious threat to the independence of the Tunisian Constitutional Council.\textsuperscript{50} When the latter was raised to constitutional status in 1995, its members were not yet given a determined mandate. During the discussion of the constitutional bill in 1995, some deputies proposed to determine a term of office for the members of the council. The government, however, rejected that proposal, arguing that the constitutional council’s advisory nature made such a limitation unnecessary.\textsuperscript{51} Thus the President of the Republic could dismiss them whenever he decided to. Needless to say, the absence of fixed terms undermined the independence of the members of the constitutional council. The members of any body, even if it is advisory, must enjoy maximum independence during the exercise of their functions without fearing any sanction, such as dismissal.\textsuperscript{52}

3. Incompatibilities

The members of the constitutional councils in the Maghreb are principally subject to the same incompatibilities. The function of a member of the constitutional council is incompatible with the functions of a member of government or Member of Parliament. Council members cannot hold any public office or any elective public function. Nevertheless, there are some incompatibilities particular to each country. For instance, the Moroccan members of the constitutional council are not allowed to engage in paid activities in firms where more than 50 percent of the capital belongs to the state or a public body.\textsuperscript{53}

Moreover, the same incompatibility can be regulated more strictly in one country than in the other. For example, while it is forbidden in Morocco for a member of the constitutional council to have a leading function in a political party or a trade union,\textsuperscript{54} the Algerian members are not even allowed to be members of any political party.\textsuperscript{55} They are, however, allowed to exercise other cultural or scientific activities that do not endanger the impartiality and independence of the institution.\textsuperscript{56}

\textsuperscript{47} Art. 79 Moroccan Constitution.
\textsuperscript{48} Art. 81 Mauritanian Constitution.
\textsuperscript{49} Art. 75 Tunisian Constitution
\textsuperscript{50} Omar Bendourou (n 46) 229.
\textsuperscript{52} Rafaa Ben Achour (n 23) 457.
4. Immunities

The members of the Mauritanian Constitutional Council enjoy, with regard to immunities, the highest protection among their Maghreb counterparts. In fact, they are given the same immunity as Members of Parliament, according to which no member may be prosecuted, pursued, arrested, detained, or tried because of the opinions or votes emitted by him during the exercise of his functions. Furthermore, the parliamentary immunity implies that no member may be prosecuted or arrested for a criminal or penal matter, except with the authorization of parliament, unless it is a case of flagrant delecto. In Tunisia, the members of the constitutional council do not enjoy the same immunity as Members of Parliament as in Mauritania but are nevertheless given a substantial measure of protection. They may not be prosecuted, arrested, or tried for acts done within their professional roles. Moreover, in the case of a crime or a misdemeanor they may be prosecuted only upon referral of the advocate general (avocat général) to the investigating judge (juge d'instruction).

In Morocco and Algeria, the members of the constitutional councils are not given any immunity. The only guarantee of a similar nature is that the constitutional councils are the only bodies competent to exercise disciplinary authority over their members. If the constitutional councils decide that the members failed to fulfill their obligations, they may force the delinquent members to present their demission.

It is obvious that the members of the constitutional councils in Tunisia, Morocco, and Algeria should be granted the same parliamentary immunity as in Mauritania, if they are to exercise their functions without any fear of external interference or pressure.

IV. JURISDICTION

The competences assigned to the constitutional councils in the Maghreb countries are diverse. They are not only entrusted with the constitutional review stricto sensu, which means the examination of the constitutional validity of a statute or a regulation, but also with monitoring functions concerning the electoral and referendum processes and with miscellaneous consultative functions.

A. Jurisdiction outside the Constitutional Review

The constitutional councils were established to protect the constitution. Their purpose is to ensure that power is exercised and transmitted in conformity with the constitution. As a result, they are granted some functions beyond constitutional review. The control of the validity of the electoral processes and referendum is shared by all the constitutional councils in the Maghreb. Appeals concerning the regularity of presidential and legislative

57 Art. 81 Mauritanian Constitution.
58 Art. 50 Mauritanian Constitution.
59 For the Tunisian Constitutional Council, Zouhair Mudhaffar (n 51) 51–53.
elections may be brought before them. In Algeria, for instance, the constitutional council is entrusted with overseeing the proper conduct of referendums, presidential and legislative elections, and proclaiming the results of the elections and votes. The candidates for the presidential and the legislative elections, and the voters in the case of a referendum, can bring claims regarding the validity of the election or referendum process before the Algerian Constitutional Council. The decisions of the constitutional councils are binding and not subject to appeal.

In addition, the constitutional councils are granted diverse competences under exceptional circumstances. For instance, if the President of the Republic in Algeria wants to declare the state of emergency or the state of exception (Arts. 91–93 of the Constitution), he first has to refer the matter to the constitutional council. In Morocco, the King has to consult with the chairman of the constitutional council before declaring the dissolution of parliament. In Tunisia, by contrast, the constitutional council does not enjoy similar powers. It is not consulted before the dissolution of parliament. Before taking “the exceptional measures” of Art. 46, the President of the Republic consults only with the presidents of each chamber of the parliament but not with the constitutional council or its chairman. This may be an indicator that the Tunisian Constitutional Council does not enjoy in the same prestige and importance as in the other Maghreb countries.

In addition, the constitutional councils in the Maghreb are entrusted with the role of arbitrating conflicts between the legislative and executive powers. For instance, Art. 35 of the Tunisian Constitution stipulates that if the President of the Republic objects to the admissibility of any bill or amendment because it interferes with the exercise of the general regulatory power assigned by the constitution to the executive, he shall submit the issue to the constitutional council, which has to hand down its decision within ten days of receiving the President’s request. The same jurisdiction is conferred upon the Moroccan Constitutional Council.

B. Constitutional Review

1. Obligatory Constitutional Review
Obligatory constitutional review means that the legal text or the issue must be submitted to the constitutional council for examination of its conformity with the constitution. Thus, the competent authorities are obliged to submit the texts or the issue to the constitutional council. The constitutions of the Maghreb countries determine which legal texts are subject to the obligatory constitutional review. They are supposed to be of considerable importance; thus they enjoy a special protection. In Morocco, Algeria, and Mauritania the scope of the obligatory constitutional review is narrower than in Tunisia.

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63 Art. 163 Algerian Constitution.
64 For Presidential elections and referendum: Art. 166 Institutional Act No. 97-07 of March 6, 1997 related to the organization of elections; For Legislative elections: Arts. 148–149 of the same Act.
65 For Tunisia: Art. 75 §4 Constitution.
66 Art. 71 Moroccan Constitution.
67 Art. 63 Tunisian Constitution.
68 Art. 53 Moroccan Constitution.
In Algeria, the President of the Republic must refer the Institutional Acts to the constitutional council after their adoption by parliament (Art. 165 §2). The Constitution requires the constitutional council to assess the constitutionality of the internal regulations of each of the houses of parliament before their application. The presidents of the respective chambers of parliament must refer the regulation to the constitutional council. The same solution has been adopted in Morocco and Mauritania.  

In Tunisia, the scope of the obligatory constitutional review is broader than in the other Maghreb countries because the Tunisian Constitutional Council evolved differently. The President of the Republic was obliged to submit to the constitutional council a large number of texts to counterbalance the exclusively consultative nature of the constitutional council. Until the constitutional amendment of 1998, the constitutional council fulfilled only consultative functions. In fact, between 1987 and 1990, the President of the Republic was completely free to submit any bill to the council. With the Law No. 90-39 of April 18, 1990, the discretionary power of the President in this context was slightly reduced. With the new law, he was under the obligation to submit to the constitutional council all draft Institutional Acts and bills concerning specific issues, such as the general methods of implementation of the Constitution, nationality, personal status, obligations, definition of crimes and misdemeanors and the applicable sentences, procedures before the different orders of courts, amnesty, the basic principles of the system of ownership and real rights, education, public health, labor law, and social security. With the elevation of the constitutional council to constitutional rank in 1995, the list of the texts requiring submission to the council was extended to include “the treaties stated in article 2 of the Constitution.” These are the treaties signed in the framework of the integration of the Great Arab Maghreb and whose execution may require a modification of the Constitution. In addition, the President has to submit to the constitutional council the bills provided for in Art. 47 of the Constitution, which concerns bills and questions of national importance that may be submitted by the president for referendum.  

In contrast to other Maghreb countries, the President of the Republic in Tunisia submits bills before, not after their adoption by parliament to the constitutional council. The only exception concerns legislation initiated by Members of Parliament. Nevertheless, as in other Maghreb countries, the internal regulations of each chamber of the parliament in Tunisia must be submitted to the constitutional council by the president of the respective chamber of parliament.

2. Facultative Constitutional Review

The constitutions of the Maghreb countries also regulate the facultative constitutional review. This review encompasses the legal texts that are not constitutionally required to be submitted to the constitutional council. In Tunisia, only the President of the Republic is entitled to submit to the constitutional council any question concerning the organization and functioning of the country’s institutions.

The scope of the facultative constitutional review is defined more precisely in the other constitutions of the neighboring Maghreb countries. The Algerian Constitutional Council

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69 Art. 86 §1 Mauritanian Constitution; Art. 81 Moroccan Constitution.
70 Art. 72 § 1 and Art. 2 Tunisian Constitution.
71 Art. 74 § 1 Tunisian Constitution.
73 Art. 72 § 3 Tunisian Constitution.
enjoys the largest powers of facultative constitutional review. Ordinary laws, treaties, and regulations may be submitted to the council. Algeria is the only Maghreb country in which the submission can take place both before the instrument enters into force and afterward. This implies that promulgated and applied laws, as well as applied regulations, may be submitted to the examination of the constitutional council. In this respect, the Algerian Constitution has departed from the French model of constitutional review based on prior examination, and avoided one of the shortcomings of this model. In fact, “this type of constitutional review ignores the value of the passage of time as revelatory of the effective impact of legislation, and as an important factor in defusing acute political crises.” 74 Moreover, only in Algeria can regulations be submitted to the constitutional council.

In Morocco, only ordinary laws may be referred to the constitutional council, whereas in Mauritania ordinary laws and international agreements may be submitted.75 In Morocco and Mauritania not only the head of state, but also his prime minister, the President of the Republic and the presidents of the houses of the parliament may call upon the constitutional council in the context of facultative constitutional review.

In Mauritania, one-third of the deputies in the National Assembly or one-third of the senators may request a constitutional review.76 The same power is conferred upon one-fourth of the members of each house of parliament in Morocco. As a result, in these two countries more political authorities have constitutional standing to initiate the constitutional review than in Tunisia or Algeria. The opening of the constitutional review for deputies in Morocco is not simply theoretical, since the opposition has been represented sometimes by more than one-fourth of the Members of Parliament. Nevertheless, this option has not been used often because of the consensus that has reigned between the government and the opposition in the last years.77 It is also regrettable that the decrees of the King (French dahir, Arabic ḍāhir) cannot be submitted to any constitutional review. This raises serious doubts about the effectiveness of the constitutional review in a political and legal context where the King stands above the constitution and the law.78

3. Effects of the Constitutional Review
It goes without saying that the binding nature of constitutional council decisions represents a very important factor for the effectiveness of the constitutional review. The Moroccan and Mauritanian constitutions provide that the decisions of these bodies are not subject to any appeal (autorité de la chose jugée) and that they are binding upon all public authorities.79

Although in Algeria the finality of constitutional council decisions has not been expressly laid down in the constitution, one can deduce it from the provisions providing that if the constitutional council considers a treaty or a legislative or regulatory provision unconstitutional, its ratification cannot take place, or it loses its effect from the date the

75 Art. 81 Moroccan Constitution; Art. 86 § 2 Mauritanian Constitution.
76 Art. 86 § 2 Mauritanian Constitution; Art. 81 Moroccan Constitution.
77 Abdeltif Mennouni (n 45) 280.
78 Omar Bendourou (n 12) 236–37; for more information about the status of the King in the Moroccan Constitution, see Maurice Torelli, “Le pouvoir royal dans la constitution” in Driss Basri/Michel Rousset/Georges Vedel (eds), Trente années de vie constitutionnelle au Maroc (LGDJ, Paris 1993) 108.
79 Art. 87 Mauritanian Constitution; Art. 81 Moroccan Constitution.
council’s decision, respectively. In the Maghreb countries, the decisions of the constitutional councils must be published in the official gazette. The publication of the decisions of the constitutional council is a major condition for the effectiveness of the constitutional review, since it gives the public authorities a significant impetus to comply with them.

The opinions of the Tunisian Constitutional Council are also binding on all public authorities and must be published. It took eleven years to impose the binding character of its decisions. When the constitutional council was created, it was allowed to render only advisory opinions. Its opinions were also confidential, communicated exclusively to the President of the Republic. Even the introduction of the constitutional council into the constitution did not change this dominantly advisory nature of its pronouncements, which Tunisian scholars criticized as an obstacle to effective constitutional review.

A 1998 constitutional amendment to Art. 75 provides that the opinions of the council must be respected by all public authorities unless they concern the issues stipulated in Art. 72, paragraph 3 of the constitution (i.e., those subject to the facultative jurisdiction). This amendment abolished the confidentiality of constitutional council opinions in order to enable public authorities to take notice of the opinions of the constitutional council. However, the confidentiality of the decisions of the constitutional council was removed expressly only by Institutional Act No. 2004/52 of July 12, 2004. Art. 28 of this Act contains an obligation to publish all the opinions and decisions rendered by the constitutional council, with the exception of the issues that the President of the Republic voluntarily refers to the constitutional council.

V. THE CONTRIBUTION OF THE CONSTITUTIONAL COUNCILS TO THE RULE OF LAW

A. Algeria

After its establishment, the Algerian Constitutional Council rendered some important decisions and stated important constitutional principles. For instance, the Algerian Constitutional Council struck down the provision of the electoral law that required the spouse of a presidential candidate to be of Algerian national origin. The constitutional council stated that that provision amounted to a discrimination forbidden by the Algerian Constitution and the international treaties. Concerning the principle of the separation of powers, the constitutional council voided provisions of the internal regulation of parliament, which vested the legislative committees with large investigative powers. Nevertheless, the

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80 Arts. 168–169 Algerian Constitution; Omar Bendourou (n 12) 229.
81 For example, Morocco: Art. 23 Institutional Act relating to the Constitutional Council.
83 Rafaa Ben Achour (n 24) 129.
84 L.C. No. 98-76 of 2 November 1998 containing the modification of Art. 75 Para. 1 of the constitution.
85 Rafaa Ben Achour (n 24) 133.
86 Omar Bendourou (n 21) 230.
88 Omar Bendourou (n 12) 232.
abrupt interruption of the democratic process in Algeria in early 1992 curtailed the role of the constitutional council significantly. The civil war in Algeria stifled the constitutional council and the other constitutional bodies.  

The end of the civil war in Algeria coincided with the revival of the constitutional council. Following the end of the war, the council adopted a dynamic attitude. Not bothered too much by the constitutional provisions which provide the constitutional council engages in constitutional review only upon the request of the competent authorities, the council prompted requests by making public statements. For instance, it declared the ordinance of July 19, 1995 inconsistent with the constitution, for it enjoined the candidates to the Presidency of the Republic to produce a certificate on the Algerian nationality of their spouses. The constitutional council referred to a previous decision in which it had considered such a condition unconstitutional. As a result, the President of the Republic officially submitted the ordinance to the constitutional council. Likewise, the constitutional council not only examined the provisions submitted to it, but extended its control to those closely linked to the referred provisions.

Furthermore, the Algerian constitutional council rendered some important decisions concerning very delicate political issues such as the Berber identity. Recognizing the rights of minorities is obviously an important feature of democratic systems. Upon the request of the President of the Republic, the constitutional council considered the Berber indigenous language, along with Arabic, a national language consistent with the constitution. However, the proposal of a constitutional amendment to this effect was not adopted.

The constitutional council invalidated the provisions in the Institutional Act, requiring that a candidate to the school of Magistrates hold the Algerian nationality for at least ten years. The constitutional council held that such a provision violated the principle of equality of all Algerian citizens.

In addition, the President of the Republic submitted to the constitutional council a proposed constitutional amendment concerning the repeal of the re-eligibility of the President of the Republic. The constitutional council considered the possibility for the President of the Republic to be reelected consistent with the constitutional principles. It argued that sovereignty belonged to the Algerian people. Thus they should be free to decide whether to renew their confidence in the President by reelecting him or not.

In the period 2001–2008, the Algerian Constitutional Council issued opinions only on the request of the President of the Republic. On its official website, the Algerian Constitutional Council admits that it has never been asked to examine the constitutionality.

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90  Chibli Mallat (n 73) 187–88.
93  Jocelyne Cesari (n 17) 269.
of very important legal instruments such as presidential decrees, regulations, and the ratification of international agreements. The constitutional council sees this lacuna as an obstacle to strengthening the rule of law in Algeria.98

B. Morocco

The constitutional review activities of the Moroccan Constitutional Council have not fulfilled the expectations in the field of protection of fundamental rights and freedoms.99 In some cases, the constitutional council voided the referred laws on the basis of procedural arguments and avoided the questions pertaining to fundamental rights. In one example, the deputies called upon the council to void the law ratifying the ordinance imposing taxes on the installation of receiver dishes.100 The Moroccan Constitutional Council declared the law unconstitutional, arguing that the ordinance it ratified had been issued after and not during the recess period of parliament. The deputies had argued that the imposed tax was inconsistent with the constitutionally proclaimed freedom of opinion and the right to be informed. However, the constitutional council did not discuss the issue and thus missed the opportunity to determine the scope of this fundamental freedom.101 The decision of the constitutional council was respected by the authorities and the government paid back to the taxpayers the money it had unconstitutionally extracted from them.102

The Moroccan Constitutional Council has seldom been called upon to exercise its facultative constitutional review. The constitutional council could not develop important case law relating to the fundamental rights, as the deputies of the opposition have rarely referred ordinary laws to the constitutional control.103 Some Moroccan scholars attribute the rarity of referrals to the constitutional council to the controversial nature of some of its decisions.104 This applies to the case concerning the non-retroactivity of laws in which the council rejected the application of the opposition against some provisions of the law of finances of 2002. The provisions criticized by the opposition exempted the members of the royal military forces from taxes imposed on the importation of some kinds of meat, and provided for their retroactive application. Commentators on the decision scolded the constitutional council for wrongly admitting an exception to the principle of non-retroactivity of laws.105

The opposition’s lack of trust in the Moroccan Constitutional Council can be explained by its perceived bias in favor of the government. The constitutional council has been firm in the defense of government prerogatives. For instance, in its decisions on the

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101 Omar Bendourou (n 99) 27.
102 Abdeltif Mennouni (n 45) 293.
103 Omar Bendourou (n 99) 23.
104 Id. 37.
105 Id. 29.
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constitutionality of the internal regulations of parliament the council declared many provisions restraining the powers of the government inconsistent with the Constitution.  

Be that as it may, it still remains astonishing that a series of laws were not submitted to the control of the constitutional council even though their consistency with the constitution was doubtful. In this vein, one can mention the 2002 amendments to the laws relating to the freedom of press, of association, and of public meetings. One can also mention the law about the fight against terrorism (of May 28, 2003) and the law relating to the entry and stay of foreigners in the Kingdom of Morocco, emigration, and illegal immigration (of November 11, 2003). These laws were the object of consensus of all political parties represented in parliament. Consequentially, they were not referred to the constitutional council to examine their constitutionality. Therefore, it would be beneficial for the rule of law to grant individuals the right to contest the constitutionality of laws in the context of court case or controversy. This would permit the suppression of unconstitutional laws that escaped prior constitutional review because of a political consensus.

C. Mauritania

In its first years, the Mauritanian Constitutional Council rendered courageous decisions that were significant for the strengthening of the rule of law. Since then the constitutional council has seemed to fall back into a kind of hibernation, which has been accentuated by the breakdown of the democratic process brought about by the military coup of August 2008 and the removal of the democratically elected president Sidi Ould Sheikh ‘Abdullāhī from office.

The constitutional council was requested under its compulsory jurisdiction to test the constitutionality of the internal regulations of the senate and of the National Assembly, the Institutional Act concerning the organization of the judiciary, and the Institutional Act relating to the election of senators who represent Mauritania abroad. The constitutional council struck down many of the provisions in those instruments. For instance, in its Decision No. 002/D.C. of June 22, 1992 about the internal regulation of the National Assembly, the constitutional council voided the provision about sanctions against deputies for violation of the principle of proportionality, arguing that it did not provide for intermediate measures between the most severe and least severe options. In its first decisions, the Mauritanian Constitutional Council followed the case law of the French Constitutional Council, as it also examined ex officio the constitutionality of provisions whose constitutionality had not been questioned by the initiators of the request. Furthermore, the constitutional council emphasized the fundamental political features of the Mauritanian society, such as political pluralism, universal suffrage, and status of languages. It ensured the separation of powers and guaranteed the respect of the fundamental

107 Id. 37.
108 Id. 37.
109 Id. 240–42.
111 Id. 302–03.
rights of the human person.112 It even recognized some principles as having constitutional value, although they do not expressly figure in the constitution. An example is the freedom to live abroad, which the constitutional council considered to be the corollary of the freedom of movement.113

In spite of these courageous decisions, the effectiveness of the contribution of the constitutional council to the rule of law has been contested. The main reason for this criticism is the council’s failure to exercise its facultative powers of constitutional review. In its report to the Association des Cours Constitutionnelles ayant en partage l’Usage du Français the Mauritanian Constitutional Council stressed that in the period between 1992 and 2000 it has only examined the constitutionality of Institutional Acts and internal regulations of parliament within the framework of obligatory constitutional review.114 No ordinary laws have been submitted for review, because the examination of these laws belongs to the facultative jurisdiction of the constitutional council. Members of parliament have not brought any applications because the opposition does not have the number of seats needed to make a referral to the constitutional council.115 In the above-mentioned report, the constitutional council itself admitted that the failure of the facultative constitutional review was responsible for its stagnation.

In addition, the Mauritanian Constitutional Council has had to face an additional obstacle: the recurrent instability of politics. In this regard, Chibli Mallat wrote that: “. . . there are, in the history of nations, moments at which the political tide of disarray is too strong for courts to withhold or reverse, namely the American Civil War or the collapse of the Weimar Republic.”116

The military coups in Mauritania are a comparable challenge for the country’s constitutional council. It seems to be a peculiarity of the politics in Mauritania that the chief of the armed forces first gains power in a coup and subsequently consolidates his power through the electoral process. The coup of August 2008 deposed the democratically elected President ‘Abdullāhi. The military junta announced that governing authority was transferred to General ‘Abdul-‘Azīz as president of the High State Council, who soon after the coup stated that presidential elections would be held.117 ‘Abdul-‘Azīz resigned from all political military positions on April 15, 2009 so that he could stand as a candidate in the presidential elections. As a result, the Mauritanian Constitutional Council rendered a decision declaring the vacancy of the presidency and announced, in accordance with Art. 40 of the constitution, Ba Mamadou dit M’baré as interim President of the Republic. This decision has been criticized by numerous Mauritanian lawyers as legitimizing the illegal overthrow of the democratically elected President. Through the course of the political crisis, the Mauritanian Constitutional Council is losing its legitimacy, since in these circumstances it has become difficult for the council to show that it is still fulfilling its functions independently.

112 Id. 304.
113 Id. 304.
115 Ahmed Salem Ould Bouboult (n 110) 306.
116 Chibli Mallat (n 74) 208.
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D. Tunisia

The status of the Tunisian Constitutional Council has undergone a progressive and cautious evolution. It evolved from a mere advisory body for the President of the Republic to an independent institution with a constitutional status. Still, Tunisian scholars refuse to see it as a complete constitutional jurisdiction able to achieve an effective constitutional review. However, the constitutional council has made some serious steps in this direction; it has considered laws submitted by the President of the Republic unconstitutional and clarified important constitutional questions like that concerning the legal nature of the preamble. Tunisian scholars had not been unanimous about the legal nature of the preamble. Should the constitutional council take it into consideration while examining the constitutionality of a bill? The constitutional council considered the preamble of the constitution as part of the norms to be taken into account in the exercise of constitutional review. In its Opinion No. 56-2005 on a bill relating to the regulation of deep-sea diving, the constitutional council considered some provisions of the bill unconstitutional because they violated the principle of separation of powers as stipulated in the preamble of the constitution.

The Tunisian Constitutional Council has also issued important opinions about fundamental rights and freedoms and about the relationship between the different powers in the constitutional order. For instance, the constitutional council considered a bill unconstitutional for violation of the principle of equality enshrined in Art. 6 of the constitution because it provided for different rules for the questioning of suspects in criminal cases by the investigating judge (juge d’instruction) on the one hand and by the police (police judiciaire) on the other.

As far as the separation of powers is concerned, it is worth noting that the constitutional council has made sure that the competences of the judiciary are not encroached upon. In addition, it has held that the decisions of the Conseil de la Concurrence (an administrative body entrusted with the control of the application of anti-trust laws) should be subject to judicial review.

VI. CONCLUSION

The constitutional councils in the Maghreb represent a serious step toward constitutionalism and the protection of fundamental rights and freedoms. Their constitutional and legal regimes have been reformed to vest them with significant means to achieve this objective.

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118 Rafaa Ben Achour (n 24) 128.
123 Mouna Tabei (n 119) 36.
The Tunisian Constitutional Council has undergone the slowest evolution in the region because of the still dominant view that the President of the Republic is the real protector of the constitution. He is the only organ entitled to refer ordinary and institutional bills to the constitutional council. The referral of legal texts to the constitutional council is more generously regulated in the neighboring countries Morocco and Mauritania, where a certain number of deputies may call upon the constitutional councils. Nevertheless, the tendency toward consensus in Moroccan politics and the weakness of the opposition in Mauritania have so far prevented these more liberal rules from producing the expected results. Accordingly, it would be beneficial for the rule of law in the Maghreb countries if the constitutional councils were given the jurisdiction to examine the constitutionality of laws upon referral by the parties or the court in a concrete case whose outcome depends on the constitutionality of the applicable legislative provisions, as is the case with the Egyptian Supreme Constitutional Court.  

This would provide individuals, at least indirectly, with access to the constitutional councils. But even if individuals were to be granted standing to bring laws before the constitutional councils, the latter would still be hampered in the exercise of their powers by ideologies specific to these countries, such as the concentration of power in the head of the state, and the consequent fragility of the institutions. The constitutional councils are particularly fragile in Algeria and Mauritania, where coups and other abrupt halts to the democratic processes restrain the councils or prevent them from gaining any credibility.

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125 Chibli Mallat (n 74) 196.
In his address titled “Über Verfassungswesen” (“On Constitutional Systems”), Ferdinand Lassalle states that the problems of the constitution are essentially not legal problems, but in fact problems of power. According to him, the real constitution of a country is a product of real and actual power relations dominant in that country; written constitutions can only be valuable and valid as long as they are an accurate reflection of power relations within the society. Nowadays, as Turkish society is trying to frame its own “civil” constitution for the first time, although four different constitutions have been adopted in Turkey within ninety years, it is necessary to reconsider this problem.

Additional attention must be given to the question of whether it is sufficient to base the constitution simply on “power relations,” or if it is also necessary to ensure its democratic legitimacy. Whether the raison d’état refers to a state enjoying social approval, or the implementation of a political system that is established around the interests of a single group and legitimized through ideology, is directly related to what the constitutional court is designed to protect.

Furthermore, will the constitution and the structure of Turkey’s constitutional judiciary, with its special place in the Islamic world regarding societal pluralism and democratic culture, be able to provide a positive comparative law paradigm for countries trying to democratize?

These questions will be answered through examination of the power relations creating the Turkish Constitution and the constitutional court, the structure of this court, and judicial precedents it has set.

The Turkish Constitutional Court was established by the Constitution of 1961 as the special court assigned to oversee the conformity of laws with the constitution. It was the fourth constitutional court in Europe, created after the constitutional courts of Austria, Italy, and Germany. Another characteristic of this institution based on Hans Kelsen's model of modern European constitutional review is that it has emerged outside the constitutional culture of Christian Europe, in a Muslim country that follows the form of that culture.

However, despite formal similarity, it is clear that there is a substantial difference in content, differentiating this institution from the political conditions and power relations upon which European constitutional courts are based. Within this framework, the widespread opinion exists that the constitutional court’s decisions have limited the democratic political arena in favor of the bureaucracy from the day it was established. Especially in the periods in which the bureaucracy lost ground in the face of democratic developments, the judiciary, and particularly the constitutional court, have come to its defence. Anyone who follows current (2006–2010) Turkish and global media cannot fail to notice this trend. Focusing on this fundamental problem requires an introduction to Turkish constitutional history.

II. THE HISTORICAL ASCENDANCY OF KEMALISM AND ITS IMPACT ON MODERN TURKISH CONSTITUTIONALISM

A. The Rise of Kemalism after World War I

Turkey has had five constitutions since 1876. The shortest text among these, the Constitution of 1921, unfortunately has not relinquished its title of being the only constitution in Turkish history that enjoyed relative democratic legitimacy, although it had been in force for only three years.

Democracy had constituted neither a final goal nor a cornerstone for the Turkish political elite until 1999, when Turkey was granted the candidacy for membership in the European Union. However, it is known that free elections continued to take place for local governments, from the 1839 Edict of Reorganization (Tanzimat Fermanı) on, mostly because of international circumstances. The Constitution of 1876, which did not stipulate any kind of constitutional court, was based on neither direct nor indirect democracy.

This new system had been established by the new authority which gave itself the mission to save “the Sick Man of the Straits,” and assigned itself the authority to intervene in the system for this purpose. The lack of a bourgeoisie in the country precluded the birth of their rivals, i.e. the working classes and related social forces, so perhaps it must be accepted as an unavoidable consequence of historical conditions that the armed as well as unarmed rulers, educated in the Western norms, saw themselves as the new owners of the country, and in effect, its saviors.

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2 Similarly Ceren Belge, “Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey” (2006) 40 Law & Society Review 653 and the rest.

3 For comments and data, see Bülent Tanör, Osmanlı-Türk Anayasal Gelişmeleri (Yapı Kredi Yayınları, İstanbul 1992) 187.


5 Recai Galip Okandan, Amme Hukukumuzun Anahatları (İÜHF Yay, İstanbul 1968) 146.
The Constitution of 1876, which was suspended by the Sultan within a short period of time, was put into force again in 1908, following a struggle by the Committee of Union and Progress (İttihat ve Terakki Cemiyeti, known as İTC), which was founded by nationalist and partly ethno-centrist officers, bureaucrats, and other elites. The İTC came to power with the constitutional amendments of 1909, having eliminated competing forces such as the liberal Ottoman Liberty Party (Osmanlı Ahrar Fırkası) through the “31 March” movement. The semi-free environment that was created in this context came to an end with the coup d’etat of the continuously militarizing İTC in 1913. This bureaucratic mechanism, which took the country into World War I, albeit relinquishing power in Istanbul after the war, moved on to Anatolia. There, it organized the society, and, following a successful war of independence, had the chance to shape the post-war system according to its own ideology.6

This movement perceived itself as the founder of a nationalist-revolutionary system. Parallel with the rising global trends of the day, and following the examples of the rising fascist and national socialist political systems in Central and Southern Europe, it saw the ethnic cleansing of the social and economic structures as the key to saving the country. Among the fundamental characteristics of this movement was a subjugation of “old” beliefs to a revision which would help the establishment of a “new” national identity. The ties between this basically centralist, nationalist, and “new” political structure, which rejected ethnic and cultural differences, and the “old” traditional structure would not be severed; the purpose was to establish the rule of the bureaucratic ideology over the religion, to ensure that the former oversees the latter, and to see the ideology as merely a leverage supporting the state against religious minorities.

The system of the Republic of Turkey, established in 1923, cannot be evaluated outside the political and ideological preferences of “the military and civilian bureaucracy in a super-ficial effort for westernization and modernization.”7 Its founders and political leaders were among the leading personalities of the İTC; this could explain why the ideological and systematic structure of the young republic was parallel to that of the İTC. Established by the founding fathers in 1923, the Republican People’s Party (Cumhuriyet Halk Partisi, known as CHP) has perceived itself as the party of the state,8 just like its predecessor, the İTC, and ruled the country without interruption9 through the single-party regime till 195010 after closing down the first liberal party of the republican era,11 the Progressive Republic Party (TerakkiperverCumhuriyet Partisi) in 1925. Despite the Constitution of 1924, which had paid lip-service to fundamental freedoms, organized political opposition had been eliminated after 1933. Paralleling totalitarian practices, the press had been transformed into

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6 Erik J. Zürcher, Terakkiperver Cumhuriyet Fırkası (Baglam Yayınları, İstanbul 1992) 23 to the end.
8 According to 1935, Art. 95 of the statute of CHP, “The Party perceives itself and the government organiza-

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[1013]
an instrument of ideological propaganda.\textsuperscript{12} The judiciary,\textsuperscript{13} from which no mission was expected other than defending the revolutions, had been shaped in accordance with this line of thinking.\textsuperscript{14} The parliament, constituted through show-elections redolent of the Soviet system, had been rendered a mechanism to create the civilian wing of the bureaucracy. Hence, one cannot dispute that the 1924 Constitution drafted by that parliament was lacking democratic legitimacy. This period has been labeled “implicit fascism.”\textsuperscript{15} Even though the CHP elevated its own ideological perspective to constitutional principles\textsuperscript{16} and formed all legislation with the purpose of realizing this very ideological political structure,\textsuperscript{17} it did not refrain from defining itself as “democratic”\textsuperscript{18} and as a system where “national sovereignty is built.”\textsuperscript{19}

Following the democratic nations’ victory in World War II, the necessity of transition to a multi-party system was met by the ruling elite with no changes at the constitutional level.\textsuperscript{20} In this way, the party that had single-handedly created the constitutional order entered into a race against other parties, having the advantage of the resources accumulated by administering the state budget for decades, and without developing a constitutional order and bureaucratic structure that would have created equality among all political parties. In starker words, the party of the state, confident that they could control the political system, began to compete with the parties established by the governed, although still within the limits and frameworks created by the state. Later developments prove that this cannot be labeled a transition to a multiparty system.

\textsuperscript{13} Bülent Tanör, Osmanlı-Türk Anayasal Gelişmeleri (Yapı Kredi Yayınları, İstanbul 2004) 308.
\textsuperscript{15} Mete Tunçay (n 10) 152 and the rest.
\textsuperscript{16} Through the constitutional amendments of 1937, Turkey had been transformed into a “republican, national, populist, etatist, secular, and revolutionary” state. These changes were a success of CHP’s radical wing, which controlled the state after the death of Atatürk and which gave the state its ideological character.
\textsuperscript{17} In the same vein: Taha Parla, The Social and Political Thought of Ziya Gökalp (E.J. Brill, Leiden 1985).
\textsuperscript{18} One of the prominent figures of the era, the Minister of Justice and the person who created the ideological framework of the judiciary, Mahmut Esat Bozkurt explains his idea of “democracy” with the following words: “… a German historian argues that both National Socialism and fascism are nothing but a slightly modified version of Mustafa Kemal’s regime . . . This is a very accurate opinion. Kemalism as an authoritarian democracy, its roots are in the people . . . its head, who we call the chief . . . is a head borne among the people . . . Democracy is nothing more.” Mahmut Esat Bozkurt, Atatürk İhtilali (Reprint from 1940 TÜPRAS Yay, İstanbul 2003) 87. The loyalty of the judiciary to Bozkurt is at such a deep level that in parliamentary activities, criticism of his statements in the preamble to the “Civil Law” can be punished severely. For a precedent, see the decision no E. 2002/634, K. 2003/861 dated March 22, 2003 of Ankara 17th Court of First Instance.
\textsuperscript{19} Recep Peker, speech in 34th Ordinary Congress. Peker, thinking democracy should be shaped and implemented in accordance with the conditions of the country, adamantly opposes single tier elections. This is no different from “planting an orange tree at the top of the Zigana Mountain.” For reference, see Mehmet Ö. Alkan, “Milli Şef’li Tek-Parti Döneminde Seçimler—1939 ve 1943 Seçimleri” in Mehmet Ö. Alkan (ed), Bülent Tanör Armağanı (Oglak Yayıncılık, İstanbul 2006) 360.
\textsuperscript{20} One should note that the only legal change of significance at that time had been to replace the “open ballot-secret count” system with “secret ballot under judicial supervision-open count.”
In a country where there was no program for urbanization, the system that limited modernization to the ideologically homogeneous environments of urban centers consequently also limited its legitimacy to the 16 percent of the society that were urbanized. Although this segment of the population cooperating with the military and the civilian bureaucracy cannot be called a bourgeoisie, since it was subsidized from the treasury of the state, it evolved throughout the whole process into a distinctive social class, becoming the propeller behind the ideological interventions to the democratic process. In a nutshell, the transition to a multiparty system, in effect, connotes nothing more than a privileged class called the “Coalition,” which was created and subsidized by the single-party regime through the army, university, judiciary, and other bureaucratic structures, leaving the social segments outside the system to constitute a limited opposition.

The social opposition, which was kept at bay from the political discourse, finally acquired legislative power under the framework of the Democratic Party (Demokrat Parti, known as DP) in 1950, winning a huge majority. This period continued for ten years with 53 percent of votes in 1950, 58 percent in 1954, and 48 percent in 1957, when the democratic majority was unable to rule over the bureaucracy, hence it basically failed to govern. The Democratic Party’s attempts to break the bureaucratic resistance during the 1925–1950 period led to the coup d’état by the Coalition—a product of the military and civilian bureaucracy, assisted by the judiciary, university, and CHP. The Coalition, which had ignored the constitution for twenty-five years, put an end to democracy with a military coup on May 27, 1960, accusing the DP of counter-revolutionary activity and violation of the constitution. The prime minister and two additional ministers were executed by an extraordinary court established in the aftermath of the coup. Death sentences for eleven persons, including the President of the Republic Celâl Bayar, were later commuted to life imprisonment. The Coalition, which had justified the coup with the charge of “violation of the constitution,” did not refrain from abolishing the constitution through the coup. Considering that the political phenomenon they labeled the “revolution” represents the basic political preferences of Europe during the era of single-party dictatorships from 1920 to 1945, it is obvious that the charge of “counter-revolution” implies “liberal democracy and free market economy.”

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22 It is possible to observe that those political movements who carry the flag of the single-party ideology continue today to stay below that percentage.
24 The party had been founded by four MPs who resigned from CHP. The last prime minister of the Atatürk era, the leader of the party, became the president of the republic in 1950. This party, in the beginning, represented the liberal and democratic tradition under the İTC framework. The İTC had lapsed into an ethnic-dictatorial organization, while the Ottoman Liberal Party, in turn, had been dissolved by the İTC in 1908. The follower of this liberal tradition, the Freedom and Agreement Party (Hürriyet ve İtilaf Fırkası) had been dissolved after the 1913 coup by İTC, and the successor to the same tradition established after the republic, the Progressive Republic Party (Terakkiperver Cumhuriyet Fırkası), was dissolved by the CHP in 1925. The authoritarian and anti-liberal tradition has been represented, on the other hand, by the İTC and CHP, which alone have shaped the political structure.
25 More on this topic: Zürcher (n 11) 247f.
26 That is why the economic development of the society, its transformation into a force that cannot be controlled by the Coalition by becoming more complex through increased division of labor, has always been
One should immediately note that the DP was not a radical democratic party that effectively intended for a counter-revolution. It is known that the political ideology underlying the party was a nationalist and liberal tradition which did not clash with society. This ideology was a part of the İTC until 1913 and was advocated by close comrades-in-arms of Mustafa Kemal Atatürk, who took important roles in defending the country and proclaiming the republic. Similarly, it should not be forgotten that the DP had been founded after the resignation of four persons from the CHP, which had established the single-party regime. Hence, it is clear that the DP was not opposed against the “revolution” per se—rather on the contrary—but against its preclusion from a liberal and democratic transformation and exclusion of the public from political governance.

B. The 1960 Coup and Subsequent Developments

Following the military coup d’état on May 27, 1960, the CHP drafted a new constitution with contributions from the university and the judiciary, which was adopted in a referendum with a majority of 61.5 percent. The exclusion of all social opposition except the Coalition actors who had executed the coup from the framing of the constitution signified that the constitution would lack democratic principles, from the development process onward, and would not be generally regarded as legitimate.

Since forgoing the multiparty system in the age of democracies is not an option, a constitution should be drafted that would accommodate the formal democratic process, as well as provide constitutional safeguards for the immunities and hegemonic positions of the Coalition. Again, the single-party ideology would be reflected in the constitution as a transformation into a new sacrosanct and non-negotiable state ideology, with bureaucratic mechanisms defending this ideology against the representatives of the nation.

Within this framework, the most important weapons of the single-party ideology, the armed forces and the judiciary, were excluded from the chain of democratic legitimacy and labeled “counter-revolution” by the opponents of democracy. A leading advocate of the May 27 Coup, Prof. Sina Akşin, has called the prioritization of economic development in the DP era as “counter revolution,” while Chief Public Prosecutor of the High Court of Appeals, Abdurrahman Yalçınkaya, who demanded the dissolution of the Kurdish Democratic Society Party (Demokratik Toplum Partisi, known as DTP) and the governing AKP in years 2007 and 2008, explains what the Coalition line of thinking means with the phrases “revolution” and “counter-revolution,” stating: “With the advent of conservative parties, secularism has been dropped off the agenda by emphasizing economic growth more,” and, “Unfortunately we do not have rules to ban conservative parties.”

28 In accordance with laws 157 and 158 passed by the perpetrators of the coup, the Constituent Assembly would have two houses; one comprising those who made the coup, while the latter would be composed of CHP and other members appointed by the perpetrators of the coup. For details, see Kemal Gözler, Türk Anayasası Hukuku (Ekin, Bursa 2000) 82.
29 Indeed, the forced implementation of this constitution, which befell on governments where social opposition other than the “coup coalition” had obtained the parliamentary majority, also caused serious deficiencies in effectiveness during the nineteen-year period in which the constitution remained in effect.
30 Soysal defines the May 27, 1960 coup as the recapture of the power by the bureaucratic intelligentsia that lost power in 1950. Mümtaz Soysal; 100 soruda anayasanın anlani (Gercek Yayinevi, Istanbul 1986) 64; for a similar account, see Belge (n 2) 657.
The armed forces were transformed into a constitutional institution of suzerainty over democratic politics. For this purpose, a National Security Council, in which the Chief of General Staff and force commanders were influential, was established. This council, by including all domestic problems within the context of “national security,” acquired the power to direct and guide the political policies to be adopted. The Chief of General Staff was made not “subordinate” to the prime minister, but only “responsible” to him or her. This system was consolidated in the 1982 Constitution, which is still in effect. The practical functioning of the system enabled the Presidents of the Republic to be elected from among the generals. Indeed, the first President of the Republic was the leader of the coup, General Cemal Gürsel. A significant law, introduced in 1961 and left outside the jurisdiction of the constitutional court, until today enables the armed forces to intervene in the democratic process whenever it deems necessary.

The judiciary was then completely removed from the influence of democratic representatives; the ideological homogenization which began in 1924 was granted constitutional safeguards. It was made possible for the judiciary as a homogenous structure to oversee politics in the name of “law,” yet in actuality, on behalf of the state ideology. Some justices who supported the coup were chosen as the members of the High Court of Justice, an ad hoc court which, as mentioned above, effected the illegal execution of democratic representatives, while some others obtained important posts in the Council of State or the High Court of Appeals. Other high-ranking justices, seven from among the membership of the High Court of Justice and the Investigation Commission, were appointed as members of the constitutional court that was established in 1962. The ideology of the higher

31 For a similar account concerning the military, see Heinz Kramer, “Demokratieverständnis und Demokratisierungsprozesse in der Türkei” (2004) 44 Südosteuropa Mitteilungen 30–43; see also http://www.swp-berlin.org/de/common/get_document.php?asset_id=1144&PHPSESSID=30afee949742ceb3021b9d201e656ff, accessed April 6, 2009. Taking into account that the office of the President of the Republic had been occupied by generals until 1989, it is clear that the appointment of high-ranking generals by the President of the Republic cannot be taken as an indication of “democratic legitimacy.” Concerning the judiciary, even this formal gesture of legitimacy has not been established.

32 An interesting point is that while Art. 110 of the 1961 Constitution held the Chief of General Staff “responsible” to the prime minister concerning his duties and powers, it stipulated that the Council of Ministers was responsible to the GNAT for ensuring national security and preparing the armed forces for war. Hence, a hierarchical relationship between the armed forces and democratic representatives was avoided, while democratic representatives would still be held responsible to the GNAT, in case of failure. One should note immediately that this condition, preserved in the 1982 Constitution, is still in effect.

33 According to Turkish Armed Forces Internal Service Law no. 211 Art. 35, the duty of the armed forces is to protect and watch over the Turkish homeland and the Republic of Turkey as determined in the constitution.

34 In this context, attention must be drawn to the fact that the only association founded by the members of the judiciary branch and justices, YARSAV, has voiced opinions that coups “are not criminal actions” on the basis of this legal provision, and are advocating that the Ergenekon case, which is still being heard in the court, is illegal. See the program “Çok Farklı” on CNN-Türk on March 26, 2009. On the other hand, an armed forces memorandum dated April 27, 2007, widely known as the “Midnight Memorandum,” included the threat of a coup, and referenced the said article.

35 Salim Başol had been appointed as a member on May 24, 1962, filling out this post till July 14, 1970. Also, the first chairman of the High Council of Investigations, which was assigned to the task of opening the final investigation in the High Court of Justice, Mahmut Celalettin Kuralmen and the Council member İbrahim Hilmi Senil have served as members of the constitutional court from its foundation to 1971.
echelons of the judiciary decisively presents itself in the opening addresses of each judiciary year as well as in the decisions concerning every politically critical event.

In addition, the publicly-funded universities are granted absolute autonomy outside parliamentary supervision, and are not held to any kind of standard for scientific performance. The same university personnel who prepared the political conditions that paved the way for the military coup were later tasked with preparing the draft constitution. The universities maintain their ideological stance decisively and persistently for the coup preparations of today.

Another institution created to hinder democratic politics is the second house of the legislature, the Senate of the Republic, which was established by Art. 70 and the following articles of the 1961 Constitution. The Senate of the Republic was an institution where the perpetrators of the coup enjoyed lifelong terms. The Senate was comprised of members appointed by the Presidents of the Republic, former generals, and members who necessarily belonged to social classes upon which the single-party ideology was based.

Political parties were granted formal constitutional guarantees, with the adoption of the provision that they could only be dissolved on the grounds stipulated in the constitution and only by the constitutional court. However, considering the structure and mission of the constitutional court, the practice of the court in the past forty-eight years since its establishment demonstrates that this is not really a guarantee.

The Turkish Constitutional Court is the most striking institution established by the constitution; it enjoys broad powers of constitutional review, and reflects the current political opinion.

Examples from Western democracies, particularly the German Constitutional Court, were considered during the establishment of the Turkish Constitutional Court. However, whereas the establishment of constitutional courts in both countries represents a reaction to the past, it is possible to recognize vital differences in what exactly the object of that reaction is.

First of all, while the reaction in Germany has been against a totalitarian single-party dictatorship that abolished democratic politics, the reaction in Turkey has been against the democratic politics that did not accept the single-party dictatorship's practice. Second, while the German Constitutional Court was created to defend democratic politics,
especially against a bureaucratic “anti-parliamentarism,” the Turkish Constitutional Court, itself a part of the bureaucratic system, was established with the purpose of rendering bureaucratic mechanisms and ideology immune to democratic politics. In other words, whereas in Western democracies the basic need that led to the establishment of the constitutional court was the “protection of democracy,” in Turkey it had been “protection from democracy.”

Third, while all members of the German Constitutional Court are elected by democratic representatives, the power of democratic representatives had been acknowledged only partly in Turkey’s 1961 Constitution (one-third would be elected), before being eliminated completely in the 1982 Constitution. The fourth difference is that while the constitutional court in Germany accepted the individual’s right to appeal as a fundamental tool to protect basic rights and freedoms, this function was not afforded to the Turkish court.

The sole objective of the court was to oversee the parliament; as a consequence it became impossible to implement the articles on basic rights, which constituted half of the constitution.  

Briefly, the constitutional court can be characterized as a court established and operating around an ideology that was transplanted to the constitution during the single-party dictatorship, a continuation and a radical representative of a corporatist, ethnicist, and authoritarian/totally authoritarian political movement that came into being in the final years of the Ottoman Empire, and which was revisited with more refined and modern concepts by the May 27, 1960 coup.

If an assessment is necessary from that point of view, the founding fathers of the 1961 Constitution saw democratic politics as a serious threat, and constructed a parliamentary regime that was intentionally dysfunctional, since they desired to limit its influence as much as possible.

The political structure prescribed by the 1961 Constitution went through some changes with the March 12, 1971 Military Memorandum, which established the internal hierarchy of the armed forces. As the armed forces began to alter the coup coalition, which comprised the military, judiciary, university, and the CHP, and took the leading role as the sole authority of guardianship, the “ideological state” was further developed into a “security state” through constitutional amendments from 1971 to 1973. During this period, the military, in efforts to garner the support of the social opposition, started moving toward the political “right,” which caused the CHP to use a “left of center” approach. The same period witnessed the beginning of the use of “freedom jargon” by the constitutional court against the legal and constitutional actions of the cooperation between the military and rightist governments.

40 Belge (n 2) 667.

41 The efforts in year 2005 for the adaptation of the Constitutional Complaints institution had failed because of the resistance of the judicial bureaucracy and CHP. They argued that the practices of institutions in the majority of Western democracies were in contradiction with the principle of the rule of law and separation of powers, and would politicize [sic] the court.

42 For a similar line of thought, see Belge (n 2) 657.

43 For detailed explanations, see Belge (n 2) 676 and the rest. Through a detailed analysis, it is possible to figure out that the goal has been to protect the factions that supported the May 27 Coup against the legislative and executive branches. The most telling example on this issue has been the repeal of the decision of the parliament rescinding the immunity of Osman Köksal, who, as the commander of the Presidential Guard during the May 27 coup, arrested the President of the Republic who was entrusted to his protection, only to be rewarded with membership in the National Unity Committee and later on natural membership in the Senate of the Republic, due to his participation in the attempted coup of March 9. See K. 1971/62,
The armed forces put an end to democracy on September 12, 1980 with a coup abolishing the 1961 Constitution. All political parties, including the CHP, were dissolved and their properties confiscated. Because the coup was against the current political paradigm, it did not opt for the alternative of a constituent assembly to draft a new constitution. The appointed Consultative Assembly composed of “apolitical” bureaucrats and professionals was then assigned to prepare a draft. The prepared draft was finalized by the leader of the coup and presented to the public in a referendum. In an environment where a ban on even implicit criticism of the constitution was in place, and where the consequence of a rejection was left uncertain, the constitution was approved by 91 percent of the population, and was entered into force. Additionally, the leader of the coup Cemal Gürsel became the President of the Republic.

The army, which became the single determinant of the system with the military coup of September 12, 1980, strengthened the National Security Council and created the environment for a virtually continuous coup. The Council’s new responsibility was to direct the Council of Ministers, although it previously had held a consultative role. The armed forces extended its powers by making it easier to establish martial law. The military was made an obligatory participant in every vital decision-making mechanism involved in the administration of the state. The judiciary was prevented from reviewing all laws enacted during the coup, which encompassed all the basic laws regulating the social and political arena. Collective and intellectual freedoms were minimized to the lowest possible standards, dissolution of political parties was made easier, and the provisions of the constitution that were not amendable were colored with ethnic-nationalist and chauvinist elements. The single-party ideology already present in the constitution had taken on a militaristic character.

The government established by the coup shaped the constitutional court according to its own preferences. The parliament’s power to appoint some members was removed, and the already weak democratic influence was terminated. The number of members from the military and from the bureaucracy was increased. The new government prohibited judicial review of all laws enacted during its rule, decrees with the force of law issued under the influence of the military, as well as the decisions of the Supreme Military Council.


45 The requirement that a member of the Council of Higher Education, two members of the constitutional court, and a member of TRT are of military background, as well as having retired officers in the boards of trustees of all universities belonging to foundations, or the participation of all higher level bureaucrats, justices, journalists and businessmen attending seminars at the National Security Academy, are examples of this. For information on the academy, see the War College Command website, http://www.harpak.tsk.mil.tr/pageContainer.aspx?PID=2, accessed June 8, 2009.

46 This approach, which became customary with the Provisional Art. 4 of the 1961 Constitution, would have virtually created a parallel constitution in provisional Art. 15 of the 1982 Constitution. This anomaly was sought to be remedied in constitutional amendments of 2001.

47 See the preamble and first four articles of the 1982 Constitution.

48 Between September 12, 1980 and December 6, 1983, basic laws were enacted concerning social and political life in Turkey. Through these laws enacted directly by generals and officials who perpetrated the coup, and who were advised by bureaucrats, the Assembly has been virtually dictated to act only on “economic” matters. In this framework, all basic laws concerning the whole of the judiciary as well as the constitutional
The court was structured as the defender not of a “romantic” ideology formulated by the military coup of 1960, but of a more militaristic and totalitarian version of such an ideology. This practical perspective led to the adoption of more efficient legislative and executive branches. Some review powers of the court were limited in favor of the legislative and executive, including formal review of laws and constitutional amendments, and review of decrees having the force of law issued during the public emergencies. The strong executive came into power with an efficient and expedient parliament; it is obvious that democratic representatives were made efficient and powerful in the political arena, which was effectively controlled by the military. Turkey’s goal of becoming an integral part of the capitalist global economy through a free market economy explained its preference for a strong legislature and executive, which are fast and efficient in decision-making. The September 12, 1980 coup differed from the May 27, 1960 coup on these basic political preferences.  

III. THE FUNCTIONS OF THE CONSTITUTIONAL COURT

The 1961 Constitution stipulated that the newly established constitutional court be composed of fifteen justices, eight of which would be high-ranking justices. As legislative assemblies and universities also opted to elect justices for their quotas, judiciary bureaucracy reigned supreme during the 1961 Constitution era. Art. 147 of the constitution gave the court jurisdiction only to review laws and the standing orders of the assembly. The constitutional court was empowered to try the President of the Republic and the members of the Council of Ministers, as well as high-ranking justices. However, it should be duly noted that although numerous politicians have been tried by the constitutional court, no high-ranking justice has been referred to the court by his or her colleagues.

Just as the constitutional court is not empowered to decide on conflicts between constitutional organs, it is also not empowered to review the acts and decisions of the judiciary, military, or civilian bureaucracy that may be in conflict with democracy, nor is it able to hear judiciary, laws concerning the issues of associations, meetings, strikes and lock-outs, labor, elections, parties, radio and television, environment, gendarmerie, MIT (National Intelligence Agency) and Martial Law, military and security, in addition to all basic laws related to higher education were enacted during this period. Furthermore, these laws, which signify a hijacking of national sovereignty, were left outside the jurisdiction of the constitutional court. For information on these laws, see Nuri Alan, “Anayasannın İdari Yargıda Somutlaştırılması” (1997) 92 Danıştay Dergisi 25.

This view is capable of explaining why etatist and nationalist left politics oppose only the September 12, 1980 coup, whereas appreciating the May 27, 1960 coup as a “revolution.”

The 1961 Constitution, Art. 145.

Taking into consideration that, until recently, courses on basic rights and freedoms were not included in the curriculum of Turkish law schools, and that constitutional law was taught only as a form of organizational law, the profile of court justices reveals that decisions on Turkish constitutional order were made by persons knowledgeable only in civil law or penal law, but not in the constitution, politics, sociology, and other specialties. Under this light, it is not surprising that the constitutional court failed to develop legal precedents with a scientific content.

In twelve cases filed before 2009, a total of seventeen politicians, including prime ministers, and ninety-two civilian bureaucrats have been tried. For related information, see http://www.anayasa.gov.tr/general/icerikler.asp?contID=368&menuID=&ID=368, accessed May 26, 2009. Considering the sections “Investigations, inquiries, and prosecution regarding criminal acts” of the laws of Council of State and the High Court of Appeals, it is obvious that high justices are virtually impossible to try. Additionally, a member of the military judiciary may not be tried without permission from the Chief of General Staff.
individual appeals regarding the violation of freedoms. Such a power would contradict the political preferences explained above. Therefore, only oversight of the democratic politics lies within the mandate of the court. Continuing its historical stance, the Coalition continues to prevent the introduction of the individual’s right to appeal through constitutional amendments since 2004. It is surprising that the Coalition considers the individual’s right to appeal, which is practiced in a significant number of the well-established democracies and most of the European countries, in conflict with the principles of the independence of the judiciary and the separation of powers. However, this stance should not be surprising in the case of the Coalition, which perceives the “independence of the judiciary” as the “independence of the justice” from law and freedoms, and which equates the separation of powers with the equal participation of the judicial bureaucracy in the governance of the state.  

Considering that the social opposition continuously occupied the majority in the National Assembly from 1965 on, with a few short periods of exception, and the political extensions of the Coalition were always in the minority, the process of constitutional review illustrates an interesting cycle: the opposition party files a case with the protector of the ideology, the constitutional court, against the will of the legislature. During the court proceedings, where the governing party has no right of defense or hearing, the laws against the ideology and interests of the Coalition would be repealed and the constitutional order would be protected “legally.” The constitutional court did not refrain from repealing constitutional amendments in this period, although it did not have the mandate to do so.  

An additional type of case the court had been empowered to hear was the dissolution of political parties. During the tenure of the 1961 Constitution, a total of six parties were dissolved. The rulings in these cases show the implementation of state ideology by the highest court. It is possible to note that the legal precedents established at the time still remain valid without substantial change.  

The principles of civil liberties and judicial independence only fell further out of reach during the 1982 Constitution era. The 1982 Constitution requires all justices to be appointed by the President of the Republic, either by presidential approval of nominees or by direct appointment. According to Art. 146 (old version) of the 1982 Constitution, five of the total of eleven full members of the court shall be appointed from among high civilian justices, two from among high military justices, three from among higher bureaucrats and lawyers, and one from within the university establishment. The court’s duties and powers  

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53 See the statements of the chairpersons and members of the high judiciary bodies in the media since 2004.
54 K. 1970/31; K. 1975/87; K. 1976/46. The first of these rulings noted that political bans placed by the perpetrators of the May 27 coup could not be lifted by democratic representatives.
55 While Worker-Farmer Party (İşçi-Çiftçi Partisi) (1968), Advanced Country Party (İleri Ülke Partisi) (1971), and Great Anatolia Party (Büyük Anadolu Partisi) (1972) were dissolved due to deviation from the proscribed form, National Order Party (Mıllî Nizam Partisi) (1971), Turkish Workers’ Party (Türkiye İşçi Partisi) (1971), and Turkish Laborers’ Party (Türkiye Emekçi Partisi) (1980) were dissolved because they were in contradiction with the fundamental tenets of the single-party ideology. Violations of democracy and human rights were not noted in the grounds for their dissolution.
56 According to Art. 7 of High Military Administrative Court, the members of the court need not necessarily be of “justice” backgrounds.
57 This person is not required to be a professor of constitutional law. Indeed, throughout the history of the constitutional court, no constitutional lawyer has been appointed to the seat reserved to the university. In addition, two substitute members are elected from within the High Court of Appeals, one from within the Council of State, and one from among the high administrators. These may participate in the proceedings in the absence of a full member, according to the order of seniority.
do not differ substantially from those established in 1961, and the individual’s right to appeal is again not considered.

When the military government of 1980 extended the domain of the legislative power, it did not fail to confine it with an ideological framework. The directive given to the constitutional court is present in the preamble of the constitution, and the court refers heavily to this directive in all critical political decisions. According to the directive provided in Paragraph 5 (previously Paragraph 7) of the preamble, it would not be possible for the judiciary to decide outside the confines of the belief “that no protection shall be accorded to an activity contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey with its state and territory, Turkish historical and moral values or the nationalism, principles and reforms and modernism of Atatürk.”

However, it is important to note that while the basic concept of the 1961 Constitution weakened the legislature and executive in order to protect the basic philosophy of the May 27, 1960 coup, the 1982 Constitution tried to curb such a relationship by limiting some powers of the constitutional court. The power of the court to review laws and constitutional amendments was restricted by the 1982 Constitution both in time and content, it was not allowed to review martial law decrees with the force of law, and it was barred from creating new legal precedents. However, it is necessary to underline that the constitutional court itself eliminated these limitations from the mid-1990s onward. A return to the etatist perspective began at that time, as one privatization law after another was repealed and ideological homogeneity was rendered categorically supreme over the complete political system through the dissolution of opposition political parties. In 2008 constitutional amendments were reviewed based on content, barring democratic developments at the constitutional level. Therefore, it is possible to argue that the constitutional court, and the entire judicial bureaucracy, has come full circle and returned to the philosophy of the 1960 coup.

After constitutional reform in 2010 the composition of the constitutional court changed profoundly. The number of judges increased to seventeen, three of which are elected by parliament. This move suggests a strengthening of the democratic legitimacy of the judges. Furthermore, the electoral procedure for the remaining judges was altered with the result that the President of the Republic now has the power to appoint judges not belonging to the Kemalist elite. Likewise, the introduction of a constitutional complaint procedure will not remain without consequences. While the effects of these changes are not straightforward or easy to predict, the general expectation is that they will have significant ramifications for the court’s jurisprudence.

IV. THE COURT IN ACTION: A STAUNCH DEFENDER OF KEMALISM

The rulings of the constitutional court do not depict a state which derives its legitimacy from its citizens as sovereign. In fact, the state is defined with the adjectives “sacred” and

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60 Osman Can, “Özelleştirmeler ve Anayasa: Bir Liberal Dönüşüm Serüveni” (2008) 4 Ankara Barosu Uluslararası Hukuk Kurultayı 188 to the end. This return had effectively culminated in the process of February 28, 1997, and the Coalition, which was damaged by the 1971 military intervention, was reconstituted.
“august” in the preamble of the constitution. In a ruling indirectly touching upon Turkish Penal Code Art. 301 (which replaced the former Art. 159 in 2005), the constitutional court voiced the opinion that “… criminal acts of contempt and derision against” state organs “violate the political and legal interests of the State, which is the greatest and holiest being within the society.”\(^{61}\) The court has warned in party dissolution cases that the state enjoys “natural rights” just like individuals,\(^{62}\) and, similar to individuals is entitled to the basic right to property. The legislator can interfere with this basic right “only to the extent necessary in the democratic order.”\(^{63}\) For instance, from the court’s perspective, the reason to preclude foreigners enjoying the classical rights to the extent granted to the citizens is to protect the state.\(^{64}\) This understanding of the state resonates Hegelian thought, where the common good and public interest always take priority over the individual.

A state which characterized itself as “august” and “sacred” would most likely neither consider fundamental freedoms compatible with its ideology nor agree with democratic legislators on the freedoms of thought, organization, political activity, religion, and conscience. The decisions quoted below may shed some light on this issue.

Immediately after its establishment, the court justified its ruling on the constitutionality of the Law No. 38 of May 5, 1962, which made even the implicit criticism of the May 27, 1960 coup a punishable act, stating that “Considering that unlimited freedom is nothing but anarchy, the freedom of thought and opinion … can be limited in every direction, provided that the limitation is in accordance with the fundamental principles which constitute the basis of the Constitution, and lies within the criteria stipulated in Art. 11 of the Constitution. …”\(^{65}\) In another decision of the same year, the court stated that the prohibition, through Art. 31 of the Press Law, of foreign publications from entering into the country is unrelated to the freedom of thought, and in effect they were not entitled to guarantees from any freedoms.\(^{66}\) In 1964, the court upheld the abolished Art. 312/2 of the Turkish Penal Code, which enabled justices to punish those voicing the existence of ethnic, regional, lingual, and religious differences, on the grounds that “the Constitution would not permit any thoughts that might damage the peace and harmony among citizens.”\(^{67}\) In decisions finding the abolished Arts. 141 and 142 of the Turkish Penal Code constitutional, which were imported from Fascist Italy’s Penal Code, and which penalized socialist propaganda, it ruled that “propaganda of thoughts contradicting with Atatürk revolutions and a consciousness of loyalty to him, which constitute the fundamental structure and philosophy of the constitution, does not lie within the boundaries of the guaranteed freedom of thought.”\(^{68}\) These decisions make reference to the minutes of the Constituent Assembly of the May 27, 1960 coup, indicating the ideological linkage. Abolished Art. 163 of the Turkish Penal Code, which prohibited the expression of religious or anti-secular opinions, was found constitutional on the grounds that "Prohibition of opinions prohibited by the Constitution

\(^{62}\) K. 1992/1.
\(^{64}\) K. 1985/7.
\(^{65}\) K. 1963/83; K. 1963/84.
\(^{66}\) K. 1963/178.
\(^{67}\) K. 1964/9.
\(^{68}\) K. 1965/40; K. 1980/59.
itself cannot be a violation of the freedom of thought." 69 This attitude reflects the ideology of the framers of the constitution. 70

It would not be wrong to argue that these attitudes are dominant in all rulings concerning religious and political freedoms. The court repealed the law that permitted wearing a headscarf in universities, with the statement “built on the basis of the Turkish Revolution, and assigning a special place and ascendancy to the principle of secularism, the constitution has aimed to carefully protect the principle of secularism in the face of freedoms, and did not allow this principle to be sacrificed for freedoms.” 71 The court thus perceives the concepts of secularism and freedom as an irreconcilable dichotomy, never bothering once to explain why a concept of secularism that perceived a threat in freedoms is better than totalitarian systems. In a party dissolution ruling from 1983, it conceptualizes the relationship between secularism, principles of Atatürk, and the preamble as follows: “Secularism lies in the starting point of Atatürk’s Revolutions, and this principle constitutes the cornerstone of revolutions. In other words, the slightest concession on the issue of the principle of secularism can alter the orbit of Atatürk’s Revolutions, causing their destruction. Therefore . . . it has become necessary to place an absolute command (in this direction) in the ‘preamble.’” 72

The constitutional court, in its progressive rulings from 1985 onward on the issue of privatizations, 73 based its basic justifications on interpretations of the economic views of Atatürk, while trying not to conflict with the ideas of economic liberalism espoused by the framers of the constitution. However, from 1994 on, the link with the views of the coup of May 27, 1960 was established again, adopting the views prioritizing “national security” and “inviolableness of state property” instead of economic liberalism. 74

On the issue of property sales to foreigners, it limited this option substantially without any legal justification since 1985, by establishing an anachronistic “sovereignty” relationship between national security and land ownership. The fundamental justification of the rulings appears in the following expressions: “It can not be trusted in the possibility of taking back the lands sold to foreigners through legal means, because foreigners, at any moment, enjoy the protection of their own states” and “within the legal order stipulated by the Constitution, national interests should be superior to anything else.” 75

The court’s hostile attitude toward parliamentarianism and democratic representation can be seen in its decisions about privatizations from 1994 on. The court has annulled almost all laws which authorize the executive in this regard on the grounds of “ambiguity.” Such an approach resulted in acts to be lengthy like regulations in a manner which would not leave room for discretion by the government. The court explains the rationale of the
The fact that “political cadres” that do not have the authority to determine the national interest cannot possibly govern the country is not a problem, for according to the political ideology on which the court is built, only the “state,” meaning the Coalition, may determine the government of the country and define the national interest.

That the court can continue to protect an ideological political structure under the disguise of “law” against all demands for freedoms and democracy is only possible through a methodological deviation. Despite some liberal and democratic revisions, the actions of the judiciary are not based on concrete constitutional provisions, but on general principles such as “the rule of law,” “fundamental objectives and duties of the state,” “secularism,” and the “inalienability of the legislative power.” It is noteworthy that over four-fifths of the repeal decisions of the constitutional court are based solely on general principles, a practice that is impossible to call judicial review.

The court tries to ensure ideological guardianship by very effectively claiming that not only the judgment, but the whole justification of its rulings, are binding. Certainly, this attitude results in transforming the subjective opinions of the court, which should be made in conformity with the constitution, into “constitutional rules.” On the other hand, the natural consequence is that the constitutional court is able to create hundreds of constitutional provisions once justifications of rulings, which comprise hundreds of resolutions, are accepted as binding. It is difficult to imagine a comparable institution in the world enjoying such “unlimited and unchecked constituent government authority,” as one may define it.  

The court’s attitude toward political parties is that of absolute compliance with fundamental ideological preferences. To date, the court has dissolved twenty-four parties. Four were dissolved during the March 12, 1971 military intervention, one on the eve of the September 12, 1980 coup, and three during and after the February 28, 1997 intervention. Aside from the last two instances, all party dissolution cases filed with the court on the grounds of violations of the state ideology have resulted in the dissolution of the concerned political party.

76 K. 1985/7.

77 In a ruling that is also mentioned below (K. 2008/116), the court has repealed constitutional amendments on the basis of resolutions in the justification of a previous ruling (K. 1989/12). In this decision, the court interpreted the unalterable principles of the constitution not through other rules of the constitution, but through the resolutions in its own ruling, adopting its subjective opinions as virtually unalterable principles.

78 The National Order Party (Milli Nizam Partisi, known as MNP), Advanced Country Party (İleri Ülke Partisi, known as İÜP), and Worker’s Party of Turkey (İsci Partisi, known as IP) were dissolved in 1971, while the Great Anatolia Party (Büyük Anadolu Partisi, known as BAP) was dissolved in 1972.

79 The Laborers Party of Turkey (Türkiye Emekçi Partisi, known as TEP) was dissolved shortly before the coup in 1980.

80 The Welfare Party (Refah Partisi, known as RP) was dissolved in 1998, the Democratic Mass Party (Demokratik Kitle Partisi, known as DKP) in 1999, and the Virtue Party (Fazilet Partisi, known as FP) in 2001.
A very crucial finding is as follows: none of the dissolved parties had been dissolved on the grounds of violating the liberal democratic order. In this context, no extreme right, corporatist, militarist party, or party which deemed coups legitimate has been dissolved. On the contrary, dissolution rulings are based on the grounds that parties who demand freedom and democratic participation are in violation of the ideological paradigm. More concretely, they violate the nationalist-Kemalist perception of the unitary state and its value of “secularism,” which incidentally can be observed in none of the democratic and secular Western countries. Hence, this ideology, which is more “metaphysical-clerical” than secular, lead to the dissolution of many participatory parties calling for recognition as conservative, liberal, socialist, libertarian, or cultural. However, as explained above, this attitude predates the establishment of the constitutional court, having been in effect since 1908 when the İTC ideology was constructed, and has continually ensured the elimination of the political opposition.

Another finding is that, while the demands for the repeal of the prohibitive rules concerning political parties in party dissolution cases have been invariably turned down, liberalizing rules have been repealed on the grounds that “making it harder to dissolve parties puts the regime in danger.” Ideological justifications in dissolution rulings have overshadowed legal justifications; or the need to base decisions on legal justifications was not felt at all; the perception of “threat to the regime” is based on contradiction to ideological preferences, instead of the objective findings of sociologists or political scientists.

In the rulings, the concepts of “democracy” and “freedom” are generally presented as instruments of hostile actions against which all state organs should fight determinedly. Some rulings claim that recognition of the demands for pluralism and minority rights leads to the disintegration of the state. It is therefore necessary to ban all party texts and speeches sympathetic to these ideas. Every act and discourse in contradiction with the nationalism of Atatürk damages the unity of the country. On the other hand, it is possible to come across numerous rulings where racism is presented as “evil.” However “racism” is not characterized in Turkey the same way it is in the common democracy culture of Europe and elsewhere, for the reprehensible expressions are those arguing “that there are people in Turkey who are different from the majority; these peoples should be protected and should enjoy cultural rights.” The twisted perception in these rulings, which are labeled by the European Convention on Human Rights as anti-democratic and anti-libertarian, and which result in the conviction of Turkey as such, is so deep-rooted that while the infringement

81 Conservative Party (Muhafazakar Parti, known as MP) ruling K. 1983/4; Labor Party (Emek Partisi, known as EMEP) ruling K. 1997/1; Democratic Peace Movement Party (Demokratik Barış Hareketi Partisi, known as BDP) ruling K. 1997/3; DKP ruling K. 1999/1 and finally Peoples Democracy Party (Halkın Demokrasi Partisi, known as HADEP) ruling K. 2003/1.
82 K. 1998/1; K. 2000/50.
83 In a similar vein, see the Venice Commission Report, Para. 33.
84 K. 1989/12.
86 Id. K. 1995/1.
87 K. 1993/1; K. 1992/1.
88 United Communist Party of Turkey (Türkiye Birles Komünist Partisi, known as TBKP) ruling K. 1991/1; Freedom and Democracy Party (Özgürlik ve Demokrasi Partisi, known as ÖZDEP) ruling K. 1993/2; Socialist Unity Party (Sosyalist Birlik Partisi, known as SBP) ruling K. 1995/1; Socialist Party of Turkey (Sosyalist Türkiye Partisi, known as STP) ruling K. 1993/3; Revolutionary Communist Party (Devrimcici Komünist Partisi, known as DKP) ruling K. 1999/1.
decisions of the European Court of Human Rights are deemed as a cause for a re-trial within the EU reform process, the appeals of these parties have been refused without examination of the principle.\footnote{Ruling dated January 8, 2008 K. 2008/2 People’s Work Party (Halkin Emek Partisi, known as HEP); K. 2008/3 ÖZDEP and K. 2008/4 TBKP.}

On the other hand, an important concept in democracy, consensus, is understood as the political party that has the majority in the parliament and which exercised the executive power to seek the approval of the CHP, which represents the Coalition in politics. In the famed “367 ruling,” the decision was made that the Justice and Development Party (Adalet ve Kalkınma Partisi, known as AKP) would not be able to elect the President of the Republic as long as the boycott of CHP continued.\footnote{K. 2007/54, http://www.anayasa.gov.tr/eskisite/KARARLAR/IPTALITIRAZ/K2007/K2007-54.htm, accessed January 22, 2010.} By interpreting the constitutional amendment in a manner completely contradictory with the constitution, the court claimed that amendments that did not achieve consensus would contradict with unalterable principles.\footnote{K. 2008/116, http://www.anayasa.gov.tr/eskisite/KARARLAR/IPTALITIRAZ/K2008/K-2008-116.htm, accessed January 22, 2010.} Yet the amendment in question was accepted by a majority that corresponded to 80 percent of the Assembly (411 out of 518 votes and three out of five parties represented in the Assembly) and thus also of society. The court accepted both of CHP’s appeals, took over a power of parliament, and brought the system into a severe state of instability. Prohibited from a review of constitutional amendments with regard to content by Art. 148 para. 2 of the Constitution, the court rendered the constitutional amendment process, a power given to the parliament, impossible in practice.\footnote{Since it is impossible to deem a ruling at the end of a review that the Court was banned from “legal,” it is also dubious that a ruling even exists.} An unfortunate consequence is that the way to solutions to the issues of the Kurdish problem, religious freedoms, the European Union, and reorganization and democratic legitimization of the administration and judiciary, which could be provided only through constitutional amendments, was blocked.

V. CONCLUSION: QUO VADIS?

In a state where all basic laws are products of periods of dictatorship, single-party regimes, or military rule after a coup, the exclusion of judges from democratic legitimacy and prevention of the establishment of pluralism can lead to a single outcome: the undemocratic system that prevails in Turkey until today.

In such a system, the legal order cannot be a product of a democratic process; references to “the rule of law” by the judiciary or various bureaucratic powers should not be expected to have a liberal democratic color or content. The reference to “the rule of law” by a judicial mechanism isolated from democratic legitimacy would inevitably serve the purpose of protecting a bureaucratic-elitist hegemony, which is based on suspicions against democracy, pluralism, freedoms, and universal values. Considering the ideological background of the system, this is not implausible. The 2009 report by the Venice Commission takes this into consideration and emphasizes that the Turkish Constitutional Court harms democratic values more than political parties do.\footnote{Venice Commission, Para. 108, http://www.venice.coe.int/docs/2009/CDL-AD(2009)006-e.asp, accessed January 22, 2010.}
The struggles for freedom and democracy are constantly waged against this hegemony. It is possible to argue that the democratic history of Turkey is the story of a society’s democratic struggle against an elitist bureaucratic hegemony over a period of a century.

In the course of this struggle, the constitutional court has never diverged from the purpose of its creation, i.e., serving as part of the elitist bureaucratic political system labeled as the “republican alliance,” “historical bloc,” or “coup coalition.” The Venice Commission, in a revealing report, determined that the constitutional court’s rulings do not recognize the principles of the society, proving a lack of social pluralism. 94

The court generally takes a negative stance in the political discourse on the concepts of freedom and democracy. It is very difficult to come across a decision in which the judiciary defines the concepts of freedom and democracy. For this reason, it is also difficult to carry out a descriptive study beyond the extent of an article on a topic such as democracy and human rights in the rulings of the constitutional court; to date it has not been done. On the other hand, the court plays the role of the principal protector of “Kemalism,” “secularism,” “the indivisible unity of the Turkish state with its nation and territory,” and “the military and civilian bureaucracy” in the political discourse. The court itself has interpreted this set of concepts, and has transformed them into sacred references which are not debatable.

The activism of the court is effective not on the issue of basic rights and freedoms but in the ideological field and in administrative infrastructure. 95 It has struggled with the legislature not on the protection of basic rights and freedoms, but on the raison d'état or in other words: the defense of ideology.

The court has built the raison d'état of the Republic of Turkey on merely two elements, in parallel with the expectations of the Coalition. These elements, both of which are an expression of Atatürk revolutions, are the unitary state idea and the basic political constituent element of this idea, the principle of secularism. Freedom and democracy were never central principles; on the contrary, they were sometimes labeled as dangers.

As a result, an anachronistic bureaucracy continues to obstruct the establishment of democracy in Turkey. Even though the constitutional court has recently delivered more liberal rulings, which mainly result from the country’s aim of EU accession, its attitude in critical cases indicate that it cannot isolate itself from being a part of the Coalition and the protector of the raison d'état.

However, it is doubtful whether this anachronistic structure can survive in the face of social and political changes. The transformation of Turkey’s political system into a legitimate, democratic system for the first time since the early days of Ottoman-Turkish constitutional history and the restructuring of the court in line with the recommendations of the Venice Commission report to become the “defender of freedom and democracy” are inevitable.

The state does not derive its legitimacy from the social majority; the government mechanism is grounded in the ideology and hegemony of the minority that conveys this ideology. The situation in Turkey shows that the raison d'état defends the interests of a political minority, which is the opposite of the practice in most European countries.

94 Para. 87–88.
95 For similar views, see Mehmet Turhan, “Anayasa Yargısının Demokratik Hukuk Devletindeki İşlevi ve Meşruluğu” in Mehmet Turhan and Hikmet Tülen (eds), Anayasa Yargısı İncelemeleri I (Anyasa Mahkemesi Yayınları, Ankara 2006) 60 to the end; Belge (n 2) 656.
The constitutional reform of 2010 has reduced the constitutional court’s ability to act as guardian of the Kemalist regime and insulated the top level of the judicial branch from the influence of the Kemalist elite. The reform can be seen as the promise of a more democratic constitutional order in Turkey in the future. Indeed, the country is moving toward a constitutional system in which the people will be the ultimate sovereign for the first time in Turkey’s history. However, the most recent changes regarding the constitutional court are provisional in character, and it is not possible to predict whether the court will retain its present structure in the future. The question in how far the court may act as a role model for other Islamic states can thus not be answered at this point.
A Different Approach to the Control of Constitutionalism

Iran’s Guardian Council

FOROUD SHIRVANI

I. INSTITUTIONAL CONTROL AND ISLAMIC LAW

One main concept of the Constitution of the Islamic Republic of Iran is the implementation of the principles of Islamic law. While the penetration of national law by constitutional law is an important feature of constitutionalism in Europe,¹ the penetration of national law by Islamic Law is the characteristic trait of the Constitution of Iran. In order to implement this concept, there are several institutional mechanisms laid down in the Iranian Constitution. Among these, the Guardian Council (shūrā-ye negahbān) is the most significant institution. Its role is founded in the constitution and is to be seen in connection with the central religious, ideological, and normative axioms of the Islamic Republic. These axioms are signs of the interdependence of religion, politics, and law in Iran and emphasize the public and governmental relevance of Shi‘ah Islam.² The principles relevant for the role and the constitutional position of the Guardian Council are to be found primarily in the preamble and the “General Principles”³ of the Iranian Constitution adopted in 1979 and amended in 1989.⁴ These principles determine the relationship between divine sovereignty,

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³ Art. 1ff of the Constitution of Iran.
Islamic religion, Islamic law (Shari‘ah), and governmental legislation, as will be explained in detail below.

Constitutive importance for the idea of the state in the Islamic Republic is given to the principle of divine sovereignty. From this principle, the constitutional state of Iran derives its legitimacy. Thus, Art. 2 No. 1 of the Iranian Constitution determines that the legal order of the Islamic Republic is based on the absolute and exclusive sovereignty of the One God, his right to legislate, and the necessity of submission to his order. Therewith, the constitution, on the one hand, emphasizes the Islamic rule that God’s will has to be executed in every aspect of life and that a Muslim has to submit to his commands. On the other hand, the constitution affirms the principle that the privilege of all legislation is subject to the authority of God and that his will has to become law. As a result, the law is of divine origin, i.e., ius divinum, and has to guide human behavior in such a way that it complies with God’s will. The main sources of Islamic law are the Qur‘ān, which contains the word of God in Islam, and the Sunnah, which covers the statements of the Prophet Muḥammad, his actions and his implied approvals.

Based on this concept, states that declare Islam as their state religion and the Shari‘ah as binding are aimed at incorporating the principles of Islamic law into national law and enforcing them with state power. Also, the Constitution of Iran sets forth in its preamble that the legislation has to be based on the Qur‘ān and the Sunnah and that all civil, penal, financial, economic, administrative, cultural, military, political, and other laws have to conform to Islamic criteria and must be interpreted from this perspective. Due to the fact that this general maxim can be applied to all regulations with constitutional status as well as to all other laws and regulations, the central question is which persons are authorized to

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2 See also Art. 56 cl 1 of the Constitution of Iran, which includes that the absolute right to rule over the world and the people is entitled to God and he has authorized the human being to define his own social destiny.  
9 Art. 4 cl 1 of the Constitution of Iran.  
10 Art. 4 cl 2 of the Constitution of Iran.
interpret the Islamic canons and supervise their implementation. The Constitution of Iran has assigned this duty to the religious jurists (fuqahā) who are members of the Guardian Council. Only they are supposed to have the necessary knowledge to interpret the divine law and guarantee the compliance of secular laws with the Islamic criteria. The fuqahā are in charge of the predominance of Islamic ordinances, overseeing their enforcement through legislation and serving as guardians of the Islamization of the legal system.

II. HISTORIC REVIEW: THE IRANIAN CONSTITUTIONAL REVOLUTION (1906–1911)

The legal status of the Guardian Council is best analyzed in a historical context. Especially, the era of the Constitutional Revolution in Iran (1906–1911) and the legislative reforms in 1906/1907 can be seen as formative periods in the constitutional history of Iran. The Constitutional Revolution and the conflicts between the then reigning Qājār dynasty on the one hand and several political groups on the other hand had diverse internal and external causes. The main external issue was the massive influence of Great Britain and Russia in Iran and the various treaties concluded between the British and Russians and the Qājār Shāhs, which had a negative impact on the economic situation of the people in Iran. Agreements conceding exclusive rights for British or Russian companies enhanced the dependence of Iran on these foreign powers and impaired the social and economic interests of workers, farmers, and merchants. Well-known in this context is the “tobacco movement” in response to the tobacco concessions granted by Nāṣeroddīn Shāh to a British company in 1890. These and other treaties strengthened the anti-colonial movement that aimed at stopping the intrusions by foreign powers, demanding domestic reforms. The major groups in this movement were the lower middle class, a large part of the clergy, intellectuals, workers, and farmers. Among these groups, the clergy had an important position and organized several riots. The continuous dissatisfaction and massive class protests led to temporary concessions by the monarchy. Prominent results were the Constitution of 1906 and the Supplementary Constitutional Law of 1907. The establishment of the National Consultative Assembly (majles) with the mission to represent the Iranian people and “to examine and discuss all matters,” including the power to legislate on those issues.

During the Constitutional Revolution, the clergy intended to safeguard its political influence. In this context, Art. 2 of the Supplementary Constitutional Law has to be mentioned, setting forth that a five-member body consisting of doctors of Islamic law and jurisprudence should be established by the Assembly. This body had, similar to the later Guardian Council, the duty to control the parliamentary laws regarding their compatibility.

15 Art. 4 cl. 2, 91 of the Constitution of Iran.
18 Rasoulzadeh (n 17) 46.
19 Both laws are printed in Rasoulzadeh (n 17) 150ff, 162ff.
20 Art. 1, 2, 15 of the Constitution of Iran (1906).
21 Art. 16 of the Constitution of Iran (1906).
with the principles of Islam. However, the clause was not executed as intended at that time. Both the body and the Assembly were not really able to play the roles envisioned for them in the constitution. One of the reasons was the counter-revolutionary strategy pursued by the monarchy with the assistance of Great Britain and Russia, weakening the Assembly and the political groups. This strategy finally resulted in the demise of the Constitutional Movement in 1911.

These historical circumstances provide a useful background for understanding the status of today’s Guardian Council based on Art. 93 of the Iranian Constitution. According to this article, the Islamic Consultative Assembly (i.e. the parliament) generally has no legal status without the simultaneous existence of the Guardian Council. As a consequence, the existence of the Council is a precondition for the efficiency of the legislative power.

The constitution intends to prevent a situation in which the provisions regarding the Guardian Council could be repealed and in which the Council would be an institution without any power.

III. THE FORMATION OF THE GUARDIAN COUNCIL IN LIGHT OF DIVERSE CONSTITUTIONAL PRINCIPLES

The institution of the Guardian Council is characterized by diverse constitutional principles. Considering the modalities of the election of the Guardian Council’s members, one will notice that primarily the theocratic and only secondarily the parliamentary principle is influencing the composition of this institution. According to Art. 91 of the Iranian Constitution, the Guardian Council consists of twelve members, six Islamic jurists and six jurists specialized in different fields of law. The six “righteous” Islamic jurists are appointed by the religious Leader, who is the central authority in the Constitution of Iran and enjoys a wide range of powers. They have to be scholars of fiqh, which means that they have to possess the ability to deduce the divine commands of Islam from the authentic sources (Qur’an and Sunnah) and to declare the findings as binding law. They shall be “righteous,” i.e., they must exercise their religious duties and have to be politically neutral. The six other jurists, who also have to be Muslims, are recommended by the Head of the Judiciary to the Islamic Consultative Assembly and are elected by this body.22

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22 See S. Tellenbach, Untersuchungen zur Verfassung der Islamischen Republik Iran vom 15. November 1979 (Klaus Schwarz Verlag, Berlin 1985) 217; Ebert (n 11) 164.
26 Arts. 91 No 1, Arts. 110 No 6 a) of the Constitution of Iran.
27 The provisions regarding the religious Leader can be found in Art. 107ff of the Constitution of Iran. The Leader is appointed by the “Assembly of Experts.” Art. 110 of the Constitution of Iran enumerates the competences of the Leader.
29 Hāshemi (n 16) 276–277.
31 Cf. concerning this institution Art. 62ff of the Constitution of Iran.
32 Art. 91 No 2 of the Constitution of Iran.
The restriction to Muslim jurists is, according to Iranian interpretation, to be attributed to the principle of Islamic state leadership and shall limit the risk of interpretations by non-Muslim jurists that might contradict Islamic maxims. In general, all members of the Guardian Council are appointed or elected for six years; in the first legislative period, half of every group had to resign by drawing lots and be replaced by new members. Since the second legislative period, half of the members are newly appointed or elected every three years. The overlapping mandate gives the new members the opportunity to profit from the experience of the incumbent members and also to introduce new ideas in the panel. The possibility of reelection is guaranteed.

The modalities of appointment or election of the members of the Guardian Council underline the primacy of the theocratic principle. The six Islamic jurists (fuqahā) are appointed by the religious Leader. They have to be experts of fiqih, shall enforce the Islamic law and supervise the legislative as deputies of the religious Leader. The primacy of the theocratic principle also results from the ballot modalities within the Guardian Council, which lead to a dominant position of fuqahā. I will elaborate on this point below. By contrast, the parliamentary principle comes into play for the election of the six other jurists of the Guardian Council: They are elected by the Islamic Consultative Assembly. However, the principle of velāyat-e faqīh applies here too: the Head of the Judiciary, who recommends candidates to the Assembly, is appointed by the religious Leader for the duration of five years and has to be a scholar of Islamic law (mujtahed). Because of his right of nomination, he evidently influences the election of the six further members.

### IV. THE MAIN COMPETENCES OF THE GUARDIAN COUNCIL

The Constitution of the Islamic Republic of Iran provides for a number of competences held by the Guardian Council. One of them is the review of the bills of the Islamic Consultative Assembly regarding their compliance with Islamic ordinances and the provisions of the constitution. Closely related to this reviewing power is the power of the Guardian Council to interpret the Constitution of Iran. Another politically relevant and delicate matter is its competence to supervise the election of the Assembly of Experts, the presidential election, the election of the Islamic Consultative Assembly, and the referendums. This competence includes the right and the duty to examine the suitability of candidates who want to take part in the presidential elections. This competence is justified with the argument that the specific requirements regarding the suitability of a candidate for

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33 Hāshemi (n 16) 278–279.
34 Art. 92 of the Constitution of Iran.
35 Hāshemi (n 16) 284; W. Wahdat-Hagh, *Die Islamische Republik Iran* (Lit-Verlag, Münster 2003) 285.
36 Hāshemi (n 16) 284.
37 Wafādār (n 28) 523; Mehrpur (n 23) 65, 72.
38 Cf. Khamehi (n 4) 121–122; Ebert, Fürtig, Müller (n 2) 445.
39 Cf. section IV.
40 Art. 157 of the Constitution of Iran.
41 Arts. 72, 91, 96 of the Constitution of Iran.
42 Art. 98 of the Constitution of Iran.
43 This Assembly is responsible for the appointment and the dismissal of the religious Leader, cf. Arts. 107, 111 of the Constitution of Iran; see also (n 27).
44 Art. 99 of the Constitution of Iran.
45 Art. 110 No 9 of the Constitution of Iran.
the presidency must be enforced by a competent and even-handed authority. The Guardian Council is seen as such an adequate institution. Resulting from this consideration, also the examination of the suitability of candidates for the election of the parliament is assigned to the Guardian Council.

The competence of the Guardian Council to review the bills of the Islamic Consultative Assembly is based on Art. 91ff in conjunction with 72 of the Iranian Constitution. According to Art. 72 of the Iranian Constitution, the Consultative Assembly cannot enact laws contrary to the principles and ordinances of the official religion of the country or to the constitution. The official religion is Islam and the Twelver Ja’fari School. The parliamentary legislation, therefore, has to comply with the ordinances of the Qur’an and the Sunnah, the principles deduced from these sources by the doctrine of the fiqh and the teachings of the Twelver Ja’fari School. The Guardian Council’s control is guaranteed since all bills of the Consultative Assembly have to be submitted to the Council. The Guardian Council has the duty to examine the compatibility of the relevant bill with the criteria of Islam and the constitution within a maximum of ten days. If it finds the bill to be incompatible, it has to return it to the Assembly for revision. If the parliament, however, does not share the opinion of the Guardian Council and refuses to make corrections, the matter shall be submitted to the Exigency Council. This Council is similar to an arbitration panel, intervening in cases where the Consultative Assembly and the Guardian Council cannot reach agreement. Its members are appointed by the religious Leader.

If the Guardian Council comes to the conclusion that the bill complies with the criteria of Islam and the constitution within the ten-day period, it may formally confirm the consistency of the bill with the aforementioned principles. If it does not comment on the bill within the ten days, its silence is interpreted as confirmation of the compliance with above-mentioned criteria. The law can now be put into effect. The Guardian Council can request an extension of the time limit in certain cases: Art. 95 of the Iranian Constitution provides for this possibility in cases where the Guardian Council deems ten days inadequate for completing the process of review and delivering a definite opinion. In these cases,

46 Cf. Art. 115 of the Constitution of Iran.
47 Hāshemi (n 16) 318.
48 Cf. Hāshemi (n 16) 321ff
49 Cf. Art. 12 of the Constitution of Iran. During the development of Islamic law the traditional law schools and their doctrines played an important role. The history of the law schools reaches back to the initial phase of Islam. Cf. Zacharias (n 9) 43, 96ff.
51 Art. 94 cl 1 of the Constitution of Iran.
52 Art. 94 cl 2 of the Constitution of Iran.
53 Cf. Art. 112 para 1 of the Constitution of Iran.
55 Art. 112 para 2 of the Constitution of Iran.
56 Cf. Art. 96 of the Constitution of Iran.
57 Hāshemi (n 16) 296.
58 Art. 94 cl 3 of the Constitution of Iran.
it can request the Islamic Consultative Assembly to grant an extension of time not exceeding ten further days.

The voting procedure in the Guardian Council is regulated in Art. 96 and Art. 98 of the Iranian Constitution. As far as the interpretation of the constitution is concerned, the Guardian Council has to decide with a three-fourths majority of its members.\textsuperscript{59} Regarding the review of the parliamentary bills, Art. 96 of the Iranian Constitution is applicable, underlining once more the predominance of the fuqahā. According to this article, the determination of compatibility of a bill passed by the parliament with Islamic ordinances rests with the majority vote of the fuqahā, whereas the determination of compatibility with the constitution rests with the majority vote of all members of the Guardian Council. This implies a double vote for the fuqahā: Only the six fuqahā rule on the compatibility of the legislation with Islamic ordinances. Regarding the compatibility with the constitution, they decide together with the six other jurists of the Guardian Council, i.e., in the plenum. The determination of compatibility in each type of review requires the majority of the votes, i.e., four or seven votes, respectively.\textsuperscript{60} For example, if three fuqahā share the opinion that the legislation does not comply with Islamic ordinances, the legislation is returned to the parliament for revision. Similarly, a decision confirming the consistency of a bill with the constitution requires the support of at least one Islamic jurist.

\section*{V. THE GUARDIAN COUNCIL AS HYBRID INSTITUTION}

Considering the role and position of the shūrā-ye negahbān in the Constitution of Iran, this institution can be considered as hybrid. To begin with, it is a consultative body that reviews parliamentary bills regarding their compatibility with Islamic ordinances and the requirements of the constitution.\textsuperscript{61} In this respect, the Guardian Council is an institution staffed with jurists that makes decisions on the basis of law and fulfills judicial tasks.\textsuperscript{62} Furthermore, the Guardian Council is responsible for the interpretation of the Constitution of Iran,\textsuperscript{63} a duty which is normally assigned to a constitutional court. Nonetheless, the Guardian Council may not be classified as a genuine jurisdictional body. On the one hand, the applicable provisions do not feature in the chapter on the “Judiciary,”\textsuperscript{64} but in the chapter on “Powers and Authority of the Islamic Consultative Assembly.”\textsuperscript{65} A comparison of the functions of the Guardian Council and the Supreme Court of Iran, which is responsible for the control of the correct implementation of the laws by courts and the uniformity of

\textsuperscript{59} Cf. Art. 98 of the Constitution of Iran. Pursuant to the statute of the Guardian Council the process of the interpretation of the constitution is initiated if it is requested by bodies that are responsible for the execution of the constitution. Such bodies may be the president or the head of judiciary; cf. Hāshemi (n 16) 310.

\textsuperscript{60} Wahdat-Hagh (n 35) 286; Mehrpur (n 23) 65, 73.

\textsuperscript{61} Cf. concerning the councils supervising the legislation in the Islamic states Ebert (n 11) 162f.


\textsuperscript{63} Cf. section IV.

\textsuperscript{64} Cf. Art. 156ff of the Constitution of Iran.

\textsuperscript{65} Cf. Art. 71ff of the Constitution of Iran.
jurisdiction, shows that the constitution classifies the Supreme Court rather than the Guardian Council as classical jurisdictional body. On the other hand, Art. 91 of the Iranian Constitution speaks of the fuqahā, or jurists, as members of the Guardian Council, while Art. 156ff of the Iranian Constitution use the term mujtahed and the term qāżī, or qożāt, ("judge" or "judges"). At least, regarding the jurists who are members of the Guardian Council, the use of the term qāżī, or qożāt, would have been possible, if the Guardian Council were to be seen as a jurisdictional body.

Apart from that, there are further differences between the Guardian Council and traditional judicial bodies, including constitutional courts. The decisions of the Guardian Council in the legislative process are neither binding nor final. If the Guardian Council and the Islamic Consultative Assembly do not come to an agreement, as mentioned above, the Exigency Council is called upon to mediate between the two institutions. It is interesting that members of the Guardian Council are also appointed to the Exigency Council. Such a practice would be rather unusual for a constitutional court, as the members of the court would be reviewing their own decisions. Finally, the members of the Guardian Council are also involved in the revision of the constitution. According to Art. 177 of the Iranian Constitution, an edict containing the relevant amendments of the constitution has to be issued by the religious Leader after consultation with the Exigency Council, and a special Council for the Revision of the Constitution has to be appointed. This Council consists of members of the Guardian Council and further office holders. Thus, the Guardian Council is also involved in this legislative procedure.

In spite of the arguments outlined above, the Guardian Council neither belongs exclusively to the legislative power nor does it have the status of a second legislative chamber. Its hybrid character is a consequence of its composition and duties. The composition of the Guardian Council is significantly influenced by the religious Leader as mentioned above. He directly appoints the six fuqahā equipped with a double right to vote. His opinion also has to be taken into account when selecting the remaining jurists who are proposed to parliament for appointment. Thus, the composition of the Guardian Council clarifies its affiliation with the office of the valī-e faqīh. Alongside this, the duties of the Guardian Council have also to be interpreted in light of Art. 57 of the Iranian Constitution: According to this article, all governmental powers (legislature, executive, judiciary) are supervised by the religious Leader. On the basis of this provision, the Guardian Council can be classified as an

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66 Cf. Art. 161 of the Constitution of Iran.
67 Cf. Art. 157 of the Constitution of Iran regulating the features of the Head of Judiciary.
68 Cf. Art. 163 of the Constitution of Iran speaking of the qualifications of a judge.
69 Cf. Art. 162 of the Constitution of Iran speaking of the judges of the Supreme Court of Iran.
70 Cf. section IV.
71 Cf. Art. 112 of the Constitution of Iran.
73 According to Art. 177 of the Constitution of Iran, the Commission should consist of: the members of the Guardian Council; the heads of the three branches of the government; the permanent members of the Exigency Council; five members from among the Assembly of Experts; ten representatives selected by the Leader; three representatives from the Council of Ministers; three representatives from the judiciary branch; ten representatives from among the members of the Islamic Consultative Assembly; and three representatives from among the university professors.
74 Cf. section III.
institution controlling the parliament on behalf of the religious Leader, with the ability to stop its bills and to regulate the admission to the state offices.\textsuperscript{75}

The Guardian Council is not a completely unique institution in the Islamic countries. A comparison with other judicial institutions illustrates some similarities, especially to the Pakistani Federal Shariat Court.\textsuperscript{76} The Federal Shariat Court consists of not more than eight Muslim judges. Not more than three judges shall be well-versed in Islamic law.\textsuperscript{77} The Court acts on its own motion, on a petition of a Pakistani citizen or the Federal or a Provincial Government of Pakistan. It examines whether a law or the provision of a law is contrary to the injunctions of Islam.\textsuperscript{78} Similar to the Guardian Council, the Federal Shariat Court examines the compatibility of national law with religious law. But in contrast to the Guardian Council, the Federal Shariat Court can only review the law after it has already entered into force.

VI. THE ROLE OF THE GUARDIAN COUNCIL IN THE POLITICAL PROCESS

The position of the Guardian Council in the Constitution of Iran raises questions regarding its power in the political process. The influence of the Guardian Council rests on its competence to make decisions in the field of legislation and to supervise elections.

Reviewing the legislation passed in the last thirty years, frequent tensions between the parliament and the Guardian Council can be recognized. These tensions caused structural changes in the relationship among the religious Leader, the parliament, and the Guardian Council, in particular in the first decade after the Islamic Revolution. The main conflict in the early 1980s concerned the legislation restricting private ownership of urban land in Iran.\textsuperscript{79} During this conflict, different views were advanced regarding the compatibility of the legislation with the Shari‘ah. While the Guardian Council asserted that the legislation was contradictory to the Shari‘ah, the parliament disagreed. Because of the hardened positions and the enormous significance of the legislative project, the religious Leader finally intervened. Āyatollāh Khomeinī decreed that the parliament could carry out temporary measures aimed at protecting the system of the Islamic Republic.\textsuperscript{80} In this particular “case of emergency,” the religious Leader went so far as to authorize the parliament to pass a bill that was contrary to Islamic law. Facing a two-thirds majority in the parliament, the Guardian Council was unable to veto the legislation.\textsuperscript{81} Even after this conflict, the debates between the parliament and the Guardian Council did not abate. Thus, it became necessary to find a solution in order to prevent a permanent blockade of the legislative procedure. To this end, Khomeinī established a new institution in 1988 which, as mentioned, was later called Exigency Council and had to mediate between the parliament and the Guardian Council. This measure showed once more the special position of the religious Leader and his extra-constitutional competences in the political process.\textsuperscript{82} In later conflicts between those two bodies, the Exigency Council played a key role.

\textsuperscript{75} Cf. Khomei (n 4) 121–122; Mehrpur (n 23) 65, 72.
\textsuperscript{76} Cf. Art. 203Aff of the Constitution of Pakistan.
\textsuperscript{77} Art. 203C of the Constitution of Pakistan.
\textsuperscript{78} Art. 203D of the Constitution of Pakistan.
\textsuperscript{80} Schirazi (n 79) 179.
\textsuperscript{81} Schirazi (n 79) 181.
\textsuperscript{82} Tellenbach (n 54) 369, 379; Khomei (n 4) 124.
In regard to the responsibilities of the Guardian Council in the context of elections, Art. 99 of the Iranian Constitution uses the phrase *nežārat*, which means supervision. The interpretation of this phrase, especially its scope, has been discussed controversially in Iran. The parliament tried to pass a bill in 1991 that intended to restrict the supervisory activity of the Guardian Council. Under its provisions the Guardian Council would not have had the right to take any action before the candidates are elected. The Guardian Council disagreed and interpreted the phrase as *nežārat-e estevābī*, claiming full supervision and approval. Due to the strict supervision exercised by the Council, candidates whose loyalty toward the maxims of the Islamic Republic is questioned can be excluded prior to the election. Several examples for this procedure can be found in practice. For instance, many candidates were not admitted to the parliamentary election in 2004 for alleged lack of loyalty. At the same time, however, this election was an example of an intervention by the religious Leader. After the Guardian Council had rejected approximately 3500 out of 8000 candidates (including eighty-two representatives who ran for reelection), the religious Leader suggested a new examination. Subsequently, the Guardian Council revised its decision rejecting a minor number of candidates in total but raised the number of the representatives that were not admitted again. In this case, the Council showed some kind of flexibility without reversing its opinion on the substance of the matter.

In the presidential elections of 2009 the Guardian Council again attracted public attention. After the elections of June 12, 2009, the opposition and its main candidate Mīr-Hosayn Mūsavī, who, according to the official announcement, had achieved less votes than the incumbent President Maḥmud Aḥmadinezhād, protested against the result. Mūsavī and the other failing candidates filed complaints against the result to the Guardian Council, claiming that the vote had been rigged. The Council decided to recount 10 percent of the votes according to the random principle. At the end of June 2009 the speaker of the Guardian Council declared that there had been no serious irregularities, neither in the elections nor in the ballot-counting. With this declaration the Council confirmed the decision of the religious Leader, Āyatollāh Khāmene‘ī, who had pointed out the regularity of the elections during a sermon some days before. Nevertheless the protests against the election results continued.

**VII. SUMMARY**

The Guardian Council is an institution which is recognized as one of the main pillars of the Islamic government in Iran. Its religious-theoretical fundaments can be found in the doctrine of the Islamic state, the enforcement of the Islamic law and the supervisory function of the clerical jurists. Under constitutional law, the task of the Guardian Council follows from the general rule in Art. 4 of the Iranian Constitution, which defines the Islamization of the legal system as leading principle. The implementation of this principle is the primary duty of the Guardian Council. In fulfilling this duty, the Guardian Council has a scope of

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84 Schirazi (n 79) 89.
86 Cf. Tellenbach (n 54) 369, 378.
87 Reissner (n 85) 1f.
88 Cf. “Iran: Wächterrat bestätigt Wahlergebnisse” FAZ (Frankfurt am Main, June 30, 2009).
discretion when taking its decisions. In practice, the Council has often acted as an instance defending the status quo and, therefore, blocked the initiatives of a reform-minded parliament. The tensions arising from this relationship are also a consequence of the special pattern of institutional control in Iran. The preventive and automatic control by the Guardian Council constrains the scope of parliamentary action. It also transfers the decision procedure to another institutional platform, in particular to the Exigency Council. A possible solution to these problems could be the concept of judicial control only at the request of certain officeholders. In this concept, the Guardian Council would probably resemble a jurisdictional body.
Pakistan was established as the homeland for Muslims in India in August 1947. It owed its birth as a separate state to the labors of the All India Muslim League, a party of modernist Muslims in pre-Independence India. Most of its leaders were men of high integrity with a modern outlook, particularly Sayyid Ahmad Khan, Sayyid Amir ‘Ali, ‘Allāmah Muḥammad Iqābāl, and fina. Muhammad ‘Ali Jināḥ, who was the founder of the state of Pakistan.

The establishment of Pakistan was initially opposed by major Muslim religious parties in India and in particular Jamāʿat-i Islāmi, Jām’iat-i ‘Ulamā’-i Islām, Jām’iat-i ‘Ulama-i Hind, and Majlis-i Aḥrār. These parties did not think much of the leadership of the Muslim League, whom they saw as men with modern ideas who were deeply impressed with the British legal system. The leaders of religious parties thought that the objects of the movement were inadequate because it did not seek the creation of an Islamic ideological state but only a modern state where the Muslims would constitute a majority.

Fearing the onslaught of theocracy, the founder of Pakistan, Muḥammad ‘Ali Jināḥ, while addressing the first Constituent Assembly on August 11, 1947, clearly envisaged Pakistan as a modern democratic state that would guarantee the freedom of religion: “You are free; you are free to go to your temples, you are free to go to your mosques or to any other places of worship in this state of Pakistan. You may belong to any religion or caste or creed—that has nothing to do with the business of the state.”1 Jināḥ hoped

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that the new state would serve the peaceful coexistence of the followers of different faiths:

Now, I think we should keep that in front of us as our ideal and you will find that in course of time, Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the state.  

However, soon after the death of Jinâḥ in September 1948, the religious parties, who had originally opposed the creation of Pakistan, came up with a political theocratic agenda for Pakistan. Jinâḥ’s successors succumbed to their pressure and adopted the “Objectives Resolution” in the Constituent Assembly in March 1949, declaring that sovereignty over the entire universe belonged to Almighty Allâh alone and that such sovereignty was delegated by him to the state of Pakistan to be exercised through chosen representatives of the people. This resolution was opposed by members belonging to non-Muslim minorities in the Constituent Assembly, but it was still adopted by a divided vote, with Muslim members voting for the resolution and non-Muslim members against it. However, there were certain redeeming features in the resolution, as reflected by the following extracts taken from its text:

Wherein principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed.  

Wherein adequate provisions shall be made for the minorities to freely profess and practise their religions and develop their cultures.  

Wherein adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes.  

Wherein the independence of the judiciary shall be fully secured.

These portions of the Objectives Resolution did indeed provide for the establishment of a modern democratic state with fundamental rights being fully secured by an independent judiciary. The Objectives Resolution was not made an operative part of the constitution when the first constitution was adopted in 1956. It was made the preamble of the constitutions adopted in 1956, 1962, and 1973. However, under the dictatorship of General Muḥammad Zia-ul-Ḥaq (1977–1988) the resolution was made an operative part of the constitution under the newly introduced Art. 2A of the constitution.

II. BRIEF CONSTITUTIONAL AND POLITICAL HISTORY

The Pakistani state went through several periods of uncertainty, insecurity, and dictatorship. Its constitutional and political history is full of periods of trouble and vicissitudes.
It took nearly nine years to frame its first constitution, adopted in 1956. The constitution did not last for a long time. It was abrogated after martial law was declared in October 1958 by then-President Iskandar Mīrzā, in collusion with the commander-in-chief of the Pakistani Army. After four years of martial law, during which the country was without any constitution, the military dictator General Muḥammad Ayyūb Khān created a constitution all by himself, which was more dictatorial than democratic. However, this document did not last long. After country-wide agitation against Ayyūb Khān, he had to step down. Unfortunately, he handed over power to the then-Commander-in-Chief of the Pakistani Army, General Yahyā Khān on March 25, 1969, who immediately imposed martial law nationwide and abrogated the Constitution of 1962.

The dictatorial policies of General Yahyā Khān created serious animosity and political antagonism between the two wings of the country, East and West Pakistan, which were separated by thousands of miles of Indian territory. After general elections took place in December 1970, serious differences surfaced between the political leadership of East Pakistan, which had won a majority of seats in the National Assembly on the one hand, and the military establishment in West Pakistan, led by General Yahyā Khān, on the other. This situation led to a military crackdown in East Pakistan ultimately resulting in the emergence of the independent state of Bangladesh in East Pakistan.

Pakistan, reduced to half of its population as a result of this separation in December 1971, adopted a Constitution in August 1973 under the leadership of Mr. Zulfiqār ‘Alī Bhutto, who was then the President and later Prime Minister of Pakistan. It was a democratic constitution and all political parties inside and outside the parliament unanimously agreed to its adoption. Unfortunately, the general elections held in March 1977 led to confrontations among the political parties in Pakistan and a political movement was launched demanding fresh elections. General Zia-ul-Ḥaq, who was then the Chief of Staff of the Army, taking full advantage of the deteriorating political situation, dismissed the government of Mr. Bhutto and declared martial law nationwide. He promised to hold elections within ninety days. This was a promise he never intended to keep. He got Bhutto hanged in 1979 on the basis of judicial verdicts obtained from the judges of the Supreme Court and the Lahore High Court, who were closely cooperating with Zia. The General held up martial law until 1985. The constitution remained suspended during these eight years and was only revived in March 1985 by General Zia after extensive changes and alterations through his Revival of Constitution Order 1985 (RCO). The constitution was completely mutilated by the amendments and the President was given undemocratic powers, including the power to dissolve the National Assembly at his discretion and to dismiss the federal government, including the prime minister and his cabinet. In May 1988 he exercised this power against his own hand-picked government led by Mr. Muḥammad Khān Junejo.

General Zia died in an air crash on August 17, 1988, and his death ushered in a period of civilian governments for about eleven years, during which four governments changed hands. The reason for short-lived governments during this period was the exercise of discretionary powers by the President to dissolve the National Assembly. This happened no less than three times in the period from 1988 to 1999, i.e., in 1990, 1993, and 1996. The discretionary power of the President to dissolve the National Assembly was finally abolished by the Thirteenth Amendment to the Constitution passed in 1997.

However, the civilian governments remained unstable and in October 1999, then-Chief of Army Staff, General Pervēz Musharraf, struck against the government headed by Mian Nawāz Sharīf. He dismissed the government, dissolved parliament, and ruled as a military dictator for nearly nine years. He assumed the office of President illegally and unconstitutionally in 2001. In the meantime he did revive the constitution in 2002, but with several draconian amendments bolstering his powers as President. He reintroduced
the discretionary power of the President to dissolve the National Assembly. However, General Musharraf was driven out of power by a lawyers’ movement supported by opposition political parties and the public. Under this pressure, relatively free and fair elections were held in February 2008, in which the political parties/forces opposed to Musharraf won with an overwhelming majority, and Musharraf was forced to resign in August 2008 under the threat of removal from office through impeachment by the parliament.

III. THE SUPREME COURT OF PAKISTAN

The purpose of this brief overview of constitutional and political history of Pakistan was to emphasize the point that the judiciary in general and the Supreme Court in particular had to function in a difficult and complex constitutional and political environment during the last sixty years. The courts were virtually forced into following the dictates of military rulers and civilian dictators which had seriously undermined its independence.

Pakistan and India, at the time of independence in August 1947, inherited the Federal Court of India, which had been established in 1937 under the Government of India Act 1935. It had been the highest court in undivided India. However, after the partition of India into independent states of Pakistan and India, the Federal Court at Delhi had to be divided as well. Consequently, a Federal Court of Pakistan was established in 1949. It was the highest court of Pakistan until March 1956, when the first Constitution of Pakistan was promulgated and the highest court in the country was designated as the Supreme Court of Pakistan.

The first test of the Federal Court came in October 1954, when Governor-General Ghulām Muḥammad dissolved the democratically elected Constituent Assembly of Pakistan. The undemocratic establishment in Pakistan at that time backed the decision of the Governor-General and pressed the Federal Court to go along with it. Consequently, three judgments in quick succession were given by the Federal Court led by Chief Justice Muḥammad Munir, justifying the undemocratic actions of the Governor-General and thus undermining the nascent democracy in Pakistan.  

In the first case (Maulvi Tamizuddin’s case), an appeal to the Federal Court against the decision of the Sindh Chief Court was filed by the government. By a majority of four to one, the Federal Court decided, on March 21, 1955, in favor of the government, and rejected Maulvi Tamizuddin’s petition challenging the proclamation of the Governor-General dissolving the Constituent Assembly. The most significant point in the Federal Court’s judgment was that it did not address the question of whether the Constituent Assembly had been lawfully dissolved by the Governor-General or not. It reversed the judgment of the Sindh Chief Court on purely technical grounds, arguing that Section 223A of the Government of India Act, as adapted in Pakistan by virtue of which the Sindh Chief Court had issued the writ in favor of Maulvi Tamizuddin, was “not yet a law” because it had not received the assent of the Governor-General. One of the judges of the Federal Court, Justice Alvin Robert Cornelius, wrote a strong dissenting opinion stating that there was no obligation that all laws made by the Constituent Assembly of a constitutional nature required the assent of the Governor-General for their validity and operation.

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In the second case (Usif Patel’s case), a “state of grave emergency” was declared throughout Pakistan, presumably to prevent the breakdown of the constitutional machinery of the country because all laws that did not receive the assent of the Governor-General had been rendered invalid by the earlier judgment. The Governor-General’s emergency powers were soon challenged before the Federal Court. A full bench of the Federal Court, presided over by Chief Justice Munir, declared that the power to make amendments to the constitution of the country could not be exercised by the Governor-General by means of an ordinance. The third case (Governor-General’s Reference) contained a number of questions that were referred to the Federal Court for its opinion by the Governor-General. The most important question was related to the laws/ordinances that had been declared invalid in Usif Patel’s case. The Federal Court was asked if such laws/ordinances could be deemed to have been validly passed and if the actions thereunder could be considered to have been validly taken. Answering this question, the Federal Court held that in the situation outlined in the Reference, the Governor-General had, during the interim period, the power under the common law of civil or state necessity of retrospectively validating such laws and ordinances, and that until the question of validation was decided upon by the Constituent Assembly they would remain valid and enforceable.

When martial law was declared in October 1958 the Supreme Court under Chief Justice Muhammad Munir once again gave a pernicious judgment justifying the abrogation of the constitution and the imposition of martial law in the country.9 However, in 1972 the Supreme Court tried to make amends regarding its past record by giving a judgment declaring the emergency imposed by General Yahya invalid, and by denouncing him as usurper.10 However, this judgment came after General Yahya had been overthrown in December 1971.

When in July 1977 General Zia-ul-Haq imposed martial law and suspended the constitution, the Supreme Court had once again to adjudicate upon the validity of martial law and the suspension of the constitution. The Supreme Court once again failed in this test and came up with a judgment validating martial law and constitutional deviation on the basis of the doctrine of state and civil necessity.11 It even authorized General Zia to make amendments in the constitution single handedly which indeed was a contradiction in terms. How could the Supreme Court, which itself could not introduce any amendments to the constitution, authorize anyone else to do so? The conferment of such power on a military ruler proved disastrous for the Constitution of Pakistan. Zia did not hesitate and made extensive amendments and alterations to the constitution in the most irresponsible and wanton manner.

After the death of General Zia, the Supreme Court regained some of its lost authority. During the period between 1988 and 1999, the Court handed down several sensitive judgments. In 1993, it struck down the order of the then-President, who wanted to dissolve the National Assembly at his discretion and dismiss the federal government.12 However, on two other occasions, the Supreme Court upheld the exercise of discretionary power to dissolve the National Assembly.13 There were a number of sound judgments given during this period

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The military takeover of October 1999 once again placed the Supreme Court in a difficult and critical situation. The new military ruler was demanding the validation of his military coup d’état and demanded conferment of power in order to being able to amend the constitution single handedly. The Supreme Court in January 2000 fixed the petitions that had been filed by various individuals and institutions challenging the military takeover. General Musharraf tried to pressure the incumbent Chief Justice, Saëd-uz-Zaman Siddiqui, to uphold his military takeover and to grant him power to amend the constitution. When the Chief Justice refused to budge under his pressure, Musharraf took the extreme act of dismissing him and five other judges of the Supreme Court under an unconstitutional arrangement that required all the judges of the Supreme Court and the High Courts to take oath under his Provisional Constitutional Order (PCO) and to abandon the oath they had taken under the constitution. Those who refused to take oath under the PCO or to whom Musharraf refused to give oath under the PCO would cease to be judges. In this way Musharraf was able to get rid of six independent judges in the Supreme Court, including the Chief Justice. The Court was left with seven pliant and unprincipled judges who agreed to take the oath under the PCO. One of them, Justice Irshād Īasan Khān, was rewarded with the office of the Chief Justice of Pakistan. These seven judges, along with some other judges who were hurriedly inducted into the Supreme Court, gave a judgment in May 2000 upholding the military takeover and conferred the power on General Musharraf to amend the constitution unilaterally and single-handedly. Thus, the Supreme Court of Pakistan became completely subservient to the will of the military dictator despite the fact that Irshād Īasan Khān was succeeded by three other judges as Chief Justices of Pakistan from 2002 to 2005. All Chief Justices were as weak and spineless as Irshād himself.

In June 2005, Justice Iftikhār Muḥammad Chaudhri was appointed Chief Justice of Pakistan. He started asserting his independence by forming a bench of the Supreme Court judges that reviewed the privatization of Steel Mills of Pakistan and held that it had been unlawful. The sale of the steel mills, the Court argued, was against the national interest because such a valuable national asset was being sold for peanuts. Chaudhri also interfered in the cases of missing persons whom the Musharraf regime had kidnapped, abducted, and handed over to the intelligence agencies of the United States of America after 9/11. The families of thousands of such persons were desperate to find out the whereabouts of their dear ones who had been made to disappear. No other Chief Justice or judge before him had dared to inquire into the matter due to its high sensitivity on account of the war on terror. However, the new Chief Justice summoned the senior officials of the intelligence agencies of Pakistan to furnish the whereabouts of the missing persons to the Supreme Court.

Some of the examples are: Benazir Bhutto v. Federation of Pakistan, PLD 1988 S.C. 416, in which it was held that no restrictions by way of registration, etc. can be imposed on a political party to deprive it from participation in a general election; Sh. Liaquat Hussain v. Federation of Pakistan, PLD 1999 S.C. 504, in which the Supreme Court held the military courts unconstitutional. In Shela Zia v. WAPDA, PLD 1994 S.C. 693, the Supreme Court held that environmental pollution caused by electromagnetic radiation of high voltage transmission lines of electricity posed a serious hazard to the quality of life and was therefore violative of the right to life.

The common English transcription of the name is Saeeduzzaman Siddiqui.


He succeeded in getting about two hundred of such missing persons recovered and released. He also encouraged judicial activism in the area of public interest litigation and interfered in a major case where the government was planning to set up a city in the high mountains, which would have resulted in severe environmental degradation, due to the cutting of large numbers of trees.

**IV. SUPREME COURT’S PRINCIPLED STAND**

The aforesaid acts of judicial activism did not find favor with General Musharraf, who regarded the judiciary as subordinate to his will. He was aware of the fact that in November 2007 his term of office as President would expire and he would have to seek election for the office of President in autumn. He also knew that being in the service of Pakistan as Chief of Army Staff, he was not qualified to run in the Presidential elections. Under the requirements of the constitution, he had first to retire as Chief of Staff of the Army and then wait for two years to qualify for being a candidate for the office of President of Pakistan. Therefore, he sought a verdict from the Supreme Court in clear violation of the constitution that would allow him to contest the election of President while being in uniform. He knew that Chief Justice Iftikhar Muhammad Chaudhri was too independent to give such an unconstitutional verdict for him. Therefore, on March 9, 2007, the Chief Justice was summoned to the Army House, where in the presence of three other Generals, who were heads of various intelligence agencies, General Musharraf demanded his resignation. He alleged that there were complaints of misconduct against him and that it would be better for him to resign before his case was referred to the Supreme Judicial Council for inquiry into the allegations of misconduct. Chief Justice Chaudhri did not buckle under the pressure of the generals and refused to resign. Consequently, a reference for inquiry into alleged misconduct was sent by General Musharraf against Chief Justice Chaudhri to the Supreme Judicial Council. The proceedings before the Supreme Judicial Council remained inconclusive because three out of five members of the Council were clearly biased against him. Ultimately, the case against Chief Justice Chaudhri was brought before the Supreme Court, where a thirteen-member bench in its verdict dated July 20, 2007 held that the reference sent to the Supreme Judicial Council against the Chief Justice was *malafide* (done in bad faith) and was constitutionally misconceived. Chaudhri, who had been suspended as Chief Justice by Musharraf on March 9, 2007, was restored to his position of Chief Justice on July 20, 2007.

The restoration of the Chief Justice was followed by judicial activism, in which the cases of missing persons and military action against the students and staff of the Red Mosque in Islamabad were filed and were being heard. A number of petitions were filed in August/September 2007 in which the *vires* of two offices being simultaneously held by Musharraf, i.e., that of the President and Chief of Army Staff, were challenged. It was also argued that he was disqualified to run for the office of President because of being in active military service. These cases were heard at length and the petitions were held to be inadmissible by a majority of six to three. Three dissenting judges held that the petitions were not only admissible but should also be allowed to proceed on the merits.

Since a majority of the judges hearing the said petitions were of the view that the petitioners did not have *locus standi* to challenge the qualifications of Musharraf to run for the election of President, one of the other presidential candidates, Justice Wajihuddin Ahmad,

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18 Chief Justice Iftikhar Muhammad Chaudhry v. The President of Pakistan, PLD 2007 S.C. 578. The detailed reasons are reported as PLD 2010 S.C. 61.
challenged the acceptance of nomination papers of Musharraf for election to the office of President before the Supreme Court. A ten-member bench of the Supreme Court on October 5, 2007 passed an order of injunction to continue the election process that had already commenced. The final notification of the election returns, however, would not be issued until the final decision of the petition pending in this case. Despite such injunction, the Chief Election Commissioner proceeded to hold the election, had the votes counted, and unofficially declared that Musharraf had been elected. However, the main petition about his disqualification continued to be heard on a day-to-day basis till November 2, 2007. The Attorney General was arguing the case that day and the case was adjourned to November 5. It was now clear that the hearing could be completed in a few days and the judgment might be announced by November 8 or 9, 2007. Musharraf, who was under the impression that the majority of the eleven-member bench hearing the case might decide against him, meaning that he would be held ineligible and disqualified as a presidential candidate, panicked. On November 3, 2007 he declared a state of emergency in the country, which was virtually a martial law in clear violation of the constitution. He suspended the constitution and asked the judges to take oath under his new Provisional Constitution Order (PCO).

Responding to these presidential measures, the Chief Justice, jointly with six other judges available in the building of the Supreme Court, passed an order on an application already pending before the Supreme Court restraining the government, including the President and the Prime Minister, from undertaking any action contrary to the independence of the judiciary. The judges of the Supreme Court and the High Courts, including the Chief Justices, were restrained from taking oath under the PCO or any other extra constitutional steps. The Court ordered the military commanders not to act on the basis of the PCO or to administer a fresh oath to any judge and also restrained them from undertaking any action contrary to the independence of the judiciary and prohibited all authorities from making any appointment of the Chief Justices or judges of the Supreme Court and the High Courts. Despite such clear orders by the Supreme Court, the military troops entered the Supreme Court premises, arrested the judges inside, including the Chief Justice, and placed them all under house arrest. However, out of eighteen judges of the Supreme Court, including the Chief Justice, thirteen judges refused to take oath under the PCO. Only five judges breached their oath under the constitution and took oath under the PCO and one of them, Justice ‘Abdul ‘Amid Dogar, was sworn in as Chief Justice of Pakistan. The Chief Justice and twelve other judges of the Supreme Court were kept detained in their respective residences. They were physically restrained from going to the Supreme Court to resume their functions on November 5, 2007. The Chief Justice and his entire family were under house arrest and were held incommunicado. No one could go to his residence and the whole area around his residence was completely cordon off. The Chief Justice remained under detention in his house for four-and-one-half months until he was ordered to be released by Yūsuf Rażā Gīlānī on assuming office as the Prime Minister of Pakistan on March 25, 2008.

19 This order of the Supreme Court is reproduced in the reported judgment titled Wajihuddin Ahmad v. Chief Election Commissioner, PLD 2008 S.C. 25.

20 Three documents were promulgated by Musharraf on November 3, 2007, namely: Proclamation of Emergency reported as PLD 2008 Federal Statutes 108; Provisional Constitution Order I of 2007 reported as PLD 2008 Federal Statutes 110; and Oath of Office (Judges) Order 2007 reported as PLD 2008 Federal Statutes 118.
V. LAWYERS’ MOVEMENT

The lawyers throughout Pakistan led a movement for the restoration of the status quo in the judiciary as it had existed on November 2, 2007. There was a massive crackdown against lawyers and thousands of them were arrested and imprisoned. The lawyers’ movement was joined by the political parties that were in the opposition. The new government, formed after general elections of February 18, 2008, resisted restoration of the judiciary, particularly restoration of the Chief Justice Iftikhār Muḥammad Chaudhri. The new government, though democratic, was wary of an independent judiciary and wanted a pliable and spineless Chief Justice like ‘Abdul Ḥamid Dogar. The head of the political party in power, Āsif ‘Alī Zardārī, made promises in writing on two occasions that the judiciary of November 2, 2007 would be restored but every time he reneged on his promises.  

On August 18, 2008, fearing removal after impeachment, Musharraf resigned as President. Zardārī was elected as the President of Pakistan on September 6, 2008. When President Zardārī backed out of his commitment to restore the judiciary of November 2, 2007, some of the judges of the Supreme Court who had been restrained from performing their functions finally gave up and agreed to rejoin the Supreme Court on the condition that each one of them would accept a letter of reappointment as judge of the Supreme Court and would take a fresh oath under the Constitution. They were promised that they would be given the same seniority as judges of the Supreme Court that they held on November 2, 2007.  

The breach of the promise to restore the judiciary to the status of November 2, 2007 on the part of President Zardārī resulted in deep disappointment and anger among the members of the legal fraternity and the political parties in the opposition. The leaders of the lawyers’ community called in December 2008 for a “long march” in March 2009 and for a sit-in after the long march before the parliament buildings. The long march commenced on March 12, 2009 from different parts of the country. On March 15, hundreds of thousands of people including lawyers, political party workers, and members of civil society assembled in Lahore to march on to Islamabad. The march in the night between March 15 and 16 stood approximately seventy kilometers from Lahore. Seeing the swelling number of participants in the march and fearing that more than a million people might reach Islamabad on March 16, President Zardārī and his government capitulated. The Prime Minister Gīlānī, at 6:00 a.m. on March 16, addressed the nation and announced that all the judges of November 2, 2007 would be restored. Two notifications were issued on March 17, 2009. One notification restored Chief Justice Iftikhār Muḥammad Chaudhri with effect from November 3, 2007 though in fact he was to resume his office on March 22 after the retirement of ‘Abdul Ḥamid Dogar on March 21. The other notification restored four judges of the Supreme Court and six judges of the High Courts.

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21 Murree Declaration of March 9, 2008 and Islamabad Communique of August 7, 2008.
22 Out of the thirteen judges of the Supreme Court who did not take oath under the PCO on November 3, 2007, one was an ad hoc judge whose period of appointment had lapsed in the meantime. Two of these judges had reached the age of 65 in the meantime and retired. Out of the remaining ten judges, five succumbed to the offer of reappointment and fresh oath. The remaining five judges, including the Chief Justice, stood firm and they were restored without any oath or letter of reappointment on March 17, 2009.
VI. CHALLENGES BEFORE THE RESTORED SUPREME COURT

The restored Chief Justice and the Supreme Court are facing a huge challenge at the time of this writing. The Supreme Court was packed by Musharraf with persons of suspect character and integrity. As many as eleven appointments were made to the Supreme Court by Musharraf while the Chief Justice and eleven judges of the Supreme Court were being held in confinement in their respective residences. These appointments included either retired judges of the High Courts or junior serving judges of the High Courts who were known to be weak, corrupt, and pliable. Musharraf knew that they would not stand up to the governments in power or act independently in any manner. As long as these people would continue to sit in the Supreme Court, the judiciary in Pakistan would not be an independent institution. The restored Chief Justice and judges of the Supreme Court would have to focus on clearing the Supreme Court of these persons who have a record of serving the military and civilian dictators. The other challenge confronting the Supreme Court is the case of missing people, which is an extremely sensitive issue. Out of thousands of people who disappeared after September 11, 2001, the whereabouts of most of them have not been known for the many years. Their families have been demanding justice a long time. The missing include persons who had been kidnapped or abducted by the intelligence agencies and are being either held without trial or have already been killed. The investigation of their cases is likely to touch the raw nerves of the U.S., the foreign superpower closely involved in Pakistani politics for decades which, despite avowed belief in democracy and fundamental rights, has maintained double standards, one for their own citizens and the other for the citizens of third world countries.

Another very important challenge before the Supreme Court was the agreement between the government and Tahrīk-i Nīfāz-i Shari‘at-i Muḥammadī (TNSM) under which a different system of justice, purportedly based on Shari‘ah, would be introduced in Swāt, which is part of the northern area of Pakistan. TNSM is an affiliate of the Taliban operating in Pakistan, and it forced the government to consent to such an agreement through militancy by killing hundreds of civilians there and by pushing half a million of them into refugee camps. This Niẓām-i ‘Adal (system of justice) was at variance with the court system and structure in Pakistan. It envisaged the establishment of Allaqā Qāżī courts as courts of first instance and Zila Qāżī Courts (district courts) as first appellate courts in the Swāt area. The capitulation of the government to this militant outfit and ceding of territory to them to introduce their own legal and judicial system had emboldened the leaders of TNSM to declare that the constitutional courts like the Supreme Court and the High Courts were un-Islamic and that they would be establishing their own superior courts, namely Dārul Qużā and Dārul Dārul Qużā. However, after the breakdown of the agreement, military action was ordered to end the onslaught of Pakistani Taliban on the constitution and the State of Pakistan. The military action has proved to be successful and the law and order has been restored in Swāt region.

The Supreme Court will have to stand up as the last defender of constitutional reason in this environment of capitulation to militancy on the part of the government in power. How the Court confronts this challenge and resolves the issues under the constitution will ultimately shape the course of events in Pakistan and the neighboring countries like Afghanistan, India, China, and Iran.

The actions of General Musharraf in imposing emergency rule on November 3, 2007, suspending the Constitution, sacking the judges of the Supreme Court and the High Courts, and all other acts and instruments made by Musharraf until December 15, 2007, purportedly amending the constitution, were challenged before the Supreme Court. Similarly, the
so-called judgments by those judges who took oath under Musharraf’s PCO, upholding such acts and instruments, were also challenged. The Supreme Court announced judgment in these cases on July 31, 2009 and held that:

a) the proclamation of Emergency of November 3, 2007 and all other acts and instruments purporting to suspend or amend the constitution by General Pervez Musharraf were unconstitutional and ultra vires the constitution;

b) the office of Chief Justice of Pakistan did not fall vacant on November 3, 2007 and as a consequence thereof the appointment of Justice Abdul Hamid Dogar as the Chief Justice of Pakistan was unconstitutional and void ab initio;

c) since Justice Dogar was never a constitutional Chief Justice therefore all appointments as judges of the Supreme Court, Chief Justices, and judges of the High Courts made in consultation with him during the period he unconstitutionally held the said office (November 3, 2007 to March 22, 2009) were declared to be unconstitutional and void ab initio and such appointees would cease to hold office forthwith;

d) all those judges of the Supreme Court or High Courts who took oath under the Provisional Constitution Order in violation of the order of a seven-member bench of the Supreme Court on March 11, 2007, may be impeached before the Supreme Judicial Council;

e) Islamabad High Court, which was established during General Musharraf’s emergency, was declared to be unconstitutional;

f) the code of conduct of the judges of the Supreme Court should be amended to the effect that any judge who offers any support in whatever manner to any unconstitutional functionary who acquires power otherwise than through the modes envisaged by the constitution would be deemed to have committed misconduct;

g) the sanctity of the oath of a judge to protect, preserve, and defend the constitution would be maintained and any violation of such oath would be considered as gross misconduct;

h) the judgments in the case of Tika Iqbal Mohammad Khan, original as well as in review, granting validity to the actions of General Pervez Musharraf, were held to be coram non judice, without any legal basis and hence of no legal effect.

The short order was announced on July 31, 2009 and the detailed reasons were released later. This historic judgment has reversed the earlier trend of the judgments of the Supreme Court favoring dictators and military rulers. It is a commendable effort to close the doors of judicial approval on any military adventurer or dictator assuming power of the state through force. It is a challenge for the Supreme Court that this judgment be implemented in letter and spirit so that the avowed objects for which it has been rendered are ultimately achieved.

In October 2007, Musharraf entered into an agreement with Benazir Bhutto allowing her to return to Pakistan to participate in the politics and general elections to be held in

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23 Tika Iqbal Muhammad Khan v. General Pervez Musharraf. PLD 2008 S.C.6. The detailed reasons of this judgment are reported as PLD 2008 S.C.178. The judgment in review is reported as PLD 2008 S.C.615.

24 The judgment is titled Sindh High Court Bar Association v. Federation of Pakistan. PLD 2009 S.C.879. The author was the principal counsel for the petitioner in this case and successfully argued the case at length.
early 2008 (she was assassinated two months after her return at an election rally in Rawalpindi). This agreement was made effective through an ordinance, known as National Reconciliation Ordinance, 2007 (NRO) providing for withdrawal of all cases of corruption pending against Binaźir, her husband Āsif ‘Ali Zardārī, and other members of political parties. NRO was challenged before the Supreme Court as *ultra vires* the constitution and was so declared by the Supreme Court in its verdict dated December 16, 2009, directing the reopening of all cases closed due to NRO. The execution of the verdict on NRO is becoming a challenge for the Supreme Court because the government in power is strongly resisting it, particularly because President Zardārī is himself an accused in a number of cases inside and outside Pakistan.25

The parliament has passed Constitution (Eighteenth Amendment) Act, 2010 in April 2010 amending, altering, adding, modifying, or deleting 100 articles of the constitution. Most of the amendments are commendable because they cleanse the constitution of most of the provisions introduced into the constitution by the military rulers, Musharraf and Zia‘-ul-Haq. However, the procedure and process for appointment of judges of the superior courts had been altered in a manner that they will be a massive interference of the administration and parliament in such appointments. This provision of the newly introduced Eighteenth Amendment (Art. 175A) has been challenged in a number of petitions before the Supreme Court seeking the verdict of the Court that the said provision is invalid on the touchstone of being violative of basic features of the constitution such as the independence of judiciary and its separation from other organs of the state. These petitions were heard by the full Supreme Court consisting of seventeen judges and headed by the Chief Justice.26 However the Supreme Court did not decide the case finally. By order dated October 18, 2010, the following observations have been made:27

In view of the arguments addressed by the learned counsel, *the* criticism made with regard to the effect of Article 175A on the independence of judiciary and the observations made in paragraphs 8, 9 & 10 as also deferring to the parliamentary mandate, we would like to refer to the Parliament for re-consideration, the issue of appointment process of Judges to the superior courts introduced by Article 175A of the Constitution, inter alia, in the light of the concerns/reservations expressed and observations/suggestions made hereinabove. Making reference to the Parliament for reconsideration is in accord with the law and practice of this Court as held in *Hakim Khan v. Government of Pakistan* (PLD 1992 SC 595 at 621)

This is for the first time ever in our national, judicial and constitutional history that such a serious challenge has been thrown by a cross section of society including some premier Bar Associations of the country to a legislation which was no ordinary piece of legislation but was a constitutional amendment. By making this unanimous reference to the parliament for re-consideration, we did not consider the sovereignty of the parliament and judicial independence as competing values. Both the institutions are vital and indispensable for all of us and they do not vie but rather complement each other so that the people could live in peace and prosper in a society which is just and wherein the rule

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25 Dr. Mubashir Hassan v. Federation of Pakistan. The short order is reported as PLD 2010 S.C.1 while the detailed reasons are reported as PLD 2010 S.C. 265.

26 The author is the principal counsel in several of these petitions and has argued the case at length.

of law reigns supreme. We can also not lose sight of the fact that we, as a nation, are passing through testing times facing multidimensional challenges which could be best addressed only through measures and methods where societal and collective considerations are the moving and driving force. We had two options; either to decide all these petitions forthwith or to solicit, in the first instance, the collective wisdom of the chosen representatives of the people by referring the matter for reconsideration. In adopting the latter course, we are persuaded primarily by the fact that institutions may have different roles to play, but they have common goals to pursue in accord with their constitutional mandate.

While keeping the cases pending, the Supreme Court has referred the matter of Art. 175A to the parliament for amendment in accordance with observations made in the said order. The parliament considered the observations made by the Supreme Court (redundant) and passed the Constitution (Nineteenth Amendment) Act, 2010 on January 4, 2011. In the Nineteenth Amendment, the parliament accepted the recommendations of the Supreme Court that the number of senior most judges of the Supreme Court in the Judicial Commission be increased from two to four. However, the Supreme Court had also suggested that if the recommendation of the Judicial Commission is not agreed to or endorsed by the Parliamentary Committee, the latter should refer the matter back to former giving sound reasons for such disagreement. If the Judicial Commission, after considering the reasons, reiterates its earlier recommendation, it would be final and the President would make the appointment accordingly. The parliament, while passing the Nineteenth Amendment did not accept this suggestion of the Supreme Court.

Although the parliament did not accede to the recommendation of the Supreme Court to make the finding of the Parliamentary Committee under Art. 175A justiciable, the Supreme Court was soon called upon to adjudicate upon the justiciability of the reasons for rejection of candidates for appointment as judges of high courts by the Parliamentary Committee. The Parliamentary Committee had rejected four nominees as judges of the Lahore High Court and two nominees as judges of the High Court of Sindh who had been recommended by the Judicial Commission. The decision of the Parliamentary Committee was challenged before the Supreme Court which held that the same was subject to judicial review by the Supreme Court. The decision of the Parliamentary Committee was set aside and the federal government was directed to implement the recommendation of the Judicial Commission in respect of appointment of the aforementioned six nominees as judges of the Lahore High Court and the High Court of Sindh.

It is evident from the above that the Supreme Court of Pakistan faces ever greater challenges these days and is working hard to remain the last defender of Constitutional Reason in Pakistan.

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I. INTRODUCTION

On August 31, 2007, Malaysia celebrated fifty years of its independence constitution, which provided and continues to provide the underpinnings of constitutional rule of a nation of over twenty-seven million people comprising the predominant races of Malays, Chinese, and Indians. By the standards of the nations that emerged from colonial rule, fifty years of stable constitutional rule and economic advancement have resulted in a polity which has been held up as a model for many developing countries. It is obvious that the Malaysian constitutional framework cannot be replicated wholesale without taking into account the various racial, cultural, religious, and lingual dimensions of the Malaysian polity. Malaysia does not fall within the spectrum of liberal democracies. Instead, Malaysia and its neighbor, Singapore, “are frequently characterized as non-liberal, soft-authoritarian regimes.”

Malaysia is an enlargement of the Federation of Malaya, which shook off the British colonial shackles in 1957 as a result of a process of peaceful negotiations between a mission led by Tunku Abdul Rahman, later to become the first prime minister of the new nation, and the British government. A constitutional commission, chaired by Lord Reid (United Kingdom), and comprising Sir Ivor Jenning (United Kingdom), Sir William McKell (Australia), B. Malik (India), and Justice Abdul Hamid (Pakistan), was established and entrusted with the role of making recommendations “for a federal form of constitution for the whole country as a single self-governing unit within the Commonwealth based on

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parliamentary democracy with a bicameral legislature. The Independence Constitutional Commission was instructed to include provisions for:

1. The establishment of a new strong central government with the states and the settlements enjoying a measure of autonomy;
2. The safeguarding of the position and prestige of the Malay rulers;
3. A constitutional head of state for the Federation to be chosen from among the Malay rulers;
4. A common nationality for the whole of the Federation; and
5. The safeguarding of the special position of the Malays and the legitimate interest of other communities.

The first key objective influencing the drawing up of the new constitutional framework was that there must be “the fullest opportunity for the growth of a united, free and democratic nation.” The second was that there must be “every facility for the development of the resources of the country and the maintenance and improvement of the standard of living by the people.”

The “blessings” of the Malaysian polity have already been recounted elsewhere. While it may be politically incorrect to articulate this, British colonial rule resulted in some fortuitous circumstances that helped to nourish the state of constitutionalism in Malaysia. Malaysia, unable to avoid the historical reality of colonization, was fortunate in that it was colonized by the British rather than by some of the other European powers of that era. With the British came the “reception” of British common law, British notions of the rule of law based on a Westminster form of parliamentary government, a solid judicial and legal system, the separation of powers, and the importance of an independent judiciary. Malaysia further benefited from the fact that its first three prime ministers had received their legal training in the homeland of the common law. What is also gratifying is that, unlike many failed emergent nations, the Malaysian military forces have never sought to intervene in the political life of the Malaysian nation. The acknowledgment of civilian control over the military forces precluded the hiatus in the constitutional framework experienced by countries such as Fiji, Pakistan, and many African countries.

Since the attainment of Merdeka, or independence, in 1957, the Malaysian nation has been ruled by a coalition called the Barisan Nasional, i.e., National Front. Among its members, there are three main parties representing the three major racial groups in Malaysia—United Malays National Organization (UMNO), Malaysian Chinese Association (MCA), and the Malaysian Indian Congress (MIC). Malaysia has yet to be tested in terms of whether there can be a peaceful transfer of political power at the national level in the event the ruling coalition should lose political power. The Malaysian polity is currently going through a testing time in the wake of an election in March 2008, which saw the government losing a significant number of seats in the national parliament. For the first time in Malaysian history, there is a strong viable opposition that is capable of wresting power from the current government and forming an alternative government.

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4 Id.
5 Id. 4, para 14.
6 H.P. Lee (n 1).
The Malaysian constitutional instrument did not set out to create an Islamic state. Art. 3(1) provides: “Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.” The constitution entrenches, in Art. 11, the right of every person “to profess and practise his religion and to propagate it.” Propagation of any religious doctrine or belief among persons professing the religion of Islam may, under the constitution, be controlled or restricted by state law or federal law in the case of the federal territories. Art. 3 was inserted as a result of the strong views of one member of the Reid Constitutional Commission, Justice Abdul Hamid, who nevertheless described it as an “innocuous” provision. This was despite the fact that it was the hereditary rulers’ “considered view that it would not be desirable to insert some declaration such as has been suggested that the Muslim faith or Islamic faith be the established religion of the Federation.” Law Professor Shad Salim Faruqi has stated that “there is historical evidence in the Reid Commission papers that the country was meant to be secular and the intention in making Islam the official religion of the Federation was primarily for ceremonial purposes.” Given the general consensus that a secular nature of the Malaysian Constitution was intended, the political and legal discourse in Malaysia employs language familiar to any liberal democracy—the rule of law, separation of powers, democratic traditions, constitutional conventions, and the primacy accorded to the protection of fundamental rights.

II. KEY INSTITUTIONS OF THE MALAYSIAN CONSTITUTIONAL SYSTEM

Constitutionalism denotes a state of limited government. It requires constraints be placed on the powers of government. The common parlance pertaining to the notion of constitutionalism is the notion of checks and balances. In Malaysia, the key institutions relevant to a discussion of the control exerted over the exercise of governmental powers are the Federal Parliament, the executive, the Yang di-Pertuan Agong (King) and the Conference of Rulers, and the Judiciary. The legislative authority of the Federation is vested in a bicameral Parliament consisting of the King, the Dewan Negara (Senate), and the Dewan Rakyat (House of Representatives). The executive authority of the Federation is vested in the King and is exercisable, subject to the provisions of any federal law and of the Second Schedule of the Constitution, by him or by the cabinet, or any minister authorized by the cabinet. The judicial function is performed by a hierarchy of courts with the Federal Court at its apex.

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11 Art. 44 of the Malaysian Constitution.
12 Art. 39 of the Malaysian Constitution.
13 Art. 121 of the Malaysian Constitution.
A. The Executive and the Parliament

To yoke the two institutions of the executive and the Federal Parliament together in a discussion of Malaysian constitutionalism is to recognize the political reality that the Parliament merely gives effect to the wishes and legislative agenda of the government. Putting it in fairly crude terms, the track record of the Parliament is that it is perceived to be a “rubber stamp” institution. Since the attainment of independence in 1957, the Parliament has, until the recent general elections on March 8, 2008, been dominated by the ruling coalition, the Barisan Nasional. The 2008 election resulted, for the first time, in a failure by the Barisan Nasional to retain its two-thirds majority in the House of Representatives. A coalition of opposition parties under the leadership of Anwar Ibrahim captured 82 of the 222 seats. On August 26, 2008, Anwar Ibrahim won the parliamentary seat for Permatang Pauh which was vacated by his wife Wan Azizah Wan Ismail in a by-election with a massive majority. He was formally appointed as leader of the opposition after taking the oath on August 28, 2008.

From 1957 to 2008, the wielding of a two-thirds majority by the Barisan Nasional in the Federal Parliament eroded the state of constitutionalism. Under the Malaysian Constitution, amendments to the constitution, apart from some prescribed exceptions, can be effected by the passage of amending legislation with the support of a two-thirds majority vote of the membership of each House of Parliament. The Parliament is bicameral, with the Senate being originally intended to act as a house of review and as a protector of state interests. Using its sizable majority, the government was able to amend the constitution so that the number of appointed senators exceeded those elected by the states leading to the widely held view that the Senate is a “toothless” tiger.

However, should there be a change of government, the threat to constitutionalism rears its head. With appointed senators in the majority, all appointed by the ruling government, the Senate can be an obstructive force in relation to the implementation of the election platform of any new government formed by the opposition.

It is not feasible to set out in detail all the significant changes that have been effected to the constitution since 1957. While it is acknowledged that many constitutional amendments were dictated by necessity, such as to effect an enlargement of the Federation of Malaya into the Federation of Malaysia in 1963 and to provide for the ejection of Singapore from the Malaysian Federation in 1965, many other amendments were designed to enhance the powers of the executive, diminish the role of the Malay rulers, and erode the fundamental rights guaranteed by the constitution.

Nowhere is this more evident than the enhancement of the powers of the government to counter subversive activities and to proclaim a state of emergency. The independent Federation of Malaya came into constitutional existence in the midst of a war against communist insurgents. That insurgency officially ended in 1960. It was felt at the time of the crafting of the constitution that exceptional powers were still needed to deal with the

14 Art. 159 of the Malaysian Constitution.
communist threat. While the constitution expressly provides for a power of preventive detention, the original provisions prescribed some safeguards to prevent an abuse of this power. Originally, preventive detention of a Malaysian citizen pursuant to an executive order was for a period of three months only “unless the advisory board . . . has considered any representation made by him . . . and has reported before the expiration of that period, that there is in its opinion sufficient cause for detention.” If the advisory board decided that there was no sufficient cause for the further detention of a citizen, he must be freed. The original safeguard was weakened by a 1960 constitutional amendment. A further amendment in 1976 completely undermined the safeguards of the original provision in that a citizen can continue to be detained “unless an advisory board . . . has considered any representations made by him . . . and made recommendations thereon to the [King] within three months of receiving such representations, or within such longer period as the [King] may allow.”

The Malaysian Constitution, like those of many new emergent nations, embodies a constitutional framework of emergency powers in Art. 150. Originally, a proclamation of emergency ceased to have force at the expiration of two months from the date of issuance, and similarly, any ordinance promulgated by the King automatically lapsed at the expiration of fifteen days from the date on which both Houses of Parliament were sitting. In 1960, this was amended so that both a proclamation of emergency and an ordinance have a continuity of life until such time as resolutions are passed by both Houses nullifying them. Among the other changes to Art. 150 was the insertion of a constitutionalized privative clause effected by a constitutional amendment in 1981. This change in effect provided the executive with an unbridled power to declare an emergency at will, and to perpetuate emergency rule. The satisfaction of the King in proclaiming a state of emergency “shall not be challenged or called in question in any court on any ground.” Furthermore, “no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground,” regarding the validity of a proclamation of emergency, or an ordinance, or their continued operation thereof. As a consequence,

The amendments relating to emergency powers and preventive detention have the effect of enlarging the armory of legal powers already in the hands of the executive arm of government. Conversely, they narrow the jurisdiction of the courts and diminish their role as the guardians of the Constitution.

The Malaysian Parliament, until March 2008, has not been an effective body in the oversight of exercise of executive powers. There is very little accountability in relation to incompetent administration. The emergence of a strong opposition as a result of the general elections of March 8, 2008 will eventually transform the parliament into a body that will ensure a higher degree of accountability and transparency in governmental administration.

B. The King and the Conference of Rulers

Malaysia has a unique system of rotating kingship. Nine of the thirteen states in the Federation have hereditary Sultans. These rulers constitute the Conference of Rulers which

17 Report of the Federation of Malaya Constitutional Commission (n 3) 75, para 173.
19 Art. 150(8) of the Malaysian Constitution.
20 H.P. Lee (n 18) 109.
also includes the heads of the states not having a ruler. Every five years the nine Sultans elect, from among their own, one who ascends the throne as King of Malaysia. The votes of at least five Sultans are necessary for a Sultan to be elected to or dismissed from the office of King. Hence, the King, when dealing with the government of the day, cannot ignore the views of the majority of the Conference of Rulers. However, the King is required by the constitution to act on the advice of the cabinet or a minister acting under the general authority of the cabinet. The King may act in his discretion in the performance of the following functions:

(a) the appointment of a Prime Minister;
(b) the withholding of consent to a request for the dissolution of Parliament;
(c) the requisition of a meeting of the Conference of Rulers concerned solely with the privileges, position, honors and dignities of their Royal Highnesses, and any action at such a meeting, and in any other case mentioned in this Constitution.

Each Sultan is head of Islam in his own state. The King is head of Islam in his home state, in those states without hereditary rulers, and in any federal territory. The ruler’s pre-1957 discretionary prerogative of mercy was transformed into a power to be exercised by the ruler on the advice of a State Pardons Board.

A rocky relationship with the Mahathir government led to two major confrontations in 1983–1984 and 1992–1993. Royal assent to legislation is vital before it becomes enacted law. The concerns that some rulers might regard the royal assent as amounting to a veto were allayed by the constitutional amendments that sparked the 1983–1984 crisis. The second confrontation of 1992–1993 further eroded the privileged position of the rulers as a result of constitutional amendments introduced by the Mahathir government to remove their immunities. The original terms of Art. 181(2) were sweeping: “no proceedings whatsoever shall be brought in any court against the ruler of a State in his personal capacity.” The first prime minister of Malaysia, Tunku Abdul Rahman, perturbed by the actions of some rulers, had in 1984 said:

In this democratic, egalitarian age it is undesirable that anyone should be completely above the law. If the Ruler is to be made liable, as in the case of a private person, under the provision of the criminal law of Malaysia (which is a Federal law), then appropriate constitutional amendment is necessary.

The ultimate result of the 1992–1993 tussle was the creation of a Special Court to try an errant ruler. A decision of the Special Court is final and conclusive, and shall not be
challenged or called in question in any court, on any ground. It can be said today that the rulers have come to terms with their position as constitutional monarchs obliged to act in accordance with the rule of law and the constitution. The Conference of Rulers has now emerged as an institution commanding respect from Malaysians from all walks of life through its quiet and diplomatic role in providing the government with its views on the affairs of the country. Although the powers of the Conference of rulers have been drastically eroded, it continues to play an invaluable role in the governance of the Malaysian nation. It would be foolhardy for a national government to treat it as a rubber stamp institution, especially a government that may not command widespread popular support, and particularly when the opposition has expressed a policy of restoring the power of the Malay rulers to veto legislation.

C. The Judiciary and the Supremacy of the Constitution

In Malaysia, the constitution is declared by Art. 4 to be the “supreme law of the Federation.” Art. 4 goes on to reinforce the primacy of the constitution by stating that any law passed after Merdeka day that is inconsistent with the constitution “shall to the extent of the inconsistency, be void.”

The supremacy of the Malaysian Constitution is protected by the judiciary. Sultan Azlan Sháh of Perak, the Lord President of Malaysia in 1982–1984, succinctly explained:

The Constitution is the supreme law of the land and no one is above or beyond it. And the court is the ultimate interpreter of the Constitution: it is for the court to uphold constitutional values and to enforce constitutional limitations. This is the essence of the rule of law.27

In delivering the judgment of the Federal Court of Malaysia in the 1977 case of Loh Kooi Choon v. Government of Malaysia,28 he declared as follows:

[The Malaysian Constitution] is the supreme law of the land embodying three basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the state may encroach. The second is the distribution of sovereign power between the States and the Federation. . . . The third is that no single man or body shall exercise complete sovereign power but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not men.29

The primacy of the constitution is also underlined by the terms of the oath of office that ministers, Members of Parliament, and judicial officers have to take upon their appointment. All are required to bear true faith and allegiance to Malaysia and “preserve, protect and defend its Constitution.”

Constitutionalism requires the organs of government to observe the limits imposed by the constitution. A court may not interfere with the process of enacting a law but

29 Id. 188.
can invalidate the law once royal assent has been given if the court finds a transgression of the constitution. Thus, in *Public Prosecutor v. Dato’ Yap Peng*, a federal law was struck down by the Supreme Court (now renamed “Federal Court”) as the impugned law was held to be an encroachment upon the judicial power of the Federation. In *Stephen Kalong Ningkan v. Tun Abang Haji Openg and Tawi Sli*, the Chief Minister of the Malaysian State of Sarawak (Stephen Kalong Ningkan), who had been dismissed by the State Governor, was reinstated when the Court declared his dismissal void and restrained his rival from acting as Chief Minister. The Court held that there had been a non-conformity with the provisions of the State Constitution.

To secure the rule of law the independence of the judiciary must be guaranteed; otherwise its power to review the actions of the other arms of government to determine whether they conform to the constitution and the law would be diminished. Security of tenure of judicial officers is guaranteed by the constitution. Judges hold office till the age of sixty-six unless they have been removed in accordance with the procedures prescribed by Art. 125. Removal of a judge is effected following a recommendation by a tribunal that a judge should be removed on the ground of a breach of the code of ethics or on the ground of inability, from infirmity of body or mind or any other cause, to properly discharge the functions of the judge's office. The constitution also prohibits judicial remuneration to be varied to the disadvantage of a judge during his or her term of office. It is also prohibited to discuss in either House of Parliament the conduct of a judge of the Federal Court, Court of Appeal, or High Court, except on a substantive motion of which notice has been given by not less than one-quarter of the total number of members of that House.

The Malaysian Constitution adopted a tribunal system for the removal of a judge and would at first glance appear to be a more superior mode than the system of removal by an address of parliament adopted by many other countries. The constitution requires the tribunal to be composed of “not less than five persons who hold or have held office as judge of the Federal Court, the Court of Appeal or a High Court.” If it appears to the King expedient to do so, the King may appoint persons “who hold or have held equivalent office in any other part of the Commonwealth.” Considerable doubts were raised as to the efficacy of the tribunal system in ensuring a fair mode for judicial removal by the dismissal of Lord President Tun Salleh Abas in 1988.

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30 [1987] 2 MLJ 311 (HC) and 316 (SC).
32 Art. 125 (3).
33 Art. 125 (?).
34 Art. 127.
III. THE JUDICIARY IN CRISIS

The 1988 crisis was triggered by a letter sent by Tun Salleh Abas to the King following a meeting of the judges in the capital city of Kuala Lumpur. The convening of this meeting was the culmination of exasperation and anger of judicial officers over ongoing attacks on the judiciary by prime minister Mahathir. One of the cases decided by the courts that had incurred the wrath of the prime minister was the Berthelsen case, in which a foreign journalist, Berthelsen, was notified that his employment pass had been canceled and that he would be expelled from the country. The Supreme Court held that there had been a denial of natural justice as Berthelsen had not been afforded an opportunity to make representations given that the stipulated period of the pass had not yet expired. This natural justice notion based on the doctrine of “legitimate expectation” is an unsurprising notion. However, Mahathir was of the view that the judiciary was overstepping its role and strongly criticized the Court. This view of the prime minister ignored the standpoint of the Court, which did not seek to deprive the minister of his power to revoke the employment pass and to deport the journalist. All that the Court was saying was that the journalist should have been given an opportunity to be heard and once that had been done, there was nothing to stop the minister from exercising his power to revoke and deport. Another case which drew the ire of the prime minister was the case of Dato’ Yap Peng, in which a law which empowered the Public Prosecutor to issue a certificate requiring the Court before which the case was pending to transfer it to the High Court, was invalidated on the basis that the impugned law was an “intromission into the judicial power of the Federation.” The government subsequently responded by amending Art. 121 of the constitution to provide that the High Court and inferior courts “shall have such jurisdiction and powers as may be conferred by or under federal law” in lieu of the express vesting of the judicial power of the Federation. The government subsequently responded by amending Art. 121 of the constitution to provide that the High Court and inferior courts “shall have such jurisdiction and powers as may be conferred by or under federal law” in lieu of the express vesting of the judicial power of the Federation. In addition, a new clause (1A) was added to Art. 121 which provides that the civilian courts cease to have jurisdiction in respect of anything within the jurisdiction of the Shari’ah courts. Art. 121(1A) has led to a “jurisdictional imbroglio” arising from cases which either involve “Muslim and non-Muslim litigants” and/or “mixed questions of religious and civil laws.”

There were other underlying political factors that placed the judiciary on a collision path with the government. In Malaysia, it is the traditional practice that whoever is elected the President of the dominant UMNO party is appointed the Prime Minister of Malaysia. At the party’s general assembly elections in 1987, Mahathir triumphed over his rival (Tengku Razaleigh) by a very slim majority. An application was made to the court by eleven dissatisfied members challenging the validity of the election. The trial judge held that UMNO had become an unlawful society because of certain registration irregularities and refused to entertain an application for a declaration that the election was null and void. When an appeal was made to the Supreme Court, Tun Salleh, in an unprecedented move, directed a full bench of nine Supreme Court judges to hear the appeal. Mahathir’s political fortunes hung in the balance. Tun Salleh found himself summoned to the Prime Minister’s office where he was told that his letter had so angered the King that the King wanted

37 Public Prosecutor v. Dato’ Yap Peng [1987] 2 Malayan Law Journal 311 (High Court) and 316 (Supreme Court).
38 Id. 319.
39 See Li-ann Thio, “Jurisdictional Imbroglio: Civil and Religious Courts, Turf Wars and Article 121 (1A) of the Federal Constitution” in Andrew Harding and H.P. Lee (eds) (n 34) 197–226.
him replaced. However, the King was advised that under the constitution it was necessary to establish a tribunal to try him. Tun Salleh, who initially expressed a desire to resign but then decided to stay on, found himself in the eye of a storm. An application by Tun Salleh for an adjournment to enable an overseas Queen’s Counsel (now Lord Lester of Hernehill) to represent him was rejected. The tribunal also rejected his application for a public hearing. The composition of the tribunal was criticized, as the chair of the tribunal was Tun Hamid, who was next in line for consideration of the top judicial office in the event that Tun Salleh was removed from office. This was clearly in violation of the rules of natural justice but Tun Hamid refused to recuse himself. Other members of the tribunal, except for Ranasinghe CJ of Sri Lanka, were people who were not of equivalent status to Tun Salleh. A day before the tribunal was to sit, Tun Salleh turned to the courts for relief. He sought an order to restrain the tribunal from making any investigation, report or recommendation. When the trial judge was perceived to be dragging his feet on the application, Tun Salleh turned to the Supreme Court. Five Supreme Court judges granted an oral application by Tun Salleh for a limited stay, restraining the tribunal from submitting its report to the King. Tun Hamid, after consulting the Prime Minister, made a representation that the “misbehavior” of these judges justified their removal from office. The King then ordered a second tribunal be established to try these five Supreme Court judges. This time the chair of the tribunal in the face of a submission of bias recused himself, and another chair was appointed.

Following the report of the first tribunal, the King removed Tun Salleh from office. The same day as the removal took effect, the “UMNO 11” appeal was heard, and the following day was dismissed. The second tribunal handed down a report which led to the dismissal of two of the five Supreme Court judges. The other three suspended judges were reinstated. Tun Hamid, a month later, was elevated to the highest judicial office. From that point onward, confidence in the independence of the Malaysian judiciary plummeted, fuelled by a number of controversial judicial promotions and appointments.

The judiciary turned on itself. In one case a member of the Court of Appeal, in overruling a High Court case, invoked a quote from Shakespeare’s Hamlet: “Something is rotten in the state of Denmark.” The superior courts at that time were temporarily accommodated in a building called “Denmark House.” The Court of Appeal had found that the manner in which the case was handled could lead right-thinking people to believe that the litigants could choose the judge before whom they appeared. The Federal Court under Tun Eusoff Chin (who succeeded Tun Hamid) overruled the Court of Appeal and severely criticized it. In an unprecedented move, Tun Eusoff Chin ordered portions of the judgment of one of the Court of Appeal judges (NH Chan JCA) to be expunged. But the Court of Appeal had the last laugh when some ten years later, a High Court judge held the Federal Court’s judgment to be a nullity. Tun Eusoff Chin, by co-opting a High Court judge to sit on the Federal Court appeal, had wrongly empanelled the Court, contrary to the constitution. The appointment of Tun Dzaiddin to succeed Tun Eusoff Chin saw the judiciary beginning to regain “some of the confidence that had hitherto been destroyed.”

40 For his own version of the crisis, see Tun Salleh Abas, The Role of the Independent Judiciary (The Sir John Foster Galway Memorial 1989).
43 Visu Sinnadurai (n 35) 195.
The trials and tribulations of the Malaysian judiciary have been documented elsewhere. Suffice it to say that the confidence in the independence of the judiciary reached such a low point that it was elevated into an issue of national concern. The successor to Mahathir as Prime Minister, Abdullah Badawi, initiated moves to restore public confidence in the judiciary. His support for a Judicial Appointments Commission was underlined by a public expression of “regret” over the treatment of the judges in the 1988 convulsion. Ex gratia payments were made to Tun Salleh Abas and the other suspended and dismissed Supreme Court judges. These moves were perceived by some quarters as a response by Abdullah Badawi to embarrass Mahathir and to counter the latter’s efforts to undermine him. Legislation was recently passed by the Parliament for the establishment of a Judicial Appointments Commission.

Tun Hamid, who chaired the first tribunal that led to the removal of Tun Salleh, was appointed to succeed the latter as Lord President. The Malaysian Bar Council sought, unsuccessfully, to initiate court proceedings against Tun Hamid. Tun Hamid’s successor as the Chief Justice of Malaysia, Tun Eusoff Chin, found himself embroiled in a controversy when pictures appeared on the Internet showing him and his family with a well-known Malaysian lawyer and his family while holidaying in New Zealand. This conduct was criticized as “improper” by the then-de-facto Minister, Rais Yatim. A central concern in the contemporary politics of Malaysia is the reduced standing of the judiciary. A number of highly publicized embarrassing events, such as the disclosure of a purported conversation between a well-connected lawyer (VK Lingam) and Fairuz Sheikh Abdul Halim (who had succeeded Tun Dzaddin as the Chief Justice of Malaysia) concerning promotion of certain judges, have led to widespread disquiet and concerns over the integrity and independence of the judiciary.

The constitution provides for judicial appointments to be made by the King “acting on the advice of the Prime Minister, after consulting the Conference of Rulers.” In form, the judicial appointments are made by the King, although in reality, the King is constitutionally mandated to act in accordance with the advice of the Prime Minister. This is so in the case of the appointment of the Chief Justice of the Federal Court, the President of the Court 44 See generally Visu Sinnadurai (n 35); Wu Min Aun (n 41).
44 “PM’s Delivering Justice, Renewing Trust’ Speech,” The Star Online (April 18, 2008), http://thestar.com.my/services/printerfriendly.asp?file=/2008/4/18/nation/20991631, accessed November 25, 2009. See also Report of the Panel of Eminent Persons to Review the 1988 Judicial Crisis in Malaysia (July 26, 2008, Kuala Lumpur). This report, which was launched by the president of the Malaysian Bar (Dato’ Ambiga Sreenevasan) on August 29, 2008 concluded that Tun Salleh was innocent of all the charges against him and also absolved the senior judges involved in the 1988 judiciary crisis. The members of the panel were: J.S. Verma (former Chief Justice of India), Fakhruddin G. Ebrahim (retired Attorney-General of Pakistan), Dr. Asma Jahangir (Chairman of the Pakistan Human Rights Commission), Dr. Gordon Hughes (past President of LAWASIA), Tan Sri Abdul Aziz Abdul Rahman (senior legal practitioner from Malaysia), and Dato’ Bill Davidson (senior legal practitioner from Malaysia).
46 On June 9, 2008 there was widespread media reporting of allegations made by a High Court judge (Justice Ian Chin) that former Prime Minister Mahathir had sent judges to a “boot camp” for “indoctrination.” The judge tendered his resignation in the wake of the controversy.
48 Visu Sinnadurai (n 35) 191.
49 A Royal Commission was established to investigate the matter. It handed down a report which attracted wide publicity but to date the government has shown no signs of acting on it.
50 Art. 122B.
of Appeal, and the Chief Judges of the High Courts and the other judges of these courts. The Conference of Rulers has made it clear that the consultation process cannot be treated lightly. The actual process was explained by Sultan Azlan Shāh as follows:

The Prime Minister submits the names of the candidates to the Conference of Rulers. The Conference then submits its views to the Prime Minister before he tenders his advice to the [King]. Therefore, the views of the Conference are, strictly speaking, given to the Prime Minister. It is then for him to consider these views before he makes the final recommendation to the [King]. Only when such a procedure is followed can the Conference of Rulers play an effective role in the “advising” process.51

In early 2007, the Conference of Rulers was reported to have opposed a decision by the Badawi government to give a six-month extension to Ahmad Fairuz Sheikh Abdul Halim upon reaching the retirement age as Chief Justice of the Supreme Court. The Conference of Rulers also rejected the government’s choice to fill the position of Chief Judge of the High Court of Malaya.

Sultan Azlan Shāh has on a number of occasions spoken openly about the public concern over the judiciary. He emphasized as follows:

Amongst the three organs of government, the executive, the legislature and the judiciary, the judiciary must always remain independent because a judiciary which is not independent cannot have the confidence of the people. In any modern system of government, a judiciary which ceases to have the confidence of the people serves no purpose at all.52

The Conference of Rulers has since the last crisis of 1992–1993 reshaped its role as a body providing wise counsel to the government and has shown its preparedness to act decisively and cohesively in the interest of protecting judicial independence.

There are many other institutions, governmental and non-governmental, that play a very important and significant role in maintaining the rule of law by tempering the abuse of powers by those controlling the levers of power in the country. The vigilance of the Malaysian Bar Council, which vigorously defends the independence of the judiciary and the somewhat significant role of Suhakam, a human rights body, in educating the public on the need to protect fundamental rights, are worth mentioning.53 A comprehensive study of the institutional control of constitutionalism in Malaysia must entail also a study of the effectiveness of mechanisms to stamp out the cancer of corruption. Of high importance is the need to ensure that bodies responsible for the conduct of elections are of the highest integrity.

IV. CONCLUDING OBSERVATIONS

The strong foundations for a flourishing constitutionalism are built by the individuals who make up the different institutions of government. Unless they are people of honesty and integrity, the track to constitutionalism will be an extremely difficult one. To prevent public officials from being corrupted by bribes it is important to have an independent anti-corruption body with sufficient powers to tackle the problem and an independent judiciary to maintain the rule of law. History provides cogent evidence of many countries that have been wrecked because their founding leaders and sycophantic disciples ended up as power-hungry and dishonest people who are solely interested in plundering the national coffers and retaining control of the government at any cost.

The first lesson from the Malaysian experience is that the political leaders must view the constitutional instrument as a “sacrosanct” document. It should be a blueprint for government that should not be easily amended for expedient purposes. The legislative arm of government should be constrained in terms of its power to amend the constitution according to its whims and fancies.

The second lesson is that Parliament must be strengthened to act as an effective body that can ensure that legislation is subjected to close scrutiny and that the executive arm of government is rendered accountable to it for any abuse of power.

The third lesson is the importance of a free press. Muzzling of the press is quite often an aim of those holding the levers of political power. A tame press precludes accountability to the public regarding questionable governmental activities, permits a state of corruption to flourish, and prevents justice being accorded to aggrieved members of the public.

In Malaysia, up to 2008, the changing balance of powers had led to a parliament which acted as a rubber stamp and was unable to enforce public accountability on the part of government officials and those controlling the levers of political powers. The diminution of the influential role of the Conference of Rulers further bolstered the growth of overweening executive powers. More tragically, the independence of a once highly respected judicial institution was undermined, leading to an erosion of public confidence in the institution.

The Malaysian experience indicates that the keystone of the rule of law is an independent judiciary. It has been said:

Members of the public should be confident that the courts can be relied upon to perform their functions independently, impartially and according to law. Without that confidence, judges cannot expect their decisions to be respected.\(^{54}\)

The Malaysian experience illustrates that a hard-earned judicial reputation can be easily diminished but is very difficult to restore. A truly independent judiciary provides a bulwark against executive or legislative encroachments on civil liberties and is fundamental to the operation of a separation of powers doctrine. That doctrine ensures proper checks and balances on the other organs of government exercising the powers vested in them.

Vigilance and courage of right-minded Malaysian citizens are needed to ensure that the Malaysian polity pursues a path of constitutionalism. The temptation to weaken the

judiciary by those who seek to cling to power at all costs by making the guardian of the constitution compliant to the government of the day must be resisted vigorously. It is unclear at this stage whether the politicized judiciary can fully regain its pride of place in Malaysian society.\textsuperscript{55}

\textsuperscript{55} A constitutional crisis arising from defections by three state Legislative Assembly members in the state of Perak led the state Ruler, Sultan Azlan Shâh, to dismiss the state government under the control of the Pakatan Rakyat coalition in favor of a Barisan Nasional administration. The ensuing legal challenges placed the courts. The efforts of the courts in dealing with the legal challenges have not engendered a widespread confidence in the judiciary: see Zambry v Nizar [2009] 5 CLJ 265, CA; Nizar v Zambry [2010] 2 CLJ 925, FC.
PART 4

CONSTITUTIONALISM AND SEPARATION OF POWERS
4.1

The Separation of Powers in Muslim Countries

Historical and Comparative Perspectives

Including the Basic Law of the Ottoman Empire of 1876 with Selected Revisions and the Fundamental Law of the Iranian Empire of 1906 with the Supplement of 1907

TILMANN J. RÖDER

1

I. INTRODUCTION

The separation of powers, combined with judicial protection of individual rights, forms the “matrix of constitutionalism.”² Both of them are inseparable and indispensable for the functioning of a constitutional system that meets the standards of contemporary international law.³ A system based on the separation of powers that lacks effective mechanisms for the protection of individual rights or a judiciary that is not independent from the other branches of government would ultimately not serve the rule of law.⁴ The French revolutionaries in 1789 went as far to formulate in Art. 16 of the Declaration of the Rights of Man and of the Citizen that “any society where rights are not secured nor the separation of powers is established has no constitution at all.”⁵ They did not express any preference for direct or

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¹ The author would like to thank all those who contributed to this chapter with valuable feedback and comments.
³ Rüdiger Wolfrum, “Constitutionalism in Islamic Countries: A Survey from the Perspective of International Law” (in this volume).
⁴ See Rainer Grote, “Models of Institutional Control: The Experience of Islamic Countries” (in this volume).
⁵ Art. 16 of the Déclaration des droits de l’Homme et du Citoyen as approved by the National Assembly of France on August 26, 1789 reads: “Toute société dans laquelle la garantie des droits n’est pas assurée ni la séparation des pouvoirs déterminée, n’a point de Constitution.”
representative government in this context but declared that the law needed to be an expression of the general will.\(^6\)

Along this line of tradition, most constitutionalists of today argue that only the division of branches of government—legislative, executive, and judicial on the horizontal axis—combined with a well-balanced system of reciprocal control (checks and balances) can ensure that unconstitutional policies or decisions cannot be realized or will eventually be reversed. Many regard democratic forms of government as a third element intrinsically tied to the separation of powers and judicial protection of individual rights.\(^7\)

In his classic study on the topic, Maurice Vile states that the separation of powers “finds its roots in the ancient world.”\(^8\) Does this hold true also for the Muslim tradition of government? And how far did the separation of powers develop in the Islamic empires at the dawn of the twentieth century? These are two of the leading questions of this article, which focuses mainly on the late Ottoman Empire—the largest and most powerful Islamic state in early modern history—and its neighbor, the Iranian Empire. Both empires’ constitutional legacies presumably influenced the developments in many countries of the Islamic world.

The historical observations will be followed by a short discussion of the question of which models—historical or contemporary, domestic or foreign—have shaped the constitutional systems of the existing Islamic countries. The Hashemite Kingdom of Jordan, for instance—a monarchy on former Ottoman territory—seems to retain some structural features of the late empire, while the People’s Democratic Republic of Algeria is until today influenced by the French model of the separation of powers.

In the annex the reader will find translations of the Ottoman Basic Law of 1876, the Iranian Fundamental Law of 1906, and their most important supplements. These documents are of immense value to scholars of comparative constitutional law and practitioners who wish to understand the constitutional developments in Islamic countries of today. However, English versions meeting scientific standards are not easy to find and those who cannot read late Ottoman Turkish and Persian script have to refer to old and imperfect translations. The standard translation of the Ottoman Basic Law was published in the American Journal of International Law in 1908.\(^9\) Two years later the classical English version of the Iranian Fundamental Law was edited by the outstanding British orientalist Edward G. Browne in 1910. Both are of fine literary quality but the terminologies are not as precise as legal scholars require today.\(^10\) This chapter aims at closing this gap with improved translations, which did, however, draw upon preexisting English versions as references.

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\(^6\) Art. 6 of the Déclaration des droits de l’Homme et du Citoyen reads: “La loi est l’expression de la volonté générale. Tous les citoyens ont droit de concourir personnellement ou par leurs représentants à sa formation.”

\(^7\) E.g., Richard Bellamy (n 2) 253.


\(^9\) “The Ottoman Constitution Promulgated the 7th Zī‘-l-hijjah 1293 (December 23, 1876),” included in Dispatch no. 113, Dec. 26, 1876, MS Records, Department of State, as reproduced in American Journal of International Law, vol. 2, no. 4, suppl.: Official Documents (Oct. 1908), 367–387. Another contemporary English translation of the Ottoman Basic Law was published in the British Parliamentary Paper (Blue Book), Turkey No. 2, 1877 Correspondence Respecting the Conference at Constantinople and the Affairs of Turkey, 1876–77, Command no 1641. Selected articles have been translated by Robert G. Landen, The Emergence of the Modern Middle East: Selected Readings (Van Nostrand Reinhold, New York 1970) 98–106.

II. ELEMENTS OF THE SEPARATION OF POWERS IN THE HISTORY OF ISLAMIC STATEHOOD

Many scholars of constitutional law believe that constitutionalism, including the concept of a separation of powers, came to the Muslim world from European countries as a result of legal transfers after World War I. This assumption is, however, doubtful. In their articles in this volume, Mohammad Qasim Kamali and Asifa Quraishi evidence that rudimentary forms of the separation of powers can be traced back to the earliest phases of Islamic statehood when the unwritten Islamic constitution developed. However, this traditional concept of the separation of powers differs to some extent from the one that emerged during the Age of Enlightenment in Europe. Both authors argue that the separation of powers in Islamic law is mainly based on the distinction between the realms of rulers and religious legal scholars. Kamali points out that the legislative authority lies with the community (ummah) and is expressed in the general consensus (ijmā‘) of the legal scholars who act independently of the government. Ijmā‘ is binding for the head of state and thus limits the powers of the executive branch. The judiciary constitutes a third, independent branch with judges adjudicating in accordance with the Sharī‘ah. They must, however, take ijmā‘ into consideration which constitutes a source of law, besides the Qur‘ān, the Sunnah, and their own juridical interpretation (ijtihād).

Quraishi completes this picture by introducing the fundamental distinction between ruler-made law (siyāsah) and scholar-crafted law (fiqh). She concludes that “unlike the relationship between executive, judicial, and legislative powers in modern democracies, the classical Muslim balance of powers was not between government entities but rather between the government as a whole and the non-governmental forces of scholarly academia. Neither had absolute power over the law, and each institution recognized the other’s presence and role in the system.” The two realms checked and balanced each other as a result of the practical realities of the rulers’ police power on the one hand and the social influence of the scholars on the other. Because most fiqh scholars held significant respect among the people, rulers were aware that they risked real social resistance if they took an action which the scholars significantly opposed. (. . .) Fiqh scholars, conversely, were themselves “checked” from doing too much to undermine the rulers because they commanded no army. If a ruler felt his political desires were worth the effort of physically subduing any potential social resistance, that ruler could “check” the scholars by simply ignoring their complaints. In this way, the interaction of these legal, political, and social forces together operated to create an effective separation of powers in which neither realm—rulers or scholars—had full control over societal norms.

Noah Feldman holds that this balance explains why the traditional Islamic system of governance succeeded for as long as it did.


12 Mohammad Hashim Kamali, “Constitutionalism in Islamic Countries: A Contemporary Perspective of Islamic Law” (in this volume).

13 Asifa Quraishi, “The Separation of Powers in the Tradition of Muslim Governments” (in this volume).

14 Id.

15 Feldman (n 11) 7.
Historical studies about government in ancient Islamic societies support these findings. However, if one looks carefully at the different regions and periods, the extent of external influence on the concrete forms of political organization becomes evident. Already the earliest Islamic governments were patterned not only on the example of Muhammad’s rule, but also on the Iranian Empire of their time. The Sasanian rulers had relied on a redistributive concept of government, the so-called circle of justice, which linked the functioning, longevity, and prosperity of an agrarian state to the quality of justice and protection offered by the sovereign to his subjects. In the course of the centuries this concept was thoroughly assimilated into Islamic political thought. A century later, after the transformation of the Muslim rule from modified tribal forms of authority into an imperial system, the Umayyads caliphs (661–750) adapted further concepts of government from neighboring Middle Eastern empires. The systems of state in theory and practice became more complex; while the separation of powers was not developed as a coherent theory, the branches of government nevertheless gained some independence from each other. Interestingly, the circle of justice was used by Muslim scholars such as Abū-’l-Ḥasan al-Māwardī to legitimize the Muslim ruler’s interventions into the regular judicial system by granting mażālim decisions upon petitions by subjects who felt unjustly treated by the administration of courts. This tradition was upheld until the era of the Ottoman Empire where the Sulṭāns did not only perform executive tasks but also acted as mażālim judges.

From a strictly theoretical perspective, the mażālim system may not have complied with a strict separation of powers, but the Sulṭāns of the nineteenth century did actually pave the way for remarkably far-reaching state reforms. The Ottoman Basic Law of 1876 could have transformed the empire into a constitutional monarchy similar to those in contemporary European countries, had it not been suspended after only a few months for more than three decades. The efforts of the Sulṭāns to turn back the wheel of modernization, however, only led to delays. When they were forced to reenact the Basic Law in 1908 the idea of constitutionalism, including the concept of the separation of powers, had long spread in the Islamic world and ascended to the top of the political agendas of Muslim progressive elites from the Maghreb to Southeast Asia.

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16 Ibn Khaldun attributes the circle of justice not only to Khusrau I but also to Aristotle; he quotes the Greek philosopher’s definition: “The world is a garden the fence of which is the dynasty. The dynasty is an authority through which life is given proper behavior. Proper behavior is a policy directed by the ruler. The ruler is an institution supported by the soldiers. The soldiers are helpers who are maintained by money. Money is sustenance brought together by the subjects. The subjects are servants who are protected by justice. Justice is something familiar (harmonious) and through it, the world persists. The world is a garden . . . and then it begins again . . . they are held together in a circle with no definite beginning or end.” The Muqaddimah: An Introduction to History (1377) by Ibn Khaldun, as translated by Franz Rosenthal (Princeton University Press, Princeton 1969) 41. Very similar concepts of the Circle are reported, e.g., from the Timurid rulers of Iran; see The Counsels of Alexander, presented to the Timurid prince Baysunghur (1495–1497), and translated and quoted in Thomas W. Lentz and Glenn D. Lowry, Timur and the Princely Vision: Persian Art and Culture in the Fifteenth Century (Smithsonian Institution Press, Washington 1989) 12.


18 Darling (n 17).


20 Interventions into the powers of the judiciary are however not unknown to contemporary systems of government based upon the separation of powers; one may think of the right to grant pardon to convicted criminals of many heads of states.
The nineteenth century witnessed a few other constitutional experiments in Islamic countries. However, not all of them were as influential as the Ottoman Basic Law of 1876. On September 10, 1857 Muḥammad Bey of Tunisia signed a civil rights charter called ‘Ahd al-Amān (“Pledge of Security”) modeled by the Ottoman Khaṭṭ-ṭ Sherif of 1839. With this act he responded to French and British demands for reform and improvements of the legal situation of foreigners in Tunisia. The ‘Ahd proclaimed his intention of codification of the charter, instituted a number of civil and political rights including the guarantees of life and property, equality of nationals and foreigners before the law, freedom of religion and commercial activities, and laid out principles of governance. Its content also addressed the demands of Tunisian reformists who believed absolute rule to be “contrary to both the rules of Sharī’ah and the dictates of reason,” but it mainly reflected the extent of European influence on the region’s political affairs. Three years later, the subsequent ruler, Muḥammad al-Ṣādiq, mandated a committee to draft on the basis of the ‘Ahd al-Amān a constitution for the country. Ṣādiq Bey proclaimed the resulting Qānūn al-Dawlah on April 26, 1861, after it had been approved by Napoleon III at a meeting in Algiers in September 1860. The latter fact “sufficiently epitomizes the power relations surrounding the birth of ‘constitutionalism’ in Tunisia,” as the historian L. Carl Brown put it. The constitution—which was, in fact, the first modern constitution in an Arabic country—provided for a constitutional monarchy in which the Bey shared some of his power with ministers and a legislative Council of sixty members from the most influential families of the country. Severe opposition came from, among others, the ‘ulamā’ who stated that the Qurʾān was the only legitimate constitution, and led to the abolishment of the constitution in 1864.

Another remarkable constitutional experiment was the introduction of the Egyptian Basic Statute (al-Lā‘īyah al-Asāsiyyah) of February 7, 1882, which was largely a codification of preexisting political practices and institutions. Most of its articles provided rules for the Consultative Assembly of Representatives (Majlis Shūrā al-Nuwwāb), which had been elected a year before on the basis of a decree by Khedive Ismā’īl Pāshā of November 20, 1866 and inaugurated on September 26, 1881. According to the Basic Statute, the

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24 Ibn Abū al-Diyāf (n 22) 99.
27 K.J. Perkins (n 23) 18–19; Mohamed El-Tahir El-Mesawi (n 23) 24 and 27–30.
28 The full title is “The Basic Regulations [or Statutes] of the Council of the Egyptian Parliament.”
30 Arab. Khādīwī, i.e., viceroy.
31 Adel Omar Sherif (n 29) 156.
cabinet was accountable to the Assembly, which had the authority to legislate and interpel- late the ministers. The parliamentary term was planned to be five years. Some authors have been reluctant to name it a constitution because of its limited scope; the historian Alexander Schölch argues that

> [t]he law of the Majlis had to be supplemented by a number of further “organic laws” which, together, would probably have formed something like a written constitution. Such laws were proposed by various delegates during February and March 1882, discussed in the Council of Ministers, demanded by military leaders, and promised in the programme of the Râghib government of June 20, 1882.³²

Despite the fact that the Basic Statute was introduced by the Khedive and his Turco-Circassian government, constitutionalism and the distribution of powers was thus primarily a concern and demand of the opposing Egyptian elites who dominated the Assembly. Yet, this reformist found an early end; the Majlis held only one ordinary session (December 26, 1881–March 26, 1882) before the new Khedive, Tawfiq Pâshâ, repealed the Basic Statute under the impression of the defeat of the nationalist military revolt led by Ahmed Urâbî and Britain’s occupation of Egypt in September 1882. In 1883, a so-called Organizational Law (al-Qânûn al-Ni‘âmî)³³ was issued, which brought a setback to constitutionalism in Egypt as the Legislative Council introduced by it lacked any real legislative power.³⁴ It should be noted at this point that already in the nineteenth century the legislative technique in Egypt was inspired by French doctrine, from which the concept of the organic law (loi organique)—i.e., special legislation of constitutional scope—stems.

Both the Tunisian and the Egyptian Constitutions did not strongly impact developments in other countries in the region and in this regard differ from the Ottoman Basic Law of 1876 and the Iranian Fundamental Law of 1906, both of which will be scrutinized in the following sections.

### A. Developments in the Ottoman Empire, 1839–1912

As the nineteenth century progressed, the Ottoman Sulṭâns enacted a series of political reforms aimed at redressing the growing imbalance of power between their empire and the European realms, after finally realizing that the military modernization of previous years alone was not sufficient to sustain the empire. The first important step in this direction was the promulgation of the Noble Rescript (Khaṭṭ-i Sherîf) of Gülhane³⁵ of 1839. In view of its catalog of fundamental and equality rights, the historian Şerif Mardin aptly calls it “a semi-constitutional charter that promised security of person and property to all Ottoman

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³³ The full title is “Egyptian Regular Law on the establishment of district councils (councils of provinces) and the Shura Council of the laws and the General Assembly and the Shura Council of Government.”


³⁵ “Gülkhâneh” literally means “Rose Garden”; it is the name of a park in Istanbul where Foreign Minister Reshid Pâşâ announced the Khaṭṭ-i Sherîf on November 3, 1839.
The Rescript constituted the beginning of the *Tanzimat* reform era. It did not expressly prefigure any reduction of the extensive powers of the Sultan, who remained influential in all branches of government. Changes in this regard came nonetheless with the implementation of the edict. To this end a number of influential councils were restructured or created, including the *Mejlis-i Vala-yi Ahkâm-i Adliyyeh* (Supreme Council of Judicial Ordinances), which advised the Sultan on matters requiring legislation. The members of this council gained even more influence when the *Mejlis-i Khâş-i 'Umûmi* (The Sultan’s General Council) was formed, a body composed of ministers, retired officials, and the members of the *Mejlis-i Vala* that made concrete legislative proposals to the Sultan.

In 1854 a new phase of the reforms began and the *Mejlis-i Vala*—which had lost its efficiency—was replaced with a new legislative council called *Mejlis-i Tanzimat* (Council of Reorganization). This institution was equal to the Council of Ministers and operated distinctly from it. The mandate of the new Council was to review not only all legislation but also the structure of the administration. The 1854 reforms were certainly another important step toward the separation of the legislative, executive and judicial powers, and even though the *Tanzimat* Council certainly was not a parliament in the sense of representative democracy, the necessity of a certain consideration of the citizens’ interests got more and more accepted within the ruling class of the Empire. It must however be born in mind that none of the councils was ever independent of the Sultan; neither were any of his Grand Viziers (*Vezîr-i A'zam*), even in the most progressive periods of the nineteenth century. The Grand Vizier was the chief representative of the Sultan; he could be very influential, even actually rule, but his politics ultimately remained subject to the will of the Sultan.

Further reforms followed but could not sufficiently respond to the administrative and economic problems on the one side and the call of internal elites—especially the nationalist Young Ottoman movement—for a constitutional, parliamentary government on the other. Moreover, the Empire remained under pressure from the European powers who demanded improvements for the Christian subjects of the Empire. In 1875–1876 Midhat Pasha, the reform-minded former Grand Vizier, cleared the way for the drafting of a constitution. Midhat succeeded convincing not only Sultan Abdülhamid but also considerable parts of the Islamic establishment of the Empire: “Objections (…) raised by several ‘ulema’ about the grant of equality to non-Muslims were quickly silenced by Midhat, who (…) drew freely on the Koran to prove that his proposals were entirely in accord with the holy law.” A Constitutional Commission was formed and began drafting a new state structure, including a bicameral parliament called the General Assembly (*Mejlis-i 'Umûmi*). As the preparations progressed, the major objections raised were not directed against the designed state structure but rather to freedom of the press. But these were overcome and the Basic

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37 It was later united with a similar body which gave legislative advice on the same issues to the foreign minister and high-ranking members of the administration, the *Dâr-i Shûrâ-yi Bâb-ı 'Ali*. June Starr, *Law as Metaphor: From Islamic Courts to the Palace of Justice* (State University of New York Press, New York 1992) 25.

38 In 1865 the *Khâş-i Hümayûn* (Edict of Reform) promised equality for all subjects of the Empire in education, government appointments, and administration of justice regardless of their religion; and in 1869 a new Nationality Law created a common Ottoman citizenship.

Law (Kańn-i Esası) was promulgated on November 23, 1876. The historian Robert Devereux praised the introduction of the constitution as an “event as momentous in Ottoman history as was the Declaration of Independence in that of America”, an ardent remark which may be true at least for the long-term institutional and symbolic impact of the Basic Law.

The document defined the different state powers and their interrelations without seriously diminishing the position of the Sultan who was not responsible to any person or institution for any of his acts (Art. 5). This meant that the implementation of the constitution ultimately depended on his goodwill. Ottoman sovereignty continued to include the caliphate of Islam (Arts. 3, 4). The Sultan had widely unchecked executive powers, which included the appointment and dismissal of ministers, conclusion of treaties, declaration of war and peace, command over the armed forces, supervision of the enforcement of the Sherī'at and law (Art. 7) and, as an effect of the declaration of the state of siege, the suspension of the civil laws (Art. 113 Para. 1–2) but not of the Basic Law (Art. 115). The Basic Law further specified his legislative powers: the Sultan could enact binding decrees, while parliamentary acts had to be promulgated by him in order to become valid, and he could convocate and dissolve the Chamber of Deputies (Art. 7). No legislative draft passed by the General Assembly would become law until it had been sanctioned by him (Art. 54). In contrast, the judiciary was widely independent from the Sultan (cf. Art. 81) but he could commute judicial penalties (Art. 7) and banish anyone whom he thought to be dangerous for himself or the state without any possibility of recourse to the courts (Art. 113 Para. 4).

An important organ was the High Court, which was composed of senators, councilors of state, and high ranking judges. The High Court was, among others, competent in all cases against ministers and judges from the Court of Cassation and could only be convoked by the Sultan. He thus held another instrument of power against the highest-ranking members of the executive and the judicial branches.

The executive branch was coordinated rather than led by the Grand Vizier, who was only entitled to call and preside over the meetings of the ministers and to take care of matters that did not belong to the portfolio of any minister. The cabinet could propose legislation to the General Assembly. Ministers were appointed and dismissed by the Sultan (Art. 27), and were responsible to him, and thus were under his control. The General Assembly could summon them for hearings but not force them to respond to its questions. The Council of State (Şırāṣ-yi Devlet) kept its double function as the supreme review panel for cases of administrative law (Art. 117) and the organ drafting laws upon the request of a minister or any chamber of parliament (Art. 53 Para. 3).

The General Assembly was composed of the Chamber of Deputies (Hey'et-i Me'būsân) and the Chamber of Notables (Hey'et-i A'yân). The first were elected for terms of four years (Art. 69) while the latter were appointed for life by the Sultan (Arts. 66, 60). Contemporaneous service in executive positions was not permissible (Arts. 50, 62). All Members of Parliament had the right freely to express their opinions, and to vote (Art. 47). They were immune from arrest and criminal prosecution while in office unless their chambers chose to waive the immunity (Arts. 48, 79). Contemporaneous service in executive positions was not permissible (Arts. 50, 62). Laws needed to be approved by both chambers (Arts. 54, 55) and ratified by the Council of Ministers and the Grand Vizier before
being submitted to the Sultan for approval and promulgation. The main power of the Chamber of Deputies was its right to vote on the annual budgets submitted by the Council of Ministers at the beginning of each parliamentary term.\textsuperscript{42} The government was not entitled to collect any taxes without the consent of the Chamber of Deputies (Arts. 97, 100), and even the Sultan could not elide its fiscal decisions except for very narrow exceptions (Art. 101). The representatives of the Ottoman electorate could thus influence governmental policies through budgetary politics but had to consider that the Sultan retained the power to suspend parliament altogether at any time.

If one considers the described relations between the most important executive organs (especially the Council of Ministers), the legislature (especially the Chamber of Deputies), and the Sultan at large, one can only agree with Stanford J. Shaw’s and Ezel Kural Shaw’s judgment that the Basic Law “provided for separation of powers much more in form than in fact.”\textsuperscript{43} The branches of government were defined and divided but checks and balances between them barely existed.

The Chamber of Deputies convened for the first time on March 19, 1877. Its members had not been elected but appointed by councils in the various administrative districts of the Ottoman Empire.\textsuperscript{44} Popular elections were planned for the next term, but since it was also convened on short notice by the Sultan in December 1877, the deputies were again chosen only by a small group of electors in each district.

Sultan ‘Abdülhamid II tolerated the Chamber of Deputies supervising the government and even trying to pass legislation during its first session. The only lasting result to emerge was the Electoral Law which was never applied until the twentieth century. Then, after the second session of the Chamber of Deputies, in February 1878, ‘Abdülhamid II suspended the parliament.\textsuperscript{45} The reasons for this political reversal are not fully identified but two aspects seem probable. First, the deputies’ temerity in actually criticizing the Sultan and his inefficient and militarily incompetent government may have fed his fear of deposition. Second, the Ottoman Empire had in the meantime lost many of its non-Muslim citizens in newly independent territories such as the Balkans, and the pressure from European governments to share power with these populations in order to appease them was no longer given.

The Ottoman Empire remained without any constitutional basis for three more decades. As the ‘ulema’ had lost their role and authority as lawmakers in the course of the further reforms, the centuries-old Islamic balance between rules and scholars faded away and left the Sultan with augmented powers. Noah Feldman argues that the resulting void of effective institutional checks against the ruler was the main reason for the collapse of the Ottoman Empire.\textsuperscript{46} The new ideas of democratic constitutionalism and the separation of powers did, however, live on in reformist circles, which unified eventually under the umbrella of the Committee of Union and Progress (İttihat ve Terakki Jemiyeti), as well as various ethnic groups such as the Armenian Revolutionary Federation. Eventually, on July 3, 1908, a military rebellion in Macedonia marked the beginning of the Young Turks

\textsuperscript{42} According to Art. 43 the annual parliamentary term lasted from the first day of November until the first day of March.


\textsuperscript{44} Devereux (n 39) 124ff.

\textsuperscript{45} The appointed, unelected Senate technically continued in existence and when it, too, was resurrected in 1908 three members were still actually still living. Devereux (n 39) 201–02.

\textsuperscript{46} Feldman (n 11) 68–91.
CONSTITUTIONALISM AND SEPARATION OF POWERS

Revolution, which forced Sultan ʻAbdülhamid on July 23, 1908 to restore the Basic Law. An anti-reformist coup in 1909 led to his deposition and replacement by his brother, Sultan Meḥmed V. The General Assembly was then composed as provided in the Basic Law and took up its constitutional role. After the 1909 coup, the deputies used the opportunity to change the constitutional framework in order to consolidate and increase their own powers. In the elections of January 1912 the Committee of Union and Progress won 67 percent of the seats for the Chamber of Deputies. However, the General Assembly was closed on August 5, 1912 due to the outbreak of the First Balkan War. With this event ended the Second Constitutional Era. After another coup in 1913 the Committee of Union and Progress established an authoritarian single-party regime and sealed the Empire’s parting from constitutionalism and the separation of powers.

Despite the limited success in the implementation of the 1876 Constitution, the Ottoman state reforms of the nineteenth and early twentieth centuries were on the whole quite impressive. It must not be forgotten that the Empire was disintegrating and struggling with grave political and economic problems throughout this period. Besides, its reformist elites were small and had to contain powerful conservative opposition composed of Ottoman traditionalists and the Islamic establishment. Moreover, many authors rightly aver the important role of Western education of many reformers, which certainly formed a bridge for progressive ideas from Western Europe to the Bosporus. Another significant factor was the fact that the Ottoman Empire throughout its history was cautious to keep a distance between religion and the state. The state was of greater importance to the Ottomans in comparison to its significance in any other part of the Islamic world. Şerif Mardin has coined the term of “Turkish exceptionalism” in his analysis of the reasons behind the particular manner by which the Ottomans and Turks dealt with Islam, and this notion may be extended to their vision of the state. From this point of view one can even hold that the specific concepts of constitutionalism and secularism that shaped the Constitution of the Republic of Turkey of 1924 constituted a continuation of political preferences and practices from the Ottoman Empire rather than a revolutionary change.

B. Developments in the Iranian Empire, 1905–1921

The Iranian struggle for constitutionalism coincided with the Second Ottoman Constitutional Period (1908–1912). Recent comparative studies of both events have shown that there were not only considerable parallels but also cross-fertilization between the Iranian Constitutional Movement and the Young Turk Movement. But some differences are striking. The denomination of the events in Iran between 1906–1911 as its

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47 For an overview, see Feroz Ahmad, Young Turks (Oxford University Press, Oxford 1969).
49 In this regard, French political thought was of special significance. Fariba Zarinebaf, “From Istanbul to Tabriz: Modernity and Constitutionalism in the Ottoman Empire and Iran” (2008) 28 Comparative Studies of South Asia, Africa and the Middle East 155 f.
Constitutional Revolution (Enqelāb-e Mashrūṭeh\(^{52}\)) rightly accentuates their historical importance as a broad social movement rather than a reform aiming at sustaining the existing political order like the First Ottoman Constitutional Era (1876–1877) or a revolt carried out by small military or political elites like the Second Ottoman Constitutional Era (1908–1912). Moreover, the events in Iran were underlain with a severe struggle over the religious or secular character of the future political system. A third remarkable trait is the high theoretical level of the discussions which forced anti-constitutionalist ‘ulamā’ to add the qualification mashrū’ēh (i.e., “in accordance with Sharī‘ah”) to the term mashrū‘eh (constitutionalism; lit.: conditionality\(^{53}\)), thus coining the term Mashrūṭeh-ye Mashrū’ēh (Sharī‘ah-compatible constitutionalism).\(^{54}\) However, the revolution eventually turned in a thoroughly secular direction and the preeminent religious scholar and defender of the monarchy who had developed the concept of Mashrūṭeh-ye Mashrū’ēh, Sheykh Fāzullāh Nūrī, was executed in 1909.\(^{55}\)

Other circumstances are more similar in both empires, such as the extent of foreign intervention. Over centuries the Iranian Empire had managed to maintain its sovereignty and never been colonized, unlike most neighboring states in the region. In 1905, however, political interventions by foreign powers (especially Russia and Great Britain),\(^{56}\) inefficient administration of the country and the extravagance of the ruling Qājār family led to protests by merchants, religious authorities, and members of the noble and educated classes.\(^{57}\) On January 12, 1906 Shāh Moẓaffar al-Dīn seemed to capitulate to the demonstrators, dismissing his Prime Minister and promising to introduce a “House of Justice” (‘Adālatkhāneh) that would develop legislation on the basis of the Sharī‘ah and draft a constitution for the Empire.\(^{58}\) However, this proto-parliament was never established. Protests continued and escalated again when a Cossack Brigade serving the Shāh killed and injured dozens of opposition members. Preparing for resistance, the merchants closed the bazaar and large numbers of ‘ulamā’ left the capital and assembled in the holy city Qom. Meanwhile in Tehran, more than ten thousand citizens began to camp in the gardens of the British Embassy, which had offered them protection. Dominated by merchants, the protesters

\(^{52}\) “Mashrū‘eh” literally means “conditional,” meaning that the ruler or government was or should not be absolute.

\(^{53}\) See (n 52).


\(^{56}\) Both had given the Iranian Empire considerable loans and even defined interest zones in the country. W. Morgan Shuster, in his book The Strangling of Persia. A Record of European Diplomacy and Oriental Intrigue (T. Fisher Unwin, London 1912–1913) 81 f.

\(^{57}\) Protests had broken out in 1905 over the collection of tariffs to pay back a Russian loan of over 22 million rubles that were mainly spent for a royal journey to Europe. When two merchants were bastinadoed in Tehran for charging exorbitant prices in December 1905, an uprising of the merchant class in Tehran ensued, with merchants closing the bazaar. The clergy joined as a result of the alliance formed in the 1893 Tobacco Rebellion and in reaction to the government’s violation of the sanctuary of mosques where protesters had sought refuge.

\(^{58}\) See Saïd Amir Arjomand, “The Kingdom of Jurists: Constitutionalism and the Legal Order in Iran” (in this volume).
discussed the political situation and voiced demands for far-reaching reforms. The limitation of the power of the Shāh and control of public spending within a constitutional framework ranked first. Under such pressure, Možaffar al-Dīn agreed to the introduction of a bicameral parliament, including an Assembly of Delegates that was to be elected from among the ruling and owning classes.\textsuperscript{59} Elections were held in the fall of 1906. The voters primarily chose merchants as their representatives. The National Consultative Assembly (Majles-e Shurā-ye Mellī) first convened on November 6, 1906 (13 Mehr 1285) and immediately claimed its right to draft a constitution. Without losing any time the deputies formulated the so-called “Fundamental Law” (Qānūn-e Āsāsi-e Mashrūtē, lit.: Fundamental Law of Conditionality). Like the drafters of the Ottoman Constitution, they widely relied on Western models and especially the Belgian Constitution of 1831.\textsuperscript{60} Možaffar al-Dīn personally signed the document on December 30, 1906 (14th Dhū ‘l-Qa‘dah, A.H. 1324), thereby creating a constitutional monarchy. After only one year the Iranian Constitutional Revolution resulted in the introduction of a constitutional system with checks and balances and fundamental rights.\textsuperscript{61}

The Fundamental Law assigned the National Consultative Assembly a central, powerful position in the constitutional system of the Empire. Its importance was emphasized by the structure of the document, which began with the provisions on the Assembly (Arts. 1–31). All laws, financial decisions, business concessions, infrastructure projects, and international agreements prepared by the government needed its approval (Arts. 16–27). The Assembly could also propose “measures” which included the right to draft legislation (Art. 15). In cases of conflict it was necessary to find compromises, as the Shāh maintained the exclusive power to approve these state acts (Art. 17 regarding legislation). Ministers had the right to hear the plenary sessions of the Assembly and to explain their policies to the deputies if they deemed it necessary (Art. 31). De facto they acted under the control of the Assembly; despite the Shāh’s authority to appoint a prime minister and his cabinet, the parliament could in case of breaches of law demand their dismissal (Arts. 28, 29).

The second chamber of parliament defined by the Fundamental Law was the Senate (Majles-e Senā). Half of its members were to be nominated by the Shāh and the other half by the people (Art. 45). The Senate was competent to approve or dismiss all measures including legislative drafts proposed or voted upon by the National Consultative Assembly (Arts. 15, 17). In case of disapproval between the chambers a conciliation committee had to be formed by them (Art. 48). Interestingly, the Assembly had direct powers over the Senate, including the right to approve the Senate’s Regulations (Art. 44). Moreover, the Senate had no say in budgetary matters (Art. 46).

Shī’ite jurists had not played a significant role in the drafting of the Fundamental Law and demanded changes of the constitutional framework from the earliest stage in order to

\textsuperscript{59} According to the Imperial Command (Farmān) of Možaffar al-Dīn Shāh dated 14th Jumādā al-Ākhirah 1324 A.H. (August 5, 1906 A.D.), the Assembly of Delegates was to be elected “by the Princes, the ‘ulamā’, the Qajar family, the nobles and notables, the landowners, the merchants and the guilds.” The Regulations for the Elections to the National Assembly of 20 Rajab 1324 A.H. (September 9, 1906 A.D.) defined details of the voting qualifications. The requirements for landowners, merchants, and artisans were modest. Women were excluded from the vote.

\textsuperscript{60} Saïd Amir Arjomand, “Constitutions and the Struggle for Political Order: A Study in the Modernization of Political Traditions,” 33.4 European Journal of Sociology (1992) 52.

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strengthen the relevance of Islam. In early 1907 they succeeded by introducing a Supplement to the Fundamental Law that declared in its Art. 2: “At no time must any legal enactments of the National Consultative Assembly (. . .) be at variance with the sacred principles of Islam (. . .).” A committee of no less than five highest ranking religious jurists (mojtahedin-e beraz-e avval) was assigned the power to review legislative proposals regarding their conformity with Islam (Suppl. Art. 2) and a parallel judicial system with Shari‘ah courts and civil courts introduced (Suppl. Art. 27). The committee of five mujtahids, a virtual ancestor of the Guardian Council, was however never formed because the great majority of Shi‘ite jurists elected to the Majles in 1909 deemed themselves capable to control the conformity with Islam of all legislative drafts. 62 Besides this Islamization of the constitutional basis of the Empire, the Supplement introduced a remarkable catalogue of fundamental rights and changed the balance of powers. Art. 27 of the Supplement declared:

The powers of the Realm are divided into three branches.

First, the legislative power, which is assigned to making or amelioration of laws, is composed of His Imperial Majesty, the National Consultative Assembly, and the Senate, of which three sources each has the right to introduce laws, but their validity shall be dependent on their not being at variance with the standards of the ecclesiastical law, and on their approval by the Members of the two Assemblies, and the Royal ratification. The enacting and approval of laws connected with the revenue and expenditure of the Realm are, however, specially assigned to the National Consultative Assembly. [Moreover] the explanation and interpretation of the laws belong solely to the capacities of the above-mentioned Assembly.

Second, the judicial power, by which is meant the determining of rights, belongs exclusively to the ecclesiastical tribunals in matters connected with the ecclesiastical law, and to the civil courts in matters connected with ordinary law.

Third, the executive power, which appertains to the King, that is to say, the laws and ordinances are carried out by the Ministers and State officials in the august name of His Imperial Majesty in such manner as the Law defines.

Art. 28 added:

The three powers above mentioned shall ever remain distinct and separate from one another.

The sovereignty of the Shāh was now defined a trust confided as a Divine gift by the people to the Shāh (Suppl. Art. 35), who had to swear to observe the Fundamental Law (Suppl. Art. 39) and was left with little political power. The Supplement once again strengthened the Assembly, which could now by absolute majority force any minister or the cabinet as a whole to resign. The judges were independent from the other branches of government and could not be removed from office without any criminal conviction.

Differently from the short-lived constitutional periods of the Ottoman Empire in 1876–1877 and 1908–1912, the Fundamental Law of the Iranian Empire was applied until

1921, when the Commander of the Cossack Brigade, Reżā Khān, deposed the Qājār dynasty in a coup d’État and soon after he ascended the throne.  

II. DIVERGENT DEVELOPMENTS IN THE TWENTIETH CENTURY

A. Phases of Constitutional Development and the Separation of Powers

Constitutional monarchy remained an exception in the Islamic world until after World War I. Then, in the period between 1923 and 1925, a number of constitutions were enacted, all of which were drafted at least partly on the model of the Basic Law of the Ottoman Empire (1876), the Fundamental Law of the Iranian Empire (1906), and other documents from regional countries, but also on European models. This series comprised the constitutions of the Kingdom of Egypt and the Emirate of Afghanistan, which were both introduced in 1923, those of the Turkish Republic in 1921 and 1924, and that of the Kingdom of Iraq of 1925. All these documents contained structural attributes of the separation of powers, as well as almost all of the constitutions enacted since then. They constituted the results of efforts aiming at the modernization and centralization of states that characterized the domestic policies in many developing countries and led to the adoption of numerous new constitutions worldwide.

From the late 1920s on, ideological political thought spread in the region as communist and fascist ideas began to inspire political leaders and intellectuals in Islamic countries. These ideologies led to a second phase of constitutional enactments after World War II. The majority of the new constitutions were based upon a combination of socialist, nationalist, and pan-Arabist ideas. Examples are the Provisional Constitution of the Republic of Iraq of 1958, the federal Constitution of the short-lived United Arab Republic—a union between Egypt and Syria (1958–1961) that went along with the establishment of one common parliament and aimed at the dissolution of all existing parties—and the later Constitution of the Republic of Syria, which has undergone only minor changes since its adoption in 1973. The constitutions of this historical phase established strong presidential systems and allowed for the formation of very resistant autocratic regimes.

At the same time a number of colonies gained independence in the region and organized their political systems under constitutions based on the examples of their former

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63 The Basic Law of the Ottoman Empire formally remained in force until 1921 and the Iranian Fundamental Law until 1979.
64 Sir George Young, *Egypt* (E. Benn, London 1927) 262.
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colonial powers. The constitutions of the Islamic Republic of Pakistan (1956), the Federation of Malaya (1957), Malaysia's predecessor, and of the Republic of Bangladesh (1972) therefore displayed features of the British Westminster system,\textsuperscript{71} while the constitutions of the Republic of Tunisia (1959) and the Republic of Algeria (1963) had a strong imprint from the French semi-presidential model of the separation of powers. The latter feature is less visible in the case of the Kingdom of Morocco (Constitution of 1962) as its monarchical structure could not be adapted to the thoroughly republican French example.\textsuperscript{72} In contrast, the many francophone African former colonies chose strong presidential state structures. This fact may be explained with the influence of General Charles de Gaulle's Fifth Republic but also with the perceived need for strong, centralized leadership. In light of the highly fragmented polities typical of much of sub-Saharan Africa at that time, a system of checks and balances was thought to be overly cumbersome for the immediate tasks at hand. The Constitution of the Islamic Republic of Mauritania is a good example. Under this Constitution, the executive branch was headed by the President of the Republic and included ministers whom he appointed, and the administrative bureaucracy. The President was elected by universal suffrage for a five-year term and could serve an indefinite number of terms. In sharp contrast to its French antecedent, the Mauritanian Constitution strengthened presidential power by combining it with the function of prime minister, while giving the National Assembly a subordinate position. The President participated in the legislative process, which in France was the domain of the National Assembly. He was, however, prevented from dissolving the National Assembly. In turn, the assembly could not dismiss the president by means of a vote of no confidence.\textsuperscript{73}

A third phase of constitutional developments began in the 1960s and had its ideological roots in Islam. The idea of modern Islamic constitutionalism is, however, decades older. The formation of Pakistan as a homeland of the Indian Muslims in 1947 certainly formed an important momentum in its development.\textsuperscript{74} In this regard it predated the later resurgence of political Islam by two decades. In some of the later constitutions such as those of the Islamic Republic of Mauritania (1961)\textsuperscript{75} and the Kingdom of Afghanistan (1964),\textsuperscript{76} Islam appeared as a limitation to secular government policies and parliamentary legislation, without any presumption that it should be the basis of the constitution itself. In others, Islam came to be considered the basis of the constitution and the state itself. The Constitution of the Islamic Republic of Iran (1979), which introduced a specific Shi'ite concept of constitutionalism, certainly belongs to this group.\textsuperscript{77}

The latest period of constitutional history in the Islamic world began in the twenty-first century. While its first decade witnessed a return to the idea of limited government with

\textsuperscript{71} See Rainer Grote, "Westminster Democracy in an Islamic Context: Pakistan, Bangladesh, Malaysia" (in this volume)

\textsuperscript{72} Imen Gallala-Arndt, "Constitutional Jurisdiction and Its Limits in the Maghreb" (in this volume); Thierry Le Roy, "Constitutionalism in the Maghreb: Between French Heritage and Islamic Concepts" (in this volume).


\textsuperscript{77} Saïd Amir Arjomand, “The Kingdom of Jurists: Constitutionalism in Iran” (in this volume).
constitutions that were not based on but inclusive of the principles of Islam as the established religion, massive popular protest in numerous North African and Middle Eastern countries led to fundamental change all over the region. As of September 2011, the “Arab spring” has resulted in the overthrow of authoritarian regimes in Tunisia, Egypt, and Libya, all of which prepare for the development of new permanent constitutions, constitutional change in Morocco, concrete plans for the amendment of the constitutions of Algeria and Jordan, and political concessions in others countries while calls for further reaching reform continue.

B. Types of the Separation of Powers in the Contemporary Islamic Countries

The observer of today finds a mosaic of constitutional systems stemming from the different historical phases of their emergence. Accordingly, many different types of the separation of powers are present in the Islamic world.

Since the middle of the twentieth century, monarchy is no longer the prevalent type of government in Islamic countries. If monarchies have persisted, they are today based on constitutional foundations in most cases, as are the Hashemite Kingdom of Jordan (Constitution of 1952), the State of Brunei Darussalam (1959), the State of Kuwait (1961), the Kingdom of Morocco (1962, 1970, 1972, 1992, 1996, and 2011), the Kingdom of Bahrain (1973 and 2002) and the United Arab Emirates (1971). Even the three remaining absolute monarchies—the Sultanate of Oman (1996), the State of Qatar (2003) and the Kingdom of Saudi Arabia (1992)—have introduced quasi-constitutional documents. However, none of these seems to develop into a constitutional monarchy in the near future. In this context it should also be considered that most other hereditary rulers of the Islamic states are not only representing but actively involved in politics as heads of state. Malaysia is an unusual case in two regards: first, as a federal constitutional monarchy with a King, the Yang di-Pertuan Aging, elected to a five-year term among the nine hereditary Sultans of the Malay states, and second, as a monarchy where political decisions are nevertheless mainly taken in a democratic system of government closely modeled on that of the Westminster parliamentary system.

78 Arjomand (n 74) 99–114.
80 Brown (n 70) 54–59.
82 Brown (n 70) 60.
86 Saudi Arabia’s Basic Regulation of Government (Nigam al-Asasi li-Bukum, 1992) is generally referred to as “Basic Law.” This title is however is misleading as it is only a façade constitution. See Brown (n 70) 7 and Feldman (n 11) 92–102.
In other countries, the monarchs share less of their might with the people, and the forms of the distribution of powers to the other organs vary strongly. For instance, the King of Jordan effectively rules but has nonetheless accepted the separation of powers to some extent. The Hashemite Kingdom of Jordan was established in 1947 as a fully independent state with Islam as the state religion. Through the promulgation of its constitution on January 8, 1952 the country became a constitutional monarchy. Jordan's constitution stipulates that the country is a hereditary monarchy (Art. 28) with a parliamentary system. It outlines the functions and powers of the state, the rights and duties of Jordanians, guidelines for interpreting the constitution, and conditions for constitutional amendments. With regard to the separation of powers, Art. 26 of the Constitution is of central importance; it reads: “The Executive Power shall be vested in the King, who shall exercise his powers through his Ministers in accordance with the provisions of the present Constitution.” Moreover, the King is responsible for signing and executing all laws and can only be overridden by a two-thirds vote of both houses of the National Assembly (Art. 93 Para. 4). He appoints and dismisses judges by decree (Art. 98), approves amendments to the constitution, declares war, and commands the armed forces (Art. 33). The King also appoints the Council of Ministers, led by a prime minister, and may dismiss cabinet members at the prime minister's request. The cabinet is responsible to the Chamber of Deputies on matters of general policy and can be forced by it to resign by a two-thirds vote of no confidence.

Obviously, there is a limited system of checks and balances in place between the executive and legislative branches of government. There are, however, also shortcomings in the relations between the executive and the judiciary. As the King has the power to appoint judges, approve their advancement, and dismiss them, the court system can easily be subject to pressures by the executive branch. Thus it cannot be deemed a truly independent branch within the state. Even more critical is the lack of an independent body that is authorized to issue decisions in constitutional cases. The existing High Tribunal (Majlis al-'Ālī) is a political rather than a judicial institution. It consists of the President of the Senate—i.e., of the upper chamber of the National Assembly—and eight other members. The High Tribunal exercises only two functions. It may interpret the provisions of the constitution if requested to do so by the Council of Ministers or the Senate or by an absolute majority in the House of Representatives, i.e., the lower chamber of the National Assembly. Besides, it is competent to try ministers who have been referred to the High Tribunal due to presumed misdemeanor in the performance of their office (Arts. 58, 122). These competencies are not sufficient to establish a state organ giving checks and balances. The minor importance of the High Tribunal is also indicated by the fact that its sheer existence is widely unknown to the Jordanian population. At this point the constitutional framework of Jordan resembles the late Ottoman state system; the High Tribunal as an interpreter of the constitution functions like the councils of that time.

Presidential systems numerically dominate the wide spectrum of republican types of constitutionalism and the separation of powers. This may be due to the fact that only a few Islamic countries have witnessed longer democratic periods in their history. Three main types of presidential systems appear, which are distinct from each other. The first group

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88 Three of these are elected by the members of the Senate among its members; five judges of the highest court are selected in order of seniority (Art. 57).

89 In August 21, 2011, the Royal Committee on Constitutional Review proposed to King Abdullah, among others, to abolish the High Council and create a constitutional court.
comprising francophone African states has been mentioned above. The second group is composed of constitutional systems with strong features from former monarchical structures. Countries that have never been colonized like Yemen\(^90\) (as for its northern part) and Afghanistan\(^91\) belong here, but also Egypt, which has been able to maintain its political identity over periods of colonial rule much more than other countries with a history of foreign domination. The third important group of presidential systems comprises the post-communist republics in Central Asia, especially Turkmenistan, Uzbekistan, and Tajikistan.\(^93\) The Southern Caucasian Republic of Azerbaijan may also be included in this group.\(^94\) These states have been mainly formed by their common communist past and similar developments after the dissolution of the Soviet Union in 1989. Other Islamic countries with presidential forms of the separation of powers are Indonesia\(^95\) and Nigeria, which has combined presidentialism with a bicameral parliament evocative of the Westminster system.\(^96\)

Semi-presidential systems mostly occur in the French-influenced Maghreb region. Algeria provides a characteristic example. The country’s 1996 Constitution vests the supreme executive power in the President, who presides over his cabinet (Art. 77). He appoints and he may dismiss the Prime Minister, whose cabinet is also appointed by the President (Arts. 77, 79). These and further, far-reaching presidential powers including the command of the armed forces, foreign policy, and the authority to appoint governors (Arts. 77, 78) reflect the French semi-presidential model, which combines a strong, directly elected president\(^97\) with a parliament that is legitimated by direct elections (Art. 101) as well. The Algerian parliament is bicameral, consisting of a lower chamber, the National Popular Assembly (Assemblée Populaire Nationale or Majlis al-Shabi al-Waṭāni), and an upper chamber, the Council of the Nation (Conseil de la Nation or Majlis al-Ummah). Both chambers enjoy legislative and oversight functions; with regard to the balance of powers it is important to note that the government is obliged to report to the parliament (Arts. 80, 84, 133, 134). If the National Popular Assembly rejects the governmental program presented by the Prime Minister, the President must replace him with another head of government. Only if the new program also fails to be approved may the President dissolve the National Popular Assembly. In this case general elections must be held within three


\(^{91}\) Mohammad Qasim Hashimzai, “The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan” (in this volume).


\(^{93}\) Shahram Akbarzadeh, “Post-Soviet Central Asia: The Limits of Islam” (in this volume). Kazakhstan has a hybrid system of government that combines aspects of both parliamentary and presidential systems; see Zhenis Kembayev, “The Rise of Presidentialism in Post-Soviet Central Asia: The Example of Kazakhstan” (in this volume). In Kyrgyzstan a popular vote on June 27, 2010 approved a new constitution transforming the country into a parliamentary republic.


\(^{95}\) Nadirisyah Hosen, “Indonesia: A Presidential System with Checks and Balances” (in this volume).


\(^{97}\) The Algerian President, according to a constitutional amendment passed by the parliament on November 11, 2008, is not limited to any term length.
months (Art. 82). In political practice, the prime minister must therefore always try to find and keep a sufficient majority within the National Popular Assembly.  

Like most contemporary constitutions, the Constitution of Algeria formally protects the independence of the judiciary (Art. 138). The President of the Republic has some influence on the judiciary because he is also the President of the High Council of Magistracy, which is the judiciary’s regulatory body. However, he cannot dominate this institution (Arts. 155–157).  

It is not only for these reasons that Algeria may be counted in the group of states with a fully-fledged separation of powers. In 1989 the constitutional council (Conseil Constitutionnel or Majlis al-Dustūri) was established with the mandate to handle matters of constitutionality and to decide upon the validity of elections and referenda (Art. 163). The council is composed of nine members, three being appointed by the President, two by each chamber of parliament, one by the Supreme Court and one by the State Council (Conseil d’Etat or Majlis al-Dawla) which has jurisdiction over administrative cases (Art. 164). The President of the Republic and the Speakers of the two houses of parliament are entitled to consult the constitutional council (Art. 166). Art. 165 authorizes it also to decide upon the constitutionality of treaties, laws, and regulations. Yet in practice it must still prove that it is more than an instrument of the President, which it seemed to be in the first two decades of its existence. After all, it is obvious that the Algerian constitutional framework is strongly inspired by the model of its former colonial power, the French Republic. Influence from the Ottoman or any other constitutional history is not obvious in this case. Similar French-style semi-presidential systems include, for instance, Tunisia, Mali (Constitution of 1992), and the East African Republic of Djibouti (Constitution of 1992).  

Parliamentary systems are relatively uncommon among countries with a majority Muslim population. The Republic of Turkey is certainly the most prominent among those that do have a parliamentary system. The country’s straight path toward modernization has inspired many political leaders, including monarchs, but it has not served as a model for any other constitutional system during the nine decades of its existence. Turkey is also unique in that it has referred to the German Constitutional Court as a model of its own constitutional court (Anayasa Mahkemesi), which was introduced in 1962. More recently, Albania (Constitution of 1998) and Kosovo (2008) adopted parliamentary forms of

99 The High Council of Magistracy (Conseil Superieur de la Magistrature) handles appointments, careers of judges, and disciplinary matters. It is headed by the President of the Republic; the Minister of Justice is its Vice-President.
100 See Imen Gallala-Arndt, “Constitutional Jurisdiction and Its Limits in the Maghreb” (in this volume).
103 Ergun Özbudun, “Secularism in Islamic Countries: Turkey as a Model” (in this volume); Osman Can, “The Turkish Constitutional Court as a Defender of the Raison d’Etat” (in this volume).
government under the influence of the neighboring member states of the European Union. Developments in the Arab transformation states cannot be easily predicted but there seems to be a tendency toward semi-presidential models due to the lacking of established democratic political parties which are a necessary precondition of parliamentary systems.

A few *sui generis* systems should be mentioned. Lebanon’s political system has been aptly described as consociationalism, i.e., a system that shares power not along institutional lines like the separation of powers but between concuring societal—-in the case of Lebanon: confessional—-groups.106 Another particular case is the Great Socialist People’s Libyan Arab Jamāhīriyyah that did not have a constitution but a number of higher-ranking laws defining the structures of the state and its functioning.107 In theory this would have been a basic democracy grounded on a pyramid of so-called People’s Congresses. In reality, however, the country was ruled by the “Brother Leader and Guide of the Revolution,” Mu’ammar al-Qadhāfi. During the civil war of 2011, both the regime in Tripoli and the opposing National Transitional Council (NTC) in Benghazi promised to introduce a new permanent constitution. However, while the regime was not willing to offer details about its plans, the NTC decided only to adopt a provisional constitutional charta defining the process of drafting and adoption of a new constitution for the country.

Finally, the sad case of Somalia brings back to mind the fact that there are territories without any state system at all. Under these rather extreme circumstances, power is wielded by those who have men, money, and arms, resulting in uncontrolled and uncontrollable rule over the majority of the population.108

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108 Hatem Elliesie, “Constitution Building in Somalia: Islamic Responses to a Failed State” (*in this volume*).
ANNEX: CONSTITUTIONAL DOCUMENTS FROM THE OTTOMAN AND IRANIAN EMPIRES

A. The Basic Law [Kanûn-ı Esâsi] of the Ottoman Empire of December 23, 1876

The Lands of the Ottoman State

Art. 1. The Ottoman State [devlet-i ʿosmâniyyeh] comprises the present lands [memâlik] and parts [kıṭ'a], and semi-dependent [mümtâz] provinces [eyâlat, pl. of eyâlet], and forms an indivisible whole [yekviyyâd, lit.: one body], which cannot be split up [tefrîk] under any pretext whatever.

Art. 2. The capital [pâ-yi taḥt meaning “capital” as well as “residence”] of the Ottoman State is the city of Istanbûl and the aforementioned city possesses no privilege [imtiyâz] or immunity [muʿâfiyet] different from the other ottoman towns [bilâd-i ʿosmâniyyeh].

Art. 3. The eminent Ottoman sultanate [sultanat-i seniyye-i ʿosmâniyyeh], which includes the Supreme Islamic Caliphate [khalîfet-i kübrâ-yi islamiyye], belongs according to the rules established ab antiquo [ṣulî-i kadîme vejiyle—according to the old rules], to the eldest child [eylâd] of the descendants of the House of Osman [sülahle-i Âl-i ʿOsmân].

Art. 4. The Person [zât] of His Majesty [bağret] the Pâdishâh [Emperor] is according to the Caliphate [ḥasbe-i-khilâfeh] the protector of the religion of Islam and He is the sovereign and Pâdishâh of the totality of the Ottoman subjects [ṭebâ-a-yi ʿosmâniyyeh].

Art. 5. The Royal Person [nefs-i hümâyûn] of His Majesty the Pâdishâh is sacred [muḵaddes] and not responsible [ghayr-i mesʿâl].

Art. 6. The liberal rights [ḥukûk-i ḥürüriyye] of the descendant of the House of Osman, their personal wealth [envâl] and property [emlâk], and their financial budget [takṣiṣât-i maliyye] during their lifetime, are under public guarantee [tekâfûl-i ʿumûmî].

Art. 7. The appointment and dismissal of ministers and the conferring of grades, positions and the bestowing of medals, and the conferring of semi-dependent provinces, according to the conditions of semi-dependence [sherâʾi-i imtiyâziyye] and the coining of money and the mentioning of his name during the Friday sermon [khutbe] and the concluding of treaties with foreign states and the declaration of war and peace and the command of land and sea forces and the carrying out of military operations and of the provisions of the sherâʾ- and of the kânûn-laws and the drawing up of administrative decrees [niẓâmnâme] concerning the procedures of the administration of the administrative districts and the pardoning or commuting of judicial penalties [muʿâzât-i kânûniyye], lit.: legal penalties]; the summoning and dissolving of the General Assembly and, if necessary, the dissolving of the Chamber of Deputies, under the condition of directing the election of its new members, all belong to the sacred rights of the Pâdishâh.

This translation by Max Bilal Heidelberger relates to the document published in the Ottoman Official Gazette Düştâr, törtêb-i evvel [1st series], vol. IV, 4–20. The same volume contains an Edict of Abdülhamid II to the Grand Vizier, Midhat Pâshâ, with regard to the entry into force of the Basic Law, signed on 7 Zî-1-ḥijjah 1293 (i.e., December 23, 1876), which is not translated here (Düştâr, törtêb-i evvel [1st series] vol. IV, 2–3).
Public Rights [ḥuḳḳāk-i ʿumāmiyyeh] of the Subjects [tebeʿāḥ] of the Ottoman State

Art. 8. The totality of the persons [efrād] who are subjects [tābiʿiyet, lit.: those who reside in the “position of being a subject”] of the Ottoman State, without exception, whatever faith or confession they belong to, are called Ottomans and the status of an Ottoman is acquired and lost according to conditions specified by law.

Art. 9. The totality of the Ottomans possess personal liberty and carry the obligation not to transgress the liberty rights [ḥuḳḳāk-i ḥurriyyet] of others.

Art. 10. Personal liberty is wholly inviolable. No one can suffer punishment, under any pretext whatsoever, except in cases determined by law, and according to the forms prescribed by it.

Art. 11. The religion of the Ottoman State is the religion of Islam. But, while maintaining this principle, the free exercise of all faiths known in the Ottoman lands, and the continued existence of religious privileges granted to different communities as they used to be, on condition of public order and morality not being interfered with, are under the protection of the State.

Art. 12. The press is free, within the limits imposed by law.

Art. 13. Ottoman subjects have the permission of forming all kinds of companies for industry or agriculture, within the limits imposed by law and order [niẓām].

Art. 14. One or more persons from among the Ottoman subjects have the right to present petitions [ʿarż-i ḥāl: petition in the sense of “complaint”] about affairs they regard as contrary to law and regulation, done either to their own or public detriment to the proper authorities, and likewise to present petitions as a plaintiff [lit.: in the capacity of a plaintiff] to the General Assembly, and to complain about the actions of civil servants.

Art. 15. Education is free. On condition of conforming to the law, every Ottoman is permitted to attend public or private instructions.

Art. 16. All schools are under state supervision. The necessary means will be devised so that the education of the Ottoman subjects takes place within the framework of unity and order and there will not be any interference with the educational methods [uṣūl-i taʿlīmiyyeh] related to religious matters [umūr-i ʿtiḥādiyyeh] of the different confessional communities [millets].

Art. 17. In the face of the law and in view of the rights and duties of the country [memleketiñ ḥuḳḳāk ve veğāʾiñ] all Ottomans are equal without prejudice to their religion and confession.

Art. 18. To be employed in the service of the state, it is necessary for the Ottoman subjects to know Turkish [türkcheh], which is the official language [lisān-i resmi] of the state.

Art. 19. All subjects are admitted to the appropriate public offices according to their aptitude and ability.

Art. 20. In accordance with the special regulations, taxes [tekālif-i muḵarrereh, lit.: taxes decided upon] are imposed [sarḥ] and distributed [tevzr] among the totality of the subjects in proportion to the capacity [kuḍret] of each person.

Art. 21. Everyone is secure [emīn] regarding the wealth and property he legally owns [mūṭeṣarriñ oldīghī māl ve mūlκ]i]. If the necessity for public welfare is not definite and without the payment of a legally prescribed compensation, nobody’s property [tāṣarrafuñda olān mūlκi] can be taken.

Art. 22. The apartment [mesken] and domicile [menzil] of everyone in the Ottoman lands is inviolable. Except for a reason prescribed by law, nobody can break on the part of the government into the apartment and domicile of anyone.
Art. 23. According to the statutory form of procedure that is to be enacted, no one is bound to appear before any other than a legally competent tribunal.

Art. 24. Confiscation of property [müşâdereh], forced labor [ângâhârâyâh], and taking temporary possession of property [jerâmeh: a kind of fine] are prohibited. Nevertheless in times of war, contributions [tekâlîf] and cases [âhvâl] then to be legally defined [üsâlen ta'în olnajâk], are exempt from this prevision.

Art. 25. No money [âçekeh] can be taken from anybody under the name of a tax [vergî] or impost [rüsîmât], or under any other name, except by virtue of law.

Art. 26. Torture [ishkênjeh] and any other form of tormenting [ezıyyet], are absolutely and totally forbidden.

Ministers of the State

Art. 27. The post of the Grand Vizier [sadâret] and the Islamic Sheykhü’-l-İslâm [meshikhat] is conferred [iḥâleh buyrîldîghî] to the persons enjoying the trust of the Pâdishâh, as the posts of the other ministers [vükela] are conferred by imperial decree [irâdeh-i shâhânîeh, lit.: eminent or sublime decree].

Art. 28. The Council of Ministers [meqlis-i vükela] convenes under the presidency of the Grand Vizier and all weighty state affairs, whether internal [dâkhîlî] or foreign [khârîgî], come within its competency. Those decisions [karârlar] that result from their discussions [müzâkerâtî], which must be submitted for approval [isti’zânî], are applied by imperial decree.

Art. 29. Each minister carries out those measures, which appertain to his department according the rules within the scope of his authorization and he presents matters that are not within his scope of authorization to the Grand Vizier. The Grand Vizier takes the necessary actions [on his own] for those kinds of matters which don’t require consultation [müzâkereh] or he takes action after asking for the His Majesty the Pâdishâh’s approval and for matters that need consultation after presenting [’arz eyleyerek] them for consultation of the Council of Ministers on the basis of an imperial decree. The different types [enâ] and grades [derejât] of these matters [maşâlîb, also: responsibilities] will be defined in a special ordinance [niğâm].

Art. 30. The ministers of the state are responsible for the situation [âhvâl] and decisions under their administration.

Art. 31. If one or more members of the Chamber of Deputies lodge a complaint about a person from among the ministers of the state because of his responsibility for the [bad] situation within the scope of his duty [vażîfeh], the complaint, according to the internal by-laws of the Chamber of Deputies first of all has to be handed to the President of the Chamber of Deputies, so it can be checked by the department [shu’beh] responsible to determine whether it is necessary to submit the same to the decision [müzâkereh] of the Chamber and the President has to refer it within three days to this committee through which the necessary investigations are carried out and after the concerned Person [i.e., the Minister complained of] has been asked to give explanations, the decision [kâtârmâmeh] about the relevance of the complaint for counseling [müzâkerêh], which will be taken by the vote of the majority, is read before the Chamber of Deputies and, if, after the accused person has been summoned if it is necessary and the explanations he gives either personally or through a representative [lit.: through mediation] [the decision] will be adopted by the present members with the absolute majority of two-thirds, an address asking for the trial
Art. 32. The forms of procedure for the trial of those who are accused from among the ministers will be defined by a special law.

Art. 33. There is no distinction whatsoever between ministers and other Ottoman individuals in any kind of legal proceeding outside of their functions. Causes of such nature are to be referred to the general tribunals [meḥākim-i ‘umāmiyyeh].

Art. 34. The ministers who are to be accused by the public prosecutor’s office [dā‘reh-i ittihām] of the High Court of Justice are suspended from their functions until their innocence is proven.

Art. 35. If the ministers are insisting on the approval of one of the articles [māddeh] about which the Chamber of Deputies and the ministers differ and it is rejected categorically repeatedly on the part of the deputies while giving the detailed reasons, the replacement of the ministers or the dissolution of the Chamber of Deputies lie exclusively in the discreitional power of His Majesty the Pādishāh.

Art. 36. If there appears an urgent necessity in times when the General Assembly is not in session, to protect the state against some danger or to preserve the public safety, and if there is not enough time to summon and assemble the Assembly for the counseling of the laws that need to be introduced in this respect, the decisions taken by the assembly of ministers have provisionally the force of law as long as they are not contrary to the Basic Law by imperial decree until the Chamber of Deputies has a session and makes a decision.

Art. 37. Each minister has the right to be present at any time he wants at the sittings of both Chambers, or to be represented there by one of the chief officials of his entourage [ma‘īyyet] and to approach its members with the request to speak to them.

Art. 38. When a minister in consequence of a decision adopted by the majority of votes is requested to appear in the assembly of deputies to give explanations about some matter, he replies to the questions addressed to him by appearing either personally or sending one of the chief officials of his entourage [ma‘īyyet] or he also has the right to postpone his reply, if he deems it necessary, by assuming the responsibility for it.

Civil Servants

Art. 39. All civil servants [me‘mārin], according to the conditions of the regulations yet to be determined, can be chosen [intikhāb] for those public offices, for which they are competent [ehil] and worthy, and the civil servants that have been chosen in this way cannot be dismissed [‘azl] or transmuted [tebadil] without having given a legal reason for dismissal by his behavior, or unless he himself resigns, or unless the state [in the sense of “government”] sees an urgent reason for it.

And those who have given proof of good conduct and uprightness, as well as those who retire due to an urgent reason in the interest of the state [“government”] will either be promoted, or receive a pension, or half-pay, according to the terms which will be laid down in a special regulation.

Art. 40. The duties of the several offices will be settled by special regulations. Each functionary is responsible within the limit of his duties.

Art. 41. Every functionary is bound to pay respect to his superior, but obedience is only due within the limits defined by the law. In respect of acts contrary to law, the fact of
having obeyed a superior will not relieve the official who has carried them out from responsibility.

General Assembly

Art. 42. The General Assembly [mejlis-i ʿumūmi] is composed of two different Chambers [heyʿet] with the names Chamber of Notables [heyʿet-i aʿyān] and Chamber of Deputies [heyʿet-i mebʿūsān].

Art. 43. The two Chambers of the General Assembly will meet on November 1 of each year. And the opening takes place by imperial decree. The closing, on the following March 1, also takes place following an imperial decree. Neither of the two Chambers can meet while the other Chamber is not sitting.

Art. 44. His Majesty the Pādishāh according to the exigencies he sees in the interest of the state [devletjeh], may anticipate the date of the opening or may abridge or prolong the session.

Art. 45. On the day of the opening of the General Assembly the opening ceremony shall take place in the presence of either His Majesty the Pādishāh in person or represented by the Grand Vizier, and together with the ministers and the present members of the two Chambers.

An Imperial Speech will be read, giving an account of the internal position of the state and the state of its foreign relations during the past year, and setting forth the measures the adoption of which for the following year is deemed to be necessary.

Art. 46. The persons elected [intikhāb] or appointed [naṣb] for membership to the General Assembly shall take an oath of fidelity to His Majesty the Pādishāh and to the country [vaṭān], shall [take an oath] to observe the Basic Law, to perform the duties entrusted to them, and to abstain from all acts opposed to those duties, at the day of the opening of the Session in the presence of the Grand Vizier, and in case he cannot be present at a public sitting of the Chamber of which they are members, in the presence of their Presidents.

Art. 47. Members of the General Assembly are free in the expression of their votes and opinions and cannot be bound by promises or threats, nor influenced by instructions and they cannot be prosecuted for casting of votes or opinions expressed in the course of debate, unless they have contravened the Standing Orders [niẓāmnāmeh-i dākhüliyyeh, lit.: order of the house] of the Chamber, in which case they will be treated according to the aforementioned Standing Orders.

Art. 48. Any member of the General Assembly who, by an absolute majority of two-thirds of the Chamber of which he is a member, is accused of treason, or attempting to violate or abolish the Constitution, or of committing a crime [tūḥmet] or who has been legally condemned to imprisonment or exile, loses his status as senator or deputy.

He will be tried and sentenced passed by the tribunal competent for the prosecution of these actions.

Art. 49. Every member of the General Assembly must vote in person. He has the right to refrain from giving his vote for or against a matter that has been debated.

Art. 50. No one can at the same time be a member of both Chambers.

Art. 51. No debate can be started in either of the Chambers unless one member more than half of its seated [müretteb olān] members be present and all resolutions which are not specified as to be carried by a two-thirds majority must be carried by an absolute majority of members present are adopted by the absolute majority of the members
present, and when the votes are equally divided, the vote of the President shall be counted as two.

Art. 52. All private petitions presented to either Chamber shall be rejected if [in the course of inquiry] it should be shown that the petitioner did not apply in the first instance to the state officers concerned, or to their superior officers.

Art. 53. The initiative of bringing forward a bill or altering an existing law lies with the Ministry, and the Chamber of Notables and Chamber of Deputies may also originate a new law, or the modification of an existing one, with reference to matters within their competence. In the latter case, the demand is submitted via the Grand Vizier to His Majesty the Pâdishah for approval, and, if the imperial decree has been issued, the Council of State [shûrâ-yâ devlet] is put in charge prepare the proposed Project of Law [láyiha], according to the information and details from the proper quarter.

Art. 54. Drafts of bills elaborated by the Council of State will become law [düstû-'l-'amel] after having been specified and accepted first before the Chamber of Deputies, and after that before the Chamber of Notables and after the sanctioning by the Imperial decree and no draft bill [láyiha], once rejected definitely by either of the Chambers, can be debated a second time in the course of the session period of the same year.

Art. 55. A bill is not regarded as carried if it has not been read paragraph [bend] after paragraph before the Chamber of Deputies and the Chamber of Notables and unless every paragraph has been voted and the decision has been made by a majority of votes, and if the whole bill has not been voted by a majority in each of the two Chambers.

Art. 56. These Chambers do not admit anyone who does not belong to the ministers, their deputies or their own members, or the functionaries officially summoned, who has come to make any statement whatever, whether he presents himself personally or as the representative of a body and does not listen to any of his statements.

Art. 57. The debates of the Chambers are conducted in the Turkish language. The bills that are to be discussed have to be printed before the day fixed upon for discussion and distributed among its members.

Art. 58. The votes in the Chambers are given either by the calling of names [ta'âin-i esâmi], or by special signs or by secret voting. The carrying out of the secret vote is subject to the decision of a majority of the members present.

Art. 59. The maintenance of order in each Chamber is entrusted to its President.

Chamber of Notables [hey'et-i âyân]

Art. 60. The President and members of the Chamber of Notables are nominated directly by His Majesty the Pâdishâh under the condition that [their number] does not exceed a third of the members of the Chamber of Deputies.

Art. 61. To be nominated as a member of the Chamber of Notables it is necessary to have shown by one's deeds and actions that one is worthy of public trust and confidence, and to have rendered signal services to the interests of the state, and to belong to the persons known among the public [müte'ârîf], and not to be younger than forty years of age.

Art. 62. Membership of the Chamber of Notables is for life.

To this position available persons, having exercised the functions of Minister, Governor-General [valî], Army Corps Commander, Judge, Ambassador or Minister Plenipotentiary, Patriarch, Grand Rabbi, Divisional General of the Land or Sea
Forces, and generally persons combining the requisite conditions can be nominated. Those who are called at their request to other functions, lose their position as a member [of the Chamber].

Art. 63. The monthly parliamentary allowance [me‘āsh] for membership in the senate is fixed at 10,000 piastres [ghurāsh]. If a member receives from the Treasury salary or pay below 10,000 piastres in any other capacity he is entitled only to the difference if the sum is. If the sum is 10,000 piastres or more he continues to receive it.

Art. 64. The Chamber of Notables examines the bills or budgets [müvāzenē] transmitted to it by the Chamber of Deputies and if it finds a provision fundamentally contrary to religious matters or to the sovereign rights of the Pādishāh, to liberty, the Basic Law, the territorial integrity of the Empire, the internal security of the country, to the interests of the defense and protection of the country, or to general morality, it either rejects it categorically by a vote, assigning its reasons; or it sends it back, accompanied by its observations, to the Chamber of Deputies, demanding that it should be amended or modified and the bills adopted by it are invested with its approval, and are transmitted to the Grand Vizier. The Chamber examines the petitions presented to it and transmits them to the Grand Vizier such as it thinks deserving of reference, accompanying them with its observations.

Chamber of Deputies [hey‘et-i meb‘āsān]

Art. 65. The number of members of the Chamber of Deputies is fixed at one deputy for every 50,000 males belonging to the Ottoman subjects.

Art. 66. The election is held secretly. The mode of election will be determined by a special law.

Art. 67. The membership in the Chamber of Deputies is incompatible with public functions, except for those who are elected from among the ministers and those other public functionaries elected as a deputy are free to accept or refuse; but, in case of acceptance, they must resign their functions.

Art. 68. The following are ineligible for membership to the Chamber of Deputies:

1. Those who do not belong to the Ottoman subjects;
2. Those who, by virtue of the special regulation in force, enjoy immunities attached to the foreign service to which they belong;
3. Those not understanding Turkish;
4. Those not turned thirty years of age;
5. Persons attached to the service of a private individual at the time of the election;
6. Bankrupts not rehabilitated;
7. Those notoriously in disrepute for their bad conduct;
8. Persons visited with judicial interdiction, as long as that interdiction is not raised;
9. Those who have lost their civil rights;
10. Those who lay claim to a foreign nationality [ṭabi‘iyyet].

After the expiration of the first period of four years, one of the conditions of eligibility will be ability to read Turkish and, as far as possible, to write in that language.
Art. 69. General elections of deputies are held once every four years and the commission of every deputy lasts four years, but he is re-eligible.

Art. 70. The general elections of deputies commence at the latest four months before November 1, which is the date fixed for the meeting of the Chamber.

Art. 71. Every member of the Chamber of Deputies represents the whole body of Ottomans, and not exclusively the circumscription [da‘ireh] which has elected him.

Art. 72. The electors are bound to choose their deputies from among the inhabitants of the circumscription [da‘ireh] of the province [vilâyet] to which they belong.

Art. 73. In case of the dissolution of the Chamber of Deputies by imperial decree, the general elections of deputies are to commence in such times as that the Chamber may meet again at the latest within six months of the date of the dissolution.

Art. 74. In the case of death, judicial interdiction [hajriyyeh-i meşhrû‘eh], prolonged absence from the assembly or resignation, loss of office of deputy resulting from a condemnation or from the acceptance of public functions, a substitute shall be nominated in conformity with the prescriptions, and in such time as that the new deputy will be able to exercise his mandate at the latest in the following session.

Art. 75. The mandate of deputies elected to vacant places only lasts till the following general election.

Art. 76. The Treasury will allot to each deputy 20,000 piastres each year for the session and calculating on the basis of a monthly salary of 5,000 piastres the amount of their traveling expenses will be established conformably with the provisions of the regulations for civil functionaries of the state.

Art. 77. To the Presidency of the Chamber of Deputies three and to each, the vice-presidency [second presidency] and vice-vice-presidency [third presidency] three persons, which are altogether nine, are elected one is selected by His Majesty the Pâdishâh as President, and two as vice presidents, which are appointed by imperial decree.

Art. 78. The sittings of the Chamber of Deputies are public. At the same time, if the proposition is made by the ministers, or by the president, or by fifteen members of the Chamber of Deputies to hold a debate about an important matter in secret, the Chamber may form itself into secret committee and that proposition is voted in secret committee.

Art. 79. No deputy can, during a session of the Chamber of Deputies, be arrested or prosecuted, except in case of flagrant delinquency, unless a majority of the Chamber grants an authorization to prosecute.

Art. 80. The Chamber of Deputies discusses the bills submitted to it and adds them either to the financial provisions [umâr-i mâliyyeh] or to the Basic Law. It adopts or revises provisions and examines in detail the general expenditure of the state [meşârîf-i ‘umûmiyyeh] as has been determined in the law of budget [mûvâzeneh kânûnî], and settles the amount with the ministers. It likewise determines, in accord with the ministers, the nature, amount, and mode of assessment and collection of the receipts destined to meet the expenditure.

Courts of Law [meḥâkim]

Art. 81. The judges nominated in conformity with the special law on this subject and furnished with the patent of investiture [berâ‘at-i terîf] are irremovable, but they can resign. The promotion and curriculum of judges, their displacement, superannuation, and revocation, in case of judicial condemnation, are subject to the provisions of the same law.
The same law fixes the conditions and qualities requisite for exercising the functions of judge or the other functions of a judicial order.

Art. 82. The sittings of all tribunals are public and the publication of judgments is authorized. Nevertheless, in cases specified by law, the tribunal may sit with closed doors.

Art. 83. Any person may, in the interest of his defense, make use before the tribunal of the means \[vesā’ūf\] permitted by the law.

Art. 84. No tribunal can, under any pretext, refuse to judge an affair within its competency. It cannot either arrest or adjourn judgment after having commenced the examination or instruction, unless the plaintiff desists. Nevertheless, in penal matters the public prosecution continues to be carried on conformably to law.

Art. 85. Every affair is judged by the tribunal to whose circuit it belongs. Suits between individuals and the state are within the competency of the ordinary tribunals.

Art. 86. The tribunals are free [āzād] from any kind of interference [müdākhaleh].

Art. 87. Affairs touching upon the sheri‘at are decided by the sheri‘at tribunals [mehrākim-i sheri‘iyeh]. The judgment of civil affairs appertains to the civil tribunals [mehrākim-i niğāmiyeyeh].

Art. 88. The various categories of tribunals, their competency, degrees, and divisions the duties of the judges are settled by law.

Art. 89. Apart from the mentioned tribunals, there cannot, under any title whatever, be formed extraordinary tribunals or commissions to judge certain special cases. Nevertheless, the nomination of a ‘müvellā’ [judge delegate] and arbitration are sanctioned in the forms established by law.

Art. 90. No judge can combine his jurisdictional functions with other functions paid by the state.

Art. 91. Public prosecutors will be appointed on behalf of protecting the rights of the public in matters of criminal law [umār-i jeza‘iyeyeh]. Their functions and grades will be fixed by law.

High Court of Justice

Art. 92. The High Court of Justice [divān-i ‘ālī, lit.: high office or chamber] is formed of thirty members, of whom ten are [from] the Chamber of Notables, ten [from] the Council of State, and ten of the Court of Cassation and Court of Appeal [mahkemeh-i temyiż ve istiňaf], chosen by lot among their presidents and members. The High Court is convoked, when necessary, by imperial decree, and assembles in the building of the Chamber of Notables. Its functions consist in trying the ministers, the presidents and members of the Court of Cassation, and all other persons accused of acting against the royal rights [bükkük-i shähâne, here in the sense of high treason] and trying to endanger His Excellency.

Art. 93. The High Court is composed of two Chambers; the Chamber of Accusation [da’ireh-i ittihamiyeyeh] and the Chamber of Judgment [divān-i hüküm]. The Chamber of Accusation is formed of nine members, nominated by lot among the members of the High Court, three of them being from the Chamber of Notables, three from the Court of Cassation or Court of Appeal, and three from the Council of State.
Art. 94. The decision whether someone is accused is pronounced by the Chamber of Accusation by a majority of two-thirds of its members. The members belonging to the Chamber of Accusation cannot be present in the Chamber of Judgment.

Art. 95. The Chamber of Judgment is formed of twenty-one members from the presidents and members of the High Court of Justice, seven of whom are from the Chamber of Notables, seven members of the Court of Cassation or Court of Appeal, and seven members from the state council. It judges the cases that are sent to it by the Chamber of accusation by a majority of two-thirds of its members, and conformably to the laws in operation. Its decisions are not susceptible either of appeal or of recourse to Cassation.

Financial Matters

Art. 96. Taxes to the profit of the state can only be established, assessed, or collected in virtue of a law.

Art. 97. The budget [būjeh] is the law which contains the estimates of the receipts and expenses of the state. Taxes to the profit of the state are governed by that law as to their assessment, their distribution, and collection.

Art. 98. The examination and the vote by the General Assembly of the budget bill are carried through article by article. The tabular statements to be annexed, comprising the details of the receipts and expenditure, are to be divided into sections, chapters, and articles, according to the model defined by the regulations. These tables are voted chapter by chapter.

Art. 99. The bill of the budget is submitted to the Chamber of Deputies immediately after the opening of the session of the General Assembly, in order to make its execution possible from the commencement of the year to which it applies.

Art. 100. No extra budgetary expense can be defrayed out of the state funds except by virtue of a law.

Art. 101. If in the case of urgency caused by extraordinary circumstances additional means exterior to the budget are urgently needed, the Chamber of Ministers [hey’et-i vükêlê] may, if the General Assembly is not sitting, after presentation and petition before the Pâdishâh, create by an imperial decree the necessary resources, and defray expenses not provided for in the budget, on the condition of immediately laying a bill on the subject before the General Assembly at the opening of the next session.

Art. 102. The budget is voted for one year, and has only legal force for the year to which it refers. At the same time, if, in consequence of some exceptional circumstances, the Chamber of Deputies is dissolved before the budget is voted, the ministers of the state may, by virtue of an imperial decree, apply the budget of the preceding year till the next session of the Chamber of Deputies, but the application of this provisional budget shall never extend beyond the term of one year.

Art. 103. The law definitely settling the budget indicates the real amount of receipts collected and payments made out of the revenue and expenditure of the year to which it relates. Its form and provisions must be the same as those of the budget.

Art. 104. The definitive draft of the budget bill is submitted to the Chamber of Deputies at latest within four years [sic. seneh; n.b.: the original text is erroneous at this point, the period was meant to be four months] from the end of the year to which it relates.

Art. 105. An Office of Accounts [muhâsebeh divâni] shall be created charged with the examination of the operations of the finance functionaries, as also of the annual accounts drawn up by the various ministerial departments.
It will yearly address to the Chamber of Deputies a special report stating the results of its labors, accompanied by its observations. This office will present a report containing the explanation of the financial situation once every three months via the presidency of the ministers, to the Pâdishâh.

Art. 106. The Office of Accounts shall be composed of twelve irremovable members, nominated for lifetime by imperial decree, unless the explanatory proposition for his dismissal be approved by a decision of the majority of the Chamber of Deputies.

Art. 107. The qualities required of members of the Office of Accounts, the details of their functions, the rules applicable in case of resignation, replacement, promotion, and superannuation, as well as the organization of its bureaus [âklâmî], shall be determined by a special law.

Provinces

Art. 108. The administration of provinces [vilâyât] shall be based on the principle of decentralization [tevâ-i me'zcümiyyet ve teşriki-i vezâyi]. The details of this organization shall be fixed by a law.

Art. 109. A special law will settle on wider bases the election of the members of the administrative councils of provinces, districts [livâ], and cantons [kažâ], as also of the General Council, which meets annually in the chief town of each province.

Art. 110. The functions of the General Provincial Councils [vilâyât mejlâis-i 'umzâmiyyehsî] shall be fixed by the same special law, and shall comprise: the right of deliberating on matters of public utility, such as the establishment of means of communication, the organization of loan associations [sandik], the development of manufactures, commerce, and agriculture, and the diffusion of education, together with the right of applying to the competent authorities for the redress of acts committed in contravention of the laws and regulations as regards assessment or collection of taxes or any other matter.

Art. 111. There shall be in every circumscription [dâ'ireh] a Council appertaining to each of the different confessions, charged with controlling the administration of the revenues of the real property of pious foundations [vakıfî], the special destination of which is fixed by the express provisions of the founders or by custom, the employment of funds or properties assigned by testamentary provision to acts or charity or beneficence and the administration of funds for orphans, in conformity with the special regulation governing the matter. Each Council shall be composed of members elected by the community it represents, conformably to special rules to be established. The aforementioned Councils will be subordinated to the local authorities and the General Councils of the provinces.

Art. 112. Municipal business will be administered in Istanbul [der-i se'âdet] and in the provinces by elected municipal councils. The organization of the municipal councils, their functions, and the mode of election of their members, will be determined by a special law.

Various Matters [mevâdd-i shettâ]

Art. 113. In the case of the perpetration of acts, or the appearance of indications of a nature to presage disturbance at any point on the territory [mülk], the Imperial Government [bîkümet-i senîyyeh] has the right to proclaim temporarily a state of emergency [idâreh-i 'ürfîyyeh, lit.: customary administration] there.
The state of emergency consists in the temporary suspension of the civil laws. The mode of administration of localities under a state of emergency will be regulated by a special law. His Majesty the Pâdishâh has the exclusive right of expelling from the territory of the Empire those who, in consequence of trustworthy information obtained by the police, are recognized as dangerous to the safety of the state.

Art. 114. Primary education will be obligatory on all Ottoman individuals. The details of application will be fixed by a special law.

Art. 115. No provision of the Basic Law can, under any pretext whatsoever, be suspended or neglected.

Art. 116. In case of duly proved necessity, the Constitution may be modified in some of its provisions under the following conditions:

Every proposal of modification, whether presented by the Chamber of Ministers or by the two Chambers of Notables or of Deputies, must be, in the first instance, approved by two-thirds of the members of the Chamber it shall be forwarded to the Senate and likewise adopted by a two-thirds majority of the Chamber of Notables, and if it is sanctioned by imperial decree, the changes made shall have force of law [dîstûrû-‘l-‘amel olâr].

Articles of the constitution, which are proposed to modify, remain in force until the modification, after having been voted by the Chambers, shall have been sanctioned by imperial decree.

Art. 117. The Court of Cassation will interpret if necessary, the meaning of an article relating to matters of justice [umîr-i ‘adliyyeh]; if relating to administrative matters, the Council of State; and concerning this Basic Law, the Chamber of Notables.

Art. 118. All the provisions of the laws, regulations, usages, and customs now in force shall continue to be applied, so long as they shall not have been modified or abrogated by other laws and regulations.

Art. 119. The preliminary order of 10th Shevval [12]93 [October 28, 1876], concerning the General Assembly, will cease to have effect from the end of the first session.

On the 7th Zî-‘l-hijjej 1293 [December 23, 1876].

B. Revisions of the Basic Law

No. 130—Law on the Revision of Some of the Articles of the Basic Law of 7. Zî-‘l-hijjej 1293

Revised Articles [mevâdd-i mu’addâleh]

Art. 3. The eminent Ottoman sultanate [saltanat-i senîyyeh-i ‘osmânîyyeh], which includes the Supreme Islamic Caliphate [khilâfet-i kûbî-ya islâmiyyeh], belongs according to the rules established ab antiquo [usûl-i ẁâdîme vejihle—according to the old rules], to the eldest child [evlâd] of the descendants of the House of Osman [sûlâleh-i Âl-i ‘Osmân]. On his accession the Pâdishâh shall swear before the General Assembly, or

if the assembly is not sitting, at its first meeting, to respect the rules of the sher‘at [sher‘-i sherif] and the Basic Law, and to be loyal to the country [va‘fan] and the nation [millet].

Art. 6. The liberal rights [hukûk-i hûrriyyeh] of the descendances of the House of ‘Ösmân, their personal wealth [emvâl] and property [emlâk], and their financial budget [takhsîsât-i mâliyyeh] during their lifetime, are under public guarantee [tekâfûl-i ‘umûni], according to a special law.

Art. 7. The mentioning of his name during the Friday sermon; the minting of money; the granting of high public offices and titles, according to the law ad hoc; the bestowal of decorations; the selection and appointment of the Grand Vizier and the Sheykhü‘-l-islâm; the confirmation in their offices of the ministers of the cabinet formed and proposed by the Grand Vizier, and, if need arise, the dismissal and replacement of ministers according to established practice; the approval of putting into force of general laws; the drawing up of regulations concerning the workings of governmental departments and the method of administering the laws; the initiative in all kinds of legislation; the maintenance and execution of the canon [aḥkâm-i sher‘îyyeh] and civil laws [aḥkâm-i kânâniyyeh]; the appointment of persons to the privileged provinces according to the terms of their privileges; the command of the military and naval forces; the declaration of war and the making of peace; the reduction and remission of sentences passed by penal courts; the granting of a general amnesty with the approval of the General Assembly; the opening and closing of the sessions of the General Assembly; the summoning of the General Assembly before its time in extraordinary circumstances; according to Art. 35 the dissolution of the Chamber of Deputies if necessary, with the consent of the Chamber of Notables, on condition that elections take place and the Chamber assembles within three months; and the conclusion of treaties in general are the sacred rights of the Pâdishâh. Only, the consent of the General Assembly is required for the conclusion of treaties which concern peace, commerce, the abandonment or annexation of territory, or the fundamental or personal rights of Ottoman subjects, or which involve expenditure on the part of the state. In case of a change of the Cabinet of Ministers while the General Assembly is not sitting, the responsibility arising out of the change rests upon the new cabinet.

Art. 10. Personal liberty is wholly inviolable. No one can suffer punishment, under any pretext whatsoever, except in cases determined by the canon [sher‘] and civil law [kânân] according to the forms prescribed by it.

Art. 12. The press is free within the limits of the law. Searching through and controls cannot be made before it is printed in any way.

Art. 27. Just as His Imperial Majesty the Pâdishâh entrusts the posts of Grand Vizier and Sheykhü‘-l-islâm to men in whom he has confidence, so the other ministers, who are approved and proposed by the Grand Vizier entrusted with the formation of the cabinet, are confirmed in their offices by imperial decree [irâdeh-i senîyyeh].

Art. 28. The Council of Ministers shall meet under the presidency of the Grand Vizier. It shall deal with affairs of importance, both home and foreign. Such of its decisions as need the Imperial assent shall be put into force by imperial decree.

Art. 29. Each minister carries out those measures, which appertain to his department according the rules within the scope of his mandate and he presents matters that are not within his scope of authorization to the Grand Vizier. The Grand Vizier takes the necessary actions directly for those kinds of matters which don’t require consultation [müzâkereh] and for matters that need consultation presents them [to the Pâdishâh] if they have been approved [tâṣdîk oldîghı takdîr-deh] after debating by of the Council of Ministers [mejâlis-i vâkelâ], and in cases where
approval [tasdiğ] is not needed, he reports his decision to the Chamber of Ministers [heyet-i viikelâ]. The different types [enwat] and grades [derejât] of these responsibilities [maşâlih; lit. matters; interests] will be defined in a special ordinance [nigâm]. The Sheykhü’l-islâm presents [’arz eder] the matters that don’t need consultation directly [to the Pâdishâh].

Art. 30. Ministers shall be responsible before the Chamber of Deputies collectively for the general policy of the government and personally for the affairs of their respective departments. Decisions which need the sanction of His Majesty the Pâdishâh shall only become valid if signed by the Grand Vizier and the minister [nâqir] concerned, who thus accept responsibility, and countersigned by His Majesty the Pâdishâh. Decisions arrived at by the Chamber of Ministers shall bear the signatures of all the ministers, and in cases where approval [tasdiğ] is necessary, these signatures shall also be headed by the signature of His Imperial Majesty the Pâdishâh.

Art. 35. If a difference arises between the ministers and the Chamber of Deputies and the ministers are insisting on their opinion while the deputies reject it categorically and repeatedly, the ministers have to [mejbûrdîr] either accept the decision of the deputies or resign [isti’fâ]. If in the case of resignation, the newly formed Chamber of Ministers still insists on the opinion of their predecessors, and the assembly once again rejects it, while mentioning its reasons, the Person of His Majesty the Pâdishâh can dissolve the assembly according to Art. 7. Nevertheless, if the new Chamber of Deputies insists on the opinion of their predecessors, it will be obligatory to accept the opinion and decision of the assembly of deputies.

Art. 36. If there appears an urgent necessity in times when the General Assembly is not in session, to protect the state against some danger or to preserve the public safety, and if there is not enough time to summon and assemble the Assembly for the counseling of the laws that need to be introduced in this respect, the decisions taken by the assembly of ministers have provisionally the force of law as long as they are not contrary to the Basic Law by imperial decree until the Chamber of Deputies has a session and makes a decision and they have to be presented to the Chamber of Deputies in the first session.

Art. 38. When a minister in consequence of a decision adopted by the majority of votes is requested to appear in the assembly of deputies to give explanations about some matter, he replies to the questions addressed to him by appearing either personally or sending one of the chief officials of his entourage [ma’iyyet] or he also has the right to ask for postponement of his reply, if he deems it necessary, while assuming the responsibility for it. As a result of the explanations, the supervisor [nâqîr] who does not have the support of the majority of the votes of the Chamber of Deputies will be dismissed [lit.: dropped]. If the president of the ministers does not have the support, the Chamber of Ministers altogether will be dismissed [dropped].

Art. 43. Both houses of Parliament shall meet without being summoned on November 1 [14] of every year and [the session] will be opened by imperial decree and closed likewise by imperial decree on May 1. Neither of the two Chambers can meet while the other Chamber is not sitting.

Art. 44. If need arises His Majesty the Pâdishâh may open Parliament before the specified time, either on his own initiative or on a written application from an absolute majority of the deputies and he may also prolong the session either in virtue of a decision of the General Chamber [heyet-i ’ummiyyeh] or on his own initiative.

Art. 53. Both the ministers as well as the deputies and the notables have each the right to suggest the creation of a new law or to modify one of the existing laws. Each of the
two Assemblies sends the written \([\text{kaleme aldığını}]\) drafts of bills to be created or modified to the other Chamber. After it has been adopted there, it is presented to His Majesty the \(\text{Pâdîshâh}\) for approval \([\text{ta'dîk}].\)

Art. 54. Bills become law after being examined and accepted by the assembly of deputies and the notables, and sanctioned by an Imperial decree of His Majesty the \(\text{Pâdîshâh}\) after having been presented for approval. Bills presented must either receive that sanction within two months or be returned for re-examination. If a bill sent back to be discussed again is to be accepted, it must be voted by a two-thirds majority. Bills which are voted urgent, must either be sanctioned or be returned within ten days.

Art. 76. The Treasury will allot to each deputy \(30,000\) piastres each year for the session and calculating on the basis of a monthly salary of \(5,000\) piastres the amount of their traveling expenses will be established conformably with the provisions of the regulations for civil functionaries of the state. If more sessions take place than the period defined by the law, special payments will be made on the basis of a monthly salary of \(5,000\) piastres.

Art. 77. Together with the presidency of the Chamber of Deputies, one person for each the post of the first and second president will be elected by majority in the session of each year, and the results of the vote are presented to His Majesty the \(\text{Pâdîshâh}\).

Art. 80. After having been specified and examined in the Chamber of Deputies, the extent of public expenses that has been specified in the bill of the budget is adopted in the presence of the ministers. Accordingly, the nature, amount, and mode of assessment and collection of the receipts destined to meet the expenditure are defined in the presence of the ministers.

Art. 113. In the case of the perpetration of acts, or the appearance of indications of a nature to presage disturbance at any point on the territory \([\text{mülk}]\), the Imperial Government \([\text{bükâmet-i seniyyeh}]\) has the right to proclaim temporarily a state of emergency \([\text{idâreh-i ûrfîyyeh}; \text{lit.: customary administration}]\) there. The mode of administration of localities under a state of emergency will be regulated by a special law.

Art. 118. All the provisions of the laws, regulations, usages, and customs now in force shall continue to be applied. The canonical \([\text{fikhiyyeh}]\) and legal \([\text{bükûkiyyeh}]\) rules of leniency in the treatment of people \([\text{nâsa irfâk}]\) and adaptation to the necessities of the time \([\text{ibtyâjât-i zamâna irfâk}]\) together with good manners \([\text{âdâb}]\) and good sociable conduct \([\text{mu'âmelât}]\) have to be taken as a basis for the creation of new laws and prescriptions.

Art. 119. has been deleted \([\text{fıy olmûdûr}].\) [N.b.: Three new articles have been added and to transmit and add special details to the specifications and changes of the Basic Law that have been completed, now the three aforementioned articles with the numbers 119, 120, and 121 are laid down in the following way]:

Art. 119. The documents deposited in the post offices cannot be opened without a decision of a examining magistrate or a tribunal.

Art. 120. Ottomans enjoy the right of assembly, on the condition that they are subjects \([\text{tâbi'îyyet sharî iîleh}].\) The societies are forbidden which aim at injuring the territorial integrity of the Ottoman state, changing the form of the Basic Law or of the government, acting contrary to the provisions of the Basic Law, or bringing about a separation between the various Ottoman elements, or which are contrary to public morals. The formation of secret societies in general is also forbidden.
Art. 121. The sittings of the Chamber of notables are public. At the same time, if the proposition is made by the ministers or by five members of the Chamber of Notables to hold a debate about an important matter in secret, the Chamber may form itself into secret committee and that proposition is adopted or rejected in secret committee by majority.

5th Sha’bān 1327—August 8, 1325 [1909]

No. 318—Law Revising the Articles 7, 35, and 43 Revised on 5th Sha’bān 1327

Revision of the section of Art. 7:
[( . . . ) according to Art. 53 the dissolution if necessary and the period of delay and inactivity of the Chamber of Deputies cannot exceed the length of the yearly session period [müddeh-i ijtim‘iyyeh] and to delay or render inactive to complete the period in the frame of the year of session is the sacred right of the Pādishāh.]

The revised Art. 35:
[If the ministers insist on the adopting of an article upon which the ministers and the Chamber of Deputies differ and the deputies reject it categorically and repeatedly with the majority of their votes, the Pādishāh has the right to replace the ministers or to dissolve the assembly for a new election and session to take place within four months. Nevertheless, if the new Chamber of Deputies insists on the opinion of their predecessors, it will be obligatory to accept the opinion and decision of the assembly of deputies.]

The revised Art. 43:
[Both houses of Parliament shall meet without being summoned on November 1 [14] of every year and if a delaying has been made after the ending of the delaying period and [the session] will be opened by imperial decree. The period of session lasts six months and the session is closed by imperial decree at the end of this period. Neither of the two Chambers can meet while the other Chamber is not sitting. If the assembly of deputies has been dissolved, the session of the new Chamber will be an extraordinary session and its period will be two months that can be extended and cannot delayed and the period of four years of the office laid down in Art. 69 begins on November 1.]

Art. 73 of the Basic Law has been abandoned [mūlghā]. I ask for approval of the legality [kānuniyyet] of this draft [lāyiḥah] that has been accepted by the assembly of deputies and notables [mejlis-i meb‘ūsān ve a’yān] and for the enactment of its addition [‘ilāveh] to the Basic Law by decree [irādeh].

2nd Rejeb 1332–May 15, 1330 [1914]

Meḥmet Reshād

[other signatures]

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The Separation of Powers in Muslim Countries 357

No. 80—Law Revising the Article 102 of the Basic Law of the 7. Zī-‘l-Ḥijjah 1293 and the Articles 7 and 43 Revised on 2nd Rejeh 1332

Art. 7. ( . . . ) The opening and closing of the General Assembly, the summoning either before the fixed date or as an extraordinary session, the prolonging of the period, the delaying so that three month are not exceeded or repeated and the rendering inactive of the assembly for a defined period of time to complete the period in the frame of the year of session, the dissolution of the Chamber of Deputies if necessary, according to Art. 35, and the concluding of treaties in general are all sacred rights of His majesty the Pādishāh.

Art. 43. The two Chambers of the General Assembly are opened on November 1 of each year and if a delay has been made, on the end of the period of delaying without being summoned. The period of session lasts four months and at the end of this period . . .

Art. 102. The bill for the budget is limited to one year. It can not be applied for another than this year and this rule can neither be delayed nor rendered inactive nor be overthrown. Nevertheless, if the Chamber of Deputies has been dissolve without having adopted the budget . . .

With this draft [lāyiḥah] that has been accepted by the assembly of notables and deputies [mejlis-i a’yān ve meb’āsān] I ask for the enactment [irādeh ʻeyledim] of the revision of the Basic Law.

26th Rebi‘-‘Īl-Evvel 1333—January 29, 1330 [1914]

Meḥmet Reshād.

[other signatures]

No. 307—Law Revising the Revision of Article 76 of Ṣhāb‘ān 5th 1327

Art. 76. The Treasury will allot to each deputy 50,000 piastres each year for the session and calculating on the basis of a monthly salary of 4,000 piastres the amount of their traveling expenses will be established. If the period of session is extended and extraordinary sessions take place, there will not be given any extra payments. The members of the assembly convening after a dissolution will get half of the payments.

With this draft [lāyiḥah] that has been accepted by the assembly of notables and deputies [mejlis-i a’yān ve meb’āsān] I ask for the enactment [irādeh ʻeyledim] of the revision of the Basic Law.

4th Jumādā-‘Īl-Ūlā 1334—February 25, 1331 [1916]

Meḥmet Reshād.

[other signatures]


Art. 7. (…) the dissolution of the Chamber of Deputies for a new assembling after elections within four months are the sacred rights of His Majesty the Pādishāh (…)  
Art. 35. has been deleted.

With this draft [lāyībah] that has been accepted by the assembly of notables and deputies [mejlis-i a‘yān ve meb‘āsān] I ask for the enactment [irādeh eyledim] of the revision of the Basic Law.

4th Jumādā‘-l-Ūlā 1334—February 25, 1331 [1916]  
Meḥmet Reshād.

[other signatures]

No. 370—Law Revising Article 72 of the Basic Law of 7. Zī‘-l-hijeb 1293

Art. 72. Every Ottoman deputy with the necessary attributes for eligibility can be elected, but no one can run as a candidate in more than three election districts at the same time.

With this draft [lāyībah] that has been accepted by the assembly of notables and deputies [mejlis-i a‘yān ve meb‘āsān] I ask for the enactment [irādeh eyledim] of the revision of the Basic Law.

15th Jumādā‘-l-Ūlā 1334—March 7, 1332 [1916]  
Meḥmet Reshād.

[other signatures]

No. 102—Law revising Art. 69 of the Basic Law

Art. 69. The general election of the deputies takes place once every four years. The period for a deputy is four years, but it is permitted to be reelected. Nevertheless, if the fourth year of session collides with a war necessitating general mobilization, the period of session can be extended by vote of majority after a debate in the presence of two-thirds of its members.

With this draft [lāyībah] that has been accepted by the assembly of notables and deputies [mejlis-i a‘yān ve meb‘āsān] I ask for the enactment [irādeh eyledim] of the revision of the Basic Law.

114 Düstūr, tertīb-i sāni (2nd series), vol. VIII, p. 484. Publication and proclamation in the takvim-i vekāyî: 8th Jumādā‘-l-Ūlā 1334 March 1, 1331 [1916]—No. 2467.  
The Separation of Powers in Muslim Countries

8th Jumādā-‘l-Ākhireh 1334—March 21, 1334 [1918]

Meḥmet Resḥād.

[other signatures]

C. The Fundamental Law [Qānūn-e Āsāsī-e Mashrūṭeh] of the Iranian Empire of December 30, 1906117

In the Name of God the Compassionate, the Merciful

Whereas in accordance with the Imperial Command dated the 14th Jumādā al-Ākhirah 1324 [August 5, 1906], we issue a Command for the establishment of a National Consultative Assembly [and a Senate] to promote the progress and happiness of our kingdom and nation, strengthen the foundations of our state, and give effect to the enactments of the Sacred Law of His Holiness the Prophet; and whereas, by virtue of the fundamental principle [therein laid down], we have conferred on each individual of the people of our realm, for the amending and superintending of the affairs of the commonwealth, according to their degrees, the right to participate in choosing and appointing the members of this Assembly by popular election; Now that the National Consultative Assembly has been opened in accordance with our Sacred Purposes we do define as follows articles of the Fundamental Law regulating the aforesaid National Council, which comprises the duties and functions of the above-mentioned Assembly, its scopes of relations with the various departments of the state.

On the Establishment of the Assembly

Art. 1. The National Consultative Assembly is established in conformity with the Farmān [Imperial Command], founded on justice, dated the 14th Jumādā al-Ākhirah 1324.

Art. 2. The National Consultative Assembly represents the whole of the people of Iran,118 who [thus] participate in the economic and political affairs of the country.

Art. 3. The National Consultative Assembly shall consist of the members elected in Ṭahrān and the provinces, and shall be held in Ṭahrān.

Art. 4. The number of elected members has been fixed, in accordance with the Electoral Law separately promulgated, at one hundred and sixty-two, but in case of necessity the above mentioned number may be increased to two hundred.

Art. 5. The members shall be elected for two whole years. This period shall begin on the day when all the representatives from the provinces shall have arrived in Ṭahrān. On the conclusion of this period of two years, fresh representatives shall be elected, but the people shall have the option of re-electing any of their former representatives whom they wish and with whom they are satisfied.

Art. 6. The members elected to represent Ṭahrān shall, as soon as they meet, have the right to constitute the Assembly, and to begin their discussions and deliberations. During the

117 Translation by Mohammad Sadr Touhid-khaneh.
118 The original document uses the local name of the country while it was internationally denominated as Persia.
period preceding the arrival of the provincial delegates, their decisions shall depend for their validity and due execution on the majority [by which they are carried].

Art. 7. On the opening of the debates, at least two-thirds of the members of the Assembly shall be present, and, when the vote is taken, at least three-quarters. A majority shall be obtained only when more than half of those present in the Assembly record their votes.

Art. 8. The periods of session and recess of the National Consultative Assembly shall be determined by the Assembly itself, in accordance with such internal regulations as itself shall formulate. After the summer recess, the Assembly must continue open and in session from the 14th Mizān [October 7], which corresponds with the festival of the opening of the First Assembly.

Art. 9. The National Consultative Assembly can have extraordinarily sits on occasion of [aforementioned] holidays.

Art. 10. On the opening of the Assembly, an Address shall be presented by it to His Imperial Majesty, and it shall afterward have the honor of receiving an answer from that Royal and August quarter.

Art. 11. Members of the Assembly, on taking their seats, shall take and subscribe to the following form of oath:

“We the undersigned take God to witness, and swear on the Qur’ān, that, so long as the rights of the Assembly and its members according to this Fundamental Law are observed and respected, we will, so far as possible, discharge, with the utmost truth, uprightness, diligence and endeavor, the duties confided to us; that we will act loyally and truthfully toward our just and honored Sovereign, commit no treason in respect of either the foundations of the monarchy [ṣaltamāt] or the rights of the people, and will consider only the advantage and well-being of the State and the Nation of Iran.”

Art. 12. No one, on any pretext or excuse, shall have any right, without the knowledge and approval of the National Consultative Assembly, to molest its members. Even in case of the members committing publicly some crime or misdemeanor, and being arrested flagrante delicto, any punishment [lit. seyāsat, i.e., disciplinary measure] inflicted upon him must be with the cognizance of the Assembly.

Art. 13. The deliberations of the National Consultative Assembly, in order that effect may be given to their results, must be public. According to the Internal Regulations of the Assembly, journalists and spectators have the right to be present and listen, but not to speak. Newspapers may print and publish all the debates of the Assembly, provided they do not change or pervert their meaning, so that the public may be informed of the subjects of discussion and the detail of the news. Everyone who has an opinion of public good, may write it in the public press, so that no matter may be veiled or hidden from any person. Therefore all newspapers, provided that their contents be not disturbing any one of the fundamental principles of the state or the nation, are authorized and allowed to print and publish all matters advantageous to the public interest, such as the debates of the Assembly, and the opinions of the people on these debates. But if anyone, actuated by interested motives, shall print in the newspapers or in other publications anything contrary to what has been mentioned, or inspired by slander or calumny, he will be interrogated, convicted, and sentenced, according to law.

Art. 14. The National Consultative Assembly shall organize and arrange, in accordance with [his] separate and distinct regulations called “the Internal Code of Rules,” its own affairs, such as the election of a speaker, vice-speakers, secretaries, and other officers, the arrangements of the debates and divisions, etc.
On the Duties of the Assembly and Its Limitations and Rights

Art. 15. The National Consultative Assembly has the right in all questions to propose any measure which it regards as conducive to the well-being of the kingdom and the nation, after due discussion and deliberation thereof in all sincerity and truth; and, having due regard to the majority of votes, to submit such measure, in complete confidence and security, after it has received the approval of the Senate, by means of the prime minister of the state, so that it may receive the Royal Approval and be duly carried out.

Art. 16. All laws necessary to strengthen the foundations of the state and throne and to set in order the affairs of the realm and the establishment of the Ministries must be approved by the National Consultative Assembly.

Art. 17. The National Consultative Assembly shall, when occasion arises, bring forward such measures as shall be necessary for the creation, modification, completion or abrogation of any Law, and, subject to the approval of the Senate, shall submit it for the Royal Approval, so that due effect may thereafter be given to it.

Art. 18. The regulation of all financial matters, the modification of the budget [bill], all changes in fiscal arrangements, the acceptance or rejection of all incidental and subordinate expenditure, as also the new Inspectorships [of Finance] which will be founded by the state, shall be subject to the approval of the Assembly.

Art. 19. The Assembly has the right, after the Senate has given its approval, to demand from the Ministers of State that effect shall be given to the measures thus approved for the reform of the finances and the facilitation of co-operation between the different departments of the state by division of and assigning the frontiers of the local governments of Iran.

Art. 20. The budget of each Ministry shall be concluded during the latter half of each year for the following year, and shall be ready fifteen days before the Festival of Nowrūz. 119

Art. 21. Regarding the principal laws concerning the [functions of the] Ministries should it at any time be necessary to introduce new law, or modify or abrogate valid law, this shall [only] be approved by the Assembly, irrespective of whether the necessity for such action has been declared by the Assembly or enunciated by the responsible ministers.

Art. 22. Any proposal to transfer or sell any portion of the incomes and property of the state and kingdom or to effect any change in the boundaries of the kingdom, shall be subject to the approval of the National Consultative Assembly.

Art. 23. Without the approval of the National Council, no concession for the formation of any public corporation or public company of any sort shall, under any plea so ever, be granted by the state.

Art. 24. The conclusion of treaties and covenants, the granting of commercial, industrial, agricultural and other [monopoly] concessions, irrespective of whether they be to Iranian or foreign subjects, shall be subject to the approval of the National Consultative Assembly, with the exception of treaties which, for reasons of state and the public advantage, must be kept secret.

Art. 25. State loans, under whatever title, whether internal or external, must be contracted only with the cognizance and approval of the National Consultative Assembly.

119 Nowrūz is the traditional celebration of the ancient Iranian New Year on March 21.
Art. 26. The construction of railroads or gravel roads, at the expense of either the state or any corporation or company, whether Iranian or foreign, depends on the approval of the National Consultative Assembly.

Art. 27. Wherever the Assembly observes any defect in the laws, or any neglect in giving effect to them, it shall notify the same to the minister responsible for that department and aforesaid minister shall furnish all necessary explanations.

Art. 28. Should any minister, acting under misapprehension, issue on the Royal Authority, whether in writing or by word of mouth, orders conflicting with one of the laws which have been enacted and have received the Royal Approval, and use that as an pretext to his negligence, shall, according to the law, be personally responsible to His Imperial and Most Sacred Majesty.

Art. 29. Should a minister fail to give a satisfactory account of any affair conformably to the laws which have received the Royal Approval, and should it appear in his case that a violation of such law has been committed, or that he has transgressed the limits imposed [on him], the Assembly shall demand his dismissal from the Royal Presence, and should his treason be clearly established in the Court of Cassation, he shall not again be employed in the service of the state.

Art. 30. The Assembly shall, at any time when it considers it necessary, have the right to make direct representations to the Royal Presence by means of a Committee consisting of the speaker and six of its members chosen by the Six Classes. This Committee must ask permission, and the appointment of a time for approaching the Royal Presence through the Minister of the Imperial Court [Vazīr-e Darbār].

Art. 31. Ministers have the right to be present at the Sessions of the National Consultative Assembly, to sit in the places assigned for them, and to listen to the debates of the Assembly. If they consider it necessary, they may ask the Speaker of the Assembly for permission to speak, and may give such explanations as may be necessary for purposes of discussion and investigation.

On the Representation of Affairs to the National Consultative Assembly

Art. 32. Any individual may submit in writing to the Assembly’s Secretariat for Petitions a statement of his own case, or of any criticisms or complaints. If the matter concerns the Assembly itself, it will give him a satisfactory answer; but if it concerns one of the Ministries, it will refer it to that ministry, which will enquire into the matter and return a sufficient answer.

Art. 33. New laws which are needed shall be drafted and revised in the ministries which are respectively responsible, and shall then be laid before the Assembly by the responsible ministers, or by the prime minister. After being approved by the Assembly, and ratified by the Royal Approval, they shall be duly put into force.

Art. 34. The Speaker of the Assembly can, in case of necessity, either personally, or on the demand of ten members of the Assembly, or on the demand of a minister hold a secret parliamentary session, from which newspaper correspondent and spectators shall not have the right to participation, or [hold] a secret meeting composing of a selected number of the members of the Assembly, in which the other member of the Assembly shall not have the right to participation. However, [in the last case] the result of the deliberations of such secret meeting shall only be enforceable when it has been deliberated in the said meeting in presence of three-quarters of those selected [to serve on it], and accepted by a majority of votes. Should the proposition [in question] not be accepted in the secret meeting, it shall not be brought forward in the Assembly, and shall be passed over in silence.
Art. 35. If the secret parliamentary session shall have been held at the demand of the Speaker of the Assembly, he has the right to inform the public of so much of the deliberations as he shall deem expedient; but if the secret session shall have been held on the demand of a minister, the disclosure of the deliberations depends on the permission of that minister.

Art. 36. Any minister can withdraw any matter which he has proposed to the Assembly at any point in the discussion, unless his proposition has been made on the demand of the Assembly, in which case the withdrawal of the matter depends on the consent of the Assembly.

Art. 37. If a bill introduced by any minister is not accepted by the Assembly, it shall be returned annexed by the observations of the Assembly; and the responsible minister, after rejecting or accepting the criticisms of the Assembly, can propose the aforesaid bill a second time to the Assembly.

Art. 38. The members of the National Consultative Assembly must clearly and plainly signify their rejection or acceptance of measures, and no one has the right to persuade or threaten them in recording their votes. The signification by the members of the Assembly of such rejection or acceptance must be effected in such manner that newspaper correspondents and spectators also may perceive it, that is to say their signification must be by some outward sign such as [the employment of] blue and white voting-papers, or the like.

The Proposal of Parliamentary Bill

Art. 39. Whenever any bill is proposed on the part of one of the members of the Assembly, it can only be discussed when at least fifteen members of the Assembly shall approve the discussion of that bill. In such case the bill in question shall be forwarded in writing to the Speaker of the Assembly, who has the right to set forth it for a preliminary investigation in a Committee of Enquiry.

Art. 40. On the occasion of the discussion and investigation of the bill mentioned in Art. 39, whether in the Assembly or in the Committee of Enquiry, notice shall be given by the Assembly to the responsible minister, if any, concerned in the bill, that if possible he himself, or, if not, his assistant minister, shall be present in the Assembly, so that the debate may take place in the presence of one or other of them. The draft of the bill, with its additions, must be sent from ten days to a month before the time, with the exception of urgent proposals, to the responsible minister. Likewise the day of its discussion must be determined beforehand. After the bill has been discussed in the presence of the responsible minister, and in case it should, by a majority of votes, receive the approval of the Assembly, it shall be officially transmitted in writing to the responsible minister, so that he may take the necessary steps [to put it in force].

Art. 41. If the responsible minister cannot, for any reason, agree with the Assembly about a bill proposed by it, he must offer his excuses to it and give it satisfaction.

Art. 42. Should the National Consultative Assembly demand explanations on any matter from the responsible minister, the minister in question must give an answer and this answer must not be postponed unreasonably or beyond the scope the circumstances may allow, save in the case of secret measures, the secrecy of which for some definite period is to the advantage of the state and the people. In such cases, on the lapse of the definite period the responsible minister is bound to disclose this measure in the Assembly.
On the Conditions Regulating the Establishment of the Senate

Art. 43. There shall be constituted another Assembly, entitled the Senate, consisting of sixty members, the sessions of which, after its constitution, shall be coincident with the sessions of the National Consultative Assembly.

Art. 44. The Regulations of the Senate must be approved by the National Consultative Assembly.

Art. 45. The members of this Assembly shall be chosen from among the well-informed, discerning, pious, and respected persons of the realm. Thirty of them shall be nominated on the part of His Imperial Majesty, fifteen of the people of Ťahrān, and fifteen of the people of the provinces, and thirty by the nation, fifteen elected by the people of Ťahrān, and fifteen by the people of the provinces.

Art. 46. After the constitution of the Senate, all proposals must be approved by both Assemblies. If those proposals shall have been originated in the Senate, or by the Cabinet of Ministers, they must first be amended and corrected in the Senate and accepted by a majority of votes, and must then be approved by the National Consultative Assembly. But proposals brought forward by the National Consultative Assembly must, on the contrary, go from this Assembly to the Senate, except in the case of financial matters, which belong exclusively to the National Consultative Assembly and the decision of the Assembly, in respect to the these proposals, shall be made known to the Senate, so that it in turn may communicate its observations to the National Assembly, but the latter, after due discussion, is free to accept or reject these observations of the Senate.

Art. 47. So long as the Senate has not been convoked, proposals shall, after being approved by the National Consultative Assembly, receive the Royal Approval, and shall then have the force of law.

Art. 48. If any proposal, after undergoing criticism and revision in the Senate, be referred by a minister to the National Consultative Assembly, and be not accepted, such disputed proposal shall, in case of its being of importance, be reconsidered by a third Assembly composed of members of the Senate and members of the National Consultative Assembly elected in equal moieties by members of the two Assemblies. The decision of this [third] Assembly shall be read out in the National Consultative Assembly. If it be then accepted, well and good. If not, a full account of the matter shall be submitted to the Royal Presence, and should the Royal judgment support the view of the National Consultative Assembly, it shall become effective; but if not, orders will be issued for a fresh discussion and investigation. If again no agreement of opinion results, and the Senate, by a majority of two-thirds, approves the dissolution of the National Consultative Assembly and the Cabinet of Ministers approves separately the dissolution of the National Consultative Assembly too, then the Imperial Command shall be issued for the dissolution of the National Consultative Assembly, and at the same Command His Majesty shall give the order for the holding of fresh elections, the people, however, having the right to re-elect their former representatives.

Art. 49. The new representatives of Ťahrān must present themselves within the space of one month, and the representatives of the provinces within the space of three months. When the representatives of the capital are present, the Assembly shall be opened, and shall begin its labors, but they shall not discuss the disputed proposal until the provincial representatives shall arrive. If, after the arrival of all its members, the new Assembly shall by a clear majority confirm the first decision, His Most Sacred and Imperial Majesty shall approve that decision of the National Consultative Assembly, and shall order it to be carried into effect.
Art. 50. In each electoral period, which consists of two years, orders for the renewal of representatives shall not be given more than once.

Art. 51. It is resolved that the kings of our successors and posterity shall regard as a duty of their sovereign state and an obligation incumbent upon them the maintenance of these laws and principles, which we have established and put into force for the strengthening of the edifice of the state, the consolidation of the foundations of the throne, the superintendence of the machinery of justice, and the tranquility of the nation.

14th Dhū‘-l-Qa‘dah, A.H. 1324 [December 30, 1906]

This Fundamental Law of the National Consultative Assembly and the Senate, containing fifty-one Articles, is correct.

14th Dhū‘-l-Qa‘dah, A.H. 1324 [December 30, 1906].

[Underneath the concluding words is the signature of the Šāh, Moa‘aff ar al-Dīn, and on the back of the page are the seals of the then Crown Prince or Wālī’ahd [Moḥammad ‘Alī Šāh] and of the then Counselor of the State or Mushīr al-Dowleh.]

D. The Amendment of the Fundamental Law of the Iranian Empire of October 7, 1907

In the Name of God the Compassionate, the Merciful

The Articles added to complete the Fundamental Law of the Iranian Constitution ratified by the late Šāhanshāh of blessed memory, Moa‘aff ar al-Dīn Šāh Qājār [may God illuminate his resting-place!] are as follows.

General Dispositions

Art. 1. The official religion of Iran is Islām, according to the orthodox Ja‘fari doctrine of the Ithnā‘ Ashariyya [Confession of the Twelve Imāms], which faith the Shāh of Iran must profess and promote.

Art. 2. At no time must any legal enactment of the sacred National Consultative Assembly, established by the favor and assistance of His Holiness the Imām of the Age, may God hasten his glad Advent!, the favor of His Majesty the Šāhanshāh [King of the Kings] of Islām, may God immortalize his reign!, the care of the Proofs of Islām [Religious Authorities], may God multiply the like of them!, and the whole people of the Iranian Nation, be at variance with the sacred principles of Islām and the laws established by His Holiness the Best of Mankind [i.e., the Prophet Muḥammad], on whom and on whose

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120 This translation by Mohammad Sadr Touhid-khan presence relates to the document promulgated by Moḥammad ‘Ali Šāh on 29th Sha‘bān A.H. 1325 [October 7, 1907] without any later amendments. It takes existing English versions, especially that developed by Browne (n 10), in consideration.

121 The original document uses the local name of the country while it was internationally denominated as Persia.

122 I.e., the Twelfth Imām, or Imām Mahdī, who is believed to have disappeared in the year A.H. 260 (A.D. 873–4) and expected to return at the end of time.
household be the Blessings of God and His Peace!, and it is hereby declared that it is for the ‘ulamā’ [Religious Authorities], may God prolong the blessing of their existence!, to determine whether such statutory laws are or are not conformable to the principles of Islām; and it is therefore officially enacted that there shall at all times exist a Committee composed of not less than five Mujtahids and devout Islamic Jurisprudents, cognizant also of the requirements of the age, [which committee shall be elected] in this manner. The ‘ulamā’ and Proofs of Islām who obtain the rank of being Source of Imitation, marja’-e taqlid, shall present to the National Consultative Assembly the names of twenty of the ‘ulamā’ possessing the attributes mentioned above; and the members of the National Consultative Assembly shall, either by unanimous acclamation, or by vote, designate five or more of these, according to the exigencies of the time, and recognize these as members [of the aforesaid Committee], so that they may carefully discuss and consider all matters proposed in the Assembly, and reject and repudiate, wholly or in part, any such proposal which is at variance with the Sacred Laws of Islām, so that it shall not obtain the title of legality. In such matters the decision of this Ecclesiastical Committee shall be followed and obeyed, and this article shall continue unchanged until the appearance of His Holiness the Proof of the Age, may God hasten his glad Advent!

Art. 3. The frontiers, provinces, departments and districts of the Iranian Empire cannot be altered save in accordance with the law.

Art. 4. The capital of Iran is Ōrān.

Art. 5. The official colors of the Iranian flag are green, white, and red, with the emblem of the Lion and the Sun.

Art. 6. The lives and property of foreign subjects residing on Iranian soil are guaranteed and protected, save in such contingencies as the laws of the realm shall except.

Art. 7. The principle of the constitutionality is not suspendable either wholly or in part.

Rights of the Iranian Nation

Art. 8. The people of the Iranian realm are to enjoy equal rights before the law.

Art. 9. All individuals are protected and safeguarded in respect to their lives, property, homes, and honor, from every kind of interference, and none shall molest them save in such case and in such way as the laws of the land shall determine.

Art. 10. No one can be summarily arrested, save flagrante delicto in the commission of important felony or misdemeanor, except on the written authority of the president of the Court of Justice, given in conformity with the law. Even in such case the accused must immediately, or at latest in the course of the next twenty-four hours, be informed and notified of the nature of his offence.

Art. 11. No one can be forcibly removed from the court which is entitled to give judgment on his case to another court.

Art. 12. No punishment can be sentenced or executed save in conformity with the law.

Art. 13. Every person’s house and dwelling is protected and safeguarded, and no dwelling-place may be entered save in such case and in such way as the law has provided.

Art. 14. No Iranian can be exiled, or prevented from residing in any part, or compelled to reside in any specified part, save in such cases as the law may explicitly determine.

Art. 15. No property shall be removed from the possession of its owner save by ecclesiastical sanction, and then only after its fair value has been determined and paid.

Art. 16. The confiscation of the property or possessions of any person under the title of punishment [lit. seyāsat, i.e., disciplinary measure] is forbidden, save in conformity with the law.
Art. 17. To deprive owners or possessors of the properties or possessions controlled by them on any pretext whatever is forbidden, save in conformity with the law.

Art. 18. The teaching and studying of all sciences, arts and crafts is free, save in the case of such as may be forbidden by the ecclesiastical law.

Art. 19. The foundation of schools at the expense of the state and the nation, and compulsory instruction, must be regulated by the Ministry of Sciences and Arts, and all schools and colleges must be under the supreme control and supervision of that Ministry.

Art. 20. All publications, except heretical books and matters hurtful to the perspicuous religion [of Islām] are free, and are exempt from the auditing. If, however, anything should be seen in them contrary to the Press Law, the publisher or writer shall be punished according to that law. If the writer be known, and be resident in Iran, then the publisher, printer and distributor shall be free from any molestation.

Art. 21. Associations and assemblies which are not productive of mischief to religion or the state, and are not disturbing of good order, are free throughout the whole Empire, but demonstrators must not carry arms, and must obey the regulations laid down by the law on this matter. Assemblies in the public thoroughfares and public arenas must likewise obey the police regulations.

Art. 22. All people’s postal correspondence is safeguarded and exempt from seizure or examination, save in such exceptional cases as the law lays down.

Art. 23. It is forbidden to disclose or detain telegraphic correspondence without the express permission of the owner, save in such cases as the law lays down.

Art. 24. Foreign subjects can accept Iranian nationality. Their nationality acceptance or their nationality continuance or their removal from this nationality, is in accordance with a separate law.

Art. 25. No special authorization is required to proceed against administrative officials in respect of violations connected with their job [capacities], save in the case of ministers, in whose case the special laws on this subject must be observed.

Powers of the Realm

Art. 26. The powers of the realm are [all] derived from the people; and the Fundamental Law regulates the employment of those powers.

Art. 27. The powers of the realm are divided into three branches.
First, the legislative power, which is assigned to making or amelioration of laws, is composed of His Imperial Majesty, the National Consultative Assembly, and the Senate, of which three sources each has the right to introduce laws, but their validity shall be dependent on their not being at variance with the standards of the ecclesiastical law, and on their approval by the members of the two Assemblies, and the Royal ratification. The enacting and approval of laws connected with the revenue and expenditure of the realm are, however, specially assigned to the National Consultative Assembly. [Moreover] the explanation and interpretation of the laws belong solely to the capacities of the above-mentioned Assembly.
Second, the judicial power, by which is meant the determining of rights, belongs exclusively to the ecclesiastical tribunals in matters connected with the ecclesiastical law, and to the civil courts in matters connected with ordinary law.
Third, the executive power, which appertains to the King, that is to say, the laws and ordinances are carried out by the ministers and state officials in the august name of His Imperial Majesty in such manner as the law defines.
Art. 28. The three powers above mentioned shall ever remain distinct and separate from one another.

Art. 29. The special interests of each province, department and district shall be arranged and regulated, in accordance with special laws on this subject, by provincial and departmental councils.

Rights of Members of the Assembly

Art. 30. The deputies of the National Consultative Assembly and of the Senate represent the whole nation, and not only the particular classes, provinces, departments, or districts which have elected them.

Art. 31. One person cannot at one and the same time enjoy membership of both Assemblies.

Art. 32. As soon as any deputy is employed in one of the departments of the state, he ceases to be a member of the Assembly, and his re-acceptance as a member of the Assembly depends on his resigning such state appointment, and being re-elected by the people.

Art. 33. Each of the two Assemblies has the right to investigate and examine every affair of the realm.

Art. 34. The deliberations of the Senate are ineffective when the National Consultative Assembly is not in session.

Rights of the Iranian Monarchy

Art. 35. The sovereignty is a trust, which in Divine blessing, has been conferred by the people to the person of the King.

Art. 36. The constitutional Monarchy of Iran is vested in the person of His Imperial Majesty Sultan Muhammad Ali Shah Qajar, may God prolong his sovereignty!, and in his heirs, generation after generation.

Art. 37. The succession to the Throne, in case of there being more than one child, passes to the eldest son of the King whose mother is a Princess and of Iranian race. In case the King should have no male issue, the eldest male of the Royal Family who is next of kin shall rank next in succession to the Throne. If, however, in the case supposed above, male heirs should subsequently be born to the King, the succession will de jure revert to such heir.

Art. 38. In case of the transition of the Monarchy, the Crown Prince can only undertake in person the functions of the Throne provided that he has attained the age of eighteen years. If he has not reached this age, a Regent shall be chosen with the sanction and approval of the National Consultative Assembly and the Senate, until such time as the Crown Prince shall attain this age.

Art. 39. No King can ascend the Throne unless, before his coronation, he appear before the National Consultative Assembly, in presence of the members of this Assembly and of the Senate, and of the Cabinet of Ministers, and repeat the following oath:

“I take to witness the Almighty and Most High God, on the glorious Word of God, and by all that is most honored in God’s sight, and do hereby swear that I will exert all my efforts to preserve the independence of Iran, safeguard and protect the frontiers of the kingdom and the rights of my People, observe the Fundamental Law of the Iranian Constitution, rule in accordance with that Law and enacted laws, endeavor to promote the Ja’fari Confession of the Twelve Imams, and will in all my deeds and actions consider God Most Glorious as present and watching me, have no
aim other than prosperity and magnificence of the Iranian state and nation. I further ask aid from God, from Whom alone aid is derived, and seek help from the holy spirits of the Saints of Islām to render service to the advancement of Iran.”

Art. 40. So in like manner no one who is chosen as Regent can enter upon his functions unless and until he repeats the above oath.

Art. 41. In the event of the King’s decease, the National Consultative Assembly and the Senate must of necessity meet, and such meeting must not be postponed later than ten days after the date of the King’s decease.

Art. 42. If the mandate of the deputies of either or both of the Assemblies shall have expired during the period of the late King’s life, and the new deputies shall not yet have been elected at the time of his decease, the former deputies and the two Assemblies shall reassemble

Art. 43. The King cannot, without the consent and approval of the National Consultative Assembly and the Senate, undertake the affairs of any other kingdom.

Art. 44. The person of the King is exempted from responsibility. The Ministers of State are responsible to both Assemblies in all matters.

Art. 45. The commands and rescripts of the King relating to affairs of state can only be carried out when they are countersigned by the responsible minister, who is also responsible for the authenticity of such decree or rescript.

Art. 46. The appointment and dismissal of ministers is effected by virtue of the august Command of the King.

Art. 47. The granting of military rank and [other] honorary decorations and distinctions shall be the sole capacity of the person of the King and in accordance with the law.

Art. 48. The choice of heads of the various state departments, whether internal or foreign, subject to the approval of the responsible minister, is the King’s right, save in such cases as are specifically excepted by the law; but the appointment of other officials does not lie with the King, save in such cases as are explicitly provided for by the Law.

Art. 49. The issue of commands and orders for giving effect to the laws is the King’s right. He shall under no circumstances postpone or stop the carrying out of such laws.

Art. 50. The supreme command of all the land and navy forces is vested in the person of the King.

Art. 51. The declaration of war and the conclusion of peace are vested in the King.

Art. 52. The treaties which, according to the Article 24 of the Fundamental Law [promulgated on] 14th Dhū’l-Qa’dah, A.H. 1324 [December 30, 1906], must remain secret, shall be communicated by the King, with the necessary explanations, to the National Consultative Assembly and the Senate after the disappearance of the reasons which necessitated such secrecy, as soon as the public interests and security shall require it.

Art. 53. The secret clauses of no treaty can in any case annul the public clauses of the same.

Art. 54. The King can convocate in extraordinary session the National Consultative Assembly and the Senate.

Art. 55. The minting of coin, subject to conformity with the law, is in the name of the King.

Art. 56. The expenses and disbursements of the Royal Court shall be determined by law.

Art. 57. The Royal prerogatives and powers are only those explicitly mentioned in the present Constitutional Law.
Concerning the Ministers

Art. 58. No one can attain the rank of minister unless he be a Muslim by religion, a Iranian by birth, and a Iranian subject.

Art. 59. Princes in the first degree, that is to say the sons, brothers and paternal uncles of the reigning King, cannot be chosen as ministers.

Art. 60. Ministers are responsible to the two Assemblies, and must, in case of their presence being required by either Assembly, appear before it, and must observe the scopes of their responsibility in all such matters as are committed to their charge.

Art. 61. Ministers, besides being individually responsible for the affairs specially appertaining to their own ministry, are also collectively responsible to the two Assemblies for one another’s actions in affairs of a more general character.

Art. 62. The number of ministers shall be defined by law, according to the requirements of the time.

Art. 63. The honorary title of minister shall be entirely abolished.

Art. 64. Ministers cannot divest themselves of their responsibility by pleading verbal or written orders from the King.

Art. 65. The National Consultative Assembly, or the Senate, can impeach ministers or bring them to trial.

Art. 66. The law shall determine the responsibility of ministers and the punishment [lit. seyāsat, i.e., disciplinary measure] to which they are liable.

Art. 67. If the National Consultative Assembly or the Senate shall, by an absolute majority, declare itself dissatisfied with the cabinet, or with one particular minister, that cabinet or minister shall resign their or his ministerial functions.

Art. 68. Ministers may not accept a salaried office other than their own.

Art. 69. The National Consultative Assembly or the Senate shall declare the fault of ministers in the presence of the Court of Cassation, and the said Court, all the members of the tribunals comprised in it being present, will pronounce judgment, save in cases when the accusation and prosecution refer to the minister in his private capacity, and are outside the scope of the state functions entrusted to him in his ministerial capacity. Note: So long as the Court of Cassation is not established, a Commission chosen from the members of the two Assemblies in equal moieties shall discharge the function of that Court.

Art. 70. The determination of the fault of ministers, and of the punishment and measures to which they are liable, in case they are accused by the National Consultative Assembly or by the Senate, or, regarding the affairs of their department, are entangled to personal accusations by their opponents, will be regulated by a special law.

Powers of the Courts of Justice

Art. 71. The Supreme Court of Cassation and the judicial courts are the places officially destined for the redress of public grievances, while judgment in all matters falling within the scope of the Ecclesiastical Law is vested in just mujtahids possessing the necessary qualifications.

Art. 72. Disputes connected with political rights belong to the judicial courts, save in such cases as the law shall except.

Art. 73. The establishment of ordinary [not ecclesiastical] courts depends on the authority of the law, and no one, on any title or pretext, may establish any tribunal contrary to its provisions.

Art. 74. No court shall be held save by the authority of the law.
Art. 75. In the whole kingdom there shall be only one Court of Cassation for ordinary [not ecclesiastical] cases, and that in the capital; and this Court shall not deal with any case of first instance, except in cases in which ministers are concerned.

Art. 76. All proceedings of courts shall be public, save in cases where such publicity would be disturbing to public order or contrary to public morality. In such cases, the court must declare the necessity of sitting clausis foribus.

Art. 77. In cases of political or press offences, where it is desirable that the proceedings should be not public, this must be agreed to by all the members of the court.

Art. 78. The judgments of the courts must be well-reasoned and justified, and must contain the articles of the law in accordance with which judgments have been given, and they must be read publicly.

Art. 79. In cases of political and press offences, a jury must be present in the courts.

Art. 80. The presidents and members of the courts of justice shall be chosen in such manner as the laws [concerning the administration] of justice determine, and shall be appointed by Royal Command.

Art. 81. No judge of a court of justice can be temporarily or permanently transferred from his office unless he be brought to judgment and his offense be proved, save in the case of his voluntary resignation.

Art. 82. The duty of a judge of a court of justice cannot be changed save by his own consent.

Art. 83. The appointment of the Public Prosecutor is within the competence of the King, supported by the approval of the Ecclesiastical Judge.

Art. 84. The salaries of the members of the courts of justice shall be determined in accordance with the law.

Art. 85. The presidents of the courts of justice cannot accept salaried state posts, unless they undertake such service without recompense, and [in this case also] there be no contravention of the law.

Art. 86. In every provincial capital there shall be established a Court of Appeal for dealing with judicial matters in such wise as is explicitly set forth in the laws [concerning the administration] of justice.

Art. 87. Military tribunals shall be established throughout the whole kingdom according to special laws.

Art. 88. Arbitration in cases of dispute regarding scopes of the functions and duties of the different departments of state shall, according to the provisions of the law, be referred to the Court of Cassation.

Art. 89. The Court of Cassation and other courts [and tribunals] will only give effect to public, provincial, departmental and municipal orders and by-laws when these are in conformity with the law.

Provincial and Departmental Councils

Art. 90. Throughout the whole empire provincial and departmental councils shall be established in accordance with special regulations. The fundamental laws regulating such assemblies are as follows.

Art. 91. The members of the provincial and departmental councils shall be elected immediately by the people, according to the regulations governing provincial and departmental councils.

Art. 92. The provincial and departmental councils are free to exercise complete supervision over all reforms connected with the public interest, always provided that they observe the scopes [of competence] prescribed by the law.
Art. 93. An account of every kind of the expenditure and income of the provinces and departments shall be printed and published by the provincial and departmental councils.

Concerning the Finances

Art. 94. No tax shall be established save in accordance with the law.
Art. 95. The law will specify the cases in which exemption from the payment of taxes can be claimed.
Art. 96. The National Consultative Assembly shall each year by a majority of votes fix and approve the taxes.
Art. 97. In the matter of taxes, there shall be no difference or distinction among the individuals of the nation.
Art. 98. Reduction of or exemption from taxes is regulated by a special law.
Art. 99. Save in such cases as are explicitly excluded by law, nothing shall on any pretext be demanded from the people save under the categories of state, provincial, departmental, and municipal taxes.
Art. 100. No order for the payment of any allowance or gratuity shall be made on the Treasury save in accordance with the law.
Art. 101. The National Consultative Assembly shall appoint the members of the Audit Tribunal for such period as may be determined by the law.
Art. 102. The Audit Tribunal is appointed to inspect and analyze the accounts of the Department of Finance and to liquidate the accounts of all book keepers of the Treasury. It is especially watched to see that no item of expenditure fixed in the budget exceeds the amount specified, or is changed or altered, and that each item is expended in the proper manner. It shall likewise inspect and analyze the different accounts of all the departments of state, collect the documentary proofs of the expenditure indicated in such accounts, and submit to the National Consultative Assembly a complete statement of the accounts of the kingdom, accompanied by its own observations.
Art. 103. The establishment, organization and administration of, this Tribunal shall be in accordance with the law.

The Army

Art. 104. The law determines the manner of recruiting the troops, and the duties and rights of the military, as well as their promotion, are regulated by the law.
Art. 105. The military expenditure shall be approved every year by the National Consultative Assembly.
Art. 106. No foreign troops may be employed in the service of the state, nor may they remain in or pass through any part of the kingdom save in accordance with the law.
Art. 107. The military cannot be deprived of their rights, ranks or functions save in accordance with the law.

Copy of the August Imperial Rescript

In the Name of God, blessed and exalted is He.

The Amendment of The Fundamental Law has been perused and is correct. Please God, our Royal Person will observe and regard all of them. Our sons and successors also will, please God, confirm these sacred laws and principles.

I. INTRODUCTION

In January and February 2011, demonstrators resorted to the streets in Egypt to call for the departure of President Ḥusnī Muḥāрак and for the end of his autocratic rule. The 1971 Constitution, in particular, was blamed for having been a main instrument in the consolidation of his authoritarian regime. Two days after assuming power from Muḥammad Ḥusnī Muḥāрак on February 11, 2011, the first decision of the Supreme Council of the Armed Forces was to suspend the constitution and appoint a committee to amend some of its provisions. The constitution was never reinstated and on March 30, 2011, it was replaced by a constitutional declaration that was to act as an interim Charter until a new permanent constitution would be drafted after the parliamentary elections scheduled for November 2011.

The Egyptian Constitution of 1971, indeed, was establishing a hybrid of parliamentary and presidential forms of government where the head of state dominated the entire scope of political activity. One of the main criticisms directed to that constitution by its opponents was its extreme centralization of powers with the President of the Republic, increased by subsequent constitutional amendments, laws, and practice.

The constitution provided the President with a wide variety of executive and legislative powers. It had been amended in 2005 and 2007 with the declared purpose of increasing the balance of power within the executive power and between the executive and the legislative branches. This promise of change had been an implicit recognition of the fact that political reform was necessary and that the current regime was not democratic.

If some revisions, aiming at diminishing the presidential nature of the regime and increasing its parliamentary dimension, had been generally well-received, other amendments had been widely perceived as reinforcing its presidential character. The fact that the President was now directly elected had increased his legitimacy and therefore his personal authority. He cumulated his various constitutional competences with far-reaching legislative and de facto powers. The failure of the parliamentary checks and balances mechanisms had further increased the presidential or one might even say authoritarian nature of the Egyptian regime, and finally led to its collapse.
II. ELECTION OF THE PRESIDENT

Art. 76 of the Constitution regarding the nomination process of the President had been amended in 2005 to establish presidential elections by direct ballot. Until then, that provision was providing for the following procedure of nomination of the President: one-third of the People’s Assembly nominated a candidate. After winning two-thirds of the votes of the Assembly, the candidate was presented to confirmation by a referendum where he had to obtain an absolute majority of the votes cast. The President was therefore chosen by the parliament, rather than by the people itself.

The amendment of 2005 had provided for presidential elections but imposed strict conditions on the candidacy for presidency, establishing a distinction between political party and independent candidates. Independent candidates, i.e., persons not affiliated with any recognized political party, needed the support of at least 250 elected members from among the People’s Assembly, the Consultative Assembly, or regional councils in the governorates. Besides, this support had to include at least sixty-five members of the People’s Assembly, twenty-five of the Consultative Assembly, and ten of regional councils in at least fourteen governorates. In the presidential elections of 2005, not a single independent candidate had been able to fulfill such conditions and enroll for the elections.

Special conditions existed for political parties to register candidates. On the request of the President of the Republic, these conditions had been eased by the amendments of 2007 in order to “take into consideration the realities of these parties and their likely future, and their role as the foundation and engine of our political life.”1 Political parties having effectively exercised their activities for five consecutive years before the opening for candidacy could submit a candidate chosen from among the members of their supreme council, in conformity with their internal regulations, provided that such a candidate had been seating at the council for at least one year. The party, in addition, was required to have obtained at least 3 percent of the parliamentary seats at the People’s and Consultative Assemblies, or the equivalent number of seats in one of these two chambers in the latest elections to be able to field a candidate.2

If amended, Art. 76 had been applied to the presidential elections, scheduled for 2011, only the National Democratic Party (NDP) would have been able to nominate a candidate fulfilling the constitutional requirements.3 This is the reason why the provision had been amended again in 2007 to provide that exceptionally, “in as much as political parties require a further time to meet the permanent conditions for presidential candidates,”4 parties that had obtained at least one seat at the People’s Assembly or Consultative Assembly in the last elections to be able to field a candidate.

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2 Instead of 5 percent of parliamentary seats at both People’s and Consultative Assemblies, as originally stated in 2005.
3 During the NDP Congress in September 2007, the internal rules of procedure of the party had been amended, to create a new body called the “Supreme Council” (hay’at ‘ulāya). The NDP candidate to the presidential elections would have been chosen among the members of that new body, in conformity with Art. 76 of the Constitution. This body was composed of about fifty high-ranking leaders of the NDP, including Jamāl Mubārak, the son of then ruling president Ḥusnī Mubārak. This had been often seen as an indication of the scenario of the hereditary transmission of power, a plan which came to nought due to the popular uprising in February 2011.
4 Request for constitutional amendments (n 1).
elections would have been allowed to designate a candidate for all presidential elections taking place between 2006 and 2016. A similar exception had already been introduced in amended Art. 76 in 2005, to allow any political party to designate a candidate from its Supreme Council to run for the presidential elections of 2005, even if the party did not fulfill the 5 percent condition. As a consequence, the presidents of ten political parties had been able to run in the 2005 presidential elections. While the conditions for candidates of political parties had been eased in 2007, the strict conditions imposed on independent candidates had not been amended to allow the Muslim Brothers, who could only run independent candidates to the presidential elections, since they were not recognized as a political party.

The President had to be born to Egyptian parents and be at least forty years of age. Following the constitutional amendment of 1980, he was reeligible for unlimited successive terms. The current term-period was six years, renewable indefinitely. The opposition and civil society had struggled to restrict the terms to two, as was the case in the 1971 Constitution before the 1980 constitutional amendments, as well as to limit the presidential mandate to five years instead of six. However, they had not succeeded in having this provision amended.

In case of permanent vacancy or permanent disability of the President of the Republic, the Speaker of the People's Assembly was to assume temporarily the presidency. If at that time, the People's Assembly was dissolved, the President of the Supreme Constitutional Court was to take over the presidency, on condition that neither of them would nominate himself for the presidency (Art. 84). Since 2007, if the President of the Republic was temporarily unable to carry out his functions and no Vice President could take over the presidential functions—either because no Vice President had been nominated or because the Vice President was himself temporarily incapacitated—the President was to delegate his powers to the President of the Council of Ministers (Art. 82). The powers of the latter were, however, to be limited: in particular, he was not allowed to initiate constitutional amendments, to dissolve the People's and the Consultative Assemblies, or to dismiss the cabinet during the interim period. Until 2007, the Constitution had provided only for the transfer of power to the Vice President. The new provisions constituted the response to a situation that occurred in 2004, when President Ḥusnī Mubārak had been hospitalized for several weeks in Germany. The head of state, not having nominated any vice president, had asked his prime minister to replace him. The 2007 amendment had constitutionalized that practice.

The presidential elections were supervised by an electoral commission, headed by the President of the Supreme Constitutional Court, who was himself appointed by the President of the Republic. It was expressly stipulated in new Art. 76 that the decisions of that commission were immune from any judicial control, which was incompatible with Art. 68 of the Constitution, according to which no administrative act was to be exempt from judicial review. This showed how important it was for the President to control the whole electoral process, to avoid any unexpected result.

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5 Out of more than twenty political parties.
6 President Mubārak was holding his fifth term when he stepped down on February 11, 2011.
7 In a decision of September 6, 2005 the Supreme Administrative Court vigorously criticized new Art. 76, which it deemed in contradiction to Art. 68 and 172 of the constitution and strongly urged the constitutional legislator to reexamine this provision in order to bring it into conformity with the established
III. THE BROAD POWERS OF THE PRESIDENT

The President was granted a wide range of powers. In his request for constitutional amendments dated December 26, 2006, President Mubārak had maintained that the amendments would consolidate the balance of powers between the branches of the government through a redistribution of the competences within the executive authority and by increasing the powers of the parliament. He had added that the independence of the judiciary would also be enhanced. However, the President still concentrated executive, legislative, and even judicial powers.

A. Executive Powers of the President

The President of the Republic was assuming the executive power (Art. 137 of the Constitution) and formulated and supervised the implementation of the general state policy (Art. 138).

On the international level, he appointed and dismissed diplomatic representatives and accredited diplomatic representatives of foreign states (Art. 143). He declared war, with the approval of the People’s Assembly (Art. 150). He concluded treaties (Art. 151).

On the domestic level, he made all military and civil appointments (Art. 143) and was the Supreme Commander of the Armed Forces (Art. 150). Because of the iron grip of the army on the whole political system, the position of the President of the Republic as head of the armed forces allowed him to control the country in all circumstances. He also had the right to grant amnesty or to commute a sentence (Art. 149). He could issue executive decrees for organizing public services and interests (Art. 146) or to regulate administrative police (Art. 145). His regulatory powers extended to the promulgation of laws (Art. 112) and the adoption of executive decrees for the enforcement of the laws (Art. 144). The President also controlled the local administration through the appointment of the governors in the governorates.

He appointed and dismissed the Prime Minister and the ministers (Art. 141) and could therefore reshuffle the Council as he wished. New Art. 141, as amended in 2007, obliged the President of the Republic to consult the president of the Council of Ministers upon nominating or dismissing members of his government. However, the head of government would simply give a non-binding opinion. The president convoked the cabinet and presided over its meetings (Art. 142).

The head of state exercised most of these powers independently from the Council of Ministers. In 2007, however, a provision had been added to the constitution, stipulating that the President of the Republic was to exercise some of his competencies with the approval or upon the advice of the government (Art. 138 para. 2). This amendment had been presented as aiming at a better allocation of powers within the executive authority “... by expanding the competencies of the Council of Ministers and the extent to which it shares with the President in the exercise of the executive authority.”

Thus, the head of state was now to get the approval of the government before adopting executive decrees for the enforcement of the laws (Art. 144), administrative police regulations (Art. 145), decisions necessary for the creation and organization of public services (Art. 146), as well as for promulgating decree-laws in exceptional circumstances, in

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principles pertaining to the prohibition of excluding administrative decisions from the control of the administrative judge.

s Request for constitutional amendments (n 1).
case the People’s Assembly was not in session or was dissolved (Art. 147). The government was simply consulted and its opinion was not binding in the following cases: before the President adopted decree-laws upon delegation by the People’s Assembly (Art. 108), declared a state of emergency (Art. 148) or ratified important treaties (Art. 151 para. 2). In the current political context, it was doubtful that the Prime Minister, who was appointed and dismissed by the President of the Republic, would ever dare to refuse his support to the President’s decisions.

In addition to these ordinary executive powers, the President also enjoyed exceptional ones. First, he could proclaim a state of emergency with the only requirement to notify the People’s Assembly (within fifteen days) and, since 2007, to inform the government (Art. 148) “... whenever security or public order in the territories of the Republic or one of its regions are endangered, whether by an outbreak of war or by the threat of such an outbreak, or by internal disturbances, or by natural disasters or by the outbreak of an epidemic.” Law 162/1958 on the State of Emergency granted the President broad emergency powers to maintain public security and order. He could place restrictions on the freedom of persons to assemble and outlaw any public gathering, impose limits on freedom of movement, restrict freedom of opinion and expression, or permit the search of persons and places without recourse to the normal procedures. The law even allowed the President or his representative to arrest and detain suspected persons or those dangerous to security and public order. No judicial authority had any role in authorizing arrests or in controlling the issuing of such detention orders. Besides, detainees would not be allowed to petition a court to challenge their detention until thirty days after arrest.

A state of emergency had been proclaimed in 1981 after the assassination of President Anwār al-Sādāt and had been continuously renewed ever since by President Mubārak. The decision to declare (or extend) the state of emergency had been considered by the State Council as an act of sovereignty, exercised by the President in his capacity as ruling authority and not as an administrative authority. It was deemed to be a measure taken in defense of security, public order and the existence of the state, which was not subject to judicial control.

In case of a threat to national unity or state security, or if the state institutions were prevented from fulfilling their constitutional roles, the President also enjoyed exceptional powers. Art. 74 of the Constitution, as amended in 2007, required the danger to be serious and eminent. The measures were to be submitted to the people and a referendum was to be organized on the measures taken within sixty days of their adoption. Following the adoption of the constitutional amendments of 2007, the President of the Republic now had to consult the President of the Council of Ministers as well as the Presidents of the People’s and Consultative Assemblies before adopting any such emergency measures. Art. 74 had been used twice by President Sādāt, in 1977 to restrict strikes and demonstrations during the “bread riots” and in 1981 when clashes broke out between Islamists and Christians, to arrest opponents, ban opposition newspapers, and restrict the exercise of political rights. In both cases, the assessment of the danger involved, the expediency of the use of Art. 74, and the content of the measures to be taken had been entirely left to the discretionary power of the President.

The President’s decision to invite the electors to a referendum on decisions taken pursuant to Art. 74 of the Constitution had been considered by the State Council a political decision since its aim was the participation of the people in the decisions of the President.

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and their evaluation of the appropriateness of such decisions. By contrast, the decisions of the President taken on the basis of Art. 74 had been qualified as administrative acts and were subject to judicial review.

The President was, therefore, the main body for the launching and implementation of national policies. These executive powers were not shared with the government, which was reduced to a mere organ of coordination.

B. Legislative Powers of the President

The President of the Republic was enjoying both ordinary and exceptional legislative powers.

1. Powers in Normal Circumstances

The President enjoyed a wide variety of powers in relation to the parliament. He could propose laws (Art. 109). He promulgated the law (Art. 112) and had the right to veto a bill adopted by the People’s Assembly (Art. 112). In that case, the bill would be referred back to the Assembly within thirty days (Art. 113). If a two-thirds majority of the members approved it once again, the President had to promulgate it.

The President convoked the Assembly for its ordinary annual session (Art. 101). However, if not convoked, the Assembly met as of right (Art. 101). The President declared the ordinary session closed (Art. 101). He could call the Assembly to an extraordinary meeting in case of necessity or upon a request signed by a majority of the Assembly members (Art. 102).

The President could dissolve the People’s Assembly (Art. 136) in case of necessity. Following the adoption of the constitutional amendments of 2007, he did not have to organize a referendum anymore. In practice, the People’s Assembly had been dissolved four times since 1971: after the adoption of the Constitution in November 1971, after the referendum on the Peace Treaty in April 1979, and after two decisions of the Supreme Constitutional Court declaring the unconstitutionality of the parliamentary elections law in 1986 and 1990.

The President of the Republic could call a referendum on important matters related to the supreme interests of the country (Art. 152). This provision, which allowed the President to bypass the legislature, had been used four times since 1971: in July 1971, to approve the Program of National Action; in May 1974, to approve an ambitious economic reform program; in May 1978, to ban certain personalities from political life and to prevent the establishment of certain political parties; and in April 1979, to approve the Peace Treaty with Israel. The decision to submit a law to a referendum had been considered by the State Council and the Supreme Constitutional Court as an act of sovereignty, meaning it could not be subject to judicial review.

The President could also submit a request for the amendment of the constitution. According to Art. 189, the constitution could be amended on the initiative of the People’s Assembly or the President’s proposal. The three constitutional amendments that had

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11 For instance, the Assembly was convoked for an extraordinary session in July 2000, after the Supreme Constitutional Court declared the parliamentary electoral law unconstitutional.

12 Supreme Constitutional Court (SCC), Case No. 4/ Judicial Year 12 (October 9, 1990).
taken place in 1980, 2005, and 2007 had all been initiated by the President. Those of 2007 had been carried out in fulfillment of the electoral promises given by President Mubārak during the 2005 presidential campaign.

The President also chose one-third of the members of the Consultative Assembly, the higher chamber of the parliament. These powers were exercised independently of the Council of Ministers.

2. Legislative Powers in Exceptional Circumstances

In principle, the power to enact laws was vested in the People’s and Consultative Assemblies (Arts. 85 and 86). However, in exceptional circumstances that required urgent action, the Constitution was allowing the President of the Republic to pass legislation by decree-law to meet these pressing circumstances and avoid parliamentary battles. The President could issue two kinds of decree-laws.

He could, first, adopt decree-laws upon delegation of legislative powers. According to Art. 108, the President had the right “in case of necessity or in exceptional cases” to issue decrees having the force of law, on the condition of obtaining an authorization to this effect by two-thirds of the members of the People’s Assembly. This authorization had to be given for a limited period of time and to point out the subjects of such decisions and the grounds upon which they were based. The decree-laws had then to be submitted and approved by the People’s Assembly, during the first meeting after the end of the authorization period. If they were not submitted, or if they were submitted but not approved, they would cease to have the force of law.

In practice, this procedure was frequently used. The Assembly never refused to vote a delegation of powers to the President, and never refused to approve the decree-laws he adopted. For instance, the parliament regularly voted a delegation of legislative powers in the fields of arms procurement and all what was related to the armed forces. The Supreme Constitutional Court had decided that these decree-laws were subject to its review. In a decision of 1992 it had struck down a presidential decree-law because it had interfered in matters beyond the scope of the delegated powers.\(^\text{14}\)

The President could also adopt decree-laws in case the Assembly was not sitting, by virtue of “constitutional delegation.” According to Art. 147, during the absence of the People’s Assembly and in case of necessity, if a situation occurred requiring the taking of swift action which could not be delayed, the President could issue decisions having the force of law. To deal quickly with critical situations, the President was therefore allowed to take decisions that would enjoy the status of decree-laws. These decree-laws were to be submitted to the People’s Assembly, within fifteen days from the date of issuance if the Assembly was standing and at its first meeting if the Assembly was dissolved or in recess. If they were not submitted, or if they were submitted but not approved by the Assembly, they would lose their force of law with retroactive effect, unless the Assembly ratified their validity for the previous period.\(^\text{15}\)

It was relatively easy for the President to abuse this power by waiting for the summer recess to adopt decree-laws not justified by pressing circumstances but motivated by his wish to bypass the parliament. However, the Supreme Constitutional Court had decided

\[\text{13} \] Art. 196 of the Constitution. The other two-thirds were elected.
\[\text{14} \] SCC, Case No. 25/Judicial Year 8 (May 16, 1992).
\[\text{15} \] This provision stated clearly that they would lose the force of law with retroactive effects, when this was not mentioned by Art. 108.
in 1985 that these decree-laws were subject to its judicial review too. The constitutional issue submitted to the Court in that case concerned the validity of Decree-Law No. 44 of 1979 amending Law 25 of 1920 and Law 25 of 1929 on personal status, which had been adopted by Sādāt on the basis of Art. 147 during parliament’s recess. The Court decided that it was competent to review the constitutionality of that decree-law and to appreciate whether there were real emergency reasons justifying recourse to Art. 147. It held the decree-law to be void, considering the reasons advanced by the government to justify its adoption far from conclusive with regard to the existence of urgent circumstances and of a state of necessity. The Court decided that there was no emergency and that the President could have waited until the next parliamentary session for the People’s Assembly to adopt that text by a normal law.16

C. Presidential Powers Relating to the Judiciary

The President also enjoyed important powers in the judicial field. He was the one who nominated the general prosecutor as well as the Presidents of the Court of Cassation and of the Supreme Constitutional Court. He was also the head of the Council of Judicial Bodies. According to new Art. 173 of the Constitution, the former Supreme Council of Judicial Bodies, created in 1969 by Sādāt,17 was to be replaced by a new Council, composed of the presidents of all judicial bodies and chaired by the President of the Republic. In November 2007, a draft law had been prepared by the Minister of Justice, defining the composition, competences and rules of procedure of that Council. When the document had met with unanimous criticism, the President of the Republic requested its withdrawal in November 2007. A new draft had been prepared and adopted in June 2008.18 As had been the case in the first draft, the Council was presided over by the President of the Republic, and the Minister of Justice sat as the Deputy President of the Council, meaning he would preside in the absence of the President of the Republic.19

The President could decide to refer a case to a state security or a military court. According to Art. 9 of Law No. 162 of 1958 on the State of Emergency, he could refer to state security courts any crime liable for prosecution under the general law, be it mentioned in the Penal Code or in any other law. It followed that the President could refer at his discretion to these courts any criminal act, without having to give reasons for his decision. Besides, the judgments of these courts were not considered final until ratified by the President of the Republic, who could decide to revoke the judgment and order a retrial by another state security court. The President had the power to lighten sentences, and to annul or suspend their execution.

The Military Law No. 25 of 1966 established military courts and stipulated in Art. 6 that during a state of emergency, the President of the Republic could refer any crime provided for in the Penal Code or any other law to the military jurisdiction. It meant that the President could refer any crime liable for prosecution under the general law, be it mentioned in the Penal Code or in any other law, to state security courts. The President had the power to lighten sentences, and to annul or suspend their execution.

16 SCC, Case No. 28/ Judicial Year 2 (May 4, 1985).
17 The Supreme Council for Judicial Bodies was created in 1969 by Presidential Decree No. 82, as a retaliatory measure against judges who had been highly critical toward Nasser’s anti-liberal governmental policy and reluctant to adhere to its one-party Arab Socialist Union. It was chaired by the President of the Republic and composed of the Minister of Justice and of the presidents of all judicial bodies.
19 See, for instance, Arab Center for the Independence of the Judiciary and the Legal Profession, “Egypt: the Draft Law on the Council of Judicial Bodies is a New Violation of Judicial Independence” (Cairo, June 11, 2008).
could decide to transfer jurisdiction over a crime to the military courts, even if the crime was committed by a civilian. Since 1992, President Mubārak had been using this power to transfer cases involving Islamists to the military judge. The Supreme Constitutional Court had decided that under this provision, certain categories of crimes as well as specific cases could be referred to the military courts. The President could therefore decide on a case by case basis if a suspect was to be referred to ordinary, military, or state security courts.

According to new Art. 179 of the Constitution that allowed the parliament to adopt an anti-terrorist law, the President of the Republic was to be able to choose the court before which a suspect would be tried, as long as that court was mentioned in the constitution or in the law. It could be an ordinary court but it would most probably be an exceptional one. The regime would thus continue to be able to try civilians before exceptional courts as had been the case under the state of emergency. In addition, this provision, by authorizing the President of the Republic to choose the court before which an individual suspected of engaging in terrorist acts would be tried, stood in contradiction to Art. 68 of the Constitution, according to which “the right to litigation is inalienable and guaranteed for all, and every citizen has the right to have access to his natural judge.”

Finally, upon a decision of the President of the Republic, with the advisory opinion of the general assembly of the court to which the judge belonged or of the general prosecutor and with the agreement of the Supreme Council of the Judiciary, judges could be seconded to a foreign government or international organization. Work in a foreign country, in particular Gulf countries, was very lucrative for Egyptian judges whose salaries are low. A judge in the Emirates, for instance, would earn in one month the equivalent of the salary he would get in one year in Egypt. This power of assignment, therefore, allowed wide freedom to the President in rewarding loyal judges by appointing them to financially lucrative foreign postings.

IV. FAILURE OF THE CHECKS AND BALANCES MECHANISMS

On paper, the Egyptian constitutional framework presented some characteristics of a parliamentary regime, including a system of checks and balances. The parliament was monitoring the work of the government through several means. Every member of the People's Assembly was entitled to address questions to the Prime Minister or any of his deputies and ministers concerning matters within their jurisdiction (Art. 124). Twenty members of the People's Assembly could ask for the discussion of a public question to ascertain the government’s policy on a specific issue (Art. 129). Every member of the People's Assembly was entitled to address interpellations to the Prime Minister or the ministers concerning matters within their jurisdiction. A debate could take place at least seven days after its submission, except in case of urgency as decided by the Assembly and with governmental consent (Art. 125). However, the internal regulations of the parliament had limited the number of questions and interpellations that could be raised monthly.

Each minister was responsible for the affairs of his ministry. The People's Assembly could decide to withdraw its confidence from any of the members of the cabinet by a


The President of the Republic was sending not only extremist and violent Islamist groups before military courts, but also members of the Muslim Brotherhood accused of participating in the activities of a prohibited organization.
motion of no confidence after an interpellation and upon a motion proposed by one tenth of the members of the Assembly. The Assembly would wait for at least three days from the date of the presentation of the motion. The withdrawal of confidence had to be pronounced by a majority of its members, leading to the resignation of the minister (Art. 128.1).

The Assembly could also adopt a motion of no confidence toward the government. Until 2007, if the People’s Assembly wished to withdraw its confidence from the government, the President of the Republic had to consult with the people through a referendum. Following the constitutional amendments, the Assembly was able to adopt a motion of no confidence without submitting the conflict to the people. However, the President of the Republic retained his right not to accept the government’s resignation. In such a case, the People’s Assembly could vote again, with a two-thirds majority, for the withdrawal of confidence, and the President had then have to accept the government’s resignation.

According to Art. 136, the People’s Assembly could be dissolved by the President of the Republic in case of necessity. Until 2007, the people had to be consulted by referendum; this was not the case anymore.

The Egyptian system displayed, at least in theory, certain features of the parliamentary system, including the “soft” separation of powers and the system of checks and balances. These mechanisms had never functioned in practice, though. The parliament was not the source of legislation and was not the supervisor of the government. It reinforced rather than controlled the executive authority. The Prime Minister was not the leader of the majority party, he did not choose his ministers, who were not drawn from among members of the parliament. As to the President of the Republic, there was no real checks on his far-reaching powers. Although he was both the head of the state and the head of the government, he was unaccountable politically. The ministers were the ones who were collectively and individually responsible for the general policy of the state, though they were not the ones who decided on these policies.

According to Art. 85 of the Constitution, the President was criminally responsible in case of high treason or crime. Any such charge against him could be made upon a proposal by at least one-third of the members of the People’s Assembly. No impeachment could be brought, except upon the approval of a majority of two-thirds of the Assembly members. The President could be suspended from the exercise of his duties as from the issuance of the impeachment. The Vice President would take over the presidency temporarily, until the decision concerning the impeachment would be taken. The President of the Republic would be tried by a special tribunal set up by law. The law was also to establish the trial procedure and define the penalty. If the President was found guilty, he would be relieved of his post, without prejudice to other penalties. No law had ever been adopted to establish the court, though.

In practice, no motion of no confidence had ever been voted, no government had ever resigned for having lost the support of the Assembly, and no Chamber had ever been dissolved in order to give the people the opportunity to resolve a deadlock between the executive and the legislature. It was difficult to imagine that in the current political context the two Assemblies dominated by the ruling NDP would ever have withdrawn confidence from the government. Besides, the regime had the means to control the parliamentary elections and therefore the composition of the Assembly. In a traditional parliamentary system, the head of state has an honorific function only; he is supposed to be an arbiter to secure the

23 However, Law 247 of 1956, adopted under a previous constitution, may have applied.
proper functioning of the public powers, as stated in the Constitution of 1971 (Art. 73), which provided that he was in charge of maintaining the proper balance of powers.

The Egyptian system had also borrowed certain features of the presidential government. For instance, members of the parliament and the President were elected independently of each other, which gave to each of them its own legitimacy. The President was the one who determined the fundamental issues facing the nation, formulated and supervised the implementation of the general state policy, and was the instigator of the main public policies.

In practice, the President was always considered as the final authority, to whom a final recourse could be submitted in hopeless cases. For instance, in the course of its conflict with the Minister of Justice, the Judges’ Club had often called on the President of the Republic to intervene, in his capacity as guardian of the balance of powers and as President of the Supreme Council of Judicial Bodies. In 2006, for instance, they had called on the President to drop the charges brought against two reformist judges before the disciplinary council. The President had refused to intervene, saying he could not interfere with judicial independence and internal matters of the judiciary. In March 2007, however, he had responded positively to a call of the President of the Judges’ Club to intervene in favor of a judge referred to the disciplinary council by the Ministry of Justice on charges of libeling the President. On the request of the President of the Judges’ Club of the State Council, the President of the Republic had accepted to intervene in another case, regarding a counselor of the State Council who was suffering from a brain tumor and had to undergo an expensive medical intervention in Germany. In March 2007, the President had ordered the Ministry of Justice to bear the costs of the treatment after he had refused to do so. In November 2007, under pressure from all judicial bodies, the President had requested the Minister of Justice to withdraw the draft law he had prepared on the new Council of Judicial Bodies. In July 2009, under even stronger pressure from judicial bodies and judges’ clubs, he had requested the Minister of Justice to withdraw his draft law amending the composition of the Supreme Council of the Judiciary.

V. CONCLUSION

Opposition and civil society groups had long demanded a constitutional reform in order to reestablish a balance between government branches. They had been unanimous in denouncing the cosmetic character of the 2007 amendments and protested, in particular,

24 For an analysis of the crisis that opposed the Judges’ Club to the Minister of Justice from 2005 to 2007, see N. Bernard-Maugiron, “Judges as Reform Advocates: A Lost Battle?” Cairo Papers in Social Sciences (American University in Cairo Press, Cairo 2009).

25 Ibrahīm ‘Isā, chief editor of Sютt al-Ummah, wrote he was astonished by the fact that some judges turned to President Mubārak for intervention to find a solution to the crisis, “as if he was not the one who was responsible for the referral of these judges to investigations”; “his intervention has taken place already,” al-Dustūr (April 26, 2006).

26 Al-Jumhūriyyah (April 23, 2006); see also al-Ahrām (April 24, 2006).

27 Al-Misrī al-Yawm (February 25, 2007); see also Nahḍat Misr (February 25, 2007) and al-Ahrām (February 25, 2007).


29 For the text of the counter proposals of al-Wafd, al-Tajammu’ and the Muslim Brothers, see Cairo Institute for Human Rights Studies (CIHRS), Watān bi-lā muwāṭinin! Al-ta’dīlāt al-dustūriyyah fi al-mizān (Cairo 2007) 241 ff.
against the amendments of Art. 88 (end of judicial supervision of the elections) and Art. 179 (which expressly authorized the legislator to deviate from certain constitutional articles when enacting anti-terrorist legislation). The official objectives of the reform, which was “to achieve a greater balance of power between the branches of government, to enhance the rights of citizens and public freedoms, to strengthen the role of parties, to increase women’s empowerment and to improve local administration” had not yet been achieved.

The overpowering authority of the President, in practice, was almost unlimited. There were very few checks on his far-reaching powers; the most important of which would be massive demonstrations against the regime or the rise of radical political forces.

The 2007 constitutional amendments had further strengthened the strong presidential or even authoritarian character of the regime. The reforms had allowed the regime to block the emergence of new centers of power which had become a potential threat to the regime, by marginalizing the influence of the Muslim Brothers and the judiciary. Instead of reestablishing a balance between the state powers, some amendments had strengthened the authoritarianism of the regime, by getting rid of judicial supervision of the elections, authorizing the adoption of a repressive anti-terrorist law, establishing new conditions for establishing political parties, changing the rules for the legislative elections and modifying the conditions for running in presidential elections.

Judges and Muslim Brothers had not been the only victims of the constitutional amendments, as the amendment of the Press Law had confirmed the right to jail journalists for press offenses. The NGO Law, adopted in 2002, would probably have been next to be amended in order to increase state control even further. The Law on Professional Syndicates did not need to be amended since the amendments that had taken place in 1993 and 1995 had already allowed quite a rigid control of these competing centers of power. In the current transition of power period, the government wanted to close all avenues for the emergence of new centers of powers.

These laws and others of a repressive nature were not necessarily implemented, and similar cases were not necessarily treated similarly. Some journalists could cross the red lines without being prosecuted. Others could cross it several times until suddenly charges were brought against them. Human rights NGOs could write strong reports denouncing violations of human rights in Egypt, until some of them were suddenly closed. Some judges could be referred to the disciplinary council for having criticized the government in newspapers and on satellite channels, while no disciplinary procedure would be brought against others. This policy of tolerance followed by sudden application of the law also represented a great threat to civil society, which never knew what to expect.

Since Egypt’s system of government was characterized by a centralization of power in the hands of the President of the Republic, it could be more accurate to talk about an authoritarian regime rather than about a strong presidential one. The organization of the transition of power between the President and his successor had even increased the need to

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30 See the joint press release published by the coalition of opposition parties and Muslim Brothers, dated March 12, 2007, and the joint press release published on March 22, 2007 by a dozen of NGOs requesting the withdrawal of the amendments to Arts. 88 and 179.

31 Request for constitutional amendments (n 1).

32 After the Muslim Brothers had won the elections in many professional syndicates at the beginning of the 1990s, the Law on Professional Syndicates had been amended to require a minimum participation of half of the members in the elections. Most of the syndicates had since then been paralyzed.
control all sources of power, since the new president was to confront a period of instability during which his legitimacy would have been seriously challenged.

The January 25 Revolution swept away the president and destroyed its constitution. Egyptians succeeded in getting from the streets what had been impossible to achieve through elections, political pressure and dialogue. Egypt however now faces a new challenge: achieving constitutional reform and constructing the transition process from an authoritarian to a democratic rule. There is still much uncertainty around the character of the new political order. If the substance of the coming constitution is debated, there is, however, a strong consensus in favor of a less presidential and more pluralistic system. For the time being, the Supreme Council of the Armed Forces, who is running the country during the transitional period, exercises the same authorities as the President and the parliament, only sharing executive power with the Council of Ministers. Most liberal forces and young leaders of the January 25 Revolution feel increasingly frustrated by the confusing political process and fear that the revolution may be stolen from them.
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The Republic of Lebanon is located at the eastern shore of the Mediterranean. In fact, Lebanon’s entire 220 km western border is coastline. Syria is its neighbor to the north and east. In the South, Lebanon shares an internationally recognized but closed border with Israel. Lebanon is located in the Middle East; this is more than a geographical description: it is the beginning of an explanation. However, it only partly explains the long-standing conflict within the country, and why there has been repeated fighting during the nineteenth and twentieth centuries. It does not explain, for instance, how Lebanon came into existence, for what we understand as “the Middle East”—a certain number of Arab countries struggling with the state of Israel—did not exist before 1920. The geopolitical perspective falls short of a sufficient explanation for the hostilities, as it neglects the internal frictions allowing for external interference. Therefore this chapter will, in contrast to numerous interpretations, exclusively focus on the internal dimension of Lebanese politics.

As the actual constitutional structure results from the 1989 Ta’if Peace Agreement, designed to end the most recent lengthy Civil War (1975–1990), its ultimate function is to secure peace through internal political arrangements. This chapter argues that only since the amendments of 1990 does the written constitution reflect the consensus requirements of the Lebanese consociational democracy. The constitution now provides two distinct consensus categories, a “confessional consensus” between the religious segments of society and a “political consensus” between the main political actors or interest groups. Yet, political consensus is the prerequisite for peaceful coexistence, and consequently, it became the focal point of the constitutional amendments. In order to explore this argument further, the Lebanese Constitution will be analyzed in the light of consociational democracy.

At the outset, an overview on the political system will be given to highlight the formal consensus requirements based on affiliation with one of the main religious groups in the country (infra section II). The evolution of confessional power-sharing, which is
supplemented by the traditional family-based feudal lord system (infra section II.A) will be examined. The historical interplay of state-building, civil wars, and existing political frictions will be explored, as the traditional political actors still contribute to what the Lebanese Constitution is about today. However, statehood was favored only by a political minority, which tried to pursue their hegemonic interests with a written constitution (infra section II.B). The constitutional development regarding consociational democracy will be outlined, emphasizing the different consensus-mechanisms now incorporated in the written constitution (infra section III). This will eventually show how the Lebanese political system diverges from the classical Montesquieu system and creates its own separation of powers through consensus mechanisms (infra section III.D).

II. CONFESSIONAL CONSENSUS, CONSOCIATIONAL DEMOCRACY, AND CONSTITUTION

A description of the formal separation of powers in the Lebanese Constitution does not present major difficulties. The legislative, executive, and judiciary branches exercise their classical functions of legislating, governing, and resolving controversies. One could also analyze how their interplay has evolved—starting with the clear separation of powers when the constitution first was adopted in 1926 and then moving on to the subsequent constitutional amendments that gradually blurred the boundaries between the executive and the legislative. However, to examine the written constitution in this manner neither reflects what Lebanon is about nor the organization of the Lebanese political system.

Democracy in Lebanon never was understood as majority rule; instead consensus prevailed and had to guarantee participation on many levels. On the formal level, political power in Lebanon is distributed according to a confessional quota between eighteen recognized sects. Since 1990, the ratio to be respected is five Christians to five Muslims. At least as important as the overall quota is the confessional distribution of the state’s highest posts: the President of the Republic always is a Maronite Christian, whereas the President of the Council of Ministers is a Sunni and the Speaker of Parliament is a Shi’ah Muslim.1

It is generally because of the confessional quota and the power-sharing mechanisms that Lebanon is qualified as a consociational democracy and not as a democracy based on majority decisions. In contrast to the majoritarian democracy, a consociational democracy draws on consensus for the adoption of decisions in the state institutions. As conceptualized by Lehmburch and Lijphart in the early 1970s, consociational democracy takes into consideration group affiliations that divide the state’s population into segments (racial, linguistic, confessional, or other) and make it a—so-called—heterogeneous state.2

The division of society is regarded as so strong that political decisions cannot be made if a winning coalition excludes the losing opposition from power. Power-sharing is the tool to secure participation in the decision-making process at the state level; power-sharing quotas define who takes part in the consensus decisions.

1 The Lebanese term “president” is used for all three in order to show their ranking—somehow at the same level of “president.”

The Lebanese power-sharing system with its specific quota system seems to refer to confessions as the main societal segments to be respected. Nevertheless, confessional power-sharing is a relative newcomer to Lebanese power-sharing rules. In order to show that consensus cannot be restricted to confessional criteria, a look back into history is necessary.

A. Confessional Power-Sharing: A Rupture with Historical and Political Traditions

There is no “historic” Lebanon and no legitimation for the foundation of a state entity on the territory of the current-day Republic of Lebanon. Throughout history, Lebanon had merely been a geographical area, a mountain chain called Jabal Lubnān or “Mount Lebanon.” With its rugged and steep mountain ranges and hilltops reaching up to 3000 meters, Mount Lebanon must have been a world on its own. Life was indeed austere and arduous in the Lebanese mountains, but abundant snow assured water supply for the people to grow all kinds of fruit and vegetables.

The nineteenth century brought about a turning point in the region’s history. Decades of violence that may be called civil wars had shaken the mountain chain at a time of increasing European influence in the Levant. This European influence shaped the nucleus of the Lebanese state entity based on the mountain range Mount Lebanon. A new political system based on confession was created. A similar system still exists today.

1. Clientelistic Tradition of a Family-Based Political System

At the beginning of the nineteenth century, the “Lebanese,” who called themselves Syrians, for they belonged to Greater Syria, led their life of hardship grouped not so much into sects but into closely knit villages, separated from one another by the mountain’s valleys. Being isolated from the relatively sophisticated and open-minded town life, Mount Lebanon had developed a special kind of feudalism. It had formed a political system with the amīr at its top, called the imārah. Additionally, a strong social hierarchy (iqtā’) had evolved that divided the Lebanese population into ruling families on the one hand and peasants or sharecroppers on the other. To the noble men, called za’īm [zu’āmā’, pl.], the peasants gave their loyalty for which their za’īm gave them security and any kind of support in return.

Importantly, Mount Lebanon’s political system was not defined by confession. Sure enough, the amīr at the top emanated from the leading Druze family. But the other

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6 Axel Havemann, Geschichte und Geschichtsschreibung im Libanon des 18. und 20. Jh.: Formen und Funktionen des historischen Selbstverständnisses (Beiruter Texte und Studien Band 90, Orientinstitut der DMG, Ergon Verlag, Würzburg 2002) 34; Kamal Salibi (n 5) 8.
prominent families from the *muqaddam* down to the village *sheikh* belonged to different sects. What mattered was social status, not confession.  

2. Mount Lebanon as Part of the Ottoman Empire

The territory of current-day Lebanon was subject to changes resulting from the administrative policies of the Ottoman Empire. Damascus, Acre, Şaydā, and Tripoli were the main centers of trade, and the Ottoman Empire cut Greater Syria into different administrative units, with these towns as capitals according to its interest. Mount Lebanon had merely been part of a *vilâyet*, as the Ottomans called their greater provinces that were subdivided into *sanjaqs*. The Ottoman Empire ruled Mount Lebanon through indirect rule, which left a varying degree of independence to the local leaders, the *zu’āmā*. Mount Lebanon was at best the hinterland of the trading centers mentioned above; at worst, it was the source of trouble when the mountaineers attacked the trade routes cutting through their territory.

3. Civil Wars and European Influence

From 1820 onward, Mount Lebanon became a constant source of trouble for the Ottoman Empire. The peasants of Mount Lebanon rose against rising taxes and the forced conscription that took their young men from the fields to fight for a very distant Empire. In fact, the peasants rose against the Empire’s local governors, the *za’īm*. The *za’īm*’s official function in the political system of Mount Lebanon was that of tax collector of the Ottoman Empire. Elsewhere, the function and authority of tax collector was granted on an annual basis. By contrast, in the Druze areas and later on Mount Lebanon as a whole, the function of *za’īm* became hereditary.

The social unrests in Mount Lebanon began at a time when the Ottoman Empire was weak and when the European powers’ interest in the Levant grew stronger. The European powers had been increasing their influence in the Levant for some time. Through a system called the capitulations, the Ottoman Empire had granted privileges to European merchants regarding taxation. To guarantee their economic, religious, and political interests, the European powers broadened the capitulations into a system of protection whereby foreigners residing or trading in the Ottoman Empire became subjects to European legislation. After the European trade agents, the local population was also gradually included in this system.

From around 1841 onward, the feudal patron-client relationships were reshaped along confessional lines. Entire confessional groups became clients of a specific European power; the Maronites would from then on search protection only from the French consul whereas

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7 Kamal Salibi (n 5) xiv; Ussama Makdisi, (n 3) 604.
9 Theodor Hanf (n 5) 76.
11 Caesar E. Farah (n 8) 18, 20.
12 Caesar E. Farah (n 8) 19.
the Druze became hostile toward French meddling. Thus, by the mid-nineteenth century, large parts of the Ottoman Empire’s citizens on Mount Lebanon had a double “nationality” and effectively managed to live outside the Ottoman Empire’s legislation. Also, the confessionalization of the population began, as the Catholic Christians mainly profited from the protection system, whereas the non-Christians, especially the Muslims from the bigger cities, suffered from its consequences.

In sum, the nineteenth-century civil wars (1821, 1841, 1845, 1861–1864) were caused by socio-economic factors: poverty, unequal economic development, and overthrow of the prevalent social order. However, the realignment of the patron-client system on a confessional basis aggravated the hostilities between those who suffered under the changes (deprived and impoverished Druze, low class Sunnī) and those who gained from them (the Christians).

A solution to the internal “Lebanese” problems was sought in two international agreements between the Ottoman Empire and the European powers: France, Great Britain, Prussia, Russia, and Austria. These international agreements, the Règlement Chékib Effendi from 1841 (amended 1845) and the Règlement Organique from 1861 (amended 1864) demonstrated how influential the European powers had meanwhile become.

In both agreements, they adopted misguided conflict resolution mechanisms which did not address the prevailing problems. Economic and social problems were addressed by sectarian mechanisms.

4. Confessional Representation as Solution to Socio-Economic Problems

In 1841, the Règlement Chékib Effendi tried to end the constant clashes by dividing Mount Lebanon into two parts based on religious criteria, the Double Kaimakamate, formed by one northern Christian and one southern Druze Mount Lebanon. It provided for a multi-confessional Administrative Council in which the six major sects were represented. The Maronites, the Greek-Orthodox, the Greek-Catholic, the Sunnīs, the Shī’ites, and the Druze were each to be represented by two members of the Council. Later, following protest by the Maronite Christians, the distribution was changed according to the proportional size of the participating communities, a change that favored the Maronites, who accounted for up to 80 percent of Mount Lebanon’s population. However, as the fighting had other than confessional reasons as well, it still continued after the partitioning of Mount Lebanon. On top of that, the Double Kaimakamate brought about more problems than it solved.

In 1861, the Règlement Organique reunified Mount Lebanon. But it kept the confessional distribution of seats in the administrative council and even applied the confessional principle to the first democratic structure of “Lebanon,” The Règlement Organique foresaw

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14 Kamal Salibi (n 5) 55.
15 Caesar E. Farah (n 8) 20.
16 Kamal Salibi (n 5) 62; Samir Khalaf (n 4) 89.
17 Theodor Hanf (n 5) 84; Edmond Rabbath, La formation historique du Liban politique et constitutionnel: Essai de synthèse (2nd ed., Librairie orientale, Beyrouth 1986) 217.
18 Samir Khalaf (n 8) 120.
20 Caesar E. Farah (n 8) 257. The problems were linked to the jurisdiction applicable to the Muslims in the northern and the great number of Christians living in the southern district.
the election of the representatives to the administrative council. Moreover, it established a new tradition: the governor had to be a Christian. As a rather complicated system guaranteed for influence of the Maronite sect in the election of all the representatives regardless of their sect, the Maronites started to dominate the political system of Mount Lebanon politically, thus taking away the lead role from the Druze.

Therefore, both the Règlement Chékib Effendi and the Règlement Organique constituted a rupture in Lebanese history. The tradition was a patron-client structure based on the strong social hierarchy that gave the feudal lords their political role. The confessional nature of the political system that formed the basis of the patron-client network between the European powers and their respective Lebanese protégés was a new element added to the old tradition.

The Règlement Organique was important on another level. It created the nucleus of an independent state by giving Mount Lebanon a special status as a partly autonomous “privileged sanjak” of the Ottoman Empire. However, it was not before World War I that a state entity with institutions and a constitution was created that fully separated Lebanon from its neighbors in the Middle East. Major steps in the division of the region were the Balfour Declaration of 1916, the Sykes-Pikot agreement of 1917, and French troops’ entry into Lebanon in 1918.

While France was given a mandate by the League of Nations to “govern and guide” the Lebanese only in 1922, in 1920 the French high commissioner Général Henri Gouraud had already declared the existence of an entity called “Greater Lebanon.” Its territory did not correspond to Mount Lebanon. In order to create a viable state, the coastal area was added, with the cities and harbors dear to Syria: Tripoli, Beirut, Shaydâ, as well as the eastern Bekaa Valley with its grain fields and further northern and southern areas.

B. Hegemonic Interests: A Constitution to Foster State Existence

In retrospect, the decision to create Greater Lebanon—which corresponds to today’s Republic of Lebanon—must be qualified as an astonishing decision. The newly created state was split socially as well as politically. The population of the Middle East found itself divided between several nationalistic movements, each advocating a different political agenda. Syrian-Arab Nationalism, Pan-Arab Nationalism, and the Young Turk Movement generally competed for influence in the area. The Young Turk Movement wanted the Ottoman Empire to be kept under Turkish leadership, although a thoroughly reformed one. In contrast to this movement, Arab nationalism had evolved in the nineteenth century, formulated by Christian intellectuals, who saw the Arab identity as a possibility to attain political equality of Christians with Muslims. However, the Syrian-Arab and the Pan-Arab movements differed as to the size of

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21 Caesar E. Farah (n 8) 696: But he was not allowed to be a “Lebanese.”
22 Engin Deniz Akarli (n 19) 80; Kamal Salibi (n 5) 110; Edmond Rabbath, La Constitution libanaise: Origines, Textes et Commentaires (Université libanaise, Beyrouth 1982) 175.
26 Axel Havemann (n 6) 70; Asher Kaufman (n 25) 186.
the political entity aimed for. Whereas the Pan-Arab nationalism envisioned a common state entity for at least all countries whose language and culture was Arabic, the Syrian-Arab nationalism referred to the Fertile Crescent as a common nation, including today’s Syria, Lebanon, the Hatay Province of Turkey, Israel, the Palestinian territories, the Sinai Peninsula of Egypt, Cyprus, Jordan, Iraq, Kuwait, Northern Najd of Saudi Arabia, Cilicia of Turkey, and Ahwaz Khuzestan of Iran.

An additional movement had developed in the nineteenth century in the territory of current-day Lebanon: Lebanese nationalism. The proponents of Lebanese nationalism were all Maronite Christians; thus, it may also be called Maronite nationalism. At the beginning of the twentieth century C.E., they used the Phoenician presence on the shores of the eastern Mediterranean (3000 B.C.–800 B.C.) to justify a Lebanese state, cut off from its surrounding Arab neighbors.

While Lebanese nationalism was originally not meant to be exclusive to Christians, in time it embraced the idea of Lebanon as a Christian homeland. The Lebanese nationalists became hostile toward Muslims and even “Arabs,” from which they claimed to differ by their Phoenician identity. Not surprisingly, this Lebanese nationalism did little to attract the Muslim population. But it also repelled the majority of the Christian population, who without any doubt defined themselves as Arabs.

In the coastal cities, Sunnī Muslims, Greek-Orthodox, and Greek-Catholic Christians alike were economically oriented toward Damascus or Istanbul. Their social orientation extended to the whole of the Ottoman Empire, as the settlement of their fellow believers spread over the whole area. They were either Pan-Arab or Syrian-Arab nationalists. Not really present in the coastal towns were the Druze and Shi‘ites, who, as much as the Greek Orthodox Christians, were divided politically. But they were certainly not Lebanese nationalists favoring a Maronite political dominance. Even the Maronite Christians were divided: not all supported Christian-Maronite dominance; some advocated power-sharing with the Muslim population. So, during the period of Lebanon’s creation, several multi-confessional political movements competed for influence in the future state. Importantly, the majority of the population was Pan-Arab or Syrian-Arab nationalist and therefore opposed any state project cutting Lebanon off from its Arab vicinity. However, the political minority that wanted a Lebanese state under French protection prevailed.

In the end, Greater Lebanon comprised two markedly different territories, Mount Lebanon and the rest of the country. The population of Mount Lebanon differed from the rest of Greater Lebanon in its religious adherence, social life, and political system. Whereas direct rule of the Ottoman Empire prevailed in the annexed areas, the people of Mount Lebanon were able to pursue their hereditary form of feudalism based on a strong social hierarchy centered on the leading families—as long as they respected the Ottoman Empire’s mainly fiscal interests. These differences, in addition to the political divide, made the creation of an independent state from a larger territory than Mount Lebanon a challenge.

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27 Kamal Salibi (n 5) xvii; Georges Corm (n 10) 50.
28 Georges Corm (n 10) 50.
30 Georges Corm (n 10) 44: “Lebanon was not created artificially by French imperialism.” This, Corm says, is just another myth spun around Lebanese history.
III. THE WRITTEN CONSTITUTION: FROM HEGEMONY TO CONSENSUS

The declaration of Greater Lebanon, as it was called in 1920, did not end the political controversies. On the contrary, all steps taken to establish the state, such as the distribution of identity cards, met the fierce resistance of large parts of the population including nearly all of the Sunni Muslims in Lebanon. Boycott was also the reaction to the proposal of a constitution for Lebanon.\(^{31}\) Yet, in 1926, the first written constitution of Lebanon was enacted.

A. Genesis of the Constitution: A Strong Roman Catholic Influence

The idea to introduce a constitution was, of course, imported from Europe, and the Lebanese Constitution was drafted with considerable French input.\(^{32}\) Its norms were borrowed from the French Constitution of the Third Republic, with some elements being taken from the Second Republic. Other influences were also apparent: Rabbath concludes that the Lebanese Constitution of 1926 was a mélange of the French Third Republic together with the Egyptian Constitution of 1923 and the Belgian Constitution of 1931.\(^{33}\) Additionally, Hokayem claims that the Constitution of Switzerland as well as the Constitution of the United States of America served as sources of inspiration in the drafting process.\(^{34}\)

Whether the Constitution of 1926 is merely to be seen as a product of French influence is open to discussion. Hokayem, more than Rabbath, sees it as a genuinely Lebanese Constitution. Undoubtedly influential in the drafting of the 1926 Constitution was—on the Lebanese side—Michel Chiha, a Roman Catholic intellectual and financier.\(^{35}\) Besides, the constitution can certainly be seen as a result of Lebanese politics due to its adoption procedure: even if the drafting process had been initiated by a decree of the High Commissioner, the parliament that already existed at the time, the Representative Council, was in charge of the drafting process. A parliamentary commission of thirteen deputies prepared a questionnaire with detailed questions about the political system to be built, which they transmitted to Lebanese authorities and personalities. Not surprising under the political circumstances of the time, only parts of the population took interest in the drafting of the constitution.

Rabbath and Hokayem agree that nearly all the responses to the questionnaire were given by Christian Lebanese, as the Sunni and Shi’ite communities almost in entirety rejected the project of a separate Lebanese state and, consequently, its constitution.\(^{36}\) Generally, the Francophile Lebanese Christians were successful in shaping the constitutional structure.\(^{37}\) Their ultimate objective was the formation of a state under tight French influence, using the French language. Despite the fact that the results of the questionnaire did not accurately represent the population, the answers given were used later on to elaborate on the constitutional text.\(^{38}\)

\(^{31}\) Antoine Hokayem, *La génèse de la constitution libanaise de 1926: Le contexte du mandat français, les projets préliminaires, les auteurs, le texte final* (Les Editions Universitaires du Liban 1996) 22ff.; Edmond Rabbath (n 17) 400ff.; Nawaf Salam (n 13) 69.

\(^{32}\) Antoine Hokayem (n 31) 243 ff.

\(^{33}\) Edmond Rabbath (n 22) 50.

\(^{34}\) Antoine Hokayem (n 31) 243 ff.

\(^{35}\) Edmond Rabbath (n 22) 13; Antoine Hokayem (n 31) 231, 247ff., 271.

\(^{36}\) Nawaf Salam (n 13) 69.

\(^{37}\) Antoine Hokayem (n 31) 119; Edmond Rabbath (n 22) 35.

\(^{38}\) Antoine Hokayem, (n 31) 220ff.
B. Content: Merit Instead of Confessional Representation

The contents of the 1926 Constitution reflected the interests of those who had answered the questionnaire.

Already in 1920, Lebanese Christians had become the backbone of the state administration. At that time, they had the best education among the Lebanese population, spoke the best French and were most loyal to France. 39 In order to make sure that Maronites would continue to have access to state institutions, future appointments to political office should only be based on merit. 40

Therefore, the Constitution of 1926 generally did not foresee confessional representation. While it is not possible to quote all relevant norms in this respect, the most important regarding confessional representation shall be mentioned. Art. 7 can hardly be seen as a proper basis for confessional power-sharing, with posts and quotas determined by religious affiliation. It stipulates: “All Lebanese are equal before the law. They equally enjoy civil and political rights and equally are bound by public obligations and duties without any distinction.” It is obvious that political rights do not equally apply to all Lebanese if chances to access political functions depend on one’s confessional adherence. 41

Even more clearly, Art. 8, Paragraph 1, conflicts with the idea of confessional quotas: “Every Lebanese has the right to hold public office, no preference being made except on the basis of merit and competence, according to the conditions established by law.” The same principle of competence—as opposed to the distribution of public posts on the basis of confessional criteria—is conveyed by Art. 27, Paragraph 1, which declares that each Member of Parliament shall represent the whole nation.

The constitution tried to create a truly “modern” state with a strong executive capable of governing the newly born state loathed by the majority of its population. The President of the Republic became its central figure: he was granted executive powers (Art. 17, 1926) to be exercised with the assistance of government ministers.

Because the leading Lebanese families were meant to alternate in the presidency, Art. 49, Paragraphs 3 and 4 established that the President could only stay in power for six years, with no possibility of immediate reelection. 42 Thus, the constitutional text took into consideration the traditional political structures. This was highly important as the constitutional architecture was designed in such a way that the Presidency of the Republic constituted the center of political power. The government, and to an even greater extent the President of the Council of Ministers, did not have a clear role. Parliament was weak, at least in relation to the President of the Republic, and sometimes even restricted in its own scope of activity. 43 In essence, those who had access to the presidency were able to distribute resources to their clientelistic network. In contrast, no mention was made of a confessional distribution of parliamentary seats or of the allocation of the three supreme offices of President, Prime Minister, and Speaker of Parliament along confessional lines.

39 Georges Corm (n 10) 179 f.; Edmond Rabbath (n 22) 119.
40 Edmond Rabbath (n 22) 119.
41 Even if it is perfectly possible to change one’s confession, this does not better one’s chances. As along with one’s birth in a specific family, the family’s clientelistic network is inherited—and lost if the preset path is left. Social rights of course differ in Lebanon, where family law is made and enforced by the confessional groups (see Art. 9 of the Constitution).
42 Art. 49 was amended several times, but this was and is in essence its contents.
43 For further details, see Cordelia Koch, “La Constitution Libanaise de 1926 à Taëf, entre démocratie de concurrence et démocratie consensuelle” (2005) 3 (2) Égypte/ Monde Arabe 159, 163 f.
However, confessional representation had been chosen in the questionnaire by those Christian Lebanese who understood that the Muslims would not accept being excluded from power. Thus, as a political compromise and an instrument to enhance peace, a fair representation of confessional groups in the administration as well as in the government was accepted under two restrictions: confessional representation should only be respected during a transition period and only as long as state interests were not harmed (Art. 95, 1926–1990).

As the evolution of the Lebanese Constitution shows, that transition period never ended. Confessional representation later became a constitutional safeguard upheld mainly by Christians—with a steadily growing and better educated Muslim population, the quota seemed to protect the Christians from being outnumbered and outweighed by the Muslims. Yet this had not been the case in 1926. With the majority of the population opposing the state, the problem was more fundamental: it was about the sheer existence of a state entity called Lebanon. The country found itself constantly on the brink of civil war with clashes between the adherents of the different nationalistic movements.

In such difficult circumstances, the written constitution was a symbol of the existence and the self-preservation of the Lebanese state. It was the instrument of a political minority to entrench separate statehood. This can already be concluded from the fact that the Lebanese Constitution of 1926 existed prior to complete independence from France in 1943, i.e., during a period when no Lebanese state existed as a subject of international law. The existence of a strong executive also shows that the role of the constitution was to create effective state institutions which should not be hampered by confessional considerations. But if the new state was to have a genuine chance to survive, it had to gain the acceptance of at least some of the groups which had initially been hostile or indifferent to its creation. To build the state, the new elites had to integrate the traditional leaders, feudal lords, and leading political families into the power-sharing mechanisms of the state. This was finally achieved by the National Pact of 1943.

C. Confessional Representation: National Pact of 1943

An oral agreement called the National Pact paved the way for independence from France in 1943. It was brokered by a Maronite Christian, Béchara el-Khoury, and a Sunnī Muslim, Rashid el-Solh. El-Khoury represented a political group of Maronites, the Constitutional Block, who rejected exclusive ties to France. El-Khoury’s partner in the National Pact, el-Solh, represented those Sunni Muslims who were interested in power-sharing.

The National Pact defined a compromise identity for the Lebanese state: although it should have an Arab appearance, in substance it should belong neither to the West nor to the Arab world. Furthermore, the National Pact distributed power in the constitutional institutions among the Lebanese confessional groups: ever since, the President of the

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44 Edmond Rabbath (n 22) 32; Antoine Hokayem (n 31) 227.
45 Asher Kaufman (n 25) 186.
48 Samir Khalaf (n 4) 284.
49 Interview with Soud el-Mawla (December 17, 2003).
Republic must be a Maronite Christian, whereas the Prime Minister always has to be a Sunnī Muslim. Later, in 1947, the Shī’ah Muslims were included by making the Speaker of Parliament a Shī’ah position. Nevertheless, confessional representation theoretically included all sects, even if the National Pact reduced the Christian dominance from a seven to five ratio to a ratio of six Christians to five Muslims in parliament and government.

This dual system, consisting of the written constitution and the unwritten National Pact, has been kept in place ever since. While the constitution originally aimed at a modern non-confessional state, the National Pact builds on the tradition of confessional representation started by the above mentioned “Règlement Chékib Effendi” and “Règlement Organique.”

Since the National Pact organized power-sharing between the President of the Republic, the Prime Minister, and the Speaker of Parliament, and thus between the Maronite Christians, the Sunnī and the Shī’ah Muslims, their respective constitutional competences determine whether the relation between the different groups and their main representatives is on an equal footing.

This is exactly where the constitutional process from 1926 proved defective. Consensus requirements were not sufficiently guaranteed by the formal constitutional arrangements of the prewar or the initial independence period. The elaborate arrangements put in place to end the war in 1990 precisely address this shortcoming.

D. Consensus and the Separation of Powers

Power-sharing was not entrenched in the prewar Constitution of Lebanon (see above section B). Instead, the countersignature of all acts of the President of the Republic by the minister concerned (Art. 54) was the only consensus mechanism of the prewar constitution.

1. Power-Sharing in the Prewar Constitution: Article 54

In the French Third Republic, the countersignature had led to a complete loss of power of the President while the Prime Minister, assuming the political responsibility for decisions that were nominally the President’s, became in fact the primary decision-maker himself. But a powerless, symbolic presidency was inconceivable in Lebanon. Art. 54 did not prevent the Presidency from becoming the most powerful of the Lebanese institutions. In the prewar period of the 1950s and 1960s, Lebanon could be considered a semi-presidential system. Thus, a constitutional norm that had developed in the early constitutionalization process in Europe did not function in Lebanon the same way it had in France.

Maronites at the top of all Lebanese institutions—Presidency of the Republic, secret service, army, central bank—controlled the state. Ministers, despite their formal power of countersignature, had no comparable influence. Even the Prime Minister, and thus the

50 Until today, no mention is made to this confessional attribution in the written constitution.
52 Edmond Rabbath (n 22) 224: local mentalities lead to the strong role of the President of the Republic.
Sunnī Community, was excluded from any genuine participation in the decision-making process.

However, the lack of power-sharing in the Lebanese prewar reality cannot be attributed to the constitutional text alone. Within the government, as it was multi-confessional, the countersignature could have provided sufficient power-sharing between all sects. However, the multi-confessional Council of Ministers never assumed its role of controlling the Maronite President through consensus requirements. The role of the strong Maronite President of the Republic, attributed to the constitution, became the focal point of criticism before the civil war started in Lebanon in 1975. In fact, in order to bring the civil war to an end, the constitution was amended.

2. The Postwar Constitution: Explicit Power-Sharing through Consensus

The constitutional amendments of 1990 portray confessional representation as the remedy to Lebanon’s ills. Explicit power-sharing provisions on the one hand and changes that implicitly aim at a balance of power on the other are designed to promote the same goal.

A. EXPLICIT ACKNOWLEDGMENT OF CONFESSIONAL REPRESENTATION

The constitutional text is now characterized by explicit power-sharing on a confessional basis. Art. 24, Section 1, Paragraph 2 on the distribution of seats in parliament may be quoted verbatim to stress this point:

Until such time as the Chamber enacts new electoral laws on a non-confessional basis, the distribution of seats is according to the following principles:

a. Equal representation between Christians and Muslims.
b. Proportional representation among the confessional groups within each religious community.
c. Proportional representation among geographic regions.

While the distribution of parliamentary seats has been based on a confessional quota ever since the nineteenth century, only since 1990 is this acknowledged by the written constitution.

At first glance, Art. 95 Section 3 seems to contradict the above statement, as the wish to end confessional representation is clearly expressed:

During the transitional phase:

a. The confessional groups are to be represented in a just and equitable fashion in the formation of the Cabinet.
b. The principle of confessional representation in public service jobs, in the judiciary, in the military and security institutions, and in public and mixed agencies are to be canceled in accordance with the requirements of national reconciliation; they shall be replaced by the principle of expertise and competence. However, Grade One posts and their equivalents are exempt from this rule, and the posts must be distributed equally between Christians and Muslims without reserving any particular job for any confessional group but rather applying the principles of expertise and competence.

But despite the call for political deconfessionalization, Art. 95 expressly organizes confessional representation—and in greater detail than ever before. On the one hand, the
need for deconfessionalization\textsuperscript{54} is strongly emphasized.\textsuperscript{55} On the other hand, confessional representation is for the first time openly acknowledged in the constitution, with detailed instructions for its implementation.\textsuperscript{56} In doing so, both articles reflect a new formal attitude toward confessional representation. Even more important is the implicit reorganization of constitutional powers along confessional lines.

B. IMPLICITLY ARRANGED POWER-SHARING

One might say that in 1990 the National Pact rules were applied to the constitutional structures by redistributing the powers of the President of the Republic (Maronite Christian), of the Prime Minister (Sunnī Muslim), and of the Speaker of Parliament (Shī'ite Muslim), in order to produce a confessional balance.\textsuperscript{57} However, norms that have transferred powers from one institution to the other are rare. Instead, in order to produce a confessional balance of power, the separation of powers as conceptualized by Montesquieu was somehow abandoned for a range of norms creating interdependence between the Speaker of Parliament and the executive. These norms are supportive of a peculiar kind of political system, the “Troika.” In the 1990s, during the strict times of the Troika, all three presidents always appeared together and none let any other decide anything alone. In fact, the constitution may be read as mandating the creation of the Troika. One may quote Art. 53 Section 1 on the formation of the government: “the President of the Republic has to keep the Speaker of Parliament informed on his consultation of parliament about the President of the Council of Ministers to be named.” More importantly, Art. 58 was amended in a way that gives the Speaker of Parliament a say in the governmental decision-making process. It is now for him to decide when to put a governmental draft law on the agenda of parliament. This has given him discretionary power\textsuperscript{58} and forced the Council of Ministers to take the position of the Speaker of Parliament into consideration before passing a law on to parliament.\textsuperscript{59} This is done by reserving a certain number of ministerial posts to people representing the Speaker of Parliament. Thereby, consensus mechanisms between the executive and the legislative have been installed. Yet, some authors protest vehemently

\textsuperscript{54}The Tā'if Peace Agreement and consequently the constitutional amendments of 1990 call for “political” deconfessionalization, which contrasts to deconfessionalization of the civil law domain. Both have been opposing claims before and during the Civil War period (1975–1990). As the present article only addresses the political system as envisioned by the constitutional text, only political deconfessionalization is of interest.

\textsuperscript{55}The preamble (section h.) is even more emphatic on the issue of deconfessionalization: “The abolition of political confessionalism is a basic national goal and shall be achieved according to a gradual plan.” At the same time it stipulated in section j. that: “There is no constitutional legitimacy for any authority which contradicts the ‘pact of communal coexistence’ thereby referring to the Tā'if Peace Agreement (1989) and strengthening its confessional power-sharing character.

\textsuperscript{56}The same applies to Arts. 19 and 22 of the Tā'if Constitution.

\textsuperscript{57}For the confessional interpretation of the preamble, see Paul Salem, “The New Constitution of Lebanon and the Tā'if Agreement: translated and annotated by Paul E. Salem” (1991) 1 The Beirut Review 1, 119–172. For more details on the constitutional text, see Cordelia Koch (n 43) 169 ff.; Cordelia Koch (n 29) 225–258.


against such a reading of the constitutional text. For them, the Troika is just an aberration of practice.\textsuperscript{60}

With regard to the President of the Republic and the President of the Council of Ministers, power-sharing through consensus is clearly the goal of the constitutional amendments. Replacing the obsolete power-sharing mechanism in Art. 54, a new Art. 64 puts the Prime Minister on equal terms with the President of the Republic. It now stipulates that all decisions must be counter signed by the President and the Prime Minister. Furthermore, the constitution defines various spheres of action where these two organs have to cooperate.\textsuperscript{61}

Decision-making by consensus finally became the core principle of governmental decisions, which is the major pillar of consociational democracy in the 1990 Lebanese Constitution. Art. 65, Section 5, phrases 3 and 4 reads as follows:

\textit{The government} makes its decisions by consensus. If that is not possible, it makes its decisions by vote of the majority of attending members. Basic national issues require the approval of two thirds of the members of the Council named in the Decree forming the Cabinet.\textsuperscript{62}

The ministers’ role in the executive branch is further strengthened by the fact that the executive is now confined to the Council of Ministers (Art. 16).

All things considered, power-sharing between all sects on the one hand and a balance of power between the three main communities (Maronite Christians, Sunni, and Shi’ite Muslims) on the other, has made confessional representation the core principle of the written constitution.\textsuperscript{62} Finally, power-sharing cuts across the executive and the legislative branches, thus ensuring that political decisions are made by consensus.

3. The Lebanese Separation of Powers through Consensus

In restructuring the roles of the executive and the legislature, the Lebanese Constitution’s architecture abandons Montesquieu’s separation of powers system. As consensus is the main constitutional rule according to consociational democracy, one may even say that there is no separation of power in the classical sense at all but only consensus. Therefore, separation of power in Lebanon does not function in the traditional manner, i.e., as division of power between the legislative, the executive, and the judiciary. From the Lebanese perspective an analysis of the separation of powers as a mechanism of power-sharing through consensus seems to be more adequate.

Power-sharing through consensus traditionally involved the leading political families, the traditional leaders, or \textit{za’im}. Confessional power-sharing was only introduced to the Lebanese political system during the state-building process and has not replaced, only supplemented the traditional feudal criteria. However, in crucial political matters, friction usually exists between confessional as well as feudal groups. If political consensus,
i.e., consensus found by the political interest groups on political issues, is lacking, a majority
decision still is not an option. It may even lead to civil war. Just like in the near-civil wars of
1920, 1958, and 1975, political questions also split the country in the July War of 2006.
While in 1920 the question was: should there be a state of Lebanon?, the country in 1958
asked: should it be pro-Western?, and in 1975 a key question was: to what extent should
Lebanon support the Palestinian movements? Finally, in 2006, Lebanon asked, how the
country should decide on key issues: still on the basis of the consensus rule?
Whatever the question raised, a unilateral decision usually meant renewed conflict
and fighting, and consensus was a necessary prerequisite for a return to peaceful means
of conflict resolution. As a result, Lebanon as a consociational democracy respects
power-sharing through consensus on several levels: not only between the confessional
groups, the feudal lords, and the Lebanese families, but most importantly between the
different political groups, ensuring that no opinion will be outweighed by a majority
decision.
By contrast, the traditional separation of powers ignores the need for consensus
because it assigns state functions to persons without taking their specific affiliations into
consideration. Thus, from the Lebanese perspective, a specific kind of power separation
results from the consensus requirements as it prevents any political interest group as well as
any traditional political leader from being marginalized through majority decisions. And
even if this compromises Montesquieu's separation of power between the legislative and
the executive, it clearly meets the needs of the Lebanese political system. Consensus
guarantees that all the different political groups, families, parties, and other actors can
participate in the political process.

**IV. CONCLUSION**
The history of this tiny Republic is one of state-building in a complex setting: external
influence, internal political divide, and heterogeneous social as well as economic systems.
Thus, the actors, conflicts, and decision-making structures that characterize Lebanese
politics are the product of tradition as well as of modernization processes, or at least of
attempts to modernize the country. Montesquieu’s classical separation-of-powers analysis
does not fit the Lebanese Constitution; the constitutional architecture results from its
unique history of civil wars, which have been resolved by compromises between the
warring political forces and ideologies. Instead of hegemonic or majority decisions, consen-
sus forms the basis of the political system.
External influences add to the complexity of the internal Lebanese fabric: the United
States, Saudi Arabia, Egypt, Iran, France, Great Britain, and Israel, all have at different times
and in different ways exercised their influence on Lebanese politics. Although the role of
external actors in Lebanese politics keeps evolving, foreign money as well as weapons and
other resources given to the Lebanese factions at least help sustain violence. Yet, purely
geopolitical explanations fall short of explaining the Lebanese hostilities as they exclude the
internal dimension.
The prime domestic problem is the confessional distribution of power. The historical
perspective shows that with the realignment of clientelistic power-structures on the
confessional basis, a tradition was established by foreign powers that still characterizes
Lebanon today: the existence of Lebanon as a separate political entity, with confessional
power distribution and a Christian head of state. Yet, democracy based on confessional
quota never fit the Lebanese political system. Villages, the regional identity, and the social
strata were much more important than religious adherence. The confessional quota disre-
garded traditional consensus mechanisms between the leading families and it distorted the
political process of multi-confessional nationalistic and political movements on the basis of confessional criteria.

In that ongoing power struggle, the constitution’s role is of minor impact. When in 1926 the constitution was enacted, it tried to create a modern state with neutral, strong, and effective institutions. The executive controlled the legislative, and the executive was monopolized by the President of the Republic who was not—and still is not to this day—assigned to a confession in the written constitution. No consensus mechanism was mentioned, neither regarding the confessional nor the traditional feudal segments of the Lebanese political system. Only through the alternation of the Presidency of the Republic were feudal interests taken into consideration. The inclusion of the traditional elites in the new power-sharing system was of vital importance for the state to be accepted. This was ultimately achieved through the National Pact of 1943 and independence from France.

Already in the prewar constitution, the requirement of ministerial countersignature had provided ample opportunity for power-sharing between the President of the Republic and the ministers. As the Council of Ministers always was and still is a multi-confessional organ, the counter signature could have paved the way for consensus and power-sharing at least between the President and the Prime Minister. That the presidency became a symbol of Maronite dominance was therefore not the inevitable result of the application of the constitution.

At the same time, political controversies have tended to transcend feudal or confessional divisions. They often cut across these segments and frequently resulted in warfare if a majority decision was intended by one of the conflicting parties. The conflicts then had to be solved by political compromise: power-sharing instead of separation of powers; consensus instead of majority decision. The Lebanese Constitution today reflects this need for compromise in Art. 65, where it asks for consensus decisions in the Council of Ministers. On certain issues the constitution even requires consensus between the legislative and the executive, thus abandoning the classical separation of power scheme. Clearly structured and reliable power-sharing arrangements among the President, the government, and parliament were seen as the way out of civil war in 1990. As a result, confessional representation found its way into the written constitution and contributed to the assimilation of borrowed constitutional norms.

The constitution started its existence as an instrument of the political minority during the state-building process, but in time evolved to integrate those groups which had initially been hostile to the creation of a separate Lebanese state. The best that can be said about the 1990 Constitution is that it is a constitution for all Lebanese: consensus is the guiding principle. Thus, a separation of powers mainly exists in the sense that hegemonic or majority decisions cannot be made. Instead, consensus decisions guarantee inclusion of all political actors, parties, or opinions.
Yemen

A Burgeoning Democracy on the Arab Peninsula?

IRIS GLOSEMEYER, NAJIB ABDUL-REHMAN SHAMIRI, AND ANNA WÜRTH

I. INTRODUCTION

As elsewhere, constitutional developments in Yemen reflect, to a great extent, changes in the wider political world. After a look at the constitutional development prior to unification it will be shown that the Constitution of the Republic of Yemen, a promising document when it was put to referendum in April 1991, has lost much of its appeal since it was amended in 1994 and again in 2001 mainly for the purpose of increasing the concentration of political power in the hands of the executive branch. Nevertheless, the Yemeni Constitution remains a document with a high symbolic value. The most recent evidence of this symbolic value are the debates on the constitution in 2011: all political actors in the struggle for power surfacing in 2011 discuss amendments to the constitution, and yet all rallied around the constitution. The presidential camp had suggested another round of amendments and parliament approved them preliminarily in January. This time they included the abolishment of limitations on the number of presidential terms. These proposed amendments should be considered as one of the triggers for the massive protests that began a few days later. The opposition parties who demand a clear separation of powers and the introduction of a parliamentary system, reacted strongly, accusing the president of wanting to ensure a life-time presidency he would then bequeath to his son Ahmed. In early April, those demonstrating in the street came up with their own version of constitutional amendments that would ensure a “modern democratic civil state based on equal citizenship and an electoral system with proportional representation.”

Draft Document: “Demands of the Youth Revolution,” text distributed by youth activists via e-mail in early April 2011.
II. YEMENI CONSTITUTIONAL HISTORY 
BEFORE UNIFICATION

The Republic of Yemen is a rather new state and came into being only in 1990, after the two predecessor states—the Yemen Arab Republic (North Yemen) and the People's Democratic Republic of Yemen (South Yemen)—had negotiated a peaceful unification.

North Yemen was, until 1918, part of the Ottoman Empire. At the end of World War I, and following the defeat of the Ottoman Empire, Imām Yahyā Hamid al-Dīn took over and later declared himself king. Thus, the country became known as the Mutawakkilite Kingdom of Yemen in the mid-1920s.

Already in 1947, the Free Yemeni Movement, a heterogeneous group of mainly urban activists, proposed a draft constitution called the Holy National Charter, which provided for a constitutional imamate. With the opposition lacking any measurable public support, the rulers refused any limitation of their power.

On September 26, 1962 a revolutionary military coup took place, overthrowing the monarchy, and proclaiming the establishment of the Yemen Arab Republic (YAR). In the ensuing eight-year civil war, the major opponents in the struggle for power were supported by the Egyptian and Saudi governments, respectively. This was reflected in the several constitutions that were suggested, discussed, and sometimes promulgated in the course of the conflict. Only in 1970 was a compromise found, the civil war came to an end, and the Permanent Constitution of the Yemen Arab Republic was promulgated.

The Permanent Constitution, which—contrary to its name—was suspended for a few months in 1974 and amended by presidential decrees, provided, inter alia, that Islam was the official religion of the state (Art. 2), the Islamic Shari‘ah was the source of all laws (Art. 3), and that partisanship, i.e., political parties and related activities, was prohibited (Art. 37).

By contrast, South Yemen remained under British administration since Aden—its main city and well-known port—was occupied by the British in 1839, as the first territorial conquest of the reign of Queen Victoria. After years of increasingly bloody anti-colonial struggle, on November 30, 1967, the Eastern and Western Protectorates and the Crown Colony Aden gained independence from Britain, and the People's Republic of South Yemen was proclaimed. It was renamed the People's Democratic Republic of Yemen (PDRY) on November 30, 1970, thereby indicating its leadership's claim to the whole of Yemen. Like the Constitution of the Yemen Arab Republic, the Constitution of the People's Democratic Republic of Yemen, proclaimed in 1970 and amended in 1978, provided that Islam was the

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1 The imām was the spiritual as well as political leader of the Zaydi sect. The Zaydiyyah, also referred to as Fiver Shī‘ism, attributes a special position to the descendants of Fātimah (Prophet Muhammad's daughter) and her husband ‘Alī, and is thus considered a Shī‘ī sect. But, in most religious and legal aspects the Zaydiyyah is so close to the Sunnah that it is sometimes referred to as the Fifth School of Sunnī jurisprudence. However, the Zaydi concept of leadership is indeed special (an imām has to fulfill certain conditions and can be replaced if he does not) and obviously considered dangerous by post-Imāmate Yemeni leaders.


3 Art. 37: “partisanship in all its forms is prohibited,” i.e., parties of whatever kind, membership, or any activity in (national or regional like, e.g., the Ba’th) parties or party-like organization was prohibited.

official religion of the state (Art. 46/1970, Art. 47/1978). In the same articles, the Constitution of the People’s Democratic Republic of Yemen did, however, guarantee a certain amount of religious freedom—unlike any other Yemeni constitution except the Republic of Yemen Constitution from 1991–1994. Nevertheless, partisanship was prohibited, and the doctrine of scientific socialism was adopted.

The two Yemeni states, the Yemen Arab Republic and the People’s Democratic Republic of Yemen, waged a number of bloody wars with each other in 1972, 1979, and 1988. These wars had only one positive result: a series of agreements on peace and unification, most of which were never implemented. However, a draft constitution for the envisaged unified state was completed already in 1981, and finally two agreements laid the foundation for the merger of the two states.

The first one was the Aden Agreement of November 30, 1989. It included a schedule for a referendum on the constitution, elections prior to unification, and finally, unification. The second and final unity agreement was the Ṣan‘ā’ Agreement of April 22, 1990. It provided for a transition period of thirty months during which a constitutional referendum and parliamentary elections were to be prepared. The draft constitution was to be honored as far as it did not contradict other elements of the Ṣan‘ā’ Agreement. By postponing elections and referendum until after unification, the Ṣan‘ā’ Agreement excluded any exit option for the party that was to lose the elections. Subsequently, constitutional measures aiming at the implementation of the said agreements were introduced, including the formation of unification committees that were to adapt the constitution and respective further legislation. The laws of the two predecessor states, however, were to remain in effect until new laws had been issued to replace them.


On May 22, 1990, shortly after the end of the Cold War that had to some extent contributed to the emergence of two Yemeni states, the Republic of Yemen was proclaimed. In 1990 its territory comprised approximately half a million square kilometers, and a population of approximately eleven million, 80 percent of whom came from the former Yemen Arab Republic and only 20 percent from the former People’s Democratic Republic of Yemen. From the day of its proclamation, the Republic of Yemen has been one of the poorest Arab states.

On the eve of unification, the legislatures of the two Yemeni states approved the Ṣan‘ā’ Agreement. However, decades of Cold War ideological warfare—with the two Yemeni states on different sides of the Iron Curtain—had left their traces. Approval to

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7 For details, see Iris Glosemeyer, “The Development of State Institutions” in R. Leveau, F. Mermier and U. Steinbach (eds), Le Yémen contemporain (éditions Karthala, Paris 1999) 80.
8 Over the last twenty years the population has doubled. Currently about 40 percent of the population lives below the poverty line.
unification was not unequivocal, and 25 of the 159 Members of Parliament of the Yemen Arab Republic left the plenary protesting against the merger with what they perceived as a communist state.\textsuperscript{10}

Nevertheless, for the transitional period the two legislatures (159 YAR parliamentarians elected in 1988 and 111 PDRY parliamentarians elected in 1986) were merged and an additional 31 representatives appointed. A five-member Presidential Council, consisting of three YAR and two PDRY members, replaced the Presidents of the predecessor states. The two most influential members of the Presidential Council, former YAR President and Chairman of the YAR's General People's Congress (GPC), 'Ali 'Abdullāh Ṣālih, and 'Ali Sālim al-Bayḍ, Secretary-General of the ruling party of the People's Democratic Republic of Yemen, the Yemeni Socialist Party (YSP), became Chairman and Vice Chairman of the Council, respectively.

When the new constitution was put to referendum on May 15 and 16, 1991, important northern tribal and Islamist politicians, some of whom had already founded new political parties, called for a boycott. They had no difficulty accepting that the new state, like its two predecessors, was to be a republic (Art. 1), nor that Islam was the official religion and Arabic the official language (Art. 2). By contrast, they were troubled by Art. 3, which stated that Islamic law was the principal source of legislation instead of the only one, as in the last Constitution of the Yemen Arab Republic.\textsuperscript{11} Finally, the Presidential Council decreed that no law was to contradict Islamic law (which was never defined, see below), and most of those who had protested unification and the new constitution adjusted to the new situation.\textsuperscript{12}

The 1991 Constitution, although differing slightly from the 1981 draft, guaranteed wide-ranging political freedoms (e.g., Arts. 4, 26, 39) but did not mention party pluralism, thus indicating that at least some of the new republic’s founders considered the existence of more than one party only a temporary situation that had resulted from the merger of two one-party systems.

Nevertheless, in October 1991 a law governing parties and political organizations (Law No. 66 of 1991) was enacted, and more than forty political parties, many of them the offspring of the two former single parties, were established. Twenty-two of them participated in the first multiparty parliamentary elections on April 27, 1993 in which eight parties obtained seats in the House of Representatives (\textit{Majlis al-Nuwwāb}, 301 seats). However, two of the parties who mainly represented the northern electorate gained an overwhelming majority. The first one was the above mentioned General People's Congress, led by former President of the Yemen Arab Republic 'Alī 'Abdullāh Ṣālih (122 seats). The second one was the Yemeni Congregation for Reform (Islāh / Reform Party), founded after unification in September 1990 (62 seats).\textsuperscript{13} It comprised a rather heterogeneous mix of conservatives and Islamists—several of whom had called for the boycott of the constitutional referendum—and was chaired by Yemen's most influential tribal leader, the late Shaykh 'Abdullāh Ḥūsain al-Āḥmar. He had been a leading member of the General People's Congress prior

\textsuperscript{10} Thomas Koszinowski, "Jemen" in Deutsches Orient-Institut (ed), \textit{Nahost-Jahrbuch 1990} (Leske + Budrich, Opladen 1991) 94.

\textsuperscript{11} Al-istiftā' (n 9) 72f.

\textsuperscript{12} Iris Glosemeyer, \textit{Politische Akteure in der Republik Jemen} (Deutsches Orient-Institut, Hamburg 2001) 80–81.

\textsuperscript{13} For detailed election results, see below.
to unification.14 The Yemeni Socialist Party obtained less than 20 percent of the votes and only 56 of the 301 seats. Nevertheless, the three parties entered a government coalition.

Before long, the new balance of power and the obvious determination of the northern elite to control the new state were reflected in the constitution. When the General People’s Congress proposed constitutional amendments in early August 1993, the Vice Chairman of the Presidential Council and Secretary General of the Yemeni Socialist Party, ‘Alī Sālim al-Bayḍ, left the capital for good. While it still took nearly a year before civil war broke out, the proposed amendments certainly marked a point of no return for the southern political elite. Among the dozens of proposed amendments was one that would have completely eliminated the already dwindling political influence of the Yemeni Socialist Party on the institutional level: the abolition of the Presidential Council. It was to be replaced by an elected president who would appoint his vice president. Given the population ratio of Yemen Arab Republic and People’s Democratic Republic of Yemen of four to one, and considering the 1993 election results, the Yemeni Socialist Party would have been completely at the mercy of the former leadership of the Yemen Arab Republic.

Local and regional efforts to mediate between the two parties failed, although all relevant politicians signed a reconciliation pact in ‘Amman (Jordan) in February 1994.15 This Document of Pledge and Accord covered a wide range of issues, but also contained practical steps to improve the institutional structure of the Republic (e.g., decentralization, a regional parliamentary chamber). It was, however, never implemented. Instead, the two parties went to war in May 1994.

After emerging victorious from the so-called war of succession in July 1994, the northern leadership, organized in the General People’s Congress and the Reform Party, moved quickly to comprehensively amend the constitution: of one hundred thirty-one articles, forty-nine were changed and one was deleted; twenty-nine new articles were added. The Document of Pledge and Accord was completely ignored. The Presidential Council was abolished, and the President’s Advisory Council which had existed in the Yemen Arab Republic was re-introduced; the Islamic Sharī’ah again became the source of all legislation, and human rights—including women’s rights—were weakened. Surprisingly, for the first time in the political history of Yemen, party pluralism (Art. 5) was anchored in the constitution.

In spite of the comprehensive nature of the 1994 amendments, further amendments were considered necessary less than a decade later. Compared to the amendments of 1994, the changes made in February 2001 were minor, however. All in all, fourteen articles were amended, one was added, two were deleted. Parliamentary and presidential terms were extended from four to six and from five to seven years, respectively. Although the President lost his right to decree laws during parliamentary holidays, the executive gained further power vis-à-vis the legislature. For example, the President’s Advisory Council was upgraded. This time the changes even encroached on the prerogatives of the elected House of Representatives.

Already in 2006, a few months before his reelection and thus beginning his second term under the 2001 Constitution, President Ṣāliḥ had announced plans to amend the constitution again. As of early 2010 another round of amendments was underway.

IV. THE CONSTITUTION OF 2001

A. Separation of Powers

In spite of the constitutional amendments, the political system of the Republic of Yemen is still based on the separation of powers. Although this separation was never complete, it would be incorrect to describe it as a “myth.” Separation of powers was provided for in Art. 4 of the Constitution of 1991 and was kept thereafter. Still Art. 4 (2001) guarantees that the people shall exercise their power directly “through public referenda and elections, or indirectly through the legislative, executive and judicial powers, as well as through elected local councils.”

The state apparatus consists of, first of all, the legislative power, represented by the 301 elected Members of Parliament. The parliament not only exercises its legislative prerogatives, it also has the power to withdraw confidence from the government (Prime Minister and cabinet) and to summon the Prime Minister and members of his cabinet.

By contrast, the 111-appointed-member Advisory Council to the President of the Republic (al-Majlis al-Istīshārī from 1991 to 2001, renamed into Majlis al-Shūrā in 2001), which the Yemeni media often refers to as a second chamber of parliament, is in fact considered part of the executive by the constitution since 1994. However, the Advisory Council is a good case in point to illustrate the incomplete separation of powers: since 2001 it has a say in nominating presidential candidates and approves conventions, treaties and certain agreements (notably those concerning defense, war and peace and the national boundaries) jointly with parliament.

The executive power is split between the President of the Republic, the Prime Minister, and his cabinet, and—since 2001—the elected Local Councils. However, most of the executive powers are constitutionally (Art. 119/2001) and de facto conferred upon the President of the Republic, including the choice of the Prime Minister. The Prime Minister, who is chairman of the Council of Ministers or cabinet (Majlis al-Wuzarā’), presents his cabinet and government program to parliament for confirmation (vote of confidence), but he and the ministers ultimately depend on the President’s approval.

The President lays down, jointly with the government, the general policies of the state and oversees their implementation. The Local Councils report to the President and the Prime Minister (Art. 146/2001). The President also appoints the heads of the other central organizations of the state, including the members of the National Defense Council, military and police officers and, until spring 2008, the governors. The President represents the republic, internally and externally, approves treaties, grants political asylum, and calls the voters to elections and referendums. He also proclaims states of emergency and general mobilizations, etc.

However, it is worth mentioning that the President gave up the position of Chairman of the Supreme Judicial Council (Majlis al-Qaḍā’ al-ʿĀlā) in 2006. While this looked like a step toward a more rigid separation of powers, it was in fact at best a half-heartedly one, as the President still appoints the Head of the Supreme Court, who simultaneously chairs the Supreme Judicial Council.

The judicial power consists of the various branches and instances of courts and public prosecution offices, with the Supreme Court being the highest court of law in the state.
It will be discussed in further detail below where the importance of an independent judiciary in a functioning system of separation of powers will also be addressed.

The Republic of Yemen is divided, for administrative purposes, into twenty-one governorates (i.e., provinces), and each governorate is further divided into a number of districts. There is a Local Council for each governorate, as well as for each of the districts. The official in charge of a governorate is the governor, and of the district the director. The part of the constitution devoted to local authority (Art. 146/2001) and the Local Authority Law (Law No. 4/2000) regulate the formation of the provinces and districts as well as the duties and responsibilities of their Local Councils, in addition to those related to the governors and directors of the provinces and districts and those of the various local authority bodies. Until recently, the governors were appointed by the President of the Republic. This still applies to the directors of the districts. However, since May 2008, the governors are elected by an electoral college within each province, composed of the members of the Local Councils of the province and of the districts. As the General People’s Congress won an overwhelming victory in the municipal elections in 2001 and 2006, the risk that the local administration could undermine presidential authority is low; after all, President Ṣāliḥ is founder and chairman of the ruling party.

B. Presidential Efforts to Amend the Constitution

Since unification in May 1990, the constitution has been amended twice, in 1994 and 2001, with more significant amendments proposed by the President since 2006 to complete the gradual development from a formally semi-parliamentary to a full presidential system that started with the first constitutional amendments in 1994.

When President Ṣāliḥ first tried to present his proposal for constitutional amendments to parliament in April 2006, parliament was “enraged.” As one Member of Parliament put it, “if these constitutional amendments are approved, democracy will be out of place in our country.” Two years later, when preparations were on the way to present the amendments again, the editor of the Yemen Times commented on the likely effects of the proposed changes: “it will be a one party system wearing a multiparty mask.” It seems that President Ṣāliḥ had initially intended to concentrate the executive power in the hands of the President by abolishing the office of the Prime Minister, who, unlike the President, needs a vote of confidence from parliament.

According to the draft amendments published at the General People’s Congress website, they were to introduce the concept of a bi-cameral legislature, called Majlis al-Ummah, comprising the existing House of Representatives and a reformed Advisory

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16 During the first decade after unification the number of governorates was eighteen (twelve former YAR and six former PDRY governorates).
17 For the Local Authority Law (in Arabic), see, for example, the UNDP website “Program on Governance in the Arab Region,” available at http://localgov.cawtar.org/Assets/LostAndFound/YemenLocalGovernanceLaw.pdf, accessed November 25, 2009.
18 See, for example, http://www.almotamar.net (the website of the ruling party GPC), September 24, 2007, accessed November 15, 2009.
20 “Constitutional Amendments” Yemen Times (Ṣan‘ā’ April 7, 2008) No. 1144.
21 “Opposition Rejects Saleh’s Reform” Yemen Times (Ṣan‘ā’ October 1, 2007) No. 1090.
Council. Three-quarters of the Advisory Council’s members were to be elected in equal numbers (five per governorate, i.e. 105) by the Local Councils (governorates and district levels), while the President would nominate the remaining quarter from among professionals and experts from all walks of life. At first sight this looks like a concession to some of the demands made by the opposition since the mid-1990s. Already the Document of Pledge and Accord of 1994 had provided for a regional chamber, and the Joint Meeting Parties, a coalition of several opposition parties, had reinforced this demand in 2005. However, as the President was to appoint one-quarter of the members of the Advisory Council, this amendment would have mainly improved the position of the executive vis-à-vis the legislature and further undermined the principle of separation of powers.

Other issues that relate to the composition of the Yemeni parliament and have been discussed for a long time were not addressed, however. The proposed amendments did not mention a quota for female parliamentarians nor did they address a reform of the present electoral system. For many years the opposition has demanded a system that would eliminate the imbalance between the number of votes and the number of actual seats gained.

These proposals were to some extent balanced by the extension of powers and responsibilities of the local administrations as well as the introduction of the direct election of governors and district directors by the electorate at large into the constitution. Simultaneously, a reform of the current Local Authority Law was under preparation.

Also related to the topic of elections was a reform of the Supreme Committee for Elections and Referendums (SCER). It was not to be comprised of representatives of the political parties any more. Until December 2010, parliament presented a list of candidates to the President who could then choose from among the nominees. Under the proposals, the Supreme Judicial Council was to suggest a list of fourteen candidates to the President who was to appoint seven of them. When the amendments got stuck in parliament, the ruling party went ahead without them and amended the election law in line with the proposed amendments in December 2010. The new procedure clearly diminished parliamentary prerogatives. Given that the President still appoints the chairman of the Judicial Council, the new procedure is not likely to ensure the neutrality of the Supreme Committee for Elections and Referendums.

Simultaneously, the original duration for presidential and parliamentary terms (four and five years, respectively) was supposed to be reinstalled.

There is a side effect to the recurring constitutional amendments. The constitutional provision that no President may remain in office for more than two terms (Art. 112/2001) is circumvented. Not surprisingly, the leading constitutional and legal advisors of the government are of the view that the two terms commence to run afresh with the entry into force of the constitutional amendments. As a result, General ‘Ali ‘Abdullāh Śālih has remained President—first of the Yemen Arab Republic and then of the Republic of Yemen—for more than thirty years. When the president achieved preliminary parliamentary approval of yet another set of amendments on January 1, 2011, this time abolishing the
phrase that had limited the number of presidential terms, he clearly overstepped the line. Even though the new proposal included a quota for women, he could not even gain the support of the international community and the Yemeni opposition protested vehemently.  

C. Political Pluralism and Elections

The facts that constitutional provisions and the political reality do not necessarily overlap and that laws sometimes limit the political freedom granted by the constitution is well-illustrated by the example of political pluralism that has been anchored in the constitution since 1994 (Art. 5/1994, Art. 5/2001). Prior to unification, political parties and organizations were banned in both former Yemeni states, apart from the General People’s Congress in the Yemen Arab Republic and the Yemeni Socialist Party in the People’s Democratic Republic of Yemen. However, immediately after—in some cases even briefly before—unification, several new political parties announced their existence in spite of the legal and constitutional vacuum.

In October 1991, the Political Parties and Organization Law was promulgated, legalizing the formation of political parties and organizations. After some political bickering those parties who existed prior to the law were generally legalized, even if they did not fulfill all legal requirements for registration. Currently, more than twenty parties are registered and most of them have participated in parliamentary and local elections since 1993.

Under the Political Parties and Organization Law of 1991, parties and organizations that are not based upon regional, tribal, or sectarian criteria—and fulfill a number of other conditions—may seek registration by the Political Parties and Organizations Affairs Commission. This commission was established in March 1992, but commenced registering parties only in 1995, after the first multiparty parliamentary elections had taken place in 1993 and party pluralism had been enshrined in the constitution in 1994.

According to Art. 14 of the Law on Political Parties, a party that wants to register needs “at least 2,500 members from most of the provinces including Šan’ā city,” which shows that already right after unification, when the law was drafted, the government was concerned about the effects of politically organized regionalism. These stringent conditions at least partly explain why no new parties were registered until mid-2011. Moreover, vaguely defined provisions of the law fail to protect the opposition parties from government arbitrariness. The same can be said for other laws essential for the thriving of a multiparty system, like the Press Law or the Law for Civil Associations and Foundations and its by-law.

The Al-Ḥaqq Party is a case in point. Suspected by the government to be supportive of the rebellion in the governorate of Ṣa’dah which started in 2004 and had spread to Saudi Arabia by 2009, the party was dissolved by the Commission without sufficient legal basis

29 Law no. 66 (October 1991), governing parties and political organizations.
30 On the topic of discretionary power in Yemen, see also Corstange “Drawing Dissent: Political Cartoons in Yemen” (2007) 42 Political Science and Politics 293.
in 2007. The party chairman—seemingly pushed by the government because of the Zaydi leaning of the party—had submitted an application to abolish Al-Haqq without being duly authorized by his party. It does not seem, however, that the judiciary attaches particular weight to the scrupulous observance of the Political Parties and Organization Law.

Apart from the two constitutional referendums mentioned above (1991 and 2001), three parliamentary, two local, and two direct presidential elections have been held since unification. The Yemeni Constitution provides for universal suffrage. Every adult citizen—male and female—has the right to vote, at the age of eighteen years, and the right to stand as a candidate, at the age of twenty-five years. The country is divided into 301 parliamentary constituencies, each of which sends one representative to parliament every six years (four years until 2001). The candidate who receives a simple majority of votes gets elected. Many citizens use this possibility to express their political opinions and their will to influence the political fate of their country.

Parliamentary elections’ results are shown in Table 1, beginning with the first parliamentary elections of 1993, in which eight political parties and organizations—in addition to


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<td>122</td>
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<td>Independents</td>
<td>48</td>
<td>15.9</td>
<td>27.4</td>
<td>54</td>
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<td>29.5</td>
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a) Elections had to be postponed in two constituencies.

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32 For details, see Yemen Times (Ṣan‘ā’ March 19, 2007). More details were reported by Sahwanet http://www.al-sahwa-yemen.net, March 18, 2007 (on file with authors). On al-Haqq in general, see G.Y. Bruck, “Being a Zaydi in the Absence of an Imam: Doctrinal Revisions, Religious Instruction, and the (Re-) Intervention of Ritual” in Leveau et al. (n 7) and Ludwig Stiftl, “The Yemeni Islamists in the Process of Democratization” in Leveau et al. (n 7).

33 This table is based on Glosemeyer (n 12), updated by the 2003 election results as published by the Supreme Committee for Elections and Referendums, available at http://www.scer.org.ye, accessed December 10, 2009. The percentages do not always add up due to truncation and/or because votes for very small parties are not listed in the table.
Yemen

independents, many of whom belonged to or later joined one of the bigger parties—
won seats. The second parliamentary elections of 1997 were boycotted by the Yemeni
Socialist Party and some smaller parties, because the YSP assets, confiscated after the war of
1994, had not been returned, and the Yemeni Socialist Party was thus unable to run a proper
election campaign. Nevertheless, four political parties and a number of independents won
seats. The Yemeni Socialist Party participated in the third parliamentary elections of 2003,
and five political parties and several independent candidates won seats. A new parliament
was to be elected in 2009, but the President and the opposition agreed to postpone the
elections till 2011. Opposition parties, organized in the Joint Meeting Parties, had
threatened to boycott the elections because the promised reform of the electoral system had
not taken place.

Almost all political parties took part in the first and second municipal elections of 2001
and 2006 that brought an overwhelming victory for the General People’s Congress—amid
claims of fraud and misuse of public funds by the General People’s Congress.

Nevertheless, party pluralism does not really flourish in Yemen. This is partly due to the
fact that several of the more than twenty political parties registered in the country are mere
off-shoots of the main political parties, lacking a political agenda of their own. However,
there are other reasons. The latest voters’ registration (during the last two months of 2008),
for example, was reportedly marked by the lack of unity among the opposition parties and
a lack of universal participation; and the names of approximately 165,000 citizens who had
registered twice were referred for judicial review in rather nontransparent procedures.34

It is worthwhile remembering, however, that the number of registered voters in the coun-
try—both males and females—is 9,247,370, according to the statistics of the Supreme
Committee for Elections and Referendums for 2006.35 Thus, nearly all eligible Yemenis
have been registered in the electoral roll. As mentioned above, many have even registered
more than once.

Political participation of women is extremely restricted, as evidenced by low voter
turnout and low representation of women in all governmental bodies. This was slightly
different in the 1990s: The 1990 parliament that resulted from the merger of the legislatures
of two Yemeni states had eleven female members, all of them previous members of the
111-member legislature of the People’s Democratic Republic of Yemen. This number has
decreased drastically since that time. In the 1993 elections only two women were elected to
the House of Representatives, both from the territory of the former People’s Democratic
Republic of Yemen. In both the 1997 and the 2003 elections just one woman candidate was
elected to the House of Representatives, again from a southern constituency.

The European Union Election Observation Mission commented on the issue of
women’s participation in the 2006 municipal and presidential elections:

The exclusion of women was most notable in the very low proportion of women
candidates and the considerable pressure they faced to withdraw. Problems were also
observed in the approach of political parties, the election administration and the author-
ities towards women as voters, political party members and electoral administrators.

Extensive illiteracy and very limited levels of political awareness amongst women severely hindered opportunities for their inclusion and engagement in the elections.\textsuperscript{36}

There has been talk about a quota for women in parliamentary elections for quite some time. But this would require changes in the Election Law and, possibly, the constitution. While endorsed by the President in July 2007 and included in the proposed amendments of January 2011 (possibly for public or donors’ consumption), affirmative action for women remains controversial among Yemeni politicians and parties.

D. The Role of Islam and Shari‘ah in the Constitutional Order

A provision of particular significance in the 1991 Constitution was Art. 3, which provided that “Islamic Shari‘ah is the principal source of legislation,” implying that it was not the sole source, and that there could be other sources of legislation as well.

However, in both the 1994 and 2001 constitutional amendments the said article has become “Islamic Shari‘ah is the source of all legislation” (Art. 3). This wording, which is almost identical with Art. 3 of the Constitution of the Yemen Arab Republic of 1970, has led to ambiguity as regards both the sources of Islamic Shari‘ah and the relevant schools of Islamic jurisprudence and the different opinions within them.

There are a number of different sources of the Shari‘ah, and the different law schools differ in the authority they accord to these sources. Acknowledging the “Islamic Shari‘ah as the source of all legislation” automatically gives rise to a debate on what sources of Shari‘ah shall be used as basis for the respective Shari‘ah ruling.

As to the schools of Islamic jurisprudence, there are four main Sunni schools of law, called Shafi‘i, Hanafi, Maliki, and Hanbali, named after their respective founders. The main Shi‘ite schools are the Ja‘fari (also referred to as Twelver Shi‘ism) and the Zaydi (also referred to as Fiver Shi‘ism). Additionally, there are certain other schools concentrated in some areas of Yemen, such as the Isma‘ilis (including the Khojas as well as the Bohras). Followers of the Shafi‘i and the Zaydi schools of Islamic jurisprudence have been dominant in Yemen for many centuries, while the Isma‘ilis have always been a minority. However, migration and governmental efforts to abolish this religious and legal plurality have helped to promote a Salafi movement, supported by Saudi Arabia, sometimes provoking violent reactions.\textsuperscript{37} Art. 3 raises the question of what school of Islamic jurisprudence will be used to discern whether legislation is in conformity with Shari‘ah, and this debate remains unresolved in Yemen. It is noteworthy that since the 1962 overthrow of the monarchy no constitutional provision has defined which school of Islamic jurisprudence should be followed. Constitutions have referred to Islamic Shari‘ah, purely and simply. This holds true even for the codifications of Shari‘ah, starting with Imamic Views in the 1920s to the 1950s, and the Civil Code codified in the 1970s in Sana‘a. Even today, legislation will refer to “the Islamic Shari‘ah”—and not to a particular denomination—as the source of the applicable rules in case of lacunae in the written law.


\textsuperscript{37} See Weir (n 31); Glosemeyer (n 31); Phillips (n 31); ICG (n 31).
E. Human Rights

The Republic of Yemen has constitutionally confirmed its adherence to the United Nations Charter as well as the Universal Declaration of Human Rights. Furthermore, it is a member of all core international human rights conventions, and reports fairly regularly to the UN-treaty bodies on progress in implementation. Yemen has so far not signed the Optional Protocols that enable citizens to lodge individual complaints with the UN treaty bodies, and rarely permits country visits by UN Special Rapporteurs.

With donor support, Yemen has established a fully-fledged but yet rather dysfunctional Human Rights Ministry in 2003, and repeatedly, there have been talks to set up a National Human Rights Institution, based on the Paris Principles, and thus independent of the government. There are dozens of active civil society organizations engaged in the field of human rights. Nevertheless, Yemen has a long way to go to fulfill its human rights obligations under the human rights treaties it has ratified, as the following examples demonstrate.

Freedom of speech is provided for in Art. 42 of the Constitution (“... the State shall guarantee freedom of thought and expression of opinion in speech, writing and photography...”). According to the data collected by the Yemeni NGO Women Journalists Without Chains (WJWC), the violations in this respect are increasing (53 in 2005, 67 in 2006, 112 in 2007, to 284 in 2008). The dramatic increase is mainly due to the government's harsh reaction to reports about the rebellion in Sa'dah. Moreover, access to the Internet is limited due to low literacy and prohibitive costs; in addition, (secular) oppositional sites are monitored and blocked at times, and so are mobile telecommunications, one of the most important means of communication for the urban elites.

The government’s 2009 report to the Committee Against Torture lists a number of complaints raised by citizens and international organizations in 2007 with respect to torture, extrajudicial executions, and ill-treatment. While the Yemeni government portrays the human rights violations as “the work of sick individuals who abuse their legal authority,” human rights organizations perceive them as systemic. The Fédération Internationale des Ligues des Droits de l’Homme (FIDH) and two of its Yemeni members brought a report to the attention of the Committee against Torture in October 2009, which detailed a number of cases.

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39 In 2001 a Secretary of State for Human Rights was appointed.


42 Id.


44 Id. para. 171.

45 FIDH / SAF / HOOD, no title, (October 2009), available at http://www2.ohchr.org/english/bodies/cat/docs/ngos/FIDH_Yemen43.pdf, accessed November 30, 2009; HRW (n 31); ICG (n 31).
Discrimination as regards religious beliefs is another major problem, both for Muslims who are not allowed to change their religion, and for non-Muslim minorities who cannot practice their religion freely. In the 1991 Constitution, Art. 27 provided that “All citizens are equal before the law. They are equal in public rights and duties. There shall be no discrimination between them based on sex, color, ethnic origin, language, occupation, social status, or religion.” The constitutional amendments of 1994 and 2001 have slashed the non-discrimination clause, and Art. 40 now reads: “All citizens are equal in rights and duties.”

While the Constitution (Art. 64/2001) and the election law (Law No. 13/2001, Art. 56) do not explicitly require that presidential candidates adhere to the Muslim faith, the presidential office is in practice reserved for male Muslim Yemenis. Nevertheless, in the 2006 presidential elections, female candidates were accepted, but could not gain any significant support.

The 2008 Concluding Observations of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) summarize the most salient points with respect to the discrimination of women, but also the challenges regarding Yemen’s adherence to the international human rights treaties in general:

The Committee is especially concerned that, although Yemen ratified the Convention more than 24 years ago without reservations, the incorporation of most of the provisions of the Convention into its domestic legal order is still to be completed, substantial parts of its legal system remains in contradiction to the Convention, discrimination against women remains rampant, the development and advancement of women have not significantly improved and have even deteriorated with regard to certain issues, and the State party does not consider the implementation of the Committee’s recommendations fully.⁴⁶

The most salient issues with respect to women’s discrimination are: The low level of political participation of women, and the failure to remedy this by affirmative action (e.g., a quota system); the legislative and practical failure to ensure that marriages are concluded based only on the consent of adolescents of at least eighteen years; the failure to effectively prohibit and combat female genital mutilation common among the growing African refugee communities and in coastal areas; and the failure to end discrimination of women with respect to equality regarding blood money in homicide cases. Other shortcomings include the lack of access of women to secondary education and basic health services, leading to high maternal mortality.⁴⁷

F. An Independent Judiciary as a Guardian of the Constitution?

Art. 149 of the Constitution (2001) deals with judicial independence:

The judicial power is an autonomous power, in its judicial, financial and administrative aspects; and the public prosecution is one of its organs. The courts shall adjudicate in all disputes and crimes. The judges are independent and not subject to any authority,

except the law. No other organ may interfere, in any way, in the affairs and procedures of justice. Such interference shall be considered a crime, which shall be punished by law. A charge regarding such interference shall not subject to time-limitation.

This is an improvement over the 1991 Constitution, which had not provided for financial and administrative independence and had not criminalized interference with the judiciary (Art. 120). Art. 150 of the Constitution provides that “The judiciary is an integrated system...” Accordingly, the court system and all jurisdictions—civil, criminal, family, commercial, administrative, and military—are united under the Supreme Court of the Republic, the highest court of law in the land.

All disputes and crimes are heard and determined by the Courts of First Instance (single judge) and by Juvenile Courts, Commercial Courts, and Public Property Courts, which have original jurisdiction in some districts. All appeals are lodged on points of law, fact, and sentence before the Courts of Appeal, which are composed of Civil, Criminal, Family, and Commercial Panels, each composed of three judges. One Court of Appeal is based in every governorate. Further appeals may then be submitted to the Supreme Court of the Republic, on points of law only, or in case of irregularities regarding proceedings. Sentences providing for capital punishment (qisas) or the amputation of limbs shall be executed only after confirmation by the Supreme Court. The only court with competent jurisdiction to hear and determine constitutional appeals—either directly or by way of defense from the courts below—is also the Supreme Court.

There are eight divisions in the Supreme Court composed of five judges (except for the constitutional division, which is composed of seven judges) competent to hear administrative, civil, commercial, constitutional, criminal, family-related, and military appeals. An eighth division hears appeals regarding first instance rulings relating to national elections. In all elections since 1993 opposition parties and independent candidates have complained of election rigging. The Constitutional Division inter alia...

...hears and determines cases and defenses that laws, by-laws, regulations, and resolutions are unconstitutional; investigates and gives opinion regarding appeals referred by the House of Representatives, in connection with the membership thereof; tries the President of the Republic, Vice-President, Prime Minister, his Deputies, Ministers and his Deputies. (Art. 153 of the Constitution).

As said above, the constitutional division consists of seven judges, under the President of the Supreme Court. Its membership includes two Deputy Presidents—the President of the Commercial Division and the President of the Civil Division, respectively—and four other members from the Court’s Divisions. This composition of the Constitutional Division has not proven to be popular or successful. The ideal solution would be a Supreme Constitutional Court which is separated from the existing Supreme Court of the Republic—both in relation to its composition (scholars in Islamic Shari’ah and law) and to its jurisdiction.

The constitution forbids the establishment of extraordinary courts (Art. 148), but does allow the establishment of specialized courts, if these are based on law and integrated into

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48 While there appear to be some Primary Court rulings on lapidation, we have not come across recent reports on the execution of such sentences. They tend to get turned into prison sentences upon appeal.

49 See, for example, European Union Election Observation Mission (n 37).
the overall judicial system. Several specialized courts have been established in recent years, among them courts hearing matters pertaining to juvenile justice, public property, traffic, taxes, and specialized criminal courts dealing inter alia with terrorism cases. 50

There is nothing in the Yemeni Constitution which prohibits the appointment of female judges, female public prosecutors, or advocates, but the judicial profession continues to be male-dominated. However, the majority of the presidents of the nine Juvenile Courts in the country are women, including that of the capital Ṣanʿāʾ. Compared to the early 1990s, when there were next to no women in the judicial system of the Yemen Arab Republic, this is an improvement—compared to the situation in the People’s Democratic Republic of Yemen, which had a sizable number of women in the judiciary, this is still less than satisfactory.

Overall, there have been certain improvements in the judiciary since unification in 1990. The promulgation of reform laws has played a part in improving the performance of the judicial organs, and so has the increasing use of modern equipment (including computers). Intensive training and continuing education and/or specialization of judges—at home as well as abroad—were key to improved performance, as was improved court administration and case management, largely unheard of in earlier decades. Judicial infrastructure—in terms of buildings for courts and public prosecutions—has also been improved, and yet there remains much to be done. Many courts are housed in dilapidated rented premises, and access to and trust in the judiciary particularly among those who are illiterate, poor, or both remains limited.

With respect to the division of powers, there remains a number of challenges: Until mid-2006, the President of the Republic acted as chairman of the body governing the judiciary, the Supreme Judicial Council. The Council’s mandate is to implement the guarantees of the judiciary in the field of appointment, promotion, dismissal, and retirement. The President has resigned this function, and since then, the Head of the Supreme Court is the President of the Supreme Judicial Council. Nevertheless, the President of the Republic retains numerous powers with respect to the judiciary: he presides over the meetings of the Council, whenever the need arises; he appoints—under Art. 119 of the Constitution—magistrates, appeal court judges, Supreme Court judges, and public prosecutors, through decrees which are not subject to parliamentary approval. Accordingly, there are frequent dismissals as well as forced retirements of magistrates, judges, and public prosecutors on questionable grounds. Another cause for concern is the failure to undertake structural reforms of the judicial system, i.e., changes that would improve the quality of the law making and promote equal application and greater accessibility of the laws.

V. CONCLUSIONS: YEMEN, A BURGEONING DEMOCRACY?

In conclusion, despite of relative political continuity (in the sense that there have not been successful military coups or significant elite changes in decades)—constitutionalism in the country may be characterized as being two-fold: First, numerous constitutional articles are ambiguous and amenable to adverse interpretations because they leave too much of the constitutional rights to be defined by laws, thereby undermining the effectiveness of the said articles. The same applies to ordinary parliamentary laws, for they refer many important details to executive regulations, by-laws, ministerial resolutions, or Islamic

jurisprudence. Second, while there has been a tradition of constitutionalist thinking at least since the 1940s, central elements of constitutionalism are missing. Checks and balances are weak, and the rule of law is far from being reality. Separation of powers is not even constitutionally fully guaranteed, much less applied in practice. Surprisingly, the constitution still has a high symbolic value. If the constitution could safely be ignored, its frequent amendments, most often undertaken with the objective to strengthen the powers of the executive still further, would not be necessary.

Given the prominent role of the Shari‘ah in the constitution, it would be tempting but misleading to describe the constitutional development of the Republic of Yemen in terms of “Re-Islamization.” As shown above, especially in the former North Yemen, the Shari‘ah was officially the sole source of legislation for centuries, even after the Yemen Arab Republic was proclaimed. However, neither Iran or Saudi Arabia, but rather other (semi-) authoritarian republics such as Egypt or Syria seem to be the model of reference for constitutional development in Yemen. With the Egyptian president ousted, the Syrian regime embattled at the time this article goes to print, it is not clear in which direction Yemen is heading, with respect to the struggle for power, let alone with respect to Yemen’s future in terms of democracy and constitutionalism.
I. INTRODUCTION

One of the surprising features of post-Soviet Central Asia must be the limited role that Islam plays in shaping the public space. The Soviet collapse of 1991 was seen by many observers as opening the way to an Islamic renaissance. This renaissance was expected, or feared, to put the region on a trajectory of Islamization. The actual experience of Central Asia, however, was very different. Except for the tragic failure in Tajikistan, which descended into a bloody civil war soon after independence, the incumbent regimes in Central Asia managed to harness the emotional and symbolic appeals of Islam to consolidate their hold on power. Islam in Central Asia has not been a force for change.

This is far from the expectation of many Cold War–era observers. Alexandre Bennigsen, the highly regarded Western scholar of Islam in Central Asia who had done so much to research the experiences of Central Asians under Soviet rule, was perhaps the most notable observer to highlight undercurrents of tension. In his seminal work, Islam in the Soviet Union, Bennigsen and his co-author explored the significance of Islamic identity to Central Asians and the challenge this identity posed to the creation of the secular Soviet man (Sovetski chelovek). ¹ He presented a detailed and convincing case on how and why emotional links with Islam were reproduced through rituals and social events. Ironically, Bennigsen argued, many Communist Party apparatchiki continued to perform Islamic social rituals because they saw these acts as integral to their ethnic identity. As a result, the Soviet attempt to eradicate Islam and create new secular identities based on ethnicity and ideological commitment to the Soviet Union was only partially successful. It did generate and strengthen ethnic groupings, but these modern identities continued to carry an Islamic flavor. This process fused the ethnic and Islamic identities together and made one

indistinguishable from the other. Being a Tajik or Uzbek was by definition equivalent to being Muslim.

The underlying argument in the Cold War-era literature was that Islam acted as an emotional and spiritual bulwark against Sovietization. This argument was based on detailed anthropological and sociological studies. But what followed this argument was more conjecture than factual research. Central Asians’ resourcefulness in maintaining a salient link with Islam was often interpreted as a sign of Islam’s political potency. This assumption about the potential role of Islam to become a serious force of the political scene appeared to gain credibility following Mikhail Gorbachev’s policy of glasnost (openness). As the General Secretary of the Communist Party of Soviet Union, Mikhail Gorbachev had embarked on a policy of reform, which ultimately unlocked centrifugal forces that lead to the collapse of the Soviet Union. The emergence of Islamic groups on the public scene was seen by many observers as fitting this pattern; the Islamic Renaissance Party in Uzbekistan and Tajikistan were especially seen as heralding a new era of Islamic assertiveness. But Central Asian history took a different trajectory. Islam did not evolve into a manifestation of a political challenge to Soviet rule, and continued to be much less threatening to the post-Soviet order than expected.

Islam’s benign record is largely due to the way the incumbent regimes responded to the changing political realities of the late 1980s and early 1990s. This chapter will start by documenting Soviet instruments of administrative control on Islam in Central Asia and then proceed to examine the behavior of the incumbent regimes which inherited this Soviet legacy. While the air was full of expectation about Central Asia’s transition from authoritarian rule to democracy following the Soviet collapse, the incumbent elite managed to thwart that process and return to the familiar modes of centralized authoritarian rule. The chapter will conclude by exploring the prospects of Islam’s political role in Central Asia.

II. THE SOVIET LEGACY

From its early days, Soviet authorities launched a direct and sometimes brutal assault on religious establishments. The ruling Communist Party embarked on a forceful anti-religious campaign. Churches of all denominations, including the Islamic establishment, were stripped of their religious assets. Mosques and medreseh (arb. madrasah) (religious schools) were closed and waqf (endowed) property was confiscated. The Muslim clergy was deprived of its revenues and faced extinction.

The havoc of World War II, however, somewhat changed state-church relations. Defeating the Nazi invasion was of supreme importance for the Soviet state, and religion was considered to be a potential ally in this battle. Stalin must have sensed that having God on his side would boost his soldiers’ morale and fighting spirit. Hence, immediately after the Nazi invasion, religious establishments were allowed a broader scope of activity. In 1941 the Muslim clergy of the Soviet Union were organized in a spiritual board centered in Ufa, the capital of the Bashkir ASSR. Within two years this board was subdivided into four regional hierarchies: Central Asia and Kazakhstan, the European part of the USSR and Siberia, North Caucasus, and Transcaucasia. The Muslim Spiritual Board for Central Asia and Kazakhstan was formally established in 1943, with Mufti Ishan Bobokhan as its head in Tashkent.²

Soviet supervision and control was carried out through an especially created Council for Religious Affairs of Religious Cults (est. 1944). This body was later renamed the Council for Religious Affairs (CRA) in 1965. The Council was attached to the Council of Ministers of the Soviet Union, based in Moscow. It was a tier between all religious establishments, including the four Muslim boards, and the Soviet government. The Council was responsible for regulating the conduct of religious activities; including the opening of new prayer houses. The Council for Religious Affairs had branches at the republican level which dealt with local religious matters.3

Under the watchful eye of the Tashkent Office of the Council for Religious Affairs, the Muslim Spiritual Board for Central Asia and Kazakhstan had direct responsibility for all Muslim clerics in Central Asia. It appointed and sacked imāms. It trained imāms to lead Muslim congregations and negotiated the opening of new mosques with the Soviet regime. In other words, the Board was responsible for bringing the clergy under a unified umbrella organization, concentrating the clergy in a hierarchical organization aimed to enhance Soviet supervision and control.

In the Cold War period the Soviet Union tried to mobilize all its assets for supremacy; its Muslim population grew in significance as Soviet foreign policy became engaged in a propaganda battle in the Middle East against the United States and its ally, Israel. The Muslim Spiritual Boards were increasingly used by the regime to improve its standing in the Muslim world and attract Arab allies.

To advance this cause the Soviet state encouraged controlled relations between its Islamic establishments and the outside world. In 1968 the Muslim Board of Central Asia was allowed to publish a seasonal journal entitled Muslims of the Soviet East. This journal originally appeared in Arabic, English, French, Russian, and Uzbek, largely for outside consumption. Pages of this journal were often filled with attacks on the United States and Israel, as well as reports of religious activities in Soviet Central Asia. The obvious message that Muslims of the Soviet East wanted to convey to the outside world and Muslim states was that Muslims of the Soviet Central Asia were free to practice their religion and that the Muslim world should have nothing to fear from alliance with the Soviet Union.4

The Board was also allowed to open and manage the only two medresehs in the Soviet Union. In 1948 the Mir-i Arab Medreseh with fifty ḥujra (residential quarters) was opened in Bukhara and in 1956 the Al-Bukhārī Medreseh in Tashkent.

Commensurate with the decline of Soviet control in the late 1980s, religious activity escalated. The final Soviet collapse and the emergence of the independent states in Central Asia were celebrated by the Muslim Board of Central Asia with hope and optimism for freeing Islam from state control. The Muslim clergy perceived religious autonomy as a legitimate goal and a somewhat inevitable outcome of the Soviet collapse. But this optimism was misplaced. In spite of some modifications, the independent states of Central Asia have remained faithful to the Soviet legacy; states have maintained a firm control over their Islamic establishments.5

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III. SWITCHING HATS

An ironic feature of Central Asian politics on the eve of the Soviet collapse was that the incumbent officials who were to inherit independence did not entertain the idea of breaking away from the Soviet Union. The decision to dissolve the Union was taken by the three Slavic presidents of Russia, Belarus, and Ukraine on December 8, 1991. Central Asian presidents were not invited to this meeting and found out about the decision afterward. This was an awkward and potentially devastating political experience for the incumbent leaders. As Communist Party apparatchiki, the leadership had ruled in the name of the Soviet Union and socialism. The incumbents had climbed up the ladder of leadership through the Communist Party hierarchy by pledging loyalty to Moscow and following directives issued by the Politburo. This had provided certainty and predictability to the system. Even in the less certain period of glasnost, when the new position of a directly elected president was institutionalized, it was generally accepted that it was the Communist Party First Secretary who would win elections. This was the pattern in Central Asia, and while Kyrgyzstan appeared to carve a different course by electing Askar Akaev against the Communist Party chief, it was clear that the ruling party continued to exert unparalleled influence until the very end of Soviet Kyrgyzstan.

Overnight, however, the certainty of the Soviet regime was replaced with the mayhem of independence. Leaders who owed their rise to power to their loyalty to Moscow were faced with a serious credibility problem. Their Soviet past meant that the incumbent presidents, with the exemption of Akaev, suffered from a legitimacy deficit. How could a former communist party boss who followed Moscow’s directives be the right person to lead the post-Soviet independent state?

The response of the incumbent leaders was to recast themselves in a nationalist light, systematically embracing the manifestations of their respective nations and pledging dedication and commitment to it. This was a generally successful transformation, most remarkably in Turkmenistan and Uzbekistan, where former communists managed to monopolize nationalism. This transformation involved two key processes: an image-making process, and a physical elimination process. The nationalist image making was pursued by the adoption of a series of laws to institutionalize the supremacy of the titular nation. Some of these were purely symbolic, others were more fundamental with serious social repercussions. The change of street names was more amusing than consequential. But the adoption of the titular language in the post-Soviet constitutions that made knowledge of the national language a precondition of state employment was fundamental as it affected many Slavic state officials, often in managerial roles. These policies resulted in a growing alienation of the Slavic minority. But this was an acceptable price to pay for the elite because it drove a very important message home: the elite was prepared to start fresh and do everything to promote the interests of the nation.

The elite’s self-transformation from Soviet apparatchiki to champions of the nation was comprehensive and systematic. The elite’s attitude toward Islam was informed by the Soviet experience. It was clear to all that state policies had failed to eradicate Islam. The leadership, earlier charged with eradicating Islam, was acutely aware of the place of Islam in the center of ethnic identities. Both Uzbek and Turkmen presidents were remarkably alert to

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the importance of Islam to their post-Soviet nation-building projects. As noted earlier by Bennigsen and subsequent researchers, Islam had remained alive in social practices and rituals. As a result, the ethnic identities that were supposed to supplant the Islamic identity had simply absorbed it, therefore ensuring its survival. This pattern was familiar to the elite, as was its potential for buttressing the political standing of nationalist leaders. President Islam Karimov of Uzbekistan made it clear that he understood the importance of Islam for the national identity of Uzbeks and how he would act to protect it.

What followed was a period of state-sanctioned Islamic revival. New mosques were built, restrictions on travel to Mecca for Hajj were relaxed, Islamic holy days were adopted as national holidays, and symbols of faith became commonplace. The two presidents of Uzbekistan and Turkmenistan took special care to be seen in public as champions of this Islamic revival. President Saparmurat Niyazov performed the hajj and posed for the cameras in his white pilgrim robe. This image was subsequently plastered on billboards across the country. In a similar vein, President Islam Karimov placed his hand on the Qur’an and pledged to the holy book to serve the people at his 1992 inauguration ceremony. The not-so-subtle message was that the post-Soviet leadership would promote national identity and interests including the Islamic heritage.

IV. INSTITUTIONS OF CONTROL

The post-Soviet elite complemented the above use of symbolism with tangible measures. Two important developments in the first year of independence set the scene for the relationship between the state and Islam. The Muslim Spiritual Board of Central Asia broke into four separate entities (Kazakhstan had already broken away before the Soviet collapse), each headed by a Mufti. At the same time, each of the Central Asian republics established their own Religious Affairs Committees attached to the cabinet of ministers to manage and administer religious activity. These bodies closely resembled their Soviet origins.

The push for political control over the clergy was easily achieved in Turkmenistan, as the clerical establishment was weak with little history of activism. In Uzbekistan and Tajikistan, however, this was more complicated. Mufti Muhammad Yusuf of Uzbekistan increasingly found himself at loggerheads with the government. Mufti Muhammad Yusuf’s vision for Muslim assertiveness in the post-Soviet era did not mirror that of President Karimov. While Tashkent expected the clergy to remain responsive to the government and endorse its policies, the Mufti saw the Soviet collapse as a historic opportunity to shake off the shackles of state control. He publicly criticized the division of Muslim clergy along national lines and the official mouthpiece of his office, Muslims of Mōwarō’unnahr, began publishing critical pieces about the questionable credentials of those in government.

The Mufti’s position soured relations between his office and the government. Matters were made worse due to the Mufti’s amicable ties with Qāżī-Kalōn Akbar Turañţōzda, who was embroiled in the Tajik civil war. At the same time the Uzbek government was becoming increasingly concerned about the emergence of unofficial Islamic groups, especially in the Farghānah Valley. It must have been increasingly clear to the Uzbek

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9 “U nas est’ svoi put’” Pravda Vostoka (Uzbekistan, December 20, 1991) 2.

10 For example, see “Editorial” (1992) 1 Muslims of Mōwarō’unnahr 2. The journal was issued also in Arabic, Russian, and Uzbek languages.
leadership that the Islamic revival, which they had sponsored and hoped to benefit from, could easily get out of control. As a result the government moved to oust the Mufti and exert total control over the clergy. In April 1993 Mufti Muḥammad Yūsuf was removed from his post, ostensibly by the Council of ‘Ulama’. His successor was a junior cleric with no ties to the ousted Mufti and no leadership experience. The Uzbek state further tightened its grip on the clerics when a new law was adopted to give regional governors the power to monitor and if needed censor Friday sermons.

The situation in Tajikistan was more straightforward. The highest Islamic authority in the country Qāżī-Ḳalōn Akbar Tūrajönzōda was also a parliamentary deputy at the time of the Soviet collapse. He openly challenged the nationalist credentials of the incumbent Communist Party leadership, and saw the failure of the regime to allow for some degree of Islamic revival as a gross betrayal against the Tajik nation.

While other regional leaders quickly embraced the opportunity to rule in the name of the nation and set upon a concerted nation-building enterprise to boost their nationalist credentials, the Tajik President and First Secretary of the Communist Party, Rahman Nabiev, went on public record to lament the fall of the Soviet Union. This was a serious blow to the political standing of the ruling Communist Party. Coupled with this open hostility to nation-building and nationalism (which was fully embraced by other leaders by January 1992), the Tajik leaders rejected any suggestion that post-Soviet Tajikistan should accommodate the Islamic heritage of the Tajiks. In contrast to the way Uzbekistan and Turkmenistan had readily adopted Islamic festivals in the national holiday calendar of the state, the Tajik parliament turned down a motion by Tūrajönzōda for similar recognition. This move drove a wedge between the Communist Party leadership and the population, further eroding the legitimacy of the elite to rule the post-Soviet state.

The rift between Tūrajönzōda and the ruling elite widened in the early months of 1992 as a result of his growing sympathy for the Islamic Renaissance Party in Tajikistan, and the subsequent civil war that engulfed that country until 1997. By the end of 1992 Tūrajönzōda had left the country and the government moved to fill the void and exert control over Muslim clerics. Although finding a successor took some time, the Tajik government has now managed to duplicate the Uzbek model of control and benefit from a subservient clergy.

V. THE ISLAMIC DILEMMA

Efforts by the incumbent regimes to dominate the clergy had two clear objectives: eliminate dissent in the ranks of the Muslim clergy, and create an image of benevolence for the political leadership. As noted earlier, the political elite was aware of the benefits to be drawn from Islam. But adopting Islamic symbols to fill the gap of political legitimacy had its limits. New forces were emerging on the political stage, challenging the carefully constructed

11 “Muftiya smeshchayut v pyatnadtsatyi raz” Nezavisimaya Gazeta (Moscow, April 28, 1993) 2.
12 RFERL Daily Reports (Prague, May 3, 1993).
image of the elite. The Islamic Renaissance Party (IRP) was one of the better-known groupings among a plethora of Islamic organizations that emerged on the eve of the Soviet collapse and immediately after. The IRP in Uzbekistan held its inaugural congress in January 1991 and soon discovered the limits of state tolerance. Within a month, the Uzbek authorities adopted a new law to ban political parties inspired by religion. Similar laws were adopted in neighboring Central Asian states to curb the growth of the Islamic Renaissance Party and others like it.

The descent of Tajikistan into civil war in 1992 served as a wake-up call for the political elite. The IRP in Tajikistan was widely blamed for the bloodshed in that country. This interpretation was simplistic and ignored the dynamics of Tajikistan. As noted above, the political elite in Tajikistan proved ill-prepared to cope with the challenge of independence.

Tajikistan’s politics were further complicated by a salient rivalry between the northern and southern provinces. Under Soviet rule, especially following World War II, officials from the northern province of Leninabad had come to dominate the Tajik Communist Party and the central government posts in Dushanbe at the expense of others. Not surprisingly, the Islamic Renaissance Party and a host of other opposition groups found fertile ground in the southern provinces. This regional rivalry deepened the political divide and contributed to heightened tensions that eventually erupted in the 1992–1997 civil war.  

Although Islamism was only a small factor that pushed Tajikistan down the spiral of civil strife, it was seen by many observers as the deciding one. Regional leaders interpreted the Tajik civil war as a warning sign about the potential of Islam to destabilize the political system and challenge the authority of the political elite. This approach forced a review of policy toward Islam, especially in Turkmenistan and Uzbekistan. Whereas the leadership had identified Islam as an important pillar of political legitimacy in the early days of independence and had championed its revival, by late 1992 the ruling elites moved to differentiate between “good” and “bad” Islam and adopted measures to suppress opposition political groupings.

The distinction between good and bad Islam was not new. Soviet officials had already put in place a conceptual framework to accommodate and adopt religious authority, represented in the state-controlled Islamic hierarchy, and marginalize and discredit autonomous forms of Islamic expression. Islamic groupings that operated outside state control were labeled “Wahhābī” to imply a foreign connection. The term carried significant negative connotations. Wahhābīsm, an influential sect from Saudi Arabia, was understood as an intolerant, harsh, and alien form of Islam. The dichotomy between home-grown and foreign Islam was very useful to the post-Soviet elite as they moved to discredit the Islamic Renaissance Party and other opposition groups which made explicit reference to Islam as representing an alien form of Islam. Opposition groups were accused of destabilizing society and putting the state on a slippery slide to anarchy and intolerance. By contrast, the state-controlled Islamic hierarchy was given recognition and authority to promote the indigenous, national form of Islam that was by definition respectful of authority and perpetuated the status quo.  

The above order was ironically justified in the name of secularism. All post-Soviet Central Asian states declare themselves secular in their constitutions. The two notions of

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secularism and popular sovereignty are invariably at the helm of post-Soviet constitutions. But, as will be explored below, this model of secularism is not about a simple separation of religion and the state.

Central Asian authorities have been heavily influenced by the Soviet model of governance. This model was authoritarian and sought to project state control over all aspects of public life. Any activity that fell outside state control was viewed with serious suspicion and often rejected as unacceptable, or illegal. This approach was also applied to Islam through the cooption of the clergy into the Soviet state structure. Those Islamic activities that took place outside the domain of the official Islamic hierarchy were dismissed as pure superstitions at best, or Wahhabist at worst. This model has survived the Soviet collapse. The ruling elites not only have preserved mechanisms of state control over the clergy but have expanded and improved it commensurate with the significance of Islam in the official nation-building narrative.18

Central Asian authoritarianism closely follows the Soviet model. While Soviet politics was based on one-party rule, the post-Soviet variant is about one-man rule. Presidents in Central Asia have managed to utilize a combination of patronage, clan solidarity, and brutal suppression of dissent to secure their hold on power. In Uzbekistan, President Islam Karimov has managed to revise the constitution to extend his presidential terms while in office (from five to seven years), and stand for reelection in 2007 in violation of the constitution that allows only two-term incumbency.19 Despite international criticism of Karimov’s unconstitutional return to power, he shows no sign on relinquishing it, and is likely to remain in office beyond 2014. The situation would have been identical in Turkmenistan, if it was not for the sudden death of President Saparmurat Niyazov, who called himself Turkmenbashi or Father of all Turkmens. Niyazov’s death in December 2006 brought to an end his lifelong presidential ambitions, but his successor appears to entertain similar aspirations. President Gurbanguly Berdymukhammedov has moved to wrest power from the legislative assembly in order to consolidate his authority.20 The experience in Tajikistan is very similar, as President Emomali Rahmanov has managed to marginalize his opponents through intimidation and administrative misconduct.

Securing control by these authoritarian regimes has been a pervasive process, which by definition has involved Islam. State patronage and control of the Islamic establishment serves two important objectives. First, the state presents this relationship as one of political benevolence and draws credibility from it. Putting clerics on the government payroll, sanctioning and funding the construction of new mosques, or restoration of existing ones, present the regime as a champion of Islam. Second, this patronage allows the ruling regimes to make a distinction between good and bad Islam. Rejecting Islamic groups that operate outside state control is made easier because the elite has already bought itself Islamic credibility. This dynamic takes place against constitutional commitments to secularism. The reality, however, is that secularism is simply a euphemism for state control of religion through an expanded institutional hierarchy and suppression of Islamic dissidents in the name of protecting good against evil.

VI. CONCLUSION

The incumbent regimes in Central Asia were presented with the surprise of the Soviet collapse in 1991. They were faced with a series of challenges on many levels: economic, political, and diplomatic. Their response to these challenges was very much cast in the mold of their Soviet training and survival instincts, which effectively meant exerting control over social, political, and economic processes, as well as removing threats. In this context Islam was a double-edged sword. It could reinforce the carefully orchestrated message that the incumbent regimes were champions of the nation and protectors of national values. It could also be used by opposition groups to criticize the incumbent regimes for not governing in accordance with an Islamically-just rule. As a result, immediately following the Soviet collapse, Islam had the potential to consolidate the hold of the ruling elite on political power or de-legitimize their rule. Perhaps not surprisingly, they chose the first option. The ruling elite managed to co-opt Islam into the state structure and draw on its symbolism to claim legitimacy.

This was made possible through the “nationalization” of the Soviet mechanisms of control. Soviet institutions were modified to ensure the state’s supervision and control of the clergy. This was facilitated by the predominance of the executive branch of the state, effectively ensuring the survival of authoritarian rule in post-Soviet Central Asia. The consolidation of power in the hands of the president and his clique allowed the ruling elite that dominated the executive branch to set the agenda for the future of Central Asia, a pattern that has largely gone unchallenged.
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I. INTRODUCTION

The Republic of Kazakhstan is situated in the heart of Eurasia, lying mainly in Central Asia, but also partly in Europe. Vast in size, Kazakhstan has a population of only about fifteen million that is diverse in its composition, consisting of more than 100 ethnic groups and a number of religions, the two most important ones being Islam and Orthodox Christianity.

The original inhabitants of the country, to whom Islam was introduced during the eighth century, when the Arabs arrived in the region, were overrun by the Mongols in the thirteenth century. It was from the nomadic descendants of the Turkic majority and the remaining Mongols that the modern Kazakhs emerged and established national statehood for the first time in 1465. Fully under Russian rule since the late 1860s, Kazakhstan became a constituent republic of the Soviet Union in 1936. Due to the collectivization of the Kazakh economy in the 1930s (achieved at the cost of one-third of the indigenous population) as well as to both voluntary and forced migration of settlers, mostly from the European part of the giant realm, by the 1960s the country had developed into one of the major economic components of the USSR. Meanwhile, it was the only Soviet republic in which the eponymous nationality was a minority of about 30 percent. However, the demographic trend has been reversed after the collapse of the USSR due to the emigration of many non-Kazakhs, and at present Kazakhs constitute about 55 percent of the population. This demographic turn has reestablished Islam as the most practiced religion in the country. However, Kazakhstan remains home to a great number of Christians as citizens of Russian, Ukrainian, German, and other descent add up to about 40 percent of the population.  

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II. THE CONSTITUTION OF THE REPUBLIC OF KAZAKHSTAN OF JANUARY 28, 1993

A. Origins and Main Provisions
Kazakhstan made its first legal step toward independence on October 25, 1990, when the Supreme Council, the representative organ of the Kazakh Soviet Socialist Republic (KazSSR), adopted a Declaration of State Sovereignty, which basically reaffirmed the provisions of the Constitution of KazSSR of 1978 and proclaimed the Republic’s sovereignty over its territory.2

The collapse of the USSR converted the Constitution of 1978 from a merely formal text into a truly important document. The Soviet-style constitution, based on the superiority of the representative councils called Soviets, gave the Supreme Council an obvious supremacy over the executive branch despite the popular election of the President Nursultan Nazarbayev on December 1, 1991.3 However, the legislators’ lack of political experience and their communist background, which had taught them to obey to the “single center,” gave Nazarbayev the freedom of action needed to enhance his powers.

On June 1, 1992, Nazarbayev proposed a draft of a new constitution to the legislature,4 which envisioned a significant increase in presidential powers but also provided that the President could not be reelected for more than two consecutive terms.5 After intense discussions, the Supreme Council finally adopted the constitution, and it went into force on January 28, 1993.

The constitution defined the Republic of Kazakhstan as a “democratic, secular and unitary state” arising as a “form of statehood of the self-determined Kazakh nation.”6 Kazakh

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2 It should be mentioned that the Constitution of KazSSR of April 20, 1978 (the provisions of which were largely identical to those of the Constitution of the USSR of 1977) continued the traditions of the first Constitution of KazSSR of March 26, 1937 (which, in turn, was very similar to the Constitution of USSR of 1936, or “Stalin Constitution”) and formally proclaimed Kazakhstan to be a sovereign state having equal rank as all other constituent republics of the USSR and even the right of free secession from the Union. These provisions, which were purely theoretical during the time of the monolithic unity of the Communist Party (since the political power in reality belonged only to the Party’s leadership), played an important role in the dissolution of the Soviet Union.

3 The shift of political power from the Communist Party, which was rapidly losing its popularity and legitimacy, to elected bodies was already evident during the last days of the USSR. Already in February 1990 Nursultan Nazarbayev, who became the head of the Kazakh Communist Party in June 1989, was elected as a Chairperson of the Supreme Soviet (i.e. the nominal head of state in the Soviet hierarchy) and, following the example set by Gorbachev in Moscow, converted this position to a genuine presidency. He was initially confirmed by parliamentary election on April 24, 1990.


was declared the state language; Russian, another major language of the country, was given merely the unclear status of a language of interethnic communication.

Legislative and judicial bodies were given strong competences and could effectively balance and control the executive branch headed by the President. Also, the separation of powers was designed to be of a strict and rigid character; thus neither the deputies of the Supreme Council nor the President could remove each other from office.

B. Reasons for Failure

The “shock therapy program” that was launched immediately after the collapse of the USSR in order to create a market economy resulted in the bankruptcy of much of the Post-Soviet economy. As a result, a bitter conflict arose between the reform-oriented executive branch and the communist-dominated legislature in many countries of the former USSR. President Nazarbayev, primarily concerned with ensuring his control over the country, began a fierce political struggle. Since the Communists dominated in the Supreme Council, the president decided to force the legislature into a “voluntary disbandment.” Subsequently, on December 12, 1993, the Supreme Council adopted the Law on Temporary Delegation of Powers, which enabled the President to exercise legislative functions until new parliamentary elections could be held. Afterward, the Parliament terminated its authority by way of “self-dissolution” and the President continued to govern though decree. All these steps were not foreseen by the constitution.

On March 7, 1994, the Republic held its first multiparty legislative elections. Although the centrist People’s Unity Party, which was the political organization most loyal to Nazarbayev’s, won only thirty-three seats in constituencies, the president’s supporters apparently emerged as the strongest force in the new 177-member legislature, as he was able to nominate forty-two “state list” deputies of his own choice. However, in a situation of catastrophic economic decline, many of the new parliamentarians became willing to establish themselves as a genuine opposition. When the President explicitly supported an ambitious privatization plan of the then-Prime Minister Terechshenko, on May 27, 1994 the Parliament put forward a motion of no confidence in the government (passed 111 to 28). Facing continued parliamentary opposition (especially after a series of corruption scandals), Terechshenko had to resign on October 11, 1994. Nevertheless, Kazhegeldin, the new Prime Minister appointed by Nazarbayev, was determined not only not to slow down but even to significantly accelerate market reforms. As a result, tensions between the President and the Parliament continued to flare, achieving a peak at the end of 1994, when the legislature refused to adopt a new draft budget. That was probably the final confrontation that

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7 See S. Sapargaliyev, Stanovlenie Konstitutsionnogo Stroya Respubliki Kazakhstan (Zeti Zarbi, Almaty 1997) 22.
10 The resignation demonstrated the basic weakness of the cabinet in the Kazakh system: in the situation of growing popular anger over falling living standards, the president, actually the chief architect of the reforms, swiftly became the major critic of the government and shifted full responsibility to its members (increasing thus his own popularity among the population).
11 On December 15, 1994 the president called the deputies to facilitate the process of the adoption of the budget and a package of reform-oriented laws. See “Zakony dolžny služit reformam” Kazakhstanskaya pravda (Almaty December 17, 1994) 1. However, even a few days before the dissolution of the parliament,
fueled Nazarbayev’s dissatisfaction with the rigid model of separation of powers and its ability to facilitate the process of economic transformation.

The solution to the problem came from a rather unexpected source. On March 6, 1995, the constitutional court issued a ruling in favor of a complaint brought by a frustrated parliamentary candidate who argued that she could not win in the parliamentary elections of 1994 due to a number of irregularities in her electoral district. On March 11, the court proclaimed that the legal consequence of its ruling was the “unconstitutionality of the powers of the Supreme Council” and gave further effect to the enabling act of December 12, 1993. Without any delay, the President declared the legislature to be dissolved. The fact that 130 legislators refused to disband and asked for an international inquiry shows how strong the parliamentarian opposition had become in the meantime. However, their resistance quickly ended since they did not get broad popular support. The overwhelming majority of people of this multiethnic and multiconfessional country, which historically never had experienced democratic traditions, saw in the confrontation between Parliament and President a potential danger of a civil war breaking out across social, ethnic, and religious lines, and was therefore strongly in favor of Nazarbayev, whom they believed to be the guarantor of political stability.

III. THE CONSTITUTION OF THE REPUBLIC OF KAZAKHSTAN OF AUGUST 30, 1995

A. Origins

The fact that the course of events leading to the dissolution of the Parliament was orchestrated by the President was confirmed by the establishment of the Assembly of the People of Kazakhstan on March 1, 1995, just a few days before the termination of the powers of the legislature. This representative body is composed of all ethnic groups of Kazakhstan, nominated partly by so-called National-Cultural Centers and partly by the President, who serves as the Assembly’s chairman. Membership is understood to be an honor that may not be refused. On March 24, 1995, the Assembly called for a nationwide referendum on the extension of the President’s term in office, which was set to expire in 1996, through the year 2000. On the next day, following the will of the Assembly and on the basis of the acquired legislative powers, the President issued a decree on conducting a referendum. Thus, Nazarbayev not only wanted to change the existing constitutional system, but also obviously attempted to avoid standing for reelection in 1996—in the middle of economic reforms that necessitated tough decisions and painful policies—and facing the possible
decline of his popularity among citizens frustrated by the outcome of the privatization processes and the effects of the transition to a market economy on their standard of living.

Official results of the referendum, held on April 29, 1995, indicated near unanimous support. More than 95 percent voted for the extension of the President’s term. Meanwhile, emboldened by his victory and arguing that greater presidential powers would be the key to an advanced democratic society, Nazarbayev ordered the drafting of a new constitution.

At the beginning of July, the first draft of the new constitution was presented to the public. It was immediately criticized by intellectuals and small opposition groups as being detrimental to the creation of a democratic state and civil society. Among the most noticeable critics of the draft were a number of judges of the constitutional court who wrote an open letter in a newspaper, not as an official organ, but as a group of persons. The letter stated that they disagreed with the distortion of the principle of the separation of powers, with the decrease of the role of the Parliament, and with the comprehensive immunity enjoyed by the President. Summarizing their letter, they stated that there are no grounds to recognize the proposed constitutional model as corresponding to the principles of democracy and rule of law.

The leadership’s response followed without delay. The second draft of the constitution, made public at the beginning of August 1995, fully changed the conception of constitutional judiciary and followed the French model of a much weaker constitutional council.
Thus, the constitutional court, which during its short existence had earned a solid reputation for its commitment to establishing the rule of law,\(^\text{21}\) was abolished. Despite the protests, 90.58 percent of voters took part in the August 30 referendum; of the votes validly cast, 89.14 percent were in favor of the new constitution, according to the official statistics.\(^\text{22}\) Although some international observers monitoring the referendum expressed their doubts on the official results,\(^\text{23}\) generally it is to be stated that the overwhelming majority of the Kazakh electorate, though most of them did not read the text of the constitution,\(^\text{24}\) voted to support the policy of stability and public concord that they associated with the personality of the President.

**B. General Provisions**

According to the Constitution of 1995, the Republic of Kazakhstan is a “democratic, secular, rule of law and social state”\(^\text{25}\) with a unitary system of government. Further, the constitution stipulates the following “fundamental principles of the state’s activity”: “public concord,”\(^\text{26}\) political stability, economic development for the benefit of the entire nation and Kazakhstan patriotism.”\(^\text{27}\) Kazakh is the state language, but Russian is also given official status and may be used on an equal basis in state institutions.\(^\text{28}\)

Although, after the fall of the USSR, Kazakhs and other Muslim ethnicities have made major efforts to revitalize their Islamic traditions, Kazakhstan, along with the other Central

\(^{21}\) On June 10, 1995 for its activities the constitutional court was conferred a “For Courage” award from the ODIHR OSCE. See “Nagрада Конституционному Суду” Panorama (Almaty July 1, 1995) 4.

\(^{22}\) “Сообщение об итогах голосования по принятию Конституции” Kazakhstanskaya pravda (Almaty September 5, 1995) 1.


\(^{24}\) Had the voters read the constitutional provisions carefully, they probably would have easily noticed that in comparison to the first constitution, which clearly stipulated that “the capital of Kazakhstan shall be the city of Almaty” (Constitution of 1993 Principle 9), the new constitution merely provided that “location and status of the capital shall be determined by law” (Constitution of 1995 Art. 2(3) of the original version). Thus, the decision to transfer the capital from Almaty to Astana, which was made by Nazarbayev already in 1994 and which in the time of exceptional economic crisis would certainly give rise to a considerable opposition, received a constitutional foundation. (The relocation of the capital was announced by a presidential decree on October 20, 1997 and confirmed by a law “On the status of the capital” of May 20, 1998. According to the constitutional amendments of May 21, 2007, the Art. 2(3) now provides that “the capital of Kazakhstan shall be the city of Astana”).

\(^{25}\) Constitution of 1995 Arts. 1(1) and 2(1).

\(^{26}\) Sapargaliev, one of the most recognized Kazakhstan constitutional law scholars, considers “public concord” to be “the foremost constitutional principle” due to the ethnic and religious diversity of the country. See S. Sapargaliyev, Konstitutsionnoe Prawo Respubliki Kazakhstan (Žeti Žargi, Almaty 2007) 22.

\(^{27}\) Constitution of 1995 Art. 1(2).

\(^{28}\) Id. Art. 7. In this regard it is interesting to cite Nazarbayev who said that “the new Constitution must be an agreement between people and the power and serve as a foundation for the unification of all people into a single Kazakhstan nation.” See “Novaya Konstitutsiya dolžna stat dogovorom naroda s vlastyu” Panorama (Almaty July 8, 1995) 2. Also, in difference to the previous basic law, the Constitution of 1995 does not contain such provisions as “statehood of the self-determined Kazakh nation” and “firmness of Kazakh statehood.”
Asian countries, fully committed itself to the principle of secularism  and did not assign a special status to Islam. Similar to the process that formed the first Constitution of the Republic of Kazakhstan, in 1995 there was no serious debate in the constitutional commission on giving special recognition or protection to any religion. In fact, there is no single reference to God in the constitution. The main reasons for the absence of any serious discussion of the matter were the still strong Soviet tradition of secularism and the primary desire to maintain public concord among Muslims and Christians, to avoid any confrontation between them, and thus to preserve the political stability in the country, a matter of vital importance for the newly established state. This desire was particularly manifest in the constitutional provisions that explicitly prohibited the formation and functioning not only of “public associations pursuing goals or actions directed toward . . . inciting religious enmity” but also of any religious political parties in Kazakhstan.

C. Legal Status of Individuals

In full accordance with the principle of secularism, the constitution guarantees everyone the right to freedom of conscience, stipulating simultaneously that this right may not be invoked in order “to precondition or limit universal human and civil rights or duties owed before the state.” While providing for the freedom of speech and creative activities as well as for the right to freely receive and disseminate information by any means not prohibited by law, the fundamental law of the country emphasized in particular that the “propaganda of . . . and advocating . . . religious superiority . . . shall not be allowed.” Also, it was stipulated that “everyone shall have the right to determine and indicate or not to indicate his . . . religious affiliation.”

In comparison to the previous constitution, the new constitution includes the right to private property—a step that may be considered a breakthrough on the way from a socialist society to a market-oriented economy—but does not provide for the right to labor, the “holy” and rigorously observed right of socialist times. Instead, it only guaranteed the freedom of labor.

Further, the new constitution does not include the so-called “guarantee of the essential content” of constitutional rights and freedoms, and simultaneously incorporates two general reservations: 1) the “obligation to desist” (“exercise of a citizen’s rights and freedoms

29 As put by Sapargaliev: “The secular character of Kazakhstan has a number of manifestations (as fixed in the Constitution and the Law on Freedom of Conscience and Religious Associations of January 15, 1992) . . . Religious associations are separated from the state. All religions and religious associations are equal before law. Religious associations do not implement any state functions and the state does not interfere with their activities unless they do not violate law. The state does not finance religious associations . . . Formation of political parties on religious basis as well as participation of clergy in the activities of political parties and in their financing are prohibited . . . The state system of education is separated from religious associations . . .” See S. Sapargaliyev (ed), Constitutsiya Respubliki Kazakhstan. Nauchno-Pravovoy Kommentariy (Nur-Press, Almaty 2004) 9, 10. On the relationship between the state and religious associations in Kazakhstan, see R Podoprigora, Gosudarstvo i Religioznye Organizatsii. Administrativno-Pravovye Voprosy (Arkaim, Almaty 2002).

30 Constitution of 1995 Art. 5(3).
31 Id. Art. 5(4).
32 Id. Art. 22.
33 Id. Art. 20.
34 Id. Art. 19.
must not violate rights and freedoms of other persons, infringe on the constitutional system and public morals”\textsuperscript{35}); and 2) the “justification to intervene” (“rights and freedoms . . . may be limited . . . to the extent necessary for protection of the constitutional system, defense of the public order, human rights and freedoms, health and morality of the population”\textsuperscript{36}). Another important limitation, which is a unique feature of the constitution, stipulates that “any actions capable of upsetting interethnic concord shall be deemed unconstitutional.”\textsuperscript{37} Doubtless a value of the highest priority in such a multiethnic country as Kazakhstan, the term “interethnic concord” is, however, of a vague and indistinct nature and potentially allows the government to justify its actions against its critics in a very wide variety of cases.\textsuperscript{38}

In addition, a significant alteration to the Constitution of 1993 was the elimination of provisions guaranteeing the judicial protection of constitutional rights and freedoms and permitting individuals to submit complaints to the constitutional court. These restrictions obviously contradict the high appreciation of human rights and freedoms proclaimed in the Art. 1 of the Constitution declaring that these are the “highest values” of the Republic.

\textbf{D. Strong Presidency: Kazakh Model}

\textit{1. Generally}

The adoption of the new constitution reflected Nazarbayev’s dominant position in the political system of Kazakhstan and his desire to conduct the political and economic transformation of the country in accordance with his visions. Accordingly, unlike the process of forming the first constitution, the constitutional commission of 1995 did not even consider the respective advantages and disadvantages of the presidential and the parliamentary systems. From the very beginning it embarked upon a course toward the creation of a strong presidency.\textsuperscript{39}

Unsurprisingly, the Constitution of 1995 explicitly provides that Kazakhstan is a “state with a presidential form of government.”\textsuperscript{40} Moreover, the new constitution transforms the country into a super-presidential republic, which may easily be seen by looking at the major functions of the Kazakh leader who is: 1) the head of state representing Kazakhstan both within the country and in international relations;\textsuperscript{41} 2) the highest official determining the main directions of the domestic and foreign policy of the Republic of Kazakhstan;\textsuperscript{42} 3) the arbiter ensuring concerted functioning of all branches of state power;\textsuperscript{43} 4) “the guarantor of rights and freedoms of individuals” and the “symbol and guarantor of the unity of the people and the state power” ensuring responsibility of the state institutions before the people;\textsuperscript{44}

\textsuperscript{35} Id. Art. 12(5).
\textsuperscript{36} Id. Art. 39(1).
\textsuperscript{37} Id. Art. 39(2).
\textsuperscript{38} See, e.g., the opinion of the judges of the constitutional court (n 21); Luchterhandt (n 4) 624.
\textsuperscript{39} As put by Malinovskiy “the presidential form of government, as established by the Constitution of 1995, may without exaggeration be called the Kazakhstan Fifth Republic, with President Nazarbayev as its central figure.” V. Malinovskiy, \textit{Glava Gosudarstva Suverennogo Kazakhstana} (VŠP Adilet, Almaty 1998) 30 (italics in the original).
\textsuperscript{40} Constitution of 1995, Art. 2(1).
\textsuperscript{41} Id. Art. 40(1).
\textsuperscript{42} Id.
\textsuperscript{43} Id. Art. 40(3).
\textsuperscript{44} Id. Art. 40(2).
and 5) the guarantor of the inviolability of the constitution, exclusively entitled to initiate any amendments or additions to the constitution.\textsuperscript{45} In performing his last-mentioned task, the President may choose whether he pursues the constitutional changes through Parliament, which would have to approve them by a three-fourths majority in both chambers, or through conducting a nationwide referendum, which can be declared only by the President.\textsuperscript{46} In addition, the President is guaranteed by the constitution the full immunity from prosecution for all potential criminal acts, excepting high treason.\textsuperscript{47}

In addition, in July 2000 a constitutional law was adopted that bestowed on Nazarbayev the status of “the First President,” assuring his full inviolability and providing him significant privileges and authorities even after he would retire from the presidential office (in particular, he would remain the chairperson of the Assembly of Peoples of Kazakhstan and would become a member of the constitutional council and of the Security Council).\textsuperscript{48}

As for the most recent events, on May 13, 2010 the Parliament of Kazakhstan adopted a set of amendments granting the title of the leader of the nation (\textit{Elbasy} in Kazakh) to the incumbent President. The amendments reiterated his lifelong immunity and provided additional exemptions to him. In particular, the private property of both the President and his family members, their premises, banking accounts, means of transport and communication, archives, and documents will be immune, while the “damage of the president’s images” and “distortion of the president’s biography” will constitute a criminal offense.

Although the President refused to sign the respective legislative acts in an open letter to the nation (saying that its main provisions were already stated in the constitution), Nazarbayev did not return them to the Parliament (i.e., he did not formally use his right of veto). According to the Kazakh legislation, since the legislative acts were neither signed nor vetoed by the President, they entered into force without the President’s signature after the expiration of one month from the date of their submission.\textsuperscript{49} Thus, on the eve of his seventieth anniversary Nazarbayev acquired the title of \textit{Elbasy}, the position which is clearly indicative of the high degree of the centralization of the political power in the hands of the Kazakh President.

2. Elections and Term of Office
The President is elected by universal, equal, and direct suffrage by a secret ballot by the citizens who have come of age.\textsuperscript{50} A candidate who receives more than 50 percent of the votes is deemed elected; if none of the candidates receives the required number of votes, a second round of elections is held between the two most successful candidates.\textsuperscript{51}

Originally, the constitution provided that the President is to be elected for a five-year term, and one and the same person may not be elected more than two times in a row; further it was stipulated that a person eligible for the office of the president must be a natural-born citizen who has a perfect command of the state language (i.e. Kazakh), has

\textsuperscript{45} Id.
\textsuperscript{46} Id. Arts. 53(1), 62(3), 44(10).
\textsuperscript{47} Id. Art. 46.
\textsuperscript{48} Constitutional Law on the First President of July 20, 2000, Arts. 1, 3.
\textsuperscript{50} Constitution of 1995 Art. 41(1).
\textsuperscript{51} Id. Art. 41(4).
lived in Kazakhstan for not less than fifteen years, and is not younger than thirty-five nor older than sixty-five.  

However, from the very beginning it was clear that these requirements would not suit the long-term interests of Nazarbayev, who was born in 1940. The course of events facilitated by the Russian financial crisis of August 1998 caused increased inflation rates and currency depreciation in all post-Soviet countries, with the peak of the crisis for Kazakhstan forecasted for the year of 1999. On October 7, 1998 the Parliament, now fully controlled by the supporters of Nazarbayev, adopted constitutional amendments, which increased the term of presidential office to seven years, raised the lower age limit for candidates to forty years, and eliminated the upper age limit. On the next day, the Mazhilis, the lower house of Parliament, announced that the next presidential election would be held in three months. Thus, the election, originally scheduled for 2000, was brought forward by more than a year, enabling Nazarbayev to avoid the vagueness and uncertainty of the upcoming critical year and giving opposition candidates little time to prepare.

In the elections of January 10, 1999, Nazarbayev was reelected for a seven-year term, receiving the votes of almost 80 percent of the electorate in a contest against three other candidates. These elections were again criticized by international observers for failing to meet democratic standards, especially because Nazarbayev’s strongest potential challenger, former Prime Minister Kazhegeldin, was refused registration as a candidate on procedural grounds.  

Another constitutional rule, stipulating that regular elections of the President must be held on the first Sunday of December, became the object of intense scrutiny in 2005. Since the President’s seven-year mandate was supposed to terminate only in January 2006, a number of Nazarbayev’s supporters demanded that the next elections should be held in December 2006. In this situation the Mazhilis, which is responsible for announcing presidential elections, approached the constitutional council requesting an official interpretation of the respective constitutional provisions. On August 19, 2005, the constitutional council issued a resolution that the elections must take place on the first Sunday of December of 2005, substantiating its decision by the fact that otherwise the President would govern the country for eleven months without proper legitimation.

On December 4, 2005, Nazarbayev was reelected in a landslide victory. The electoral commission announced that he had won over 91 percent of the vote with a turnout of nearly 77 percent.

The obvious discrepancy as to the number of terms provided by the constitution had already been resolved by the constitutional council in June 2000 in a resolution stating: “taking into account . . . that the adoption of the Constitution of 1995 profoundly changed the constitutional system . . . the first term of office of the President . . . must be counted from the moment of the assumption of his official duties, i.e., January 20, 1999.”

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52 Id. Art. 41(2) of the original version.
54 Constitution of 1995 Art. 41(3).
This issue was finally resolved by the most recent constitutional amendments, introduced on May 21, 2007. The newest version of the constitution provides that: “One and the same person may not be elected as the President more than two times in a row. The present limitation shall not extend to the First President of the Republic of Kazakhstan.”\footnote{Constitution of 1995 Art. 42(5).}

As for the most recent events, on December 23, 2010 a public initiative group was created with the aim to set off a referendum on extending Nazarbayev’s term of office until 2020 (instead of conducting presidential elections scheduled for 2012). On December 27, 2010 the group was registered by the central electoral commission and very soon it was said to have gathered more than 5 million signatures (amounting to 55 percent of the eligible voters, while the law requires 200,000 in order to forward a request to the President to hold a referendum). On January 6, the Kazakhstan’s Parliament passed constitutional amendments in favor of a referendum to extend the rule of Nazarbayev until 2020, bypassing the 2012 election. Nazarbayev vetoed the amendments, but on January 14, the Parliament unanimously overrode the President’s veto. Still on January 17 the President referred the amendments to the constitutional council which on January 31 has declared the proposed referendum unlawful. Although the President has the right to veto a constitutional council’s decision, he announced his decision to comply and renounce the proposed referendum. At the same time, he proposed holding a pre-term presidential election. As a result of the elections which were held on April 3, 2011 Nazarbayev was reelected for another seven-year term with over 95 percent of the votes against three nominal candidates.

3. President as the Head of the Executive Branch

Although the constitution creates a formally dual executive branch which includes, along with the President, the government as a separate organ “implementing the executive power of the Republic of Kazakhstan,”\footnote{Id. Art. 64(1).} the President is the dominant figure and fully controls the executive branch.

It is explicitly stated that “the Government shall be formed by the President according to the procedure stipulated by this Constitution.”\footnote{Id. Art. 65(1).} The current procedure encompasses the following five stages: 1) the President must consult with the factions of the political parties represented in the Mazhilis on a candidate for the office of the Prime Minister; 2) the President introduces the candidate for Prime Minister to the Mazhilis in order to obtain its consent; 3) with the consent of the Mazhilis, the President appoints a Prime Minister; 4) the President appoints at his own discretion foreign, defense, interior, and justice ministers and may also release them from office; and 5) at the proposal of the Prime Minister, the President determines the structure of the government and appoints its other members.\footnote{Id. Arts. 44(3) and 65(2).}

The government “in its entire activity” is responsible before the President and thus has a purely administrative character. The President may anytime, at his own discretion, remove the Prime Minister or any other member of government from office.\footnote{Id. Art. 44(3).} Further, the constitution defines the government as a “corporate organ,” which means that its members who do not agree with the policy pursued by the government as actually determined by the President must resign or face removal from office.\footnote{Id. Art. 68(1).} It is very telling as well that the
members of the government must take an oath not only to the people but also to the President.\textsuperscript{63}

4. \textit{The President and the Legislature}

In comparison to the first constitution after the end of the USSR, the Constitution of 1995 puts the President in a superior position vis-à-vis the legislature. In addition to his enormous powers with regard both to the formation of Parliament and the legislative process, the constitution foresees the possibility to delegate legislative powers to the President for a term not exceeding one year, if approved by two-thirds of the votes of each chamber of Parliament.\textsuperscript{64} This rule reflects the experience of the early 1990s when the President, in a deep political crisis, combined both the executive and legislative power within his office on a temporary basis.

Another departure from the Constitution of 1993 is the President’s right to dissolve the entire Parliament, which since May 2007 has been limited to the right to dissolve its lower chamber, the \textit{Mazhilis}.\textsuperscript{65} Theoretically, the Parliament may also remove the President from office, but only in the case of high treason and following an extremely complicated procedure requiring the following steps: the approval of the indictment by a three-fourths majority of the total number of the deputies of each chamber, the positive conclusions of the Supreme Court and the constitutional council with regard to the factual and legal basis of the charges, the adoption of the decision within two months from the moment of the accusation, and the simultaneous termination of the powers of the deputies who initiated the consideration of this issue; which makes the impeachment process virtually impossible.\textsuperscript{66}

A. \textbf{STRUCTURE AND FORMATION OF THE PARLIAMENT}

Unlike the unicameral legislature under the Constitution of 1993, the current Parliament consists of two chambers: the Senate and the \textit{Mazhilis}.

The Senate is composed of two deputies from each of the fourteen administrative regions as well as the cities Almaty and Astana, who are elected at a joint session of the local representative bodies. In addition, the President may currently choose fifteen senators “with regard to the necessity of maintaining representation of ethnic-cultural and other significant social interests in the Senate.”\textsuperscript{67}

In comparison to the Senate, the configuration of the \textit{Mazhilis} was subject to frequent changes. Originally, it was composed of sixty-seven deputies elected in one-mandate constituencies. This rule served as the basis for the first elections to the \textit{Mazhilis} conducted on December 9, 1995. The strongest political parties, which acquired twenty-four and twelve seats, respectively, were the People’s Unity Party and the Democratic Party, both strongly

\textsuperscript{63} Id. Art. 65(3).
\textsuperscript{64} Id. Art. 53(3).
\textsuperscript{65} Deviating from the original text, the amendments of May 21, 2007 require the president to conduct consultations with the chairpersons of the parliament’s chambers and the prime minister before taking decision on the dissolution of the parliament. At the same time, unlike the original text, which stated specific reasons for the dissolution like: “expressing a vote of no confidence in the Government,” “twice refusal to give consent to the appointment of the Prime Minister,” and “political crisis resulting from of insurmountable differences between the Parliament’s Chamber or Parliament and other branches of state power” [Art. 63(1)], the present text is silent on concrete reasons for the dissolution of the Parliament, leaving it fully at the discretion of the president.
\textsuperscript{66} Constitution of 1995 Art. 47.
\textsuperscript{67} Id. Art. 50(3).
The Rise of Presidentialism in Post-Soviet Central Asia

pro-presidential parties. The rest of the seats were filled by independent candidates who were, however, also largely supporters of Nazarbayev.  

On October 7, 1998, the composition of the Mazhilis was slightly modified; ten additional deputies are to be elected from the “party lists” of those political parties that receive 7 percent or more of the vote. On February 12, 1999, after the merger of several pro-presidential parties and movements, including the People’s Unity Party and the Democratic Party, the new party Otan (“Fatherland” in Kazakh) was established, which immediately outlined a program fully supportive of the President. As a result of the second elections to the Mazhilis on October 10, 1999, Otan obtained twenty-four out of seventy-seven seats, including four distributed between political parties. The other four parties that received the parliamentary mandates were the Civil (eleven seats), the Agrarian, and the Communist (three seats each), as well as the People’s Republican (one seat) Parties. Thirty-five deputies did not formally represent any political parties but were overwhelmingly associated with the government and big business and supported either Otan or two other pro-presidential parties: the Civil or the Agrarian.

The third election to the lower chamber, held on September 19, 2004, resulted in Otan winning 42 seats. A bloc formed by two other pro-presidential parties (the Civil and the Agrarian parties) obtained eleven seats; Asar, the party led by the President’s daughter Dariga, won four seats; and the moderate opposition party Ak Zhol obtained only one. Although pro-presidential parties fully dominated the Parliament, by the middle of 2006 the President became especially concerned with Asar’s independence and decided that “the country should have fewer but stronger parties that would efficiently defend the interests of the population.” On July 3, 2006, Asar declared its decision to merge with Otan. Soon thereafter it was announced that the Civil and the Agrarian Parties would follow in Asar’s path and also merge with Otan. On December 22, 2006, at the enlarged Otan’s party congress, its delegates voted to rename the party to Nur-Otan (“Nur,” as in the three first letters of the President’s first name, means in Kazakh “Ray of Light”).

Further, the constitutional amendments of May 21, 2007 completely altered the structure of the Mazhilis, both with respect to the number of deputies and the method of their election. Currently, the lower chamber consists of 107 deputies: 98 of them are now elected on the basis of the “party lists” and 9 are elected by the Assembly of Peoples of Kazakhstan. The Assembly, which previously played only a consultative role, has thus acquired permanent political significance.

Soon after the constitution was amended, a group of parliamentarians requested the constitutional council to provide an opinion on whether the Mazhilis could dissolve itself. On June 18, 2007, the constitutional council rejected such a possibility. However, on the next day, the majority of the Mazhilis’ deputies sent a request to the President saying

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68 See S. Seidumanov, Fenomen Mnogopartiinosti v Kazakhstane (Almaty 1997) 182.
72 Constitution of 1995 Art. 51(1).
that “the present Mazhilis must not block reforms” and calling for the premature dissolution of the chamber. On June 20, the President dissolved the Mazhilis and called for extraordinary elections. On July 4, at Nur-Otan’s emergency congress, Nazarbayev became the chairman of the party, which in the August 18 elections received more than 88 percent of the vote and all seats in the Mazhilis.

B. LEGISLATIVE PROCESS

According to the constitution, the right to initiate legislation belongs to the President, the Members of Parliament, and the government. Along with his own right to initiate legislation, the President may also charge the government with presenting a legislative draft to the Mazhilis.

In order to come into effect, a law must be signed by the President. If the President refuses to sign the act, the Parliament may theoretically overrule the President’s veto by confirming the draft with a majority of two-thirds in both chambers.

Moreover, both the President and the government have significant capacities to intervene into the legislative process. The President has the right to declare the urgency of a particular draft law; in this case the Parliament must consider this draft within a month from the day of its submission. Otherwise the President may issue a decree having the force of law which will be in effect until the Parliament adopts a new law. The Prime Minister may, up to twice a year, request a vote of confidence on the occasion of the presentation of a bill sponsored by the government. If confidence is not refused by a two-thirds majority, the draft law is deemed adopted.

The subordinate nature of the Parliament is evidenced by the provision stipulating that all drafts envisioning reduction of state revenues or increase in expenditures may be submitted only if approved by the government, except for those drafts which are initiated by the President.

IV. LOOKING TO THE FUTURE: PROBLEMS AND PERSPECTIVES

After the collapse of the USSR, Kazakhstan, like many other post-Soviet countries, has been in a process of unprecedented fundamental transformation. This process included, on the one hand, the transition from a communist political system and a state-managed economy to a—at least theoretically—democratic and market-oriented state, and, on other hand, the restoration of national statehood.

The constitutional development of Kazakhstan reflects the numerous acute challenges and problems of the country. The removal of the socialist planned economy resulted in a
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A catastrophic economic recession, leading to widespread poverty and massive inequalities in income. In a country where the political culture had never inculcated in its citizens’ beliefs and values that could support democratic institutions, the process of transformation could easily have caused the division of the population into antagonistic social, ethnic, and religious groups. But despite many assumptions that Kazakhstan would necessarily slide toward economic and political chaos and even military conflicts comparable to those in Bosnia, the country remained united and developed a cohesive multinational identity and ideology. Kazakhstan has stable relationships with all members of the international community and has enjoyed significant economic growth since the start of the new millennium, thanks to its market-oriented reforms and the strong energy sector. The current objectives pursued by the country include diversifying the economy away from over-dependence on natural resources and becoming one of fifty most competitive countries in the world. Many in Kazakhstan believe that all these achievements would hardly have been possible without a strong presidency.

In this regard, the words of Otto Luchterhandt are very telling: “The Constitution of Kazakhstan is . . . ‘Nazarbayev’s Constitution.’ Its construction reflects . . . a firm conviction of a politician, who, under the complicated circumstances of the transition of his state . . . sees himself as the only guarantor for the success of this venture and experiment . . . [and] does pursue an authoritarian . . . mode of government with the aim of economic and administrative modernization under unconditional safeguarding of political stability.”

At the same time, however, it is obvious that an essential precondition of sustainable economic growth is a substantial degree of democratization and political liberalization. In this regard, the overcentralization of the political power, which was required in the initial stage of Kazakhstan’s development to increase political stability and facilitate economic reforms, will now certainly be an impediment on the way to further advancement and growth. The excessive concentration of political power in the presidency entails the weakness and fragility of the legislature and other political institutions, stalls efforts at political reforms, and jeopardizes civil liberties. As a result, the commitment to democracy and rule of law remains vague; there is still a considerable danger of ultimately losing rudimentary democratic institutions and fully reverting to some form of authoritarian rule. In view of this vulnerability and the lack of development of a strong civil society, the ruling elite should not only be tolerant of political opposition, but actively take steps to generously support the creation of constructive, full-fledged opposition parties, which are a necessary requirement of any democratic system.

Currently at a crossroads, Kazakhstan should be persistent in pursuing the major programmatic objectives laid down in Art. 1 of its Constitution and in embodying the principles and ideals of democracy, not only in empty declarations, but also in practice. In doing so, despite numerous difficulties, it will ensure that “Nazarbayev’s Constitution” will go down in history as the fundamental legal instrument that has done the groundwork for a free, stable, and prosperous Kazakhstan, confidently facing the future and serving as a bridge between Europe and Asia and between Christian and Muslim worlds.

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84 Luchterhandt (n 4) 633 (translation by the author).
85 Art. 1 of the constitution proclaims the Republic to be “a democratic, secular, legal and social state whose highest values are an individual, his life, rights and freedoms.”
Westminster Democracy in an Islamic Context

Pakistan, Bangladesh, Malaysia

RAINER GROTE

1. INTRODUCTION

In all three Islamic countries examined in this article, parliamentary democracy arrived as an import from the West, i.e., from the United Kingdom, although it was already recognized at the time that democratic institutions on the British model were among the most difficult to manage properly and could not be imported as easily as goods or technical innovations from one country to another.  

Pakistan came into being as an independent sovereign state with the Indian Independence Act, which was passed by the British Parliament on July 17, 1947 and became effective on August 15, 1947. Under its provisions the Government of India Act of 1935 became, subject to certain modifications, the working Constitution of Pakistan. This was to be a temporary arrangement until the Constituent Assembly adopted a new Constitution for Pakistan. However, it would take nine years, longer than anybody envisaged at the time, for Pakistan to adopt an independence constitution (which would then prove to be extremely short-lived). Thus, independent Pakistan made its first steps in the new era under a system of government that had originally been conceived for self-governing India.

One of the most important modifications introduced by the Constituent Assembly in the operation of the Government of India Act of 1935 concerned the discretionary powers enjoyed by the Governor-General under the Act. While the list of powers of the Governor-General, which included the power to summon and prorogue the federal legislature, to

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1 G.W. Choudhury “Failure of Parliamentary Democracy in Pakistan” (1958) Parliamentary Affairs 60.
3 For a critical view on these arrangements, see Zhulfi kar Khalid Maluka, The Myth of Constitutionalism in Pakistan (Oxford University Press, Karachi 1995) 119.
assent to Bills voted by parliament and to enact legislation by way of ordinance, remained untouched, these powers were to be exercised in the future upon the advice of the cabinet that was responsible to the Constituent Assembly. The activities of the executive branch were thus comprehensively brought under the control of the cabinet, in accordance with established conventions of parliamentary government. While these modifications of the Government of India Act were of little practical relevance in the case of the first Governor-General for Pakistan, Muḥammad ‘Alī Jināh, who enjoyed tremendous personal authority due to his historic role as father of the Pakistani nation, they were designed to serve as a check on the powers of his successors in the office of Governor-General. As later developments would show, these successors often had little respect for the conventions of parliamentary government and used the formal powers assigned to the Governor-General in order to thwart any movement toward genuine parliamentary democracy if this threatened to curtail their freedom of action.4

Similarly, in Malaysia the introduction of parliamentary government was a direct legacy of British rule. The British brought with them the common law and the notion of the rule of law based on parliamentary democracy and an independent judiciary.5 When the agreement on independence was reached at the London conference in 1957 between representatives of the British Government and a Malayan delegation consisting of representatives of the Rulers, the Chief Minister, three Ministers of the Federation Government, and the High Commissioner, a consensus was established that the constitution of independent Malaysia should provide for a parliamentary form of government. A constitutional commission, chaired by the Scottish judge Lord Reid, and comprising the Cambridge jurist Sir Ivor Jenning, the former Governor-General of Australia Sir William McKell, the Indian judge B. Balik, and the Pakistani judge ‘Abdul Hamid was established and entrusted with the role of making recommendations “for a federal form of constitution for the whole country as a single self-governing unit within the Commonwealth based on parliamentary democracy with a bicameral legislature.”6

In Pakistan and Malaysia, as well as in other British colonies in Asia, there was thus little doubt from the outset that after independence the parliamentary system would be retained. It was the only system of government of which the politically conscious minority had first-hand experience, and which the lawyers who occupied a prominent place in the independence movements had studied and come to appreciate. However difficult its implementation in a different political, social, and cultural context may have seemed, the parliamentary regime had no real rivals.7

II. PARLIAMENTARY DEMOCRACY IN PAKISTAN: A TROUBLED HISTORY

It was therefore no surprise that a strong majority in the Constituent Assembly of Pakistan expressed its preference for a parliamentary government in the new constitution. Although there were partisans of a full-fledged Islamic state who considered that

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4 G.W. Choudhury, Constitutional Development in Pakistan (Longmans, London 1959) 214; Maluka (n 3) 161–162.
7 Choudhury (n 4) 213.
parliamentary government was not in accordance with the system that had existed in the early days of Islam and preferred a system in which responsibility for the administration of the country was primarily vested in a Muslim head of state, their views gained little traction inside the Assembly. Jinnah had explicitly declared that the system of government in Pakistan would be federal and parliamentary. In its first report the Basic Principles Committee of the Constituent Assembly envisaged a government structure under which the indirectly elected head of state would exercise his executive powers on the advice of the cabinet responsible to the federal legislature, an institutional design that formed the basis for the subsequent deliberations in the Assembly. However, these attempts to establish a parliamentary form of government were opposed by the Governor-General, Ghulam Muhyiddin, who resisted any move toward greater political autonomy for the government that would reduce him to a mere figurehead of the state, and in April 1953 dismissed the Nizamuddin ministry, although it still enjoyed the confidence of the Constituent Assembly and had just passed the national budget. When the Assembly tried to recoup some of its powers by amending the provisional constitution, the Government of India Act, in order to divest the Governor-General of his powers to dismiss government ministers, Ghulam Muhammad struck back and dissolved the Constituent Assembly on October 24, 1954.

After the dissolution of the Constituent Assembly those voices in the executive that called for some sort of “controlled democracy” as a potential alternative to a full-fledged parliamentary regime grew louder. The renowned English constitutional lawyer Sir Ivor Jennings was asked to draft a constitution that would combine British notions of representative government with the American idea of an executive irremovable for four years. However, these attempts were abandoned for the time being when it was realized that such a system would be exceedingly difficult to implement in the absence of the U.S. political practices and conventions that prevent such a system from degenerating into a dictatorship. In addition, the ruling of the Federal Court in the reference of the Governor-General case had also increased the pressure on the executive to summon a new assembly. When the second Constituent Assembly finally met in May 1955 it was quite clear that the presidential system would be no more acceptable to it than it had been to its predecessor. The draft constitution that was finally presented in January 1956 thus provided for the establishment of an Islamic Republic based on the British parliamentary system. Not surprisingly, in view of the controversial and undemocratic measures taken by the Governor-General under the interim constitution, great importance was attached by the second Assembly to the careful definition of the respective powers of the executive and the legislature. The draft provisions that proposed to

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8 Khan (n 2) 105–106; Maluka (n 3) 66–69.
9 Maluka (n 3) 71.
10 Maluka (n 3) 158–60.
11 The action taken by the Governor-General was upheld by the Federal Court in subsequent litigation on the basis of the doctrine of necessity, Reference by His Excellency the Governor General, PLD (i.e., All-Pakistan Legal Decisions) 1955 Federal Court 435; see Khan (n 2) 91–94.
12 Choudhury (n 1) 61.
13 Choudhury (n 4) 213.
14 Reference by His Excellency the Governor General, PLD (All-Pakistan Legal Decisions) 1955 Federal Court 435.
15 Choudhury (n 4) 213.
CONSTITUTIONALISM AND SEPARATION OF POWERS

enlarge the powers of the President as compared with those envisaged by the first Constituent Assembly had to be amended considerably, with a view to guaranteeing a genuine parliamentary system where real executive authority was vested in a cabinet responsible to the legislature, and not in the head of state. 16

When after nine years of frustration the first Constitution of Pakistan was finally adopted on February 29, 1956 it was greeted with great enthusiasm throughout the country. 17 The new constitution established a parliamentary system of government in which the President, elected by the two houses of parliament, exercised his executive powers upon advice of the cabinet with the Prime Minister at its head. The discretionary powers of the President were limited to the making of a few non-controversial appointments, such as the chairman and the members of the Federal Public Service Commission. The cabinet was collectively responsible to the federal legislature for the aid and advice it gave to the President in the exercise of his powers. While the reports adopted by the first Constituent Assembly had always envisaged a bicameral legislature, the model finally adopted by the second Constituent Assembly was that of a federal legislature consisting of just one house, the National Assembly. The Assembly was to consist of 300 members, half elected by constituencies in East and half by constituencies in West Pakistan. Although a unicameral system of parliamentary representation was highly unusual for a federal state which Pakistan still claimed to be it greatly facilitated the solution of the complex problems associated with the establishment of a balance of power between East and West Pakistan at the center.

However, the Constitution of 1956 did not bring Pakistan the desperately needed political stability. The dominant position which the Muslim League had once enjoyed in the first Constituent Assembly and in the early phases of the second Assembly was eroding, and the country ushered into a period of weak coalition governments. The practice of leaving one party on one day and joining another one on the next became so common among Pakistani politicians that no ministry was able to remain in power for a substantial period of time. The calling of a general election may have provided a way out of the resulting political impasse, but the new President, Iskandar Mirzā, was hesitant to call one for fear that he might not be able to control a freshly elected Assembly and that it would refuse to return him to the presidency. Instead he maneuvered to postpone elections indefinitely, and finally, on October 8, 1958, took the decision to proclaim martial law and to abrogate the constitution. The National Assembly as well as the Provincial Assemblies were dissolved and all political parties were banned. 18 Thus was established a pattern of government which has continued to haunt Pakistan until the present day: rather brief periods of unstable and often corrupt parliamentary government that alternate with extended periods of martial law and military rule.

The state of martial law would continue until June 1962 when the Constitution of 1956 was finally replaced by a new constitutional text. In preparing the document, President Ayyūb Khan appointed a Constitution Commission headed by the former Chief Justice of Pakistan, Muḥammad Shahābuddin. In its report submitted to the President in May 1961, the Commission identified the absence of strong political leadership, the meddling of the head of state in the ministries, and the lack of well-organized, popular political parties as

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16 Khan (n 2) 98, 106.
17 Choudhury (n 1) 62.
18 Khan (n 2) 124. Shortly after his decision to suspend the constitution, Iskander Mirza was driven from office by the Commander-in-Chief of the Pakistan Army, General Muḥammad Ayub Khan who had supported the coup and now decided that the time had come to take over the powers of President of Chief Martial Law Administrator.
the main reasons for the failure of parliamentary democracy in Pakistan. The Constitution of 1962 referred no longer to the “Islamic Republic of Pakistan” but simply the “Republic of Pakistan,” a change that clearly reflected President Ayyūb Khān’s secular mindset. The most salient feature of the new constitution was the introduction of a presidential system of government. Elected under a system of indirect election in which local government institutions played a central role, the President became the repository of all powers. He was responsible for regulating the allocation and transaction of the business of the central government, and could appoint a Council of Ministers to assist him in the performance of his duties. The office of Prime Minister was abolished. The President was given the power to dissolve the legislature, but subject to the condition that in this case he also had to resign from office and fresh elections were to be held for both the President and the National Assembly.

The Constitution of 1962 did not remain in force very much longer than its predecessor. Toward the end of the decade dissatisfaction with the autocratic government of Ayyūb Khān spread among large sectors of the population and set in motion the events which not only led to his resignation from office (in February 1969) but also, in the wake of the 1970 general elections, to the breakup of the country under his successor, Yahyā Khān. When after the war and the secession of East Pakistan, work began on a new constitution for Pakistan, an all-party agreement provided that the constitution would be based upon a parliamentary system of government in which the President would exercise all his formal powers on the advice of the Prime Minister, who would thus become the real chief executive. The agreement also envisaged a number of safeguards in order to strengthen governmental stability and to limit the possibilities of the National Assembly to bring down the cabinet by a no-confidence vote.

The new constitution, which was finally proclaimed on August 14, 1973 reverted to a parliamentary system of government along the lines of the 1956 Constitution. The framers of the 1973 Constitution retained the Islamic provisions that had been part of the two previous constitutions and added some of their own. Art. 2 proclaimed Islam as the state religion. The President and the Prime Minister had to be Muslims and were required to take a specific oath when assuming office, professing not only their belief in the unity of God, but also in the finality of the prophethood of Muḥammad, a formula which effectively excluded members of the Ahmadi sect from either of these offices. According to Art. 227, all existing laws had to be brought in conformity with the injunctions of Islam as laid down in the Qur’ān and the Sunnah. Art. 90 of the Constitution named the Prime Minister as Chief Executive of the Federation, and Art. 48 made the President wholly dependent upon his advice. However, the new constitution introduced some important changes in the parliamentary system as it had been practiced previously in the subcontinent in order to reduce governmental instability and to create the conditions for the effective exercise of political leadership by the Prime Minister. To this effect, the powers of the Prime Minister were strengthened and those of the President weakened. The President no longer enjoyed

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19 Maluka (n 3) 182.
20 Khan (n 2) 148–151.
21 Maluka (n 3) 239–240; Khan (n 2) 270–271.
22 In particular, any vote of no confidence in the prime minister would have to name his successor, and for a period of fifteen years or three electoral terms, whichever was greater, any such motion would have to be adopted by a two-thirds majority in the Assembly, see Maluka (n 3) 240.
23 Khan (n 2) 296.
the right to select the Prime Minister, subject to later confirmation by parliament. According to the new constitutional rules, the Prime Minister had to be elected immediately after the election of the Speaker and the Deputy Speaker of the National Assembly. The President was required to act on the advice of the Prime Minister which was binding upon him. He no longer enjoyed any discretion with regard to the dissolution of the National Assembly. While formally retaining this power, he could only exercise it on the advice of the Prime Minister. In case he did not act on a proposal by the Prime Minister to dissolve the National Assembly, it would automatically stand dissolved on the expiration of forty-eight hours from such advice. The position of the Prime Minister was also strengthened in relation to parliament, which frequently had been unable to produce a stable majority in support of government policies in the past. 24

Although the Constitution of 1973 continues in force today, it has been subject not only to the “normal” constitutional amendments, but also to two extended periods of military rule under General Ziyā-ul-Ḥaq (1977–1988) and General Pervēz Musharraf (1999–2008). The effect these periods of military government had on the constitution was not limited to the temporary suspension of some or of all of its provisions; they largely removed the parliamentary features from the system of government in favor of authoritarian rule masquerading as presidential government. The “normal” order of events would be that the new military ruler at first suspends the constitutional order as a whole or in parts before he later enacts constitutional amendments designed to protect the measures taken under emergency rule from any kind of review and to preserve a prominent role for himself after the return to civilian rule by recalibrating the powers of government in favor of the (indirectly elected) President and at the expense of the Prime Minister and the cabinet. 25

After the return to civilian rule, the leaders of the main political parties will then try to restore some measure of parliamentary government, most notably by depriving the President of the power to dissolve the National Assembly and to dismiss the federal government at will, and to return him to the position of titular head with only ceremonial powers as envisaged by the original Constitution of 1973. 26

The alternation of periods of military rule with rather brief spells of unstable parliamentary government has not allowed parliamentary habits to become firmly rooted in the political life of Pakistan. Parliamentary politics in Pakistan has remained extremely volatile, with political allegiances often shifting from one day to the next, thus not allowing for the formation of stable majorities in parliament. Political parties are founded on dynastic and personal loyalties rather than on political principles or programs. However, the problems

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24 Maluka (n 3) 242–22; Khan (n 2) 278–279.
25 See, e.g., the Revival of the Constitution of 1973 Order (RCO) of March 2, 1985 by President Zia-ul-Haq, which comprehensively amended the constitution before parliament met for the first time since 1977. The Order concentrated the main powers in the hands of the President and reduced the office of the Prime Minister to a subservient and subordinate position, see Maluka (n 3) 272; Khan (n 2) 382. General Pervez Musharraf attempted to revive the dominant presidential position first introduced by Zia after he seized power in 1999, most notably through the Legal Framework Order 2002 and the Seventeenth Amendment Act to the Constitution of December 2003, which has been called a “rerun of the Eight Amendment” implemented by Zia’s Revival of the Constitution (1973) Order, see Khan (n 2) 504.
26 During the period of parliamentary government that followed the death of Zia in 1988, reforms to this effect were implemented by the Thirteenth Amendment to the Constitution pushed through by the Nawaz government in 1997, see Khan (n 2) 464–465. If the events which have taken place in Pakistan since the parliamentary elections in February 2008 are any guide, history is about to repeat itself after the demise of the Musharraf government.
experienced in Pakistan in the operation of parliamentary institutions of government are not primarily due to the dominant role of Islamist tendencies in Pakistani politics but rather to the preference of the Pakistani elites, and in particular of its military establishment, for unfettered political power. While bouts of Islamization have indeed occurred in the Pakistani constitutional system, especially under the rule of General Žiyā-ul-Ḥaqq, and restraints on the operation of the parliamentary regime have been claimed in the name of “Islamic democracy” from time to time, such pretenses have almost exclusively been the devices of authoritarian rulers looking for some alternative source of legitimacy, Islamic or other, in order to perpetuate themselves in power and to quell demands for the free exercise of popular sovereignty, rather than the outcome of democratically legitimated political processes. Although the reference to Islamic values has been standard fare in the political programs of most political parties since 1947, the adherents of more radical interpretations of Islam and Islamic concepts of statehood usually have not performed well in free parliamentary elections, although this may be an insufficient yardstick for measuring their influence on public political discourse, as recent events tend to suggest.

III. PARLIAMENTARY DEMOCRACY IN BANGLADESH: A FRESH START?

The state of Bangladesh came into existence as a result of the consistent failure of the West Pakistan political establishment to provide for an adequate representation of East Pakistanis in the institutions of the central government of Pakistan. The tensions between East Pakistan and West Pakistan escalated after the National Assembly elections in December 1970, when the East Pakistan ‘Awāmmi League, which had won an absolute majority of seats, was prevented by West Pakistani politicians from forming a national government. Until then the constitutional debates on the most effective system of government in East Pakistan had been part of the larger discussion on the institutional structure of Pakistan as a whole. The structure of the provincial governments established by the 1956 Constitution had been very similar to that of the federal government, with the relationship between the provincial governor, appointed by the central government, the Chief Minister, and the unicameral Provincial Assembly closely resembling that between the President, the Prime Minister, and the National Assembly at the national level. By contrast, the Proclamation of Independence Order issued in April 1971 provided for a strong presidential system that vested both executive and legislative powers in the President, including the power to summon and dissolve the Assembly. However, this was merely a temporary system of government, put in place to meet the peculiar needs of the emergency situation which existed during the liberation war. The ‘Awāmmi League soon reverted to its preference for

27 It is no accident that attempts to explore the constitutional foundations of Islamic statehood intensified under the rule of Zia-ul-Ḥaqq, with analogical deductions made from the city-state in Medina predictably favoring General Zia’s self-sustaining and self-perpetuating exercise of Nizam-i-Islam, see Maluka (n 3) 78–81.

28 Parliamentary elections in the post-Zia era have usually been dominated by the Pakistan People’s Party (PPP) and the Muslim League (ML) which, while not being immune to making pitches for the core Muslim vote, are essentially within the Islamic mainstream.


30 Talukder (n 29) 114.
a parliamentary system of government, which it had already advocated in its quest for greater constitutional autonomy within Pakistan. The dominant political class of Bangladesh had been familiar with the system since the time of British colonial rule, and the 'Awāmmī League had committed itself to this form of government since its inception in 1949. Its leading figures remained convinced that the lack of a genuine parliamentary system during the Pakistan era had played a prominent role in depriving Bengalis of a fair participation in the country’s political and economic affairs.  

The Constitution of 1972 defined Bangladesh as a secular Republic. It introduced a Westminster type of parliamentary government that limited the President of the Republic to a largely ceremonial role and assigned the main policy-making functions to the cabinet headed by the Prime Minister. The cabinet was collectively responsible to parliament and would remain in office as long as it enjoyed the confidence of a majority in parliament.

However, the years following independence in Bangladesh were marked by frequent political turmoil and a rapid succession of heads of government, some of them overthrown by bloody coups. Due to the absence of any credible political opposition in the first elected parliament dominated by the ‘Awāmmī League, the parliamentary system envisaged by the constitution never did function in practice.  

Following the national famine in 1973–1974 and the emergence of internal rifts within the ‘Awāmmī League, Mujībur Rahmān tried to institute one-party rule and to establish strict government control over press and industry. By virtue of the Fourth Constitutional Amendment adopted in 1975, the parliamentary system was replaced by a one-party presidential system. Following the constitutional change, the President, who previously had been limited to the role of ceremonial figurehead of the state, was made the effective head of the executive. All executive authority was vested in the President and would be exercised directly by him. A Council of Ministers to aid and advice the President was created whose members, including the Prime Minister, were to be appointed at his discretion. The Council would be presided over by the President and would hold office during his pleasure. In addition, the President had the power to summon, prorogue, and dissolve parliament, and could appoint judicial and non-political officials without the advice of the cabinet.

Sheikh Mujībur-Rahmān was assassinated in a military coup in August 1975. The series of bloody coups and counter-coups that followed paved the way for the ascent to power of General Żiyā’ur Rahmān. He reinstated multiparty politics and introduced the reference to the Islamic faith and the principle of social justice into the constitution, which replaced the founding principles of secularism and socialism. He founded the Bangladesh Nationalist Party (BNP), which won the election of 1979. After his assassination in 1981, the political situation continued to deteriorate until General Ḥusayn Muḥammad Irshād, the Chief of the Army, proclaimed martial law, assumed all powers of government, and suspended the constitution. After the reinstatement of the constitution in 1986, Irshād pushed through several constitutional amendments. One of them (the Eighth Amendment) made Islam the state religion of Bangladesh but fell well short of making Shari‘ah the primary source of

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32 Talukder (n 29) 122.
33 Ahmed (n 31) 33.
34 Ahmed (n 31) 35–36.
36 Islam (n 35) 19.
legislation in Bangladesh.37 But at the end of the 1980s, popular opposition to General Irshād intensified, and in October 1990 he was finally forced to hand over power to a caretaker government led by Vice President Shahābuddin Alīmad, which would oversee the restoration of parliamentary democracy. The Twelfth Amendment to the 1972 Constitution (1991) reintroduced the parliamentary system of government by providing for the election of the President by the Members of Parliament; the institution of Vice President was abolished.38 The Thirteenth Amendment (1996) made provision for a non-party caretaker government which would govern the country in the period after dissolution of each parliament and the formation of the new government following the general election.39

The reforms of 1991 restored many of the parliamentary features of government of the original constitution. Under this system, the President as head of state is elected by the Members of Parliament for a term of five years, renewable once (Arts. 48, 50). In the exercise of his constitutional functions he is bound to act in accordance with the advice of the Prime Minister, with the exception of the power to appoint the Prime Minister and the Chief Justice of the Supreme Court. Although the measures decided by the government are nominally taken in the name of the President, the executive power is vested in the Prime Minister. The President shall appoint as Prime Minister the Member of Parliament who appears to command the support of the majority of the Members of Parliament. The Prime Minister remains in office until he resigns; if he loses the confidence of the parliamentary majority, he shall either resign or—if he is convinced that no other Member of Parliament commands the support of the parliamentary majority—advise the President to dissolve parliament. The other members of the cabinet are appointed by the President on the advice of the Prime Minister. Art. 56 (2) of the Constitution expressly requires that no less than nine-tenths of cabinet members be appointed from among Members of Parliament, thus preventing the return of governments run by military and civil technocrats that had dominated during the long period of authoritarian rule. The Prime Minister may at any time request a minister to resign; if the minister fails to comply with the request, the Prime Minister can advise the President to terminate his appointment.

The legislative power is exercised by the unicameral parliament, the House of Nations (Jatiya Sangsad). The House of Nations has 300 members who are elected from single-member-constituencies for five-year terms of office. Anti-defection legislation that was already introduced at the time of the promulgation of the Constitution in 1972 prohibits individual deputies from switching parties during the parliamentary term. If a Member of Parliament who has run for parliament on a party political ticket resigns from that party or votes against the party in parliament, he shall lose his parliamentary seat (Art. 70). Like the selection of the first-past-the-post voting system for the parliamentary elections, the provision against floor-crossing tries to secure government stability, at the expense of the autonomy of individual deputies.40

While most of the constitutional provisions on the functioning of the system of government correspond to the British model of parliamentary government, the Thirteenth Amendment to the Constitution of Bangladesh has instituted a unique system of transfer of power. According to this system, the government business in the period between the dissolution of parliament and the first meeting of the newly elected parliament is not carried

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37 Islam (n 35) 22.
38 Talukder (n 29) 132.
39 Islam (n 35) 23.
40 Ahmed (n 31) 58–59.
out by the incumbent government, but by a caretaker government specifically established for this purpose. The caretaker government was given constitutional status in 1996 following pressure from the opposition parties, which alleged massive vote-rigging in by-elections and refused to take part in any future elections unless they would be held under a non-partisan caretaker government. The non-partisan caretaker government consists of the Chief Advisor and not more than ten additional Advisors. The President shall appoint as Chief Advisor the retired Chief Justice of Bangladesh. If there are several retired Chief Justices, he must appoint the justice who retired last. Consistent with the objective of the constitutional reform, i.e., the establishment of politically neutral government representing civil society during the election process, nobody who is a member of any political party or of any organization associated with or affiliated to any political party may be appointed as a Chief Advisor or Advisor. The caretaker government has the task to carry out the routine functions of government with the assistance of the public administration in the immediate pre- and post-election period. Except in the case of necessity, it shall not make any policy decision. The caretaker government is dissolved once the new Prime Minister enters office after the constitution of the new parliament.

Since its restoration in 1991, the practice of the parliamentary system in Bangladesh has been marked by the bitter rivalry between the ‘Awammi League (AL) and the Bangladesh National Party (BNP) and their respective leaders, Sheikh Hasinah Wajid, Prime Minister from 1996–2001, and daughter of the country’s murdered independence leader, and Khulidah Ziya, widow of former President Ziyaur-Rahman and Prime Minister from 1991 to 1996 and again from 2001 to 2006. Both were widely accused of running inept and corrupt governments during their time in power and of having turned Bangladesh politics into a repulsive display of non-cooperation and vindictiveness. This was also reflected in the attitude of the dominant parties toward parliament. Both deliberately bypassed parliament on many occasions, choosing instead to enact important legislation by way of ordinance. When in opposition, the AL and the BNP displayed a similarly dismissive attitude toward parliament, routinely boycott ing and deserting the parliamentary session in favor of extra-parliamentary opposition in the form of mass demonstrations and street politics. The major characteristic of the parliaments elected since the restoration of democracy in 1991 is that they were boycotted by the opposition most of the time.

Things came to a head when the BNP government tried to manipulate the outcome of the 2006 parliamentary elections. In May 2004 the Fourteenth Amendment to the Constitution was enacted which, among other things, raised the retirement age of Supreme Court Judges from 65 to 67. This seemingly innocent reform was adopted because the BNP government wanted to see that a particular Chief Justice, who had links with an earlier BNP government, would be made head of the next caretaker government due in 2006. Amid increasing street violence ahead of the scheduled elections, the army stepped in and staged an unannounced coup in January 2007. The army tried, but in the end failed, to free the country’s politics from the bitter rivalry of its traditional leaders by jailing both Sheikh Hasinah and Khulidah Ziya for a year on corruption charges and forcing them into exile. In the end, however, it had to relent and pave the way for fresh parliamentary elections in which both Sheikh Hasinah and her old foe took part. In the relatively clean and peaceful

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41 Islam (n 35) 326.
42 See Arts. 57 C, 57 D of the Constitution.
44 Moniruzzaman (n 43) 110.
The dysfunctional nature of parliamentary politics in Bangladesh can be attributed to a number of causes, but religion has little to do with it. Although Bangladesh, too, has seen a rise in Islamic militancy over the last two decades, the role of Islam in political debate has generally remained a limited one. In the 2008 elections, the BNP’s calls to voters to shun the more secular League in order to protect Islam apparently have backfired. It seems to have been hurt by its alliance with Islamist parties, the largest of which, Jamāʿat-Islāmī, was reduced from seventeen seats to just two.

A major factor in the malfunctioning of parliamentary democracy in Bangladesh has been the central role played by street politics and violence in the country’s politics. In Bangladesh, the origin of violence in politics can be traced to the British colonial era, but it became a popular political means from the beginning of the Pakistan period. The opposition during the 1950s and 1960s remained violent and agitational on controversial issues like the determination of the state language (Bangla instead of Urdu) or greater political and economic autonomy for East Pakistan. During the 1980s political violence became commonplace in the move to unseat the Irshād regime. From the beginning of the 1990s, political violence became further institutionalized through inter-party conflict. Eventually, violence became a legitimate means of securing political demands. Violence, disturbances, and interruption of normalcy in public life have become part of the political landscape overshadowing the role and importance of parliament.45

In addition, in Bangladesh political parties have always been associated with personalities instead of principles. Since independence in 1971, political parties have remained highly personalized around a few leaders such as Sheikh Mujibur-Rahmān and his daughter Sheikh Hasinah for the AL, Ziya’ur-Rahmān and his widow Khālidah for the BNP, Irshād and his wife Rawshan for the Justice Party (JP). Due to the absence of genuine intra-party democracy, the parties suffer from a number of problems such as dominance of personality rather than rules; the maintenance of leadership so that it tends to be a lifetime position; and finally, the dynastic nature of party leadership.46

IV. PARLIAMENTARY DEMOCRACY IN MALAYSIA: THE PERILS OF STRONG EXECUTIVE GOVERNMENT

As in the case of Pakistan and Bangladesh, parliamentary democracy in Malaysia has been part of the legacy of British colonial rule, which introduced notions of the rule of law based on a Westminster form of parliamentary democracy into the nascent Malaysian constitutional tradition. The current constitution has its origins in the Report of the Constitutional Commission of 1957 chaired by Lord Reid (the so-called Reid Commission). The original Constitution of 1957 was largely based on the recommendations made by the Reid Commission in the 1957 report, though a working group was appointed afterward by the government of the Federation of Malaya to draft the new constitution.47 The report by the Reid Commission as well as the results of the subsequent working group favored a strong executive branch, which was seen as necessary at the time in order to counter the threat resulting from the communist insurgency effectively. However, over time the accumulation of legal powers in the hands of the executive came to be seen as the main

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45 Moniruzzaman (n 43) 122.
46 Moniruzzaman (n 43) 123.
47 Harding (n 6) 30.
cause for the unbalanced nature of the Malaysian Constitution, one of the key defects of the framework established in 1957 that has greatly hampered the emergence of a genuine parliamentary democracy.\footnote{See Harding (n 6) 38.}

The constitution established a bicameral parliament, consisting of the lower house or House of Representatives (\textit{Dewan Rakyat}) and the upper house or Senate, known as \textit{Dewan Negara}. The \textit{Dewan Rakyat} is directly elected every five years by the people in a first-past-the-post election. Any Malaysian citizen may become a Member of Parliament if he or she is over twenty-one years old and not disqualified under Art. 48 of the Constitution. While the assemblies of the states are entitled to elect some of the Senators in order to represent their interests in the national legislature, a majority of the members of the \textit{Dewan Negara} are nowadays appointed by the Head of State, the \textit{Yang di-Pertuan Agong}. The term of office for members of the \textit{Dewan Negara} is limited to three years, with no member being allowed to hold office more than for two terms. This constitutes a sensible limitation, though the process of nomination itself is not as democratic and transparent as might be expected.

Both houses and the \textit{Yang di-Pertuan Agong} together hold the lawmaking power under the Constitution (Art. 66 (1)). But the \textit{Dewan Rakyat} is generally considered to be the more powerful of the two chambers, since it has the last word in the lawmaking process and the Prime Minister is chosen from among its ranks. Hence the constitutional position of parliament is defined mostly by the role of the democratically elected chamber. The position of parliament is also strengthened by Art. 43 (3), which establishes the principle of collective responsibility of the cabinet to parliament, though the constitution is silent on the precise content of this responsibility.

The constitution provides for a strong executive power. Formally executive authority is vested in the Head of State, the \textit{Yang-di Pertuan Agong}, not in the cabinet or the Prime Minister, as is the case, for example, in Japan. It is regulated through convention, though, that the Head of State does not exercise his executive powers discretionally but only upon advice of the cabinet as provided for under Art. 40.\footnote{Abdul Aziz Bari, \textit{Malaysian Constitution—A Critical Introduction} (The Other Press, Kuala Lumpur 2003) 54.} In accordance with the established tradition of a Westminster-style parliamentary democracy, the bulk of real executive powers rests with the cabinet. According to Art. 43 of the Constitution the Prime Minister is appointed from among the members of the \textit{Dewan Rakyat}, with the ministers appointed on the advice of the Prime Minister, but not necessarily from among the members of the house. The number and competences of ministers are determined by the Prime Minister. When a Prime Minister ceases to command the confidence of parliament he may either tender his resignation or request that parliament be dissolved. The powers of the federal executive authorities extend to all matters for which legislative authority is allocated to the Federal Parliament under the constitution.

Although the 1957 Constitution reflects the Islamic identity of the vast majority of the population, this does not have any direct impact on the setup of the institutions of government. The most important provision of the constitution regarding questions of faith is Art. 3 (1), which states that Islam is the religion of the Federation. While putting Islam above other religions, this provision does not establish an Islamic state.\footnote{See Bari (n 49) 46.} Nor are there any constitutional provisions recognizing the Shari‘ah or Islamic law—generally perceived as basis of an Islamic state—as a source of legislation or of constitutional law. This was at least in part confirmed by the Federal Court (or rather its predecessor the...
Supreme Court) in the case of *Che Omar v. the Public Prosecutor*. In this decision the court rejected the notion that the legislative might be in any way bound by Islamic law and clearly distinguished between private law, where Islamic law may apply, and public law, where it does not.\(^{51}\)

Although the parliament of Malaysia enjoys fairly substantial powers under the constitution, in practice it has largely been subject to the dominance of the executive branch. It did not manage to secure an autonomous political role for itself but most of the time merely acted as a “rubber stamp” of the political and legislative agenda of the government.\(^ {52}\) The political conditions in Malaysia since independence have strongly favored this shift of power away from parliament to the executive. Since the attainment of Merdeka, or independence, in 1957, the Malaysian nation has been ruled by a coalition called the *Barisan Nasional* (or National Front). Among its members, there are three main parties representing the three major racial groups in Malaysia, UMNO or United Malays National Organisation, MCA or Malaysian Chinese Association, and the MIC or Malaysian Indian Congress, with UNMO being the dominant group. *Barisan Nasional* has exercised firm control over parliament (and the other institutions of the state) for over fifty years. For most of the period since independence, the wielding of a two-thirds majority by the *Barisan Nasional* in the Federal Parliament has enabled the ruling coalition to tilt the balance of power even further in its favor by way of constitutional amendment. Under the Malaysian Constitution, amendments to the constitution, apart from some prescribed exceptions, can be effected by the passage of amending legislation with the support of a two-thirds majority vote of the membership of each house of parliament. Using its sizable majority, the coalition was able to amend the constitution in order to raise the number of Appointed Senators in the *Dewan Negara* in several steps from sixteen to forty-two (with only twenty-six Senators elected by the State Legislative Assemblies). As a result, the Appointed Senators now number the members elected by the State Assemblies, thus eroding the original function of the *Dewan Negara* to act as a house of review and a protector of state interests.\(^ {53}\)

The position of the executive has also been strengthened by the broadly framed emergency powers it enjoys under the constitution. The independent Federation of Malaya came into constitutional existence in the midst of a war against communist insurgents. At the time of the drafting of the 1957 Constitution it was widely agreed that emergency powers would be indispensable in order to quell the insurgency. While the constitutional text made express provisions for exceptional powers, including the power of preventive detention, in times of a national emergency, it also provided for certain safeguards. However, these safeguards have been eroded by subsequent constitutional amendments. As a result, the courts are now barred from adjudicating on the validity of an emergency proclamation or the renewal of a proclamation. The courts do not have the power to determine that an emergency has ended because the reasons for its proclamation have ceased to exist, thus leaving the executive with the possibility to prolong emergency rule indefinitely.\(^ {54}\) The power of the executive to enact legislation by way of ordinance in the case of an emergency has also been extended by way of constitutional amendment. Whereas initially any ordinance promulgated by the King automatically lapsed at the expiration of fifteen days from the date on which both houses of parliament were sitting, ever since the Constitution


\(^{52}\) See H.P. Lee “Malaysia: The politics of the Judiciary” (*in this volume*); Harding (n 6) 83.

\(^{53}\) The constitutional amendments were challenged—unsuccessfully—in *Phang Chin Hock v. Public Prosecutor* [1980] 1 *Malayan Law Journal* 70.

\(^{54}\) Harding (n 6) 158.
CONSTITUTIONALISM AND SEPARATION OF POWERS

(Amendment) Act 1960 was passed, such an ordinance continues in force until such time as resolutions are passed by both houses nullifying them. 55

It is only since the elections of March 2008 that a strong, viable opposition capable of wresting power from the current government and forming an alternative government has emerged in parliament. The 2008 election resulted, for the first time since 1969, in a failure by the Barisan Nasional to retain its two-thirds majority in the House of Representatives. A coalition of opposition parties (under the leadership of Datuk Seri Anwar Ibrahim) captured 82 of the 222 seats. The main party of the opposition is the Islamic Party of Malaysia (PAS), which in the past has campaigned for more Islamic laws and introduced some of them—including the death penalty for adulterers and rapists—in states in which it governs, although their enforcement has usually been blocked by the federal government. Nevertheless, the recent electoral successes of the PAS do not necessarily point in the direction of an increasing Islamization of Malaysian politics. If the PAS ever enters the national government, it will have to strike compromises with its more secular partners, which are far less keen on Shari'ah law. Besides, the PAS has already started moving into the political mainstream, rebranding much of its former emphasis on Islamic jurisprudence as a commitment to social equality and clean governance, making the prospect of a genuine “Islamic” government seem more remote.

V. CONCLUSION

The experience of Pakistan, Bangladesh, and Malaysia suggests that there have been few conceptual difficulties in introducing parliamentary democracy in these societies. The real challenge to the functioning of parliamentary democracy in these as in other, non-Islamic societies is not represented by religion, but by the persistence of undemocratic practices, particularly among the political elites, which prevents the mechanisms of electoral democracy from becoming a faithful expression of the political and social grievances and aspirations of the population at large. The future development of parliamentary democracy in these countries can thus serve as a guide as to whether extensions of democratic practice are likely to provide a successful means of accommodating militant Islamic political movements. There are some indications that Islamic parties are more likely to adopt moderate views when given the opportunity to compete in a fair and open contest.

Recent elections in Pakistan and Bangladesh point to limited electoral support for radical Islamic programs and the parties which advocate them. The popularity of Islamic parties in Middle Eastern and South Asian countries may thus be largely of a protest variety, owing more to the denial of a more open political process than to the inherent attractiveness of an Islamic state. Pakistan, Bangladesh, and Malaysia were all founded on democratic values and aspirations, and as ideals these continue to resonate widely. In these countries, such basic ideas as representative government and rule of law remain part of society’s aspirations for itself. Where there has been rejection of democratic and parliamentary institutions, it has been less out of a fundamental opposition to such institutions or of the longing for authentic Islamic institutions than out of despair over their lack of genuine inclusiveness and responsiveness. If parliamentary democracy has shown its weaknesses in all three countries, the alternatives—military dictatorship, one-party rule, or authoritarian government by an overweening executive—have proved even less attractive. In all three cases, there is thus everything to play for in terms of democratic institution-building.

55 Harding (n 6) 156, note 23.
Prior to the reform era, the Constitution of Indonesia of 1945 favored the dominance of the executive branch, as its superiority over the legislative branch was written clearly into the constitution. However, the governing political institutions have drastically changed, through the amendments to the constitution that were enacted during the period 1999–2002.

Constitutional reform in Indonesia responded to popular demands following more than thirty years of authoritarian rule by President Soeharto who had come to power by ousting his predecessor Soekarno through a coup in 1967 and had tightly controlled all levers of power before he was finally forced to resign by massive public protests in 1998. They included calls for a less powerful presidency, a multiparty system, a more powerful parliament, and a reduction in, or eradication of, parliamentary seats for the military in the House of Representatives (Dewan Perwakilan Rakyat, DPR).

It could be argued that reform of the 1945 Constitution has been one of the most important aspects of the transition to democracy in Indonesia, which began in 1998. Despite the weaknesses in the 1945 Constitution as a basis for democracy, it was explicitly or implicitly accepted by most major political forces as the framework for the transition in Indonesia that began in 1998. Subsequently, however, the most important political parties came to believe that the constitution had to be amended to address weaknesses in the country’s political structure.

The first set of changes was passed during the October 1999 general session of the People’s Consultative Assembly (Majelis Permusyawaratan Rakyat, MPR), so that the new democratically elected President would be bound by them. These changes affected nine of

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the constitution’s thirty-seven articles. The MPR decided to follow the American practice of constitutional amendment, in which the full original text is accompanied by the changes to these nine articles, which, as a whole, are referred to as the First Amendment. The First Amendment focuses on strengthening the position of the legislative and judicial branches vis-à-vis the executive branch. It also reaffirms the decree passed at the MPR Special Session in November 1998, which limited the President and Vice President to two five-year terms. Nonetheless, the First Amendment merely scratched the surface of the serious problems raised by the application of the 1945 Constitution in a democratic context.

In October 1999, August 2000, November 2001, and August 2002, the People’s Consultative Assembly passed the First, Second, Third, and Fourth Amendments, respectively. The amendments altered the basis of the political game. Among other changes, the amendments established the presidential democratic principles of separation of powers, and checks and balances, and also substantially revised the constitutional framework for executive-legislative relations. These amendments have fundamentally altered the rules under which the state relates to its citizens; the three branches of government deal with one another; civilians and the military interact; and the national, provincial, district, and village authorities relate to each other.

One prominent objective of the first two amendments was to bolster the position of the legislature and weaken the presidency, in order to strengthen the new democracy by instituting greater checks and balances. For instance, the approval of the DPR must be sought for the appointment of ambassadors (Duta Besar), the governor of the central bank (Gubernur Bank Indonesia), the chief of the national police (Kapolri), and the chief of the Indonesian military (Panglima TNI). Moreover, the law shall come into force one month after the parliament has adopted it, regardless of whether the President signs the law or not (Art. 20.5). However, as Blair King points out:

The problem—in the absence of amendments to other articles regarding the presidency—is that the balance of power seesawed to the opposite extreme. In a democratic context of political pluralism and competition, the executive branch became severely crippled by its dependence on legislative support, resulting in political paralysis and instability.

It is worth noting that the Third Amendment reversed this trend and strengthened the presidency, primarily by establishing the principle of direct election of the President and Vice President and by tightening the rules and procedures for presidential impeachment. There were also efforts to include among the amendments the legal basis for the implementation of Shari‘ah (Islamic law). From the perspective of democracy, this process is important, since it accommodated different and conflicting views in a constitutional way. Historically, in 1945, Indonesian Muslims demanded that the constitution should establish an Islamic state in Indonesia. Reference was made to the draft of the preamble of the

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2 See Jimly Asshiddiqie, The Constitutional Law of Indonesia (Sweet & Maxwell Asia, Singapore 2009); and Harun Alrasid, Naskah UUD 1945 Sesudah Tiga Kali Diubah oleh MPR (UI Press, Jakarta 2002).
5 Umar Basalim, Pro-Kontra Piagam Jakarta di Era Reformasi (Pustaka Indonesia Satu, Jakarta 2002).
Indonesian Constitution (known as the Jakarta Charter), which contained the following religious principle: “Belief in one Supreme God with the obligation for adherents of Islam to live according to Shari’ah.” However, the last seven words: *dengan kewajiban menjalankan syariat Islam bagi pemeluknya* (“with the obligation for adherents of Islam to live according to Shari’ah”) were erased on August 18, 1945 after protests were made by Christians. They argued that this sentence amounted to discrimination against other religions. Therefore, the first principle of Indonesian state ideology is: “Believe in one Supreme God,” but without a mention of Islam.

It should be noted that many Muslims expressed disappointment at the dropping of these seven words, and since then the desire to have an Islamic state and to abandon the five principles of the Indonesian state ideology called *Pancasila* continues to resurface from time to time. Owing to the military’s pressure and the issuance of a presidential decree abolishing the Constitutional Assembly by Soekarno, Indonesia’s first post-independence President in 1959, Islamic political parties had to come to grips with the fact that their aspirations to restore the Jakarta Charter could not be realized, at least not in the short term. Again, due to the military’s pressure, the struggle for the Muslim parties in the 1968 MPR session to discuss the legal status of the Jakarta Charter was unsuccessful. In the Soeharto era, no political parties dared to talk about the Jakarta Charter.

In a reform era, when freedom of opinion is guaranteed, the proposal and the discussion on Shari’ah and the state in the parliament is no longer restricted. Proposals to amend the constitution, including inserting the Shari’ah, are no longer considered tantamount to treason. The approval or the rejection of any proposal will be based on, and guaranteed by, the constitutional procedure; not based on mass demonstrations, military force, or presidential decree.

In this context, the years 1999–2002 saw a new polarization within political Muslim groups, dividing them into formal versus substantive Shari’ah groups. Formal Shari’ah believes that sovereignty belongs to Allah, and therefore any ruler should be bound by the Shari’ah, while other governments are based on whimsical despotism. The ruler is the shadow of Allah on earth, meaning that he is Allah’s agent on earth, with Allah as his source. The presence of a head of state is intended to secure the effectiveness of all the commands and laws of Allah. The tradition of the Prophet, works of classical jurists, and the practice of Islamic government in medieval times provide a justification of the system of Islamic government.

By contrast, the substantive Shari’ah movement strongly disagrees with the above views. Since Allah orders Muslims to consult with others before making decisions in their affairs, an Islamic government cannot be a theocratic one. If everything was to be decided by the heavens, there would be no need to consult anyone. What the Prophet left behind him was an extremely basic state-structure based more on local traditions. Therefore, the Shari’ah does not determine any definite form of government, nor does it lay down details of the

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7 In Indonesia, the *Pancasila* (the five pillars that eventually became the state foundation: Belief in one God, Humanitarianism, National Unity, Representative Democracy, and Social Justice) in this regard basically compromises between secularism, where no single religion predominates in the state, and religiosity, where religion (especially Islam) became one of the important pillars of the state.
government structure. It provides only for some foundational principles based on the substance of Islamic values. For this group, the absence of any definite form of government in Islam is considered as a blessing because it makes it possible for Islam to march with the progress of time and adjust itself to social change. It is on this basis that the substantive Shari’ah movement accepts the idea of the rule of law.

While other Islamic parties have used a consistently substantive approach, the Partai Bulan Bintang (Crescent Moon and Star Party, PBB) and Partai Persatuan Pembangunan (United Development Party, PPP) have supported the inclusion of Shari’ah, inserting the seven words from the Jakarta Charter into Art. 29 of the Constitution. In August 2002, the People’s Consultative Assembly (MPR) officially rejected the call for the inclusion of Shari’ah in Art. 29 of the Constitution. PBB and PPP failed to convince other parties to support their proposal—between them they held only 12 percent of the seats in parliament (seventy-one seats). The two most important religious organizations in the country, Muhammadiyah and Nahdlatul Ulama, also rejected the insertion of seven words from the Jakarta Charter during the process amendment. 8

From a Shari’ah viewpoint, a new structure of the Indonesian state could be seen as the product of political ijtihād (independent legal reasoning) by Muslims in Indonesia. It is safe to argue that such ijtihād is performed by considering the substantive Shari’ah approach; not the formal one. 9 It reflects the ability to deal with a modern constitution without abandoning the principles and the objectives of Shari’ah. In the Muslim world, this model is important since the Indonesian experience has demonstrated that the Shari’ah does provide a basis for constitutionalism. This suggests that it is possible to reconcile Islam and democratic constitutionalism.

The Indonesian system is basically presidential. As will be examined below, apart from the issue of Shari’ah, the amendments to the 1945 Constitution have clarified the presidential nature of the system and continued the process of establishing greater separation of powers, and checks and balances, between the three branches of government.

II. THE NEW STRUCTURE OF GOVERNMENT IN INDONESIA

In this section, the focus will be on the form of the Indonesian state, method of election, requirements, accountability, and relationship among the executive, the parliament, and the judiciary.

The great twentieth-century Egyptian master of Islamic law, ‘Abd al-Wahhāb Khallāf (d. 1956), took the view that the Islamic government is a constitutional, as opposed to a tyrannical, government (al-ḥukūmah al-islāmiyyah al-dustūriyyah). 10 In other words, based on his understanding of the Shari’ah, government in Islam is not based on the charisma of the person. He also asserts that Islam guarantees individual rights (ḥuqūq al-afraḍ) and separates power into al-sultān al-tashrī‘iyyah, al-sultān al-qadā‘iyyah, al-sultān al-tanfidḥiyyah—which could easily be classified as the legislative, judiciary, and executive powers, respectively. 11 Khallāf’s views rests on the assumption that the Qur’ān provides the

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8 Arskal Salim, Challenging the Secular State: the Islamization of Law in Modern Indonesia (University of Hawai‘i Press, Honolulu 2008).
9 Nadirsyah Hosen, Shari‘a and Constitutional Reform in Indonesia (ISEAS, Singapore 2007).
11 Id. 57–58.
basic principles for a constitutional democracy without providing the details of a specific system. Muslims are to interpret these basic principles in the light of their customs and the demands of their consciousness.

It is this concept proclaiming the compatibility of Islam and constitutionalism that all Islamic political parties in Indonesia embraced when they discussed the amendments to the 1945 Constitution. Not a single Islamic political party proposed the concept of khilāfah (caliphate) as the form of Indonesian government. They did not even propose that Indonesia become an Islamic state, despite the fact that more than 80 percent of Indonesian populations are Muslim. According to the amendments, Indonesia remains a republic with a presidential system and three branches of government. Art. 1(1) of the 1945 Constitution stipulates that “The State of Indonesia is a Unitary State which has the form of a Republic.” This suggests that Indonesian people accept the idea of the nation-state, which is structurally and fundamentally different from the caliphate system.

A. Executive

There are four conditions for becoming President, according to Art. 6(1) of the amendments to the 1945 Constitution. First, a presidential candidate must have been an Indonesian citizen since birth. Second, he/she also must never have adopted, of his/her own accord, another citizenship. These two interrelated conditions replace the original provision which required that “The President shall be a native Indonesian citizen.” The word “native” was vague and could be interpreted as referring to racial criteria. Therefore, the amendments clarify that the word “native” means: born in Indonesia.

Third, a candidate must never have committed treason. The last condition is that candidates must be spiritually and physically able to carry out the duties and obligations of the President or Vice President. In 2004, the last condition proved to be controversial. Having read the minutes of meetings of the MPR during the constitutional debate, one may assume that the reason for the introduction of this requirement was the disability of President Wahid.12 Two strokes at the beginning of 1998 had left him blind, physically frail, and somewhat emotionally unstable, and several members of the MPR felt that Wahid could not serve the country well, because of his disabilities. The controversy arose when, in 2004 Wahid wanted to run in the presidential election. Wahid asked for a judicial review, on the grounds that he was suffering discrimination. Let the people choose who would become the President, he argued, not the law. Both the constitutional court (Mahkamah Konstitusi) and the Supreme Court (Mahkamah Agung) rejected his application for judicial review through the decisions No: 008/PUU-II/2004 and No: 07/P-HUM/2004, respectively.

The last important point is that, in Indonesia, non-Muslims have the right to become President or Vice President. This view is in opposition to many Muslim scholars’ writing. Abū al-A’lā Mawdūdī, for instance, in his “First Principles of the Islamic State” clearly states that the ruler should be a Muslim.13 Abu Faris shares this view (an yakūna ra’īs al-dawl ah al-islāmiyyah musliman wa lā yajūzu li-l-kāfi r).14 It is opposed by Ibn Ṭaymiyyah (1263–1329), who suggests that a just head of state, even an unbeliever (kāfi r) is better than an

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unjust head of state, even if he is a Muslim. Consequently, according to him, Allah will support a just state although it is an infidel state, and will not support an unjust state even if it is Islamic. The spirit of Islamic government should be justice.

It seems that the latter view is supported by all Islamic political parties in Indonesia. Given the fact that the majority of Indonesians are Muslims (more than 80 percent), it is worth noting that no single word in the amendments provides special rights for Muslims to become President and Vice President. Therefore, constitutionally speaking, it is possible for non-Muslims to be elected to the top position in Indonesia. Politically speaking, according to Abdurrahman Wahid, it is very natural for Muslims to choose a Muslim candidate as the President, but the most important thing is that every citizen (including non-Muslim citizens) has the right to be appointed.

1. Presidential Tenure

The 1945 Constitution provides citizens with the right to change their government peacefully, and citizens exercise this right in practice through periodic, free, and fair elections, held on the basis of universal suffrage. Prior to the amendments, the President of Indonesia served for a five-year term and could be reelected without limitation. Soekarno governed from 1945 to 1966, and his successor Soeharto led the country for an even longer period (thirty-two years, from 1966 to 1998). This was not a genuine democracy; in fact it was not a democracy at all: both leaders were considered to be dictators. Therefore, the priority in enacting the First Amendment was to limit the term of office to two five-year terms for both the President and the Vice President.

This limitation is clearly at variance with the formal Sharī'ah. There is no limitation on the caliph's period in office. As long as he abides by the Sharī'ah, implements its rules, and is able to manage the state's affairs, he continues as a caliph until he passes away. Actually, there is no single statement in the Qur'ān and the hadīth on this issue. The supporters of the formal Sharī'ah refer to Islamic history, particularly the era of the first four “Rightly-Guided Caliphs” (al-khulafā’ al-rāshidūn), when such limitations did not exist. Abu Bakr governed for two years (632–634), ‘Umar ran the country for ten years (634–644), ‘Uthmān held power from 644 to 656, and ‘Alī served the Muslim community from 656 to 661. Their power ended when they passed away. Based on this history, it is understood that the office of the caliphate was for life.

However, since the purported regulation is based on history (not on the obvious teachings of the Qur’ān and the hadīth), the issue is debatable. Ijtihād (independent legal reasoning) can play a role here. One may question whether the historical lessons of the seventh century are still relevant in coping with the challenges and developments of the twenty-first century. The Indonesian political parties are of the view that if the leader stays in power for life or for too long, power will inevitably corrupt him, which could lead to the collapse of the government, as in the case of Soekarno and Soeharto, and people will increasingly demand a share of the power that the leader tries to retain for himself. In this regard, one

16 See Risālah (n 12).
17 Wahid's views on this matter can be read in Masykuri Abdillah, Responses of Indonesian Muslim Intellectuals to the Concept of Democracy (1966–1993) (Abera Verl., Hamburg 1997) 104.
can see that all Islamic political parties did not refer to Islamic history, they referred directly to Indonesian history, particularly during Soeharto’s era.

2. Method of Election
In Arts. 4–5 and 10–15, the 1945 Constitution grants the president the authority to act as both head of state and head of government, as in a U.S.-style presidential system. There is no position akin to that of Prime Minister as in the traditional parliamentary system. The President is not accountable directly to the DPR. The President, however, was not, prior to 2004, elected directly by the citizenry, as is typical of presidential systems, but rather indirectly by the MPR. An indirectly elected President lacks popular legitimacy and is often also easier to remove from office. This made the Indonesian Constitution presidential in character while still containing a strong parliamentary element. The mix of presidential and parliamentary features created an imbalance in executive-legislative relations. The DPR could ask the MPR to remove the President mid-term for political reasons, yet the President could not dissolve the DPR and called for early elections.

The experience of President Abdurrahman Wahid gives weight to this caveat. Based on the accountability and removal procedures associated with indirect election, he was removed by the MPR in July 2001, when he lost the political support of the vast majority of MPR members. This very real threat of removal means that the Indonesian President, after the downfall of Soeharto, was not as free to make use of his or her extensive powers as a directly elected president.

During its 2001 session, the MPR amended the 1945 Constitution to provide for direct presidential and vice-presidential elections. In 2002 the MPR approved the Fourth Amendment, which requires presidential and vice-presidential candidates to run together on a single ticket. It provides for a second round of direct voting if no one candidate gets a clear majority of votes cast, as well as at least 20 percent of the vote in at least half of the provinces.

Direct election strengthens the presidency for two reasons. First, it ensures that the democratic legitimacy of the presidency is on a par with that of the DPR. Second, an amendment for direct election will entail changes in presidential impeachment procedures that make it harder to remove the President in mid-term than under the earlier procedures.

All Islamic political parties were consistent in their support of direct presidential elections. They believed that a directly elected President was more powerful, owing to the democratic legitimacy thereby conferred on the office, and to the fact that directly elected presidents are often protected by more stringent impeachment procedures. Partai Bulan Bintang (Crescent Star Party, PBB) was the smallest parliamentary party numerically but was vocal and important in that it represented conservative modernist Muslims. Partai Keadilan (Justice Party, PK) drew on the same conservative constituency as PBB, but had

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19 Since the majority of the members of the MPR were also members of the DPR, President Wahid alleged that in reality the DPR, not the MPR, deposed the president; and that this was against the constitution. Wahid then issued his Presidential Decree to dismiss the MPR and call new legislative elections. Although consistent with the parliamentary logic under which he was being removed, under the existing rules of the political game in Indonesia these actions were illegal. Unlike Soekarno’s Presidential Decree in 1959, Wahid’s Decree was not supported by the military, leading to his removal from office. Kevin O’Rourke, *Reformasi: the Struggle for Power in Post-Soeharto Indonesia* (Allen & Unwin, Sydney 2002) 402.
formed a legislative alliance with the more moderate modernist Partai Amanat Nasional (National Mandate Party, PAN), somewhat muting its voice. Partai Kebangkitan Bangsa (National Awakening Party, PKB) was the main political vehicle for traditionalist Muslims organization (Nahdatul Ulama) and was a solidly liberal party. Partai Persatuan Pembangunan (United Development Party, PPP) was a conglomeration of modernist and traditionalist Muslim wings.

This does not suggest that there was no controversial debate on this matter. While direct elections by the people were introduced in the Third Amendment, a difference of opinion persisted between Partai Demokrasi Indonesia–Perjuangan (Indonesian Democratic Party–Struggle, PDI-P), which wanted the second vote to take place in the MPR, and the Islamic parties who suggested a second vote by the people in case no candidate obtains an absolute majority in the first round of the election. The opposing opinions reflected the different strategies in the presidential elections, with the PDI-P, which controlled one-fourth of the total seats in the legislature, strongly in favor of a second round of voting in parliament, while the Islamic parties, unable to form a stable coalition at parliamentary level, were sticking to their preference for an exclusively popular election. In the end, the Islamic parties’ proposal was accepted.

3. Accountability

There are at least three issues concerning accountability: to whom the executive shall be responsible, the form of responsibility, and the mechanism of impeaching the President. The most important guarantee of governmental accountability is the right of the citizens to control the direction of governmental policy, and the integrity of those who exercise governmental power, through the electoral process. Indonesia now practices a direct election system. Direct election is seen as more democratic and as fostering greater accountability of the President to the people, as well as reducing the possibility of vote-buying in the presidential election process. The 1999–2002 amendments would make the President and the Vice President directly accountable to constituents.

Democratic governments are given the authority to make decisions through their electoral mandate. In other words, citizens choose government representatives. Regular elections allow opposition parties to compete and present alternative policies to the voting public. Citizens are then able to hold government officials to account by having the right to vote them out of office periodically. In the context of the rule of law, a fair and transparent election is a pre-requisite for having a “checks and balances” mechanism between the people, the parliament and the government.

In addition, elections have domestic purposes. Elections de-legitimize protests, riots, and public violence. They are the obvious and traditional way of ensuring accountability, and providing an institutional framework for the peaceful resolution of conflicts among competing political parties. They also have a moderating influence on opposition groups by

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22 "PDI-P Isyaratkan Tolak Pemilihan Langsung" *Media Indonesia* (Jakarta June 30, 2002).
convincing them that even though they may have lost this time, future elections might turn out differently.

The recent 2009 general elections are illustrative. In one day, the general elections were held to select candidates for four different legislative bodies: 560 legislators for the DPR (House of Representatives), 132 legislators for the DPD (House of Regional Representatives), and 16,253 legislators for the parliament at provincial and district/municipality levels. There were 171,265,442 eligible voters, 519,920 polling stations, 76,711 village election committees, and 6,471 subdistrict election committees with 471 General Election Commissions (KPU) on the districts or municipality level and 33 on the provincial level. Voters’ turnout was 70.99 percent for legislative election, and 72.56 percent for the presidential election. The April 2009 general elections indicate an ability to organize complex, multiple, elections without violence.24 There was an overall feeling that people had been given the opportunity to have their say. This assumes enormous significance as anything less could threaten the process of democratic consolidation in Indonesia.

The constitutional changes also restrict the authority of the MPR to impeach the President. The procedure for impeaching the President is clearly stated in Art. 7B of the amendments to the 1945 Constitution. When the DPR proposes the impeachment of the President to the MPR, the constitutional court, a newly established institution under the amendments, evaluates its legal basis before the MPR begins to deliberate its proposal. The MPR can pass the impeachment proposal with a two-thirds majority of votes at the plenary session in which over three-quarters of the total number of MPR members participate. This revision restores the balance of power in the relationship between the legislature and the executive, making it difficult for the former to dismiss the latter. On the other hand, in order to maintain legislative authority, Art. 7C determines that the President cannot suspend and/or dissolve the DPR.

B. Parliament

The legislature, or parliament, is a fundamental component of democratic government. The need for strong legislatures is reflected in the very meaning of democracy: “rule by the people.” In order for the people to rule, they require a mechanism to represent their wishes—to make (or influence) policies in their name and oversee the implementation of those policies. Legislatures serve these critical functions. A legislature reflects within its ranks a broad spectrum of the political views existing in the country, and as such is the principal forum for debate on vital issues. A legislature, or parliament, can serve as a symbol of pluralism, tolerance of diversity and dissent, as well as a place for compromise and consensus-building.

One of the most significant amendments is the revised Art. 2 (1), which stipulates that the MPR is composed of DPR members and DPD members, who are all elected in the general elections. This means that unlike under the Soeharto era (1966–1998), the MPR has no appointed members who act as regional representatives, organizational representatives, and military representatives. All the members in the MPR are elected directly by the people. Institutionally, the MPR is not the highest state organ anymore, but one of the high state organs, along with other state organs.

Art. 20A, a new provision of the 1945 Constitution states that the DPR has the following functions and powers: making laws, examining the state budget, and checking the activities of the administration; and, furthermore, the power to interpellate members of the government (hak interpelasi), and investigate government affairs (hak angket). In addition, DPR members have the right to submit questions, deliver proposals, express opinions, and present views, and in doing so enjoy immunity from criminal and civil liability (hak imunitas). These amendments are intended to strengthen the powers of the legislature and rectify the power bias of the Soeharto period in favor of the executive branch.

The establishment of the House of Regional Representatives (DPD) is regulated in Art. 22C and Art. 22D. According to this provision, members of regional representatives are directly elected in each province, forming an independent legislative assembly. The DPD has the authority to discuss, supervise, and submit laws on regional autonomy or central-local relations. In addition, it possesses the right to submit considerations to the DPR on the state budget and draft laws relating to tax, education, and religion. The members of the DPD may not exceed one-third of the numbers of the DPR.

The DPD was created with two main expectations. First, it was seen as a forum that would allow a new type of representatives from the regions to take part in the national decision-making process; second, it would make sure that the voice of the regions was heard in the making of laws and the oversight of the central government.

However, the structural features built into the DPD make it very difficult for the assembly to fulfill these functions effectively. The major criticism is that the DPD does not have a formal role in enacting legislation. Despite the fact that it has a strong legitimacy that comes from being a fully elected chamber, it can only introduce or give advice on a certain range of bills in the DPR. Stephen Sherlock correctly points out that the DPD may be seen as a purely advisory body since the DPR is under no obligation to pass or even to consider seriously laws drafted by the DPD or to accept its advice.\(^\text{25}\)

The DPD is not a true “upper house” because its limited powers mean that it merely complements, rather than supplements, the DPR. As a matter of fact, it is in no way comparable to the U.S. Senate or to upper houses in the bicameral parliaments that exist in both the Westminster tradition and in many presidential systems of government.\(^\text{26}\)

A further potential problem regarding the DPD may be found in the absence of any detailed stipulation of the DPD’s powers and, in particular, the rights of its members in the amended constitution. This is seen, for example, in the absence of any provisions granting immunity for DPD members matching that granted to members of the DPR.

C. Judiciary

In this section, special focus will be given to the issue of judicial independence. Judicial independence is critical on at least two grounds. First, protection of human rights depends partly on a robust, fair, and independent judiciary, willing to hold all political and social


actors to account on the basis of the constitution and the laws. Second, judicial independ-ence facilitates political stability and fairness.

In Indonesia, the constitutional provisions on the judiciary have been significantly extended by the amendments. Art. 1, Clause 3 defines that Indonesia is “a State of Law” (Negara Hukum). The provisions on the independence of the courts and judicial bodies have been amended in order to safeguard their powers and protect their independent role (Art. 24). A new clause defines the qualification of Supreme Court judges as well (Art. 24A, Clause 2). Art. 24A, Clause 3 and Art. 24B regulate the newly established Independent Judicial Commission (Komisi Yudisial). It has the role of proposing candidates to the DPR; the DPR selects its preferred candidates from the Commission’s list, who must then be confirmed by the President. The Judicial Commission is also empowered to guard and enforce judicial ethics (Art. 24B(1)).

More importantly, Art. 24C provides for the new constitutional court (Mahkamah Konsitusi). The constitutional court has the authority to conduct judicial review of legislation, to determine jurisdictional disputes between state organs, to decide on the dissolution of political parties, and to review the results of the general elections. The court has some potential to significantly renovate the relationship between the judiciary and the legislative branch, by creating a new check on the practices of lawmakers and the presidency.

Since the constitutional court was established, legislative institutions are no longer able to formulate laws based on political considerations alone, because despite its adoption in a democratic procedure, the entire law or part of its substance may be annulled by the court for non-compliance with certain formal or substantial requirements of the constitution. The constitutional court has reviewed seventy-four laws so far, of which four laws have been nullified in their entirety and twenty-three laws have been nullified in part.

One of the main reasons why the 2009 general elections were by and large peaceful is the role of the constitutional court in dealing with the election disputes. Conflicting interpretations of the election law by the KPU and the Supreme Court led to several delays in the release of the official results from the legislative elections, but the credibility of the constitutional court as the final interpreter of the constitution and the quality of its decisions ensured that all interested parties accepted the court’s verdict. Even the foreign observers of the elections such as the Carter Center, in its press release, commended Indonesia’s constitutional court for the timely handling of disputes relating to the results of the April 9, 2009, legislative elections. Five hundred ninety-five cases related to disputed election results were filed during a seventy-two-hour filing period after the announcement of results on May 9, 2009. It can thus be said with some justification that the constitutional court has contributed greatly to the development of democracy and enforcement of law in Indonesia.


III. CONCLUSION

The thirty-two years of the Soeharto government proved that, without the rule of law, constitutional government will remain merely wishful thinking. The amendments to the 1945 Constitution have transformed the constitution from a vague and incomplete document rooted in the antidemocratic political philosophy of organic statism into a more coherent, complete, democratic framework for a presidential system with significant separation of powers and checks and balances. The very fact that Indonesia is the largest Muslim country in the world did not lead Islamic political parties to propose that Indonesia should become an Islamic state. According to the amendments, Indonesia remains a republic, with a presidential system and three branches of government.

However, it would be misleading to assume that the amendments to the 1945 Constitution will automatically bring the Indonesian people out of their economic, political, and legal crisis, especially as long as corruption remains endemic. In other words, the most important challenge faced by Indonesian people is to ensure that the amendments will not turn out to have little more value than the wallpaper on the houses of the politicians and, more importantly, the military leaders who have ignored them in the past.

The second challenge is to extend the benefits of constitutional reform to Indonesian society at all levels. This is important since, during the debate on the constitutional amendments, the MPR solicited citizen input on only a limited basis, preferring to reserve to itself the final decision on the amendments. The MPR rejected all calls for a popular referendum on the amendments. More public involvement in constitutional reform processes would contribute to building national solidarity and to constructing or solidifying national identity, themselves worthy goals. More importantly, public involvement could intensify the development of constitutionalism, and public acceptance and respect for the constitution through a process that is as transparent and as public as possible. In this sense, since the public participation in the process of Indonesian constitutional reform has been limited, it is now necessary to fill that gap by educating the public about the meaning and principles of constitutionalism, the rule of law, human rights protection, and religious liberty as enshrined in the amendments to the 1945 Constitution.

The recent 2009 elections in Indonesia demonstrate how the Indonesian people have exercised their constitutional right to rotate elites, to select leaders, and to express grievances and desires in free and fair elections. In the wider context of the Muslim world, certainly, this rare experience is a significant way to show that the compatibility of Shari’ah and constitutionalism leads to “checks and balances” mechanisms that are vital to democracy. This confirms the statement of U.S. Secretary of State Hillary Clinton that “As I travel around the world over the next years, I will be saying to people: if you want to know whether Islam, democracy, modernity and women’s rights can co-exist, go to Indonesia.”

31 More information on the role of Indonesian military can be read in Marcus Mietzner, Military Politics, Islam, and the State in Indonesia (ISEAS, Singapore 2009).
PART 5

EMERGING CONSTITUTIONS IN ISLAMIC COUNTRIES
I. INTRODUCTION

How to stabilize ailing, failing, or disintegrating states is an inherently difficult question. It is also one which is increasingly dominating international agendas. As both the number and intensity of internal conflicts has dramatically risen in the last decades, growing interconnectedness has made it ever more difficult to cordon off instability and lawlessness seeping from failing states. Consequently, the international community has increasingly become engaged in the post-conflict reconstruction of states. Given the global normative consensus around the democratic principle, virtually all international efforts have stressed the importance of elections as a means of establishing legitimate governance. But elections rarely ensure the necessary stabilization of a fractioned society. In fact, elections can easily contribute to further polarization if they are held in an environment of intense competition over power and resources, and amidst an immature institutional framework. The reason elections have become the instrument of choice of many international efforts is the relative ease with which they can be implemented, as well as the high normative premium attached to the idea of popular sovereignty. This sentiment has somewhat flippantly if accurately been summed up by an American academic:

... you must hold elections. It does not matter a great deal who wins. Hold elections and proclaim it a democracy, even if it is flawed. We must call it a democracy because that is what we stand for and that is what will enable the administration in power to claim success. It may be only an electoral or limited democracy, not liberal or pluralist democracy, but some democracy is better than none. Then what you do is you hope.¹

This approach largely sums up the American approach in Iraq, but also other, multilateral efforts elsewhere, for instance in Afghanistan. In places such as Sudan or Libya, where governments of limited democratic legitimacy are firmly entrenched, the electoral principle is at least partially imposed, for instance in the formation of an autonomous government for Southern Sudan. When delivering material and institutional support to a country emerging from violent conflict, the international community today generally offers help in the drafting of a constitutional pact to cement the fundamental bargain underlying the negotiated peace. The inherent tension between the twin objectives of democracy and constitutionalism, however, has often been insufficiently addressed by those aiming at external stabilization. Furthermore, a constitution can embody an inter-factional compromise over the distribution of power and the commitment by these factions to certain agreed normative principles. But it cannot substitute written declarations for the absence of such a communal compact.

In Iraq, the occupation powers attempted to forge a national and political reconstruction through the medium of constitutional drafting. Through an inordinate amount of cajoling, a document was indeed finalized and ratified, but the process of arriving there severely exacerbated existing divisions and yielded a document feared to ultimately lead to the disintegration of the state. In Afghanistan, a much more forgiving, less antagonistic two-step process was used. In the first step, representatives of four major political and military groups gathered under UN auspices abroad and agreed on the time plan for the achievement in a series of second steps of important institutional benchmarks including elections and the drafting of a proper constitutional contract. Thus, the lack of broad popular representation in the first step was made more palpable by a commonly agreed and internationally supervised framework for ensuring that the second step of a popular vetted constitution enjoyed sufficient popular legitimacy. This process was inspired by, albeit substantially less sophisticated than, the equally successful South African constitutional process. The international response to the conflict in Southern Sudan likewise followed a two-step logic, equally inspired by the logic of Kosovo and of South Africa. To be sure, the Comprehensive Peace Agreement took constitutional form and clarified the outcome of many normative and material debates, not least with respect to revenue sharing and the application of religious law in the South. But perhaps the most outstanding feature of the Agreement was not its ability to resolve or channel the political struggles that had led to decades of civil war. Instead, rather akin to the Kosovo model, this internationally mediated constitutional bargain is primarily characterized by its imposition of a rather
lengthy “cooling off period” with regard to the fundamental and in the current climate irresolvable question of secession. As both conflicting sides are too weak to enforce a resolution by force of arms yet remain fiercely committed to their respective position, the best international mediation can achieve, is to postpone the decision until a more auspicious time and, in the meantime, establish firm institutional and procedural channels permitting a reasonable, if not exceedingly friendly, coexistence. The end of the period can lead to outright secession as, in the case of Kosovo, or to the renegotiation of important territorial, political, and financial arrangements of the constitutional pact, as in the ongoing case of Iraqi Kurdistan. But in any event, the period of tranquility will have ensured that the resumption of open violence will be substantially more less likely than in the immediate aftermath of conflict.

Constitutions are drafted (or renegotiated) either at the end of a conflict to seal its outcome or prior to the eruption of conflict in an attempt to stave off violence. In the midst of an ongoing conflict, however, particularly against the background of an illegitimate and humiliating foreign occupation, it is questionable whether the process could live up to the hopes placed in it. The same holds true for external attempts at mediation that sometimes preempt the emergence of a stable social consensus. This seems to be the case with external constitutional support given to the political and military actors in the Sudanese and Somalia civil wars.

The enormous pressure of time oft en imposed by external actors further undermines the ability of local participants to arrive at political compromises which could subsequently find legal expression in constitutional stipulations. Unfortunately, in Iraq the prescient prediction by an astute observer has been largely borne out by the facts:

the rushed process places hopes on the constitution that it will be unlikely to be able to bear. . . . By using a technique of post-conflict institution building in the midst of a very active conflict, the process of drafting a constitution in Iraq is likely to disappoint many of its participants.

**II. CENTRIFUGAL FORCES**

In the run-up to the American-led attack on Iraq, many different post-war scenarios were discussed. One, if not the key problem, concerned the strong centrifugal forces likely to be unleashed once the strong central government had been displaced by a foreign intervention. Created by colonial fiat out of the remnants of the Ottoman Empire, Iraq, like so many other post-colonial states, is no nation state but an artificial creation carved out by the
Treaties of Sèvres and Lausanne after World War I. Peter Galbraith, for instance, is among the most vocal critics of the aim of keeping Iraq a unitary state because he argues that it is “based on an idea of Iraq that does not exist. The fundamental problem of Iraq is an absence of Iraqis.”

Afghanistan is likewise no nation state, but a heavily fractured agglomeration of different linguistic and tribal communities. Ironically, it was the experience of common exile and resistance during more than two decades of civil war that for the first time in its history forged a semblance of national identity. Here, the creation of stable governance is not merely a question of negotiating between conflicting parties the terms of an acceptable bargain, but the much more arduous task of actually creating the physical and institutional infrastructure and mindset of statehood for the first time in its history. The Sudan and Libya have been much better in creating relatively effective central governments, but their legitimacy has likewise suffered considerably from the arbitrary nature of their colonial borders and the resulting inclusion of marginalized minorities.

Political institutions in most post-colonial creations remained weak and unable to create alternative loci of identification. Existing ethnic, linguistic, and religious subnational identities could therefore only be held in check by a strong, oppressive machinery maintaining the cohesion of the state. The artificial nature of many colonial constructs and the attendant lack of allegiance to the state are often compounded by the rentier nature of their political economies. These insulate rulers from their populations and dispense with the

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need to construct viable institutions\textsuperscript{23} and foster broad domestic constituencies. More importantly, oil and other mineral rent provided not only the wherewithal to create strong oppressive mechanisms, but made the state a highly attractive “prize” likely to be captured by narrow interests.\textsuperscript{24} The result has been a persistent tendency among rentier states, particularly in Arab and African states, toward authoritarian regimes,\textsuperscript{25} a phenomenon some have described as a “resource curse.”\textsuperscript{26} It is a well-known paradox among economists that significant mineral wealth almost invariably coincides with domestic poverty, something that holds true even for the richest of oil states:

As the princes have grown richer, the people of Saudi Arabia have grown poorer. . . . [The] protection of the rich and the powerful deprives the government of vital sources of income to address the social and economic needs of the majority of the people. The result is a skewed income distribution and the growth of extensive poverty and deprivation.\textsuperscript{27}

Such domestic poverty and inequality is compounded by weak, sometimes non-existent political and economic institutions.\textsuperscript{28} Here, it is important to bear in mind that the


\textsuperscript{28} See, for instance, Nancy Birdsall and Arvind Subramanian, “Saving Iraq from its Oil” (2004) Foreign Aff (no pagination), which compares the performance of the thirty-four less-developed countries that boast significant oil and natural gas resources (at least 30 percent of total export revenue).
concept of “rent” can also refer to foreign aid, something particularly relevant for the discussion of Afghanistan and Sudan.  

Many commentators infer from these structural factors an inherent need for a strong, oppressive central government to prevent the negative outcomes of state disintegration and societal fragmentation for the regional balance of power, particularly in the face of strong irredentist ethnic claims. Removing a given dictator would, and perhaps should, lead simply to its replacement by another strongman who is more amenable to Western interests. Current dissatisfaction with the Karzai regime in Afghanistan has led to the strategic re-evaluation of Western policy very much along these lines. 

For a variety of reasons, however, the United States has until recently asserted that its strategy for regime change went beyond replacing individuals, striving at the eventual wholesale transformation of the entire Middle East and North Africa into pro-Western, free-market democracies. Partly, this emphasis reflects the weakness of the original justifications given for the war: “The main threats Iraq was thought to present to the United States when troops went in—weapons of mass destruction and support for international terrorism—have been, to say the least, discounted. With those justifications gone, the Iraq war is left as something of a humanitarian venture.” Pointing to the lack of evidence to support earlier claims, some commentators have cynically, if accurately, concluded that “the promise of democratization remains the only justification for the war.” It is only very cautiously that the Obama administration shifted its strategy away from this presumed justification toward a traditional strongman policy advocated, for instance, by Ashdown and the British military.


III. JUSTIFICATIONS FOR INTERVENTION

Democracy is widely believed to entail significant domestic benefits in terms of individual freedoms, governmental accountability, economic performance, etc. Starting from the assessment that democracy is the “best form of government,” some scholars have argued that a right to democratic governance exists or at the very least is in the process of emerging. The implications of this development for international law, in particular the concept of sovereign equality are manifold. Kokott considers the concept outdated and “skewed” as it postulates the equality of all political communities from the equality of their constituent human beings:

This is based on a problematic idea of justice according to which all political communities are supposed to be co-equal because the human beings making up these polities all share a common dignity. . . . But the inference from the equality of man to the sovereign equality of states is flawed. For if one, correctly, values the human beings standing behind states, it cannot be inconsequential how many human beings stand behind the particular states, and likewise how their needs and desires are integrated into state policy.

She detects a gradual shift from state sovereignty to popular sovereignty to conclude that the protection of human rights and the right to political participation do not fall within the protected sphere of a state’s internal affairs. The violation of state sovereignty through an external military intervention might, it is argued, in the final analysis actually mean the “re-establishment of popular sovereignty.” Needless to say, that such expansionist interpretations of international law have found strong objections by those at the receiving end, a phenomenon especially pronounced in the Islamic nations.

40 The most influential article in this respect has been Thomas M. Franck, “The Emerging Right to Democratic Governance” (1992) 86 American Journal of International Law 46; see also the excellent collection of essays in Gregory H. Fox and Brad R. Roth (eds), Democratic Governance and International Law (Cambridge University Press, Cambridge 2000).
42 Kokott (n 41) 520–1, 533, footnotes omitted: Dahinter mögen schiefe Gerechtigkeitsvorstellungen stehen, wonach alle politischen Gemeinschaften gleichwertig seien, da die sie konstituierenden Menschen in ihrer Würde gleich sind. . . . Der Schluss von der Gleichheit der Menschen auf die Staatsengleichheit trägt nicht. Stellt man nämlich richtig auf die hinter den Staaten stehenden Menschen ab, kann es nicht gleichgültig sein, wie viele Menschen hinter den jeweiligen Staaten stehen und auch nicht, auf welche Weise deren Willen und Bedürfnisse im Staatswillen integriert werden.
43 Id., S30–32; in the same vein, see Michael W. Reisman, “ Sovereignty and Human Rights in Contemporary International Law” (1990) 84 American Journal of International Law 866 et seq.
A. The Pedigree of Interventionist Logic

There is an obvious tension between the prohibition of the use of force and the pursuit of such progressive values. It is probably no coincidence that many of the writers who have been most vocal about the need to develop international law beyond the strictures of a purely state-centric system have also shown an intense interest in theories of international relations, stressing the particular relevance of liberal theory for the study and development of international law. The case for liberalism rests on the perceived inadequacy of realism as an analytical model. Furthermore, realism deliberately minimizes the effect normative systems can have on state behavior, thereby making it not very attractive to international lawyers: “International law faced the ‘Realist challenge’: the claim that law was simply irrelevant to international politics.”

Denouncing the association of classical liberalism with altruism and utopianism, in opposition to which realism was developed, modern writers do not question that interests are important but argue that “much of international politics is about defining rather than defending national interests . . . the problem of how states pursue their interests . . . , however, is only a part of what international politics is about. Before states can pursue their interests, they have to figure out what those interests are.”

Contrast this approach with the realist position which maintains that “[t]o say that a country acts according to its national interest means that, having examined its security requirements, it tries to meet them.”

Where realism thus simply postulates “interests defined in terms of power,” alternative theoretical models reject the fixity of the national interest by emphasizing choice because “human beings and their organizations are purposeful actors whose actions help reproduce

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47 Indeed many key realists, such as Hans Morgenthau, have been disillusioned international law scholars with a particularly bleak view of the relevance of their old discipline.
50 Slaughter (n 45) 1–2.
55 Morgenthau (n 52) 5.
or transform the society in which they live.” Thus, national interests are subject to normative choice and can be affected by societal actors:

States do not have interests, in the way that they have territorial boundaries. Interests are chosen—within the constraints of structures—not bestowed. Contrary to Palmerston's famous quip, states have interests in exactly the way they have friends—as a consequence of choice within a structure of constraint.

Realism assumes that the logic of anarchy forces states as self-help units to all act essentially similar, irrespective of their internal composition. This position is further developed by neo-realism, which stresses the particular constraining and homogenizing effects of the international structure on the behavior of states. By stressing the malleability of national interests and individual agency, liberal and constructivist critiques of realism, however, reject its status quo bias and emphasize the scope for effecting value-based progressive change.

The respectability of realism after 1945 was based on its capacity of “proffering a hard-boiled code of conduct for the Cold War and disdain[ing] the dangerous moralism of international law” that had dominated the inter-war years with such disastrous results. Realism's strong emphasis on caution and the balance of power, together with its strong pessimism about human nature, seemed particularly well-suited for the requirements of a bipolar world marked by nuclear stalemate, making stability by far the overriding concern.

Toward the end of the Cold War, however, the increasing rigidity of the theoretical framework, coupled with an ever-sharpening bipolar arms race and international tension, led

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56 Wendt (n 48) 338.
58 Moravcsik (n 47) 516–19.
63 Slaughter (n 45) 1.
64 Carr (n 52).
many to search for theoretical alternatives that allowed for peaceful transformation by de-emphasizing the competition over power in favor of interdependence.\textsuperscript{67}

**B. Structural and Paradigmatic Change**

The unexpected end of the Cold War gave a strong boost to alternative theoretical approaches, due to realism’s inability to explain, let alone predict, change in the international system.\textsuperscript{68} The end of bipolar competition resulted in two contradictory but related theoretical developments with important policy repercussions: the demise of realism\textsuperscript{69} and the rise of proponents of an activist foreign policy.\textsuperscript{70} Theoretical schools interested in interdependence and institutionalism saw an unprecedented window of opportunity, now that the bipolar stalemate had been overcome. Institutions such as the United Nations were believed to be finally able to function as originally intended, as the trustees of the collective interest and enforcers of collective security. The 1991 war against Iraq was widely believed to have ushered in a new age of truly global cooperation. As the fear of nuclear annihilation was receding, stability as the overriding end in itself became less important and attention shifted to the perceived opportunities for transforming local conflicts. It was now felt possible, if not imperative, to use the available preponderance of power to spread progressive values in the collective interest, if necessary, against the will of local despots.\textsuperscript{71}

It is in this climate that the above-mentioned calls for the progressive transformation of international law were made. The sacrosanct nature of state sovereignty lost credence in line with the reduction of the systemic need for stability and the perceived analytical and normative shortcomings of the concept.\textsuperscript{72} This essentially liberal intellectual movement, however, was made possible by the relative demise of realism as the voice of conservative caution and moderation in foreign policy. With the end of the strictures of the Cold War, neoclassical conservatism\textsuperscript{73} was mirrored by calls for a more activist foreign policy essentially

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in the pursuit of values. The ideological transformation of neoconservative thinking is itself a direct result of the way the Cold War ended, which the neoconservatives interpreted as vindication of the ideologically motivated foreign policy under Reagan:

How, then, did a group with such a pedigree [of marked distrust of social engineering] come to decide that the “root cause” of terrorism lay in the Middle East’s lack of democracy, that the United States had both the wisdom and the ability to fix this problem and that democracy would come quickly and painlessly to Iraq? Neoconservatives would not have taken this turn but for the peculiar way that the cold war ended. . . . [The foreign policy establishment] felt that the Reaganites were dangerously utopian in their hopes for actually winning, as opposed to managing, the cold war. And yet total victory in the cold war is exactly what happened in 1989-91.

There is thus a convergence of liberal and neoconservative thinking about the inadequacy of the traditional concept of sovereignty. Unlike realism, both of these schools of thought consider the internal composition of states to be important determinants of foreign policy, and thus having immediate security implications:

. . . we’ll wage a comprehensive strategy to defend our country, and we will use every asset at our disposal. And one of the most powerful assets we have is freedom. Free nations do not breed resentment. Free nations do not export terror. Free nations become allies in the war against terror. By spreading freedom, we help [to] keep the peace.

Under the constraints of bipolar competition, the sovereign equality of states became the key principle to avoid ideologically motivated intervention which could have easily derailed the fragile nuclear balance. But once the constraining element of bipolar stalemate was lifted, value-based intervention becomes not only possible or desirable, but deemed to be an outright imperative of responsible foreign policy, due to the alleged security benefits liberal democracy is believed to entail. Although the aggressive use of the rhetoric of “freedom” became a staple of U.S. policy in the early 1980s, it was used opportunistically and remained subservient to the overarching goal of strategic victory: “Reagan subordinated all other foreign policy issues to the imperative of winning the Cold War. The spread of freedom in and of itself was never an animating impulse.”

After its end, however, the U.S. rhetorical stance became more explicit. Kristol and Kagan have for instance openly demanded an American “benevolent hegemony” because “[i]t is precisely because American foreign policy is infused with an unusually high degree

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76 Kurth (n 35) 310–11.
of morality that other nations find they have less to fear from its otherwise daunting power.”

This is a marked departure from realism, which predicts balancing against a predominant power and minimizes the role of motives because in a situation of anarchy and uncertainty motivations of the adversary matter less than its capabilities.

With the benefit of eight years experience in Iraq and ten years in Afghanistan, most of these ideas have by now been thoroughly refuted. As even early supporters such as Francis Fukuyama eventually conceded, the policy achieved neither democratization nor enhanced security:

As we approach the third anniversary of the onset of the Iraq war, it seems very unlikely that history will judge either the intervention itself or the ideas animating it kindly. By invading Iraq, the Bush administration created a self-fulfilling prophecy: Iraq has now replaced Afghanistan as a magnet, a training ground and an operational base for jihadist terrorists, with plenty of American targets to shoot at.\textsuperscript{80}

IV. THE DEMOCRATIC PEACE

There is a persistent academic and popular belief that, irrespective of normative preferences for democratic governance, there are important internal and external security benefits associated with it. Democracies are believed to foster an internal culture of dialogue and compromise that effectively limits the effects of sectarian strife by channeling potentially violent disputes over divergent interests into peaceful political competition.\textsuperscript{81} More importantly, democracies are widely believed to pursue more peaceful foreign policies.\textsuperscript{82} Taken together, these two hypotheses argue strongly for the global promotion of democracy, not out of an altruistic normative preference but for reasons of self-interest. Democracy equals peace, as the theory holds.

Furthermore, there is good empirical and theoretical evidence toward the proposition that democracy spreads in “waves,” i.e., that regional and international demonstration effects are crucial.\textsuperscript{83} The success of post-communist democratization in Central and Eastern


\textsuperscript{80} Fukuyama (n 75).

\textsuperscript{81} Rudolph J. Rummel, Power Kills: Democracy as a Method of Nonviolence (Transaction, Brunswick, NJ 1997).


Europe powerfully underscored the importance of regional dynamics in the socialization of states and their redefinition of national interests and identity. Despite the overall rise in the number of, at least nominally, democratic states, large parts of the world seemed resistant to the allegedly inexorable spread of democracy, leading some experts to ask whether “the third wave of democratization [was] over?” Interestingly, demonstration effects again played an important role, as both undemocratic regimes and illiberal democracies were regionally clustered.

If, therefore, democracy is not only normatively desirable but carries important security benefits, and if the existence of a democracy is likely to lead to the further democratization of an entire region, a good analytical case can be made that the risks associated with external intervention would be outweighed by the eventual benefits. There is an obvious scope for the disingenuous use of political and humanitarian arguments to cover a hidden agenda based on national or narrow group interests. But beyond such cynical readings there is an important current of academic and official thought that believes, rather sincerely, that after the successful end of the “third wave” of democratization in Eastern Europe, the time has come to use the unique position of dominance to export democracy and reap its expected local and global benefits. Stressing the “the uniqueness of our power, unrivalled, not just today but ever,” Krauthammer for instance argues that: “The rationality of the enemy is something beyond our control. But the use of our power is within our control. If that power is used wisely, constrained not by illusions and fictions but only by the limits of our mission.”

Many have denounced the ideological and intellectual rigidity of such “democratic Trotskyism” that disregards the inherent difficulties of transplanting political institutions.

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84 Finnemore (n 53) chapter 1.
86 Diamond (n 39) 24.
87 Id. chapter 2.
88 Davis (n 33).
94 Michael W. Reisman, “Why Regime Change is (almost always) a Bad Idea” (2004) 98 American Journal of International Law 516, 523. Fukuyama likewise makes the interesting point that “[i]t is not an accident that many in the [core neoconservative] group started out as Trotskyites.” Fukuyama (n 75).
by narrowly emphasizing the malleability of political culture and institutional design, especially in the Middle East. \(^{95}\) Nevertheless, official American doctrine\(^{96}\) has largely accepted the logic of the democratic peace “betting the farm that the theory holds and will help Washington achieve a peaceful, stable, and prosperous Muslim world”\(^{97}\) once a precedent has been set.\(^{98}\) There are, however, significant doubts as to whether the alleged security benefits associated with democracy can withstand empirical scrutiny.\(^{99}\)

Internally, the transition to democracy is often accompanied by high degrees of violence following the breakdown of the old order.\(^{100}\) Thus even if, as UN Secretary General Boutros-Ghali asserts, “a culture of democracy is fundamentally a culture of peace,”\(^{101}\) the process of democratization during which such a culture of peace could evolve may stimulate ethnic and sectarian conflict and “induce weak states to meet communal rebellion with repression rather than accommodation.”\(^{102}\) Furthermore, the electoral process is likely to exacerbate existing tensions when in the absence of overarching political interests primordial allegiances become key mobilizing forces:

Elections in many newly democratizing states have been an ethnic census, not a deliberation about public issues. Ethnic leaders can quickly mobilize nationalist mass movements based on crony and clan ties, common language and cultural practices. It is harder for secular or “catch-all” leaders to forge new ties across groups.\(^{103}\)

V. ILLIBERAL DEMOCRACIES

The promise of the democratic peace, therefore, carries an important caveat: while liberal democracies are in fact more peaceful, both internally and externally, illiberal democracies might actually be worse than the autocratic, albeit stable, regimes they replace.\(^{104}\) It is in this vein that the influential democracy theorist Larry Diamond stresses the need for “consolidation,” i.e., the deepening of democratic practices beyond the mere emphasis


\(^{101}\) Diamond (n 39) 5.


\(^{103}\) Mansfield and Snyder, *E lecting to Fight: Why Emerging Democracies Go to War* (n 99).
on elections.\textsuperscript{105} As Huntington aptly points out: “Democracy is one public virtue, but not
the only one, and the relation of democracy to other public virtues and vices can only be
understood if democracy is clearly distinguished from the other characteristics of political
systems.”\textsuperscript{106} Zakaria concludes in the same vein that “[i]f a democracy does not preserve
liberty and law, that it is a democracy is a small consolation.”\textsuperscript{107}

\subsection*{A. Defining Democracy}

For analytical clarity it is thus advisable to deploy a minimalist definition of democracy as
simply a process of selecting governments,\textsuperscript{108} in line with Joseph Schumpeter’s classic defi-
nition as (merely) a system “for arriving at political decisions in which individuals acquire
the power to decide by means of a competitive struggle for the people’s vote.”\textsuperscript{109} Clearly,
such a limited understanding poses problems, if taken as a description of a desirable polity,
but \textit{analytically} it is important to distinguish between the distinct, and sometimes compet-
ing, values to be incorporated into a political community.

Schumpeter’s understanding of democracy consists essentially of the right to periodi-
cally choose, among competing elites, those to act on behalf of the citizenry. He was, per-
haps influenced by his experience of the descent of Austrian democracy into fascism after
1934, deeply suspicious of more direct political involvement of “the electoral mass [that] is
incapable of action other than a stampede.”\textsuperscript{110} This has been criticized as “indeed, as spare a
notion of democracy as one could posit without draining the term of meaning.”\textsuperscript{111} Zakaria
stresses the need for analytical rigor in order to arrive at proper policy prescription:

But to go beyond this minimalist definition and label a country democratic only if it
guarantees a comprehensive catalogue of social, political, economic, and religious rights
turns the word democracy into a badge of honor rather than a descriptive category. . . .
To have democracy mean, subjectively, “a good government”\textsuperscript{112} renders it analytically
useless.\textsuperscript{113}

While it might be true that there is a powerful association between democracy and
liberty, namely that “countries that hold free elections are overwhelmingly more liberal

\textsuperscript{105} Diamond (n 39) 8–10, he continues to define the distinct elements of liberal democracy in the following
pages.

\textsuperscript{106} Huntington (n 83) 5–13, esp. 6.

\textsuperscript{107} Zakaria (n 103) 40.

\textsuperscript{108} Samuel P. Huntington, “The Modest Meaning of Democracy” in Robert A. Pastor (ed), \textit{Democracy in the
Americas: Stopping the Pendulum} (Holmes and Meier, New York 1989) 15.

\textsuperscript{109} Joseph Schumpeter, \textit{Capitalism, Socialism, and Democracy} (2nd ed. Harper & Brothers, New York
1947) 269.

\textsuperscript{110} Schumpeter (n 109) 283.

\textsuperscript{111} Diamond (n 39) 284, fn. 32. See also David Held, \textit{Models of Democracy} (Stanford University Press, Stanford,
CA 1996) 196–98.

\textsuperscript{112} On the complexities of the concept of “good governance,” especially its definition and meaningful
measurement, see also Dolzer (n 37); Georg Philip, “The Dilemmas of Good Governance” (1999) 34
\textit{Government and Opposition} 226.

\textsuperscript{113} Zakaria (n 103) 25.
than those that do not, it is important to distinguish analytically between free elections that are constitutive of democracy in its strict meaning, and the protection of individual and group autonomy through the meaningful protection of rights and the imposition of limits on the exercise of power. The peace-inducing effects, as well as the “endurance” of the democratic character of a polity, cannot convincingly be attributed to the mere existence of competitive elections. Here again, a democracy’s ability to withstand pressures to revert to authoritarian forms of government is strongly affected by demonstration effects:

Reverse waves threaten not only political freedoms and human rights but also world peace. The first reverse wave gave rise to the expansionist fascist regimes that brought on World War II. The second reverse wave spread during the peak of the Cold War and fed a number of regional conflicts and civil wars, in which the major powers became directly or indirectly involved.

Electoral choice is an important element in our appreciation of a democratic regime as a “good” form of government, but its longevity and its peacefulness depend on the effective protection of individuals and groups against undue coercion from state, church, or powerful interests, i.e., constitutional liberalism.

B. Constitutional Liberalism

The Western experience since 1945 has largely embodied both democracy and constitutional liberalism, making it thus “difficult to imagine the two apart, in the form of either illiberal democracy or liberal autocracy.” Citing empirical and case data, Zakaria establishes that these latter manifestations are not only perfectly plausible theoretically, but have in fact been the historical Western and contemporary non-Western norm. Their theoretical and historical distinctiveness is likewise stressed by Schmitter:

Liberalism, either as a conception of political liberty, or as a doctrine about economic policy, may have coincided with the rise of democracy. But it has never been immutably or unambiguously linked to its practice.

Zakaria maintains that only in the late 1940s did most Western countries become actually democratic, but that, importantly, already a century earlier most of them had put in place important elements of constitutional liberalism, namely “the rule of law, private property rights, and increasingly, separated powers and free speech and assembly” without being democratic. Government in Western Europe and North America was therefore not characterized by democracy but by constitutional liberalism: “The ‘Western model’ is best symbolized not by the mass plebiscite but the impartial judge.”

The analytical difference between democracy and constitutional liberalism and their historical distinctiveness has powerful policy implications regarding the sequencing of

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115 Id. 5.
116 Zakaria (n 103) 26.
118 Zakaria (n 103) 27.
institutional design. There is strong empirical evidence that constitutional liberalism will in time lead toward democracy, but democracy on its own will not necessarily bring constitutional liberalism. But not only are the two concepts analytically distinct, they exist in a markedly tense relationship:

. . . any conception of democracy invariably encompasses a commitment to rule by majoritarian preferences, whether expressed directly or through representative bodies. At the same time, any conception of constitutionalism must accept pre-existing restraints on the range of choices available to governing majorities.120

C. Degenerating Democracies

Alexis de Tocqueville recognized that “[t]he very essence of democratic government consists in the absolute sovereignty of the majority.” But, simultaneously, he was quite clear that majoritarian systems not tempered by constitutional restraints on the exercise of power have a tendency to degenerate into a “tyranny of the majority.”121 It is this tension between majoritarian sovereignty and minority protection that has marked democratic theory from its very beginning. Already Aristotle warned: “Where the multitude have the supreme power, and supersede the law by their decrees . . . demagogues spring up” and democracy degenerates into despotism.122

There has thus been some agreement over time that “the best realizable form of government is mixed, or constitutional, government, in which freedom is constrained by the rule of law and popular sovereignty is tempered by state institutions that produce order and stability.”123 That democracy is a force that can undermine liberty is well-understood for all types of societies. But in fractured societies divided, by historical, ethnic, linguistic, religious, or class cleavages, democracy can be a particularly divisive force:

In the face of this rather dismal account . . . of the concrete failures of democracy in divided societies . . . one is tempted to throw up one’s hands. What is the point of holding elections if all they do in the end is to substitute a Bemba-dominated regime for a Nyanja regime in Zambia, the two equally narrow, or a southern regime for a northern one in Benin, neither incorporating the other half of the state?124

Even if we don’t conclude that democracy “is simply not viable in an environment of intense ethnic preferences,”125 it seems evident that merely holding elections is insufficient and that additional institutional mechanisms, in the form of constitutional restraints, are necessary to make it work. To ascertain whether democracies remain democratic and stay

119 Id. 28.
121 Arthur Goldhammer (tr), Alexis de Tocqueville, Democracy in America (Library of America, New York 2004).
123 Diamond (n 39) 2; Held (n 111) chapter 1 and 2.
peaceful, one needs to look beyond competitive elections. Huntington identifies three big waves of democratization (1828–1926, 1943–1964, 1974–1990s) and points out that both earlier periods resulted in reverse waves of democratic breakdown,126 caused by a multitude of factors quite beyond the scope of this chapter.127 The ongoing debate about the perceived peacefulness of democracies was markedly rekindled by Doyle’s 1983 essay, in which he conceded that “[t]he decisive preference of [the] median voter might well include ‘ethnic cleansing’ against other democratic polities.”128 Zakaria thus correctly concludes that: “the democratic peace is actually the liberal peace. . . . without constitutional liberalism, democracy itself has no peace-inducing qualities.”129

The “fallacy of electoralism”130 ignores the degree to which even genuinely contested elections may exclude significant portions of the population from competing effectively for power and/or advancing their interests, as well as the extent to which important policy areas may remain outside the purview of elected officials and thus democratic oversight.131 Furthermore, the design of the electoral process itself can have an enormous impact on the way the democratic process is played out, especially with regard to the degree to which it allows genuine participation of all groups.132 There is always a trade-off in electoral design between efficiency and representativeness. This refers both to the outcome of the election, for instance stable majorities, as well as the practicalities of implementing the actual election. For instance, the first post-war Iraqi elections were held for such practical reasons as a single nationwide electoral district, despite strong reservations about the inherent and inevitable Sunni exclusion.

The choice of the electoral system needs to take into account the particular historical pattern of internal division in order to avoid “the possible exclusion, alienation, apathy, and illegitimacy of majoritarian outcomes, or the potential fragmentation, low governability, and even paralysis of proportional ones.”133 As will be shown below, electoral design has often had a big, and mostly negative, impact on the constitutional process in post-conflict situations.

126 Huntington (n 83) 15.
127 On the causal reasons, see the magisterial Juan J. Linz and Alfred Stepan (eds), The Breakdown of Democratic Regimes (Johns Hopkins University Press, Baltimore 1978).
129 Zakaria (n 103) 38.
VI. INSTITUTIONS MATTER

If thus, elections in and of themselves are insufficient to account for most of the potential benefits generally associated with democratic governance, analytically a stronger emphasis should be placed on the cultural correlates of democracy, i.e., “[t]he development of a pattern, and ultimately a culture, of moderation, accommodation, cooperation, and bargaining among political elites” that is increasingly stressed in process-oriented thinking on democratic transition and consolidation. It is precisely this cultural element of procedural legitimacy and integration that is crucially important in a post-conflict situation, but due to its inherent difficulty is often disregarded in favor of formal elections: “[In civil wars] no solution was possible without an answer as to who should govern. The international community’s formula was free elections, a compelling idea in the abstract but ferociously difficult to implement in conflict-ridden countries.”

A. Democratic Culture

The cultural element outlined here is directly linked to institutional design, not supposedly primordial essentialist traits somehow ingrained in a particular culture or religion. Referring to Paul Wolfowitz’s boastful claims about the salutary “shaming effect” of a decisive Arab defeat in Iraq, Joyce recounts that the traditional Western reaction to shame has been steadfast resistance and revengefulness:

Having been brought low does not make one generous and forgiving. Quite the opposite; the abused often become the abusers. The bitterness and resentment the Arabs feel for the humiliations they have suffered in Iraq and Palestine should be understandable. But we act as though they are essentially different from us and will be improved by such experiences.

Chiding the mistaken preconceptions that have underwritten official policy, Lynch is similarly critical of the postulated psychological difference and inferiority of subjugated peoples:

One such assumption is that Arabs respect power and scorn attempts at reason as signs of weakness—and so the way to impress them is to cow them into submission. Another assumption is that Arab public opinion does not really matter, because authoritarian states can either control or ignore any discontent. Still another is that anger at the United States can and should be disregarded because it is intrinsic to Islamic or Arab culture, represents the envy of the successful by the weak and failed or is simply cooked up.

134 Diamond (n 39) 166, emphasis in the original.
136 Anne Joyce, “Editor’s Note” (2003) 10 Middle East Policy iii, emphasis added 1.
137 Marc Lynch, “Taking Arabs Seriously” (2003) Foreign Affairs (no pagination), emphasis added
There is little denying the fact that the states that remain undemocratic after the “third wave” of democratization of the 1980s and 1990s pose particularly potent problems with regard to the preconditions often deemed necessary, a point painfully obvious in both Afghanistan and Sudan, and to a slightly lesser degree in Libya and Iraq. The fact that no Islamic nation—with the possible exception of Turkey—has tempted many commentators to point out the alleged incompatibility of its religious precepts with the demands of a modern, democratic and preferably liberal polity. Interestingly, the argument is being advanced from both sides of the alleged cultural divide:

There is a common view that the shari’a is fixed and clearly discernible from its sacred sources. For Muslim ideologists this fixity and clarity are functions of its divine origin. For many Western observers they are functions of the fixity of “Muslim society,” totally other from “the West,” with religion as its essence. . . . There is a kind of ideological symbiosis between the two. "Muslim society" in this perspective is not amenable to analysis in terms of economics, politics or sociology, but has religion as its essence which moves it and determines its processes.

An analytically more rewarding and more policy-relevant approach would focus on those sociological, institutional, and constitutional preconceptions that are in fact amenable to change. Mansfield and Snyder thus point to these preconceptions to argue in favor of a much more cautious and patient effort to nurture the necessary institutional preconditions:

All of the risk factors are there. The media and civil society groups are inflammatory, as old elites and rising oppositions try to outbid each other for the mantle of Islamic or nationalist militancy. The rule of law is weak, and existing corrupt bureaucracies cannot serve a democratic administration properly. The boundaries of states are mismatched with those of nations, making any push for national self-determination fraught with peril. Per capita incomes, literacy rates and citizen skills in most Muslim Middle Eastern states are below the levels normally needed to sustain democracy. The richer states’ economies are based on oil exports, which exacerbate corruption and insulate regimes from accountability to citizens.

They stress the turbulent early stages of democratization that easily will lead to high degrees of internal and external violence fuelled by ethnic and/or nationalistic

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141 Mansfield/Snyder “Prone to Violence” (n 99).
mobilization: “[t]he nationalist and ethnic politics that prevails in many newly democratizing states loads the dice in favor of international and civil war.”

B. Polarizing Elections

To avoid political rivalry in divided societies degenerating into ethnically-based patronage and aggression it is thus important to proceed to the phase of open electoral contestation only after institutional reform has been instigated. Denouncing the idea of imposing democracy from without by sheer force of arms as an “oxymoron,” it is stressed that “[r]arely are matters so desperate that there is no alternative to forced-pace democracy promotion at gunpoint. It is better to be patient and get the sequence right.”

Note that the preconditions outlined here concern institutional design, not waiting until economic parameters have changed. While it is “a truism that the better the performance of a democratic regime in producing and broadly distributing improvements in living standards, the more likely it is to endure,” there seems to be no absolute threshold of wealth below which democracy is unsustainable. The same holds true for the alleged need to alter religious preferences, presumably deemed to be incompatible with democratic norms. Most of these institutional preconditions concern constitutional arrangements and administrative capacity, especially the existence of an impartial and effective civil service and judiciary. But building these institutions often runs counter to the interests of an outside intervener trying to maintain control at manageable cost by relying on local elites whose legitimacy is questionable. The short-term expedients of divide and rule increases ethnic polarization and thus conflicts with the long-term transition to a stable democracy:

Even if the empire does not take active steps to politicize ethnicity, the act of unleashing demands for mass political participation that nascent democratic institutions often are not strong enough to manage is likely to increase the risk of a polarized, violent, unsuccessful transition.

Limiting the scope for majoritarian abuse through strong legal protections of individual and group autonomy, limitations on the exercise of power, and effective redress mechanisms can be achieved through appropriate constitutional design. But while it might be relatively easy to impose elections on a given country, it is much more difficult to establish constitutional liberalism, let alone trying to do this by force. Nevertheless, despite its inherent difficulty there does not seem to be a ready alternative, for “[d]emocracy without

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142 For a very nuanced elaboration of the issue of nationalism, see Haas’s two-volume work, which contrasts the experience of a number of new democracies with more established European ones, and arrives at a largely positive impact of liberal nationalism during the process of modernisation. Ernst B. Haas, Nationalism, Liberalism, and Progress: The Dismal Fate of New Nations (Cornell University Press, Ithaca 2000); Ernst B. Haas, Nationalism, Liberalism, and Progress: The Rise and Decline of Nationalism (Cornell University Press, Ithaca 1997).

143 Mansfield/Snyder “Prone to Violence” (n 99).

144 Id.


147 Mansfield/Snyder, “Prone to violence” (n 99); Linda Colley, “The US is Now Rediscovering the Pitfalls of Aspirational Imperialism” The Guardian (London December 17, 2005).
constitutional liberalism is not simply inadequate, but dangerous, bringing with it the erosion of liberty, the abuse of power, ethnic divisions, and even war.”148

**VII. THE NEED FOR CONSTITUTIONAL LIMITS**

If democracy can be defined as ultimately “popular political self-government,” a simple definition of constitutionalism could be the “containment of popular political decision-making by a basic law.”149 At the heart of constitutionalism lies the paradox of why a democratic system that associates legality with representative government should deliberately choose “to constitute its political life in terms of commitments to an originating agreement—made to be treated by the people as binding on their children, and deliberately structured to be difficult to change.”150 Two answers to this seeming paradox are traditionally given, and a third is particularly relevant in the context of divided societies.

**A. Protecting Rights**

The first answer to this seeming paradox concerns the protection of individual and group autonomy against majoritarian decisions. As Dworkin puts it: “The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest.”151 Apart from its obvious relevance in all societies, this aspect is particularly pertinent in politically polarized or ethnically divided societies. If combined with effective mechanisms of judicial or administrative redress, rights prevent the abuse of power and thus ensure that political contests do not degenerate into absolute conflicts by safeguarding a core of essential interests that remains beyond the political sphere, and thus majoritarian control. This necessary protection against the “tyranny of the majority” can ultimately only be provided by constitutionalization and judicial review.152

Furthermore, the observance of rights schemes is an effective litmus test for the overall “civility” of a given regime. A polity’s descent into barbarity and aggression relies on the progressive removal of constitutional controls. Basic human rights and fundamental freedoms constitute thus an early warning mechanism, a point stressed during the negotiations of the European Convention on Human Rights:

Evil progresses cunningly, with a minority operating, as it were, to remove the levers of control. One by one freedoms are suppressed, in one sphere after another. Public opinion and the entire national conscience are asphyxiated. . . . It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation menaced by this progressive corruption, to warn of the peril and

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148 Zakaria (n 103) 43.
to show them that they are progressing down a long road which leads far, sometimes even to Buchenwald or Dachau. 153

The violation of these standards of decency indicates the potential descent into dangerous despotism, explaining why states with a recent history of terror place much greater importance on international legal safeguards and monitoring than relatively stable liberal states. Moravcsik has analyzed the travaux préparatoires and voting pattern during the negotiations of the ECHR and concluded convincingly that it was not the liberal democratic states such as Britain or Sweden that were its strongest supporters, but those states which had just emerged from authoritarianism and wished to hedge against a possible domestic reversal of political fortunes by keeping the control mechanism beyond national control. 154 The same point was made by Heinz Klug, who stated that: “A standard explanation for the shift to democratic constitutionalism, and the empowerment of courts it implies, in states emerging from dictatorships and social conflict is that the shift is a reaction to that society’s particular past.” 155

Obviously, constitutional rights and fundamental freedoms remain ineffective if not backed by a strong and independent judiciary. In recent years there has been a growing trend to transfer ever larger subject areas from the political sphere to constitutional courts, partly because a polarized political class is unable or unwilling to reach consensus and thus “outsources” divisive issues to unelected judges precisely to prevent further polarization by removing the issue from the democratic political process. 156

This dynamic plays itself out rather interestingly throughout parts of the Middle East where “growing support for principles of theocratic governance poses a major threat to the cultural propensities and policy preferences of secular and relatively cosmopolitan elites.” 157

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The ostentatious Islamization of the state and judiciary, done essentially to bolster the legitimacy of governments with exceedingly narrow support bases, often led to the creation of constitutional courts charged with the application of Shari’ah to placate the theocratic preferences of mobilized masses. In effect, however, the jurisdiction of these courts has often been quite willing to depart from the allegedly unalterable divine law to promote legal reform much in line with Hirschl’s description of elite interests.

B. Checking Power

The second justification for constitutionalization concerns the distribution and structure of power, i.e., how governmental tasks are distributed among different agencies and offices, how conflicts are resolved between them, how government changes, and how it is held accountable. On a purely functional level, this concerns simply the rules of the game laid down in advance for the sake of predictability and efficiency in the orderly conduct of governmental business. It is already at this basic functional level that many constitutions in the developing world, particularly in the Middle East, fail miserably. The revolutionary Iranian constitution of 1979, for instance, has, despite numerous amendments and ad hoc procedural reforms, not succeeded in delineating an effective distribution of tasks and powers among the numerous branches of government.

On a more normative level, the separation of powers is believed to act as an effective guarantee against the abuse of governmental authority by providing “checks and balances” through the functional interdependency of state organs. The basic underlying idea is a simple one, namely that “political constitutions are incomplete contracts and therefore leave room for the abuse of power.” By creating conflicts of interests between the various

158 For a critical discussion of these policies in Saudi Arabia, Pakistan, Sudan, Egypt and Iran, see Zubaida (n 140) 153–6, 158–9, 165–73, chapter 6. See also Tamir Moustafa, “Conflict and Cooperation between the State and Religious Institutions in Egypt” (2000) 32 International Journal of Middle Eastern Studies 11; Steven Barraclough, “Al-Azhar: Between the Government and the Islamists” (1998) 52 Middle East Journal 236.


161 The most important of these has been the creation of the Expediency Council (shuraa-ye maslahat). Discussed in Zubaida (n 140) 210–13; Chibli Mallat, The Renewal of Islamic Law: Muhammad Baqer as-Sadr, Najaf, and the Shi’i International (Cambridge University Press, Cambridge 1993) 89–106.


branches of government but forcing them to agree eventually in the formulation of policy, greater accountability can be achieved than is possible through intermittent elections, as well as greatly increasing transparency and information flow.

This dynamic must be harnessed by the constitutional drafter to ensure that the incentive structures for individual and institutional actors within government produce an outcome that truly represents the will of the majority of the people, not that of narrow particular interests. The interplay of individual incentives and public interests has been eloquently summarized by James Madison’s famous prescription that:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State. 165

In its fundamental, mechanistic sense, the separation of powers therefore simply ensures that the rules of the game remain fair, that majorities can change, and that those elected remain accountable to the electorate; basically “that government truly represents the will of the majority of the people.” 166

A somewhat more sophisticated, critical reading, however, sees the doctrine of the separation of powers as essentially an anti-majoritarian device to protect “certain minorities [and their interests] whose advantages of status, power, and wealth would . . . probably not be tolerated indefinitely by a constitutionally untrammeled majority.” 167 In recent years one could observe a growing tendency of moving ever larger policy areas from the realm of competitive politics into the supposedly neutral adjudication by unelected judges. Hirschl’s views concur largely with the position expressed several decades earlier by Dahl, stressing the inter-elite consensus likely to emerge from such a system, often to the detriment of majority interests. Dahl considers it “unlikely to suppose that a court whose members are recruited in the fashion of the [U.S.] Supreme Court justices would long hold to norms of
rights of justice that are substantially at odds with the rest of the political elite.” The picture that emerges is one of collusion between organized narrow interests against majoritarian interests, a process that is likewise in evidence at the international level where an unprecedented amount of power is transferred from representative institutions to judicial bodies.

But whatever stance we take on the increasing “judicialization” of politics, the general principle is largely uncontroversial. The separation of legislative, executive, and judicial powers is a necessary device to avoid usurpation and tyranny by those to whom these powers are entrusted and remains a “basic constitutional principle [as] a necessary precaution, even in a democracy that periodically elects its own rulers.”

C. Bridging Division

The third justification for constitutional restraints concerns credible minority guarantees and is perhaps the most pertinent in divided societies. It is crucial to reassure the minority “that democratic rule would not simply be an invitation to majoritarian retribution [because] without some formal guarantee of security, power would never be ceded except on the closing end of a bloody civil war.” The importance of these considerations has been dramatically underscored during the Iraqi constitutional process. The failure to credibly reassure the formerly dominant Sunni Arab minority that it would continue to enjoy a reasonable position in the new political edifice has been a major driving force behind the ferocious insurgency and civil war. Likewise, the bloody civil war in several parts of Sudan has been driven in no small part by the inability and unwillingness of the central institutional structure to protect the various minorities from abuse by governmental and private interests.

The protection of rights and freedoms and the separation of powers are pertinent in any democratic polity, however homogenous or peaceful. But the challenge of a factionalized post-conflict society is to create a framework that offers sufficient incentives and secures enough legitimacy for all parties to engage in a political process with significant legal and/or physical guarantees as a substitute for violent conflict.

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171 Issacharoff (n 120) 1876.
173 Deng (n 4).
174 Issacharoff (n 120) 1863–70.
The principal paradox of constitutional democracy—why a democratic system that associates legality with representativeness should deliberately choose to “pre-commit” certain values as beyond the political process, to be administered by non-representative institutions such as an independent judiciary—assumes here an entirely new meaning. The challenge of divided societies consists of persuading potential “spoilers” that their interests will be taken care of in the democratic process, precisely by keeping certain core interests outside the scope of the normal democratic political process and guaranteeing these in advance through an inter-elite covenant. Whether this original covenant is written or unwritten, two basic theoretical approaches are possible: consociationalism, or constitutionalism.

In both cases do legal restrictions provide the basis for reconstituting society, especially during the transition toward democracy. In deeply divided does societies the original covenant provide a roadmap for the practical distribution of assets and influence. But apart from mutual security reassurance, the constitutional pact confers legitimacy to the political process and its outcome by dampening animosities between the antagonistic societal groups. The legal restrictions on the exercise of power become in this respect as important as the mere distribution of power between different groups; legal provisions assume thus “an extraordinary constituting role” in the stabilization of the democratic political process and the transition to a stable and peaceful post-conflict order.

VIII. CONSOCIATIONALISM

Initially, democracy was thought impossible in fractured societies, due to the absence of a political community with sufficiently strong bonds of loyalty and reciprocity: “Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist.” This perceived necessity of a reasonably homogenous demos continues to be a sharply contested issue. It is uncontroversial that effective administrative and representative institutions are easier to install in ethnically and linguistically homogenous polities. Popular comparisons between post-war reconstruction efforts in Afghanistan and Iraq vis-à-vis Germany and Japan are for a number of reasons largely vacuous, not least due to the ethnic homogeneity and long-state traditions of the latter as compared to the shallow patina of

176 As in the Lebanese agreement of 1943.
177 Issacharoff (n 120) 1863.
178 Donald L. Horowitz, Ethnic Groups in Conflict (University of California Press, Los Angeles California 1985); Horowitz (n 124).
statehood placed over highly fractured societies in the former. Katz strongly rejects such inappropriate comparisons: “Are Afghanistan and Iraq as nations anything like Germany and Japan? Is the situation in which the United States finds itself in Afghanistan and Iraq in any way comparable? I do not see how a knowledgeable person could think so.” Likewise, Kurth: “it strains credulity that anyone would argue that the most relevant comparison to Iraq were the homogenous nations of West Germany and Japan in the 1940s.”

Nevertheless, a number of deeply divided societies have managed to achieve significant political stability with high degrees of representativeness, as well as good levels of economic performance. Lijphart developed the concept of the consociational elite consensus to account for the paradox of the fractured, yet democratic and stable societies of Austria, Holland, Switzerland, and Belgium. Its defining characteristics are:

... (1) government by a grand coalition of all significant segments; (2) a mutual veto or concurrent-majority voting rule for some or all issues; (3) proportionality as the principle for allocating political representation, public funds, and civil service positions; (4) considerable autonomy for various segments of the society to govern their internal affairs. [emphasis added]

The consociational principle, thus, allocates power across competing interests independent of the political process, with a strong emphasis on consensual decision-making procedures. Elections do not affect the overall distribution of power among various societal groups, but only the representations within each group as political offices are allocated to particular groups beforehand. Such formal power-sharing arrangements are premised on the assumption that in deeply divided societies elections can be little more than an “ethnic census.”

Consociational arrangements have been deployed with varying degrees of success for instance in Sri Lanka, Cyprus, Bosnia, or, most prominently, Lebanon.

183 Kurth (n 35) 310.
186 Mansfield/Snyder, “Prone to violence” (n 99); Zakaria (n 103) 35.
188 Lijphart (n 132) 184; Lijphart (n 184) 158–61; A. Jarstad, Changing the Game: Consociational Theory and Ethnic Quotas in Cyprus and New Zealand (Dept. of Peace and Conflict Research, Uppsala University, Uppsala 2001).
There has been intense controversy about the ability of consociationalism to deliver on the promised stability outside the European context with its relatively muted factional conflicts.\textsuperscript{191}

Whether a negotiated settlement can actually overcome the divisions within a highly fractured society is a matter of some dispute. The historical record is not very optimistic in this regard and seems to indicate that “stable civilian governance is most likely to emerge from post-conflict societies when one ethnic group has accomplished clear dominance or destruction of the other.”\textsuperscript{192} The greater stability of military victories over negotiated outcomes\textsuperscript{193} has led some commentators to suggest that international mediation efforts are inherently futile and instead one should “give war a chance,”\textsuperscript{194} namely allow civil wars to reach their “natural” conclusion where either one group is clearly dominant or segregation leads to ethnically homogenous parts being formed.

Be this as it may, negotiated outcomes cannot provide stability in defiance of factual realities on the ground. One problem of consociationalism has been its inability to deal with societal change, reflecting either normative or demographic changes.\textsuperscript{195} Once the conditions that give rise to the original inter-elite covenant change, consociational arrangements are very difficult to alter precisely for the reasons that guarantee their stability when functioning as intended: their consensual orientation and relative isolation from democratic pressures.

These very features of consociationalism are, furthermore, fairly costly even in periods of normal operation. Because stability and inter-factional compromise are its paramount aims, competing values are habitually downplayed, not least equality and efficiency. Thus, consociational arrangements are often plagued by a host of endemic practical and normative problems, such as inequality of political and economic opportunity, legal inequality, corruption, inefficiency of decision-making, institutional duplication, severe limitation on electoral choice, the perpetuation of factional identities, and attendant centrifugal tendencies.\textsuperscript{196} The ongoing inability to form a Belgian government is a case in point.

Overall pure consociationalism has, therefore, been a relatively crude political instrument for addressing the particular problems of divided societies.\textsuperscript{197} Increasingly, more sophisticated constitutional arrangements seek to achieve the key objective of post-conflict

\textsuperscript{191} Horowitz, \textit{Ethnic Groups in Conflict} (n 178) 568–76.
\textsuperscript{192} Issacharoff (n 120) 1867.
\textsuperscript{194} Edward N. Luttwak, “Give War a Chance” (1999) 4 \textit{Foreign Affairs} 36.
\textsuperscript{195} Dekmejian (n 190).
\textsuperscript{196} Diamond (n 39) 154–59.
\textsuperscript{197} The \textit{T\'a\'if Accord} which ended the civil war in Lebanon resurrects the basic features of the consociational pact while attempting to provide for the gradual elimination of political confessionism. See inter alia Michael C. Hudson, “Trying Again: Power-Sharing in Post-Civil War Lebanon” (1997) 2 \textit{International Negotiation} 103; Jabbra and Jabbra (n 190); Theodor Hanf, John Richardson (tr), \textit{Coexistence in Wartime Lebanon: Decline of a State and Rise of a Nation} (I.B. Tauris / The Centre for Lebanese Studies, London 1993).
nation-building, namely the creation of an integrated political authority that can command loyalty and legitimacy beyond ethnic appeals, through the use of constitutional authority as a means of diffusing ethnic or racial tensions.

IX. CONSTITUTIONALISM

The main difference between consociationalism and constitutionalism concerns primarily the nature of the restrictions laid down in the original covenant namely whether power itself is distributed a priori and outside the political process, or whether the exercise of power is strictly regulated according to a pre-arranged normative agreement. Constitutionalism is thus based on the recognition that constitutional stipulations offer a much larger toolbox for community-reinforcing measures than the mere pro-rate distribution of perks and power found in consociationalism. Closely linked is the extraordinary expansion of judicial review of the various branches of government, including legislative acts traditionally held to be exclusively within the purview of the sovereign power of Parliament.

In deciding the limits of majoritarian prerogatives, constitutional courts have generally refrained from a Dworkian “moral reading of the constitution,” relying more on “pragmatic adjudication” by asking which constitutional values are most conducive to the attainment of stable democratic governance, i.e., showing “a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities.” It appears questionable whether anything but a pragmatic approach by judicial institutions could in the long run ensure the continued acceptance of constitutional constraints which are likely to be eventually identified by democratic majorities “for what they in fact are: antidemocratic devices.”

As pointed out above, consociational arrangements are relatively easy to conclude, but often do not conform to normative standards of democracy and legal equality. They are also fairly cumbersome tools of political administration, and deal badly with societal change and are thus likely to give rise to renewed conflict to adjust the system to such changes. Robust constitutionalism attempts to assuage minority concerns not through formal power-sharing, but through an inter-elite consensus on basic normative principles that are to be kept outside the sphere of majoritarian politics, to be administered by an independent judiciary (often in the form of a constitutional court) whose composition again is not subject to majoritarian control. Such arrangements are normatively more satisfying as they avoid the institutionalized perpetuation of sectarian identities, but require much higher procedural and substantial standards of legitimacy, thus requiring much more institutional “depth” and bureaucratic capability.

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199 Issacharoff (n 120) 1867.


203 Issacharoff (n 120) 1869.
In essence, a justiciable constitution requires not only a universal commitment by all political actors to an agreed normative canon, but also a judiciary able, independent, and legitimate enough to be entrusted with the task of deciding fundamental questions of immediate political relevancy, often against the wishes of the majority. The normative canon\textsuperscript{204} to be agreed among all the political actors must contain strong anti-majoritarian elements (individual and group rights protection,\textsuperscript{205} inter-agency and federal checks and balances,\textsuperscript{206} and supermajority requirements\textsuperscript{207} for particularly important issues, such as constitutional amendments, which amounts to a de facto minority veto).

But legitimacy, crucially, derives from the implementation of these norms into the final constitutions by democratically legitimated representatives and subsequent democratic ratification. The dilemma of assuaging minority concerns necessary for a peaceful transition through an elite-brokered normative commitment, while simultaneously adhering to democratic norms of majority rule, requires a carefully orchestrated transition period. The South African Constitutional Court describes the solution to the dilemma as follows:

In essence the settlement was quite simple. Instead of an outright transmission of power from the old order to the new, there would be a programmed two-stage transition. An interim government, established and functioning under an interim constitution agreed to by the negotiating parties [who had no democratic claim to the requisite mandate from the electorate], would govern the country on a coalition basis while a final constitution was being drafted. A national legislature, elected (directly and indirectly) by universal suffrage, would double as the constitution-making body and would draft the new constitution within a given time. But—and herein lies the key to the resolution of the deadlock—that text would have to comply with certain guidelines agreed upon in advance by the negotiating parties. What is more, an independent arbiter would have to ascertain and declare whether the constitution indeed complied with the guidelines before it could come into force.\textsuperscript{208}

Constitutionalism can thus be seen as a rejection of the stifling formal power-sharing and the institutionalization of legal distinctions between citizens characteristic of consociational arrangements. Due to the greater ease with which consociational power-sharing can be achieved, however, it may be a highly useful tool during an interim transitional phase. While more difficult to achieve, the final constitutionalist system is likely to enjoy much

\textsuperscript{204} Siri Gloppen, \textit{South Africa: The Battle over the Constitution} (Ashgate/Dartmouth Publisher, Aldershot 1997) 199; Issacharoff (n 120) 1875. The following examples are taken from the South African experience, where thirty-four Principles were enshrined in the 1993 Interim Constitution. Importantly, the final constitution could not be adopted unless held to be in accordance with these Principles by the independent constitutional court established as part of the interim arrangements.

\textsuperscript{205} Principle V (equality before the law).

\textsuperscript{206} Principle VI (separation of powers); Principle VII (independent judiciary); Principle VIII (requirement of multi-party legislature and representative government based on \textit{proportional representation}); Principle X (requirement of formal law-making); Principle XXVI (guarantee of an "equitable share" of national resources for provinces and local governments); Principle XXIX (independent Public Service Commission and Reserve Bank).

\textsuperscript{207} Principle XVIII (constitutional amendments require two-thirds majority in national assembly plus a majority of provincial legislatures).

greater degrees of political legitimacy and thus be much more stable than one based on a negotiated inter-elite bargain. Recent proliferation of the latter approach is in no small part the result of growing legal sophistication and greater international willingness to apply the findings of comparative constitutional law to the challenge of societal stabilization through appropriate transitional mechanisms.

X. MODELS OF CONSTITUTION-MAKING

Apart from the indirect democratic legitimacy derived from the election of the drafters and the subsequent ratification of the final product, there is an emerging new model of democratic constitution-making which stresses direct public participation in the process. In much of the developing world constitutional thinking continues to follow the traditional “Lancaster model,” named after Lancaster House in London where indigenous elites negotiated the terms of independence with the British colonial power. The ensuing bargain is then laid down in a constitutional document closely modeled on that of the “mother country,” often maintaining close institutional connections between the two entities. A similar approach could be termed the “Missouri or McArthur model,” namely the imposition of a constitution by occupational fiat as in the case of the Japanese constitution, which saw virtually no Japanese input but was drafted by General McArthur’s handlers in English and subsequently translated into Japanese. This was the approach favored by the U.S. administration which, before the invasion, “envisioned the new Iraqi constitution as a state-of-the-art document largely written by experts and bestowed on the country after a long period of occupation.”

A. The Importance of Public Participation

It is questionable whether this approach has survived the rise of norms of democratic participation so closely interlinked today with normative claims of self-determination.
Clearly, elites continue to be important in the process of negotiating an end to violence and drafting the terms of the constitutional covenant. But there must be a balance between elite pact-making and the participation of the population. The role of international experts in this respect is often overstated along a conceptual model oriented on the Lancaster model. While there is a clear need for external expertise, particularly regarding the application of innovative concepts derived from comparative constitutional legal scholarship, there must be a clear recognition that the suspicion about foreigners trying to impose a constitution on a new nation is real and likely to engender resistance. This suspicion is heightened by the unhappy legacy of most post-colonial constitutions which quickly degenerated into autocratic rule, as well as concerns about cultural and religious distinctiveness, particularly in Islamic nations.

Some have argued that democratic sovereignty entails the right of the community to deviate from the standard canon of constitutional rights: “Democratic constitutionalism holds that constitutional law, fundamental law, is still political and should be democratically self-given, and . . . that peoples can differ even on matters of fundamental rights.” Whichever position one takes on the perceived legitimacy of such claims to cultural or religious specificity, the evolving theoretical and empirical consensus seems to be that without some meaningful public participation and consultation already at the drafting stage, constitutional processes are unlikely to acquire the kind of democratic legitimacy and “ownership” necessary for a stable post-conflict order: “[O]ne of the reasons why, particularly in post-conflict countries, there is so much emphasis on this idea of legitimacy is the hope that along with the legitimacy will also come stability.” Often the process of civic education about the constitutional process is given to a constitutional commission that combines the dual task of soliciting technical expertise and fostering an inter-elite pact, as well as ensuring public participation.

**B. Act of Completion or Constitutional Practice**

Closely linked is the concern about a functional as opposed to an idealist reified notion of constitutionalism as “a dynamic, political process, rather than a fixed mode of distributing..."
power, rights, and duties.”

Put differently, the terms of the constitutional covenant are less important than collective behavior conforming to its tenets: “Our constitution is (what is relatively stable in) our activity; a stranger learns its principles by watching our conduct.”

Rather than the structural features of a fixed constitutional document, the functional view thus emphasizes social reality, i.e., the practice of constitutionalism as something to be achieved and commonly learned, not something that can merely be announced by an elite in final documentary form. With regard to Africa the issue has been aptly summarized as something to be achieved, not announced:

> The paradox lies in the simultaneous existence of what appears as a clear commitment by African political elites to the idea of the constitution and an equally clear rejection of the classical or at any rate liberal democratic notion of constitutionalism. . . . The process of constitution making . . . cannot be regarded as a simple reproduction of some basic principles that particular societies may have found operational. . . . The political history of many societies is replete with struggles for an optimal balance between the few on whom constitutions confer power and the vast majority for whose benefit it is supposed to be exercised. What is clear is that in no society has that balance been achieved through the promulgation of a constitution per se. [emphasis omitted and different emphasis added]

The traditional model of an “act of completion,” the constitution as a final settlement or social contract is contrasted by Hart to the modern process-oriented “conversational model” where publics claim a right not only to political participation but also in the formulation of the foundational norms that govern it. This argument is partly premised on the emerging right to democratic governance, which subsequently came to include a right to participate in constitutional processes. Two pronouncements by the UN Human Rights Committee explicitly interpret Art. 25 in this light: “Citizens also participate directly in the conduct of public affairs when they choose or change their constitution.” And likewise: “At issue in the present case is whether the constitutional conferences constituted a ‘conduct of public affairs’ [within the meaning of Art. 25] . . . [and] the committee cannot but conclude that they do indeed constitute a conduct of public affairs.” In addition, the right to participate in the formulation of foundational norms has important bearings on the legitimacy, and thus effectiveness and stability of the resulting constitutional order:

> We used to think of a constitution as a contract, negotiated by appropriate representatives, concluded, signed, and observed. The constitution of new constitutionalism is, in

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226 Greenberg, et al. (n 224) xvii.
229 Initially focused mainly on electoral processes, see Fox and Roth (n 41).
230 Human Rights Committee, General Comment on Article 25 of the ICCPR, the right to participation, issued on July 12, 1996.
contrast, a conversation, conducted by all concerned, open to new entrants and issues, seeking a workable formula that will be sustainable rather than assuredly stable.

It is in such an environment of conversational constitutionalism that the issue (startling to some traditionalists) of a right to participate in making a constitution has arisen. The idea is hotly contested by those who argue that only elites in modern societies possess the moderation, technical expertise, negotiation skills, ability to maintain confidentiality, and above all rational incentives to compromise so as to maintain power that make for effective constitution making. But it is hard to argue against democracy. The elite-made constitution, according to the new paradigm, will lack the crucial cultural element of legitimacy. It will do so because the process, not just the final text, is seen as flawed. It is in such an environment of conversational constitutionalism that the issue (startling to some traditionalists) of a right to participate in making a constitution has arisen.

The South African Constitution of 1996 is widely regarded as a model, not only for its innovative content, but especially due to the highly inclusionary nature of the process by which it came about. The careful two-phased structure of that process, the long time allowed for its completion, the combination of confidential inter-elite negotiations with carefully timed broad participation after necessary assurances had been given to minority interests, and the carefully built-up trust between all participants, all attest to the inherent difficulty of participatory constitution-making, which, however, is “critical to the strength, acceptability, and legitimacy of the final product.”

XI. CONCLUSION

The establishment of a stable political community that is not inordinately dependent on repressive violence rests ultimately on the voluntary acceptance by the populace of the given institutional order as legitimate. This crucial link between legitimacy and stability has been repeatedly stressed in the literature reviewed above. Increasingly, legitimacy is becoming tied to norms of democratic participation. But, as we have argued, the commitment to majoritarian decision-making that lies at the heart of democracy will in and of itself not necessarily yield a stable polity without a modicum of liberalism. This, in turn, depends on a functioning institutional structure and learned behavioral patterns of compromise and legality. Effectively contested elections are thus a necessary, but by no means sufficient, element of a functioning democracy. Furthermore, in the context of immature political institutions, elections have the potential to polarize and further deepen existing societal divisions.

Particularly in fractionalized post-conflict societies, elections can thus have a nefarious impact that should be actively countered through appropriate checks on the exercise of majoritarian power, in order to reassure minority interests and include them in the political process. In its most basic meaning, the constitutional compact is therefore little more than the solemn promise by all actors to forego the use of violence as a means of securing their interests and instead contest peacefully for power and resources within agreed normative limits. At the heart of the constitutional compact thus lies the commitment by all societal actors to forego the use of violence as a means of securing their interests and instead contest peacefully for power and resources within agreed normative limits.


233 Id. 7–8, 12.
actors toward a political community “in which there is real assurance that the members of that community will not fight each other physically but will settle their disputes in some other way.”\(^{234}\) In order for this compact to withstand centrifugal pressures and discourage the potential recourse to violence, it must embody a reasonably fair distribution of power and resources and credible guarantees against potential abuse.

Whether such guarantees take consociational or constitutional forms, or a mixture between the two, is less relevant than the behavioral patterns that underlie them. Process is in this respect at least as important as the substance of constitutional provisions, and this, importantly, extends already to the drafting stage. The idea of a constitution as “an act of completion,”\(^{235}\) that is the manifestation of an elite consensus that aims at resolving the sources of conflict once and for all, no longer seems adequate, neither analytically nor policy-wise. There are too many dead-letter constitutions whose stipulations are not translated into constitutional practice because the institutional and cultural prerequisites do not exist. Culture in this context is to be understood as simply a set of recurring behavioral patterns. Stressing human agency, it is underlined that behavior is learnable and dependent on the institutional structure in which group interaction takes place. It is thus distinct from the culturalist claims by some authors who ascribe primordial, unalterable normative values and behavioral patterns to groups solely on the basis of their shared affiliation to preexisting religious or ethnic identities.

But while societal behavior is eminently malleable and by no means predetermined by that society’s religious or ethnic designation, we need to be equally clear that the mere stipulation of certain norms or behavioral traits in a constitutional document will not be sufficient to effect change. Democratic practice and the actual experience of having one’s interests secured through the non-violent, predictable, and equitable workings of institutions is crucial for the learning of participatory behavior and the acceptance of democratic norms. In this respect, far too much emphasis has been placed in popular and academic discourse on the alleged incompatibility of religious norms with abstract definitions of democracy. Certainly, constitutions always express the normative aspirations and conception of the good life in a given society and such conceptions can show great variance across different nations.

But at a much more fundamental level, a constitution is primarily a set of rules about how power is apportioned, how conflicts over interests are to be carried out, how individual and group autonomy is to be protected. These rules of the game can and should be analyzed neutrally and objectively to assess their impact on the potentially malfunctioning political machinery. The strains from a maladjusted institutional machinery can ultimately derail the constitutional edifice, leading to a resumption of fractional violence and possibly disintegration. Often these strains are predictable, particularly when the existential interests of some groups have clearly not been taken into consideration, leaving them no incentive to remain within the political framework erected by the constitutional compact.

This has largely been the result of the Iraqi constitutional process, where basic notions of equity, participation, and consensus-building have been disregarded. The ominous result has been mounting sectarian violence leading possibly to the disintegration of


\(^{235}\) Hart (n 232).
the country in a bloody civil war. Whatever has been learned in the constitutional debates of a number of post-conflict societies during the last two decades\textsuperscript{236} seemed to have been disregarded in that process. Its failure should caution decision-makers toward a more circumspect handling of as delicate a process as the negotiations of a founding constitutional pact.

I. INTRODUCTION

Islam began to enter Libya with the Arab conquest after the seventh century, and soon spread throughout the country, giving Libya that distinctive Arab-Islamic character that still today lies at the core of the identity of Libyans.

In the early nineteenth century, Sayyid Muhammad Bin 'Alī Al-Sanūsī founded the Sanūsiyyah order, an Islamic revival movement which was to have a huge influence on the history of Libya and on the development of its Islamic institutions. Centered in Cyrenaica, the order spread easily to Fezzan but encountered many difficulties in establishing followers in Tripolitania. The difficulty encountered in this region was due mainly to another characteristic of Libyan society: tribalism.

Tripolitania, unlike the other two regions that form modern day Libya, had an urban population settled on the northern coast. More connected with the Ottomans and their institutions, and in close intellectual and commercial contact with Europe, they followed an urban, orthodox form of Islam, based upon the teachings of the Mālikī school of law and obedient to the guide of the Muftī of Tripoli. Therefore, this sector of society was neither much inclined to accept the teachings of a Sūfī sect, nor did it see the need to obey to its authority. In the interior, some of the tribes were Berber and followers of the Ibāḍī sect, while others, even though they were Sunni Muslim, resisted Sanūsī’s influence, mostly for territorial and trading rivalries. One of the most important effects of this state of things was to create a whole set of divisions between the three regions, making a unitary behavior almost impossible.

As will be shown in greater detail further below, Islam, however it was interpreted, has always been at the core of the identity of the Libyan populations. When the Italians attacked the country in 1911, Libyans rallied under the Muslim Ottoman flag against the invaders, for they saw the invasion as an attack against Islam and responded by declaring jiḥād. This was definitely more religious zeal than nationalism, as nationalism was intended in its European sense, that motivated resistance to the Italian occupation. As Khaddūrī pointed out, nationalism in Libya was linked with religion. Unlike what was happening in the Arab East where the primary object of nationalism was to attack the leading Muslim power and Islam as a basis of the state, in Libya the purpose was to enlist Ottoman support in fighting
the invasion of the infidels. “Religion was indeed one of the most potent factors in the rise and development of nationalism in North Africa.”

It was Islam that provided the core value of those that promoted the Constitution of the Republic of Tripoli, and it was Islam, under the banner of the Sanūsiyyah, that provided the motivation of the resistance against the Italians in the 1930s. In 1951, Islam as epitomized by the Sanūsi movement was what gave legitimacy and continuity to the monarchy. Still today, Islam exercises a major role in the identity of Libyans. Conservative attitudes dominate, and people’s values and behavior are very much a function of their religious background and attachment.

There is a large literature that describes, analyzes, and discusses the curious way by which Libyans have been governed for the last thirty years. Most of it deals with the character, the ideology, the idiosyncrasies of its leader Mu’ammar al-Qadhăfī, some of it with the socio-political development of the country, and some with the economic aspect.

The topic of this book allows for a different perspective, one which is situated at the intersection of the “norm” (constitution) and political practice, and which looks at the legal framework of the state organization (or lack thereof) and its development.

The goal of this chapter is to unravel the deep and slow currents that have permeated Libyan society as it has evolved in the last century. It is important to underline that the question of Libyan constitutionalism cannot be satisfactorily answered without looking at the history of all the previous attempts to devise a scheme of government.

This chapter will start with a brief discussion of the interesting debate that surrounded the constitution of the short-lived Tripoli Republic around 1918, and will continue with an analysis of the eventful period that preceded independence from which emerged the constitutional monarchy that ruled Libya for the following eighteen years.

It is important to look at the various currents that emerged in that period because it is the unresolved disputes, the bad compromises, and the frustrations of the nationalist movement that led to the enactment of a constitution that was too complex and muddled to begin with, and inadequate in reaching the main purpose of a constitution: limitation of power. The Libyan revolutionary regime, its ideology, and the legal framework of the government it imposed on the country cannot be really understood unless it is seen as just another stage in the chain of events that characterized Libyan history in the twentieth century.

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II. THE TRIPOLI REPUBLIC

Lisa Anderson discussed and explained in her many works on Libya what she identified as a main characteristic of Libyan society: its “statelessness.” She suggested that this feature is one that developed through a continuum from the days of the Ottoman occupation onward.  

After the reimposition of their rule around 1835, the Ottomans exerted their authority and modernizing efforts mainly and mostly on the cities of the coastal strip, leaving the control of the interior of Tripolitania in the hands of local tribal leaders and the control of most of Cyrenaica in the hands of the Sanūsiyyah order, which, as this article will demonstrate later, was also organized on tribal basis.

In 1911 Italy invaded Libya and attempted to occupy the whole country. What was anticipated as a “walk in the park” soon translated into a nightmare. Opposition to the invaders came from many sources but mostly from the tribes of the interior in Tripolitania and from the Sanūsiyyah in Cyrenaica. By the end of World War I, Italian occupation was pretty much limited to the cities of Tripoli and Benghâzi and their immediate surroundings.

It is during this period that what could be considered as a curious event occurred: the tribal leaders of Tripolitania got together and, on November 16, 1918, proclaimed the Tripoli Republic (Jumhūriyyah al-Ṭarābulusiyyah), which then became the first formally republican government (state) in the Arab world. A “council of four” was established to act as a ruling body; it was composed by Ramaān al-Suwayhlī representing the region of Misrātah, ʿAhmad al-Murayyid for the region of Tarhūnah, ʿAbd al-Nabī Abū al-Khayr representing the Warfallah tribe and part of Fezzān, and Sulaymān al-Bārūnī representing Western Tripolitania. A twenty-four-member advisory council was established and the Republic’s headquarters were established in ʿAzīziyyah.  

Under the Tripoli Republic, Islam was the constituent element of the identity of the Republic, which was understood by most of its members as the embodiment of an Islamic system. As the counselor to the Republic, the famous Egyptian nationalist ʿAbd al-Raḥmān ʿAẓzām explained on behalf of the Tripolitanian leadership: “Consultation is the basis of our religion and in democracy we find ourselves in our authentic element . . . The legislation and bases of the representative system in Europe are unknown to us but the Bedouin is by his very nature a member of a parliament and never submits to despotism until he is defeated.”

Most of the Tripolitanian leadership, imbued with traditional Islamic notions, saw their relation with the colonial power as confrontational: Islam versus Europe. The Republic was later weakened because of internal factional and provincial disputes. But as again stated in 1920 at the Gharyān congress the vision of the ideal state was a “legitimate and capable

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7 Letter from ʿAẓzām to an Italian friend resident in Tripoli, in Jacques Roumani, “From Republic to Jamāhīriyyah: Libya’s Search for Political Community” (Spring 1983) 37 The Middle East Journal 161.
government that would rule in accordance with the Islamic Shari‘ah, under the authority of a Muslim Amir elected by the nation.”

While Ramaḍān al-Suwayhlī was the most powerful among the various leaders, for the purposes of this article the most interesting personality is that of Sulaymān al-Bārūnī. He was a Libyan journalist and former member of the Ottoman parliament. Since 1908 he was the editor of a journal in Cairo Al-Asad al-Islāmī (The Islamic Lion). He was a strong supporter of what he called “Islamic Constitutionalism,” a vision of constitutionalism derived from his understanding of the history of Islam.

The four members of the council issued a declaration of independence that began with the following words:

In the name of Allāh most gracious most merciful, Tuesday 13 Safar 1337 (16 November 1918) the Tripolitanian nation has decided to crown its independence with the proclamation of the Republic, according to the will of its great Ṣulāmān (religious scholars), of the nobility, of the notables and of the chiefs of the honored fighters.

When the Republic’s announcement of Tripolitania’s independence and the attempts of its leaders to obtain recognition by the European powers assembled at the Paris Conference were practically ignored, the Italians saw the opportunity to counter the Tripolitanians and to achieve by diplomatic maneuvers what they had been unable to achieve in the field. On the one hand, they accepted to meet the Republic’s leaders to find an agreement, but on the other they restarted the subtle strategy of politica dei capi, which is a modern version of the ancient roman motto divide et impera. This last strategy in the end proved successful, as it compounded and further increased the internal divisions and rivalries within the Tripolitanian Republic that led to its dismantlement and sad end by 1923.

In the meantime the two sides met in April 1919 to discuss the future framework of their relationship. While the Libyans thought that they were dealing with the Italians on an equal footing, as two sovereign states, the latter were only trying to find a system by which they could govern Libya through its traditional leaders. This misunderstanding was never resolved. Nevertheless, the negotiations led to the Agreement of Khallāt Zaytūnah. Following this agreement the Italians, in conformity with both Tripolitanians and Cyrenaicans, promulgated two statutes, or statuti, called Legge Fondamentale or Statuto, one for Tripolitania and one for Cyrenaica. As Anderson pointed out:

... these laws provided for a special Italian-Libyan citizenship and accorded all such citizens the right to vote in elections for local parliaments. They were exempted from military conscription, and taxing powers rested with the locally elected parliament. Positions in the local administration were to be filled by appointment by the Italian

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8 Note addressed to the Governor of Tripolitania communicating the decisions of the National Congress of Gharyān, dated December 11, 1920. ISMAI 122/24-222, in Jacques Roumani (n 7) 161.
11 Lisa Anderson, The Tripoli Republic (n 6).
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governor after nomination by a ten-men council, eight of whose members were Libyans selected by the Parliament.  

While most scholars agree in seeing the promulgation of the statuti—for the Italians—as a way to gain time and—for the Libyans—as a compromise between complete independence or war and full colonization, a closer juridical analysis of the statutes reveals a more subtle picture.

The divisions (tribal and personal among its various leaders) within the Tripolitanian field, which soon became the real cause for the fall of the republic, were not only due to pragmatic aspects such as personal rivalries or bribes paid by the Italians to create further acrimony, but were due also to the clever manipulation that the Italians attempted to make of the religious feelings of the Libyans. The Italians gave to the statutes a strong “Islamophile” character. For example, in Art. 12 it is stated that “principles that are incompatible with the Islamic religion cannot be taught to the members of this religion,” but no reference is made in this provision to the members of other religions. The statute also declared that Shari‘ah was supposed to be the applicable law, with the accord of both parties, both in civil and criminal law matters. At the time of the declaration of independence many of the tribal leaders, tied as they were to a traditional Islamic vision of authority and power, felt uneasy and critical of the whole idea of republic, elections, and other Western imported ideas that they felt could threaten their authority and the morality of their tribesmen.

The Italians, by simply calling the document a statuto, took the whole idea of self-rule through constitution away, and included many provisions that in their outlook were made exactly to reassure traditional leaders of their authority. By making, in effect, Islamic law and customs the law for every Muslim citizen of the country, the Italians tranquilized the vast majority of the leaders, and by adopting the system of “appointing” the members of the administration only after they were nominated by their traditional leaders, they allowed the chiefs to keep all their power within their tribes intact.

This was something that some chiefs saw as preferable to what they sometimes perceived as the subversive ideas of Bārūnī, al-Zāwī, and friends. Also, the tribal loyalties were by far more relevant and important than the difficult concept of Arab nationalism as it was promoted in the Tripoli news-sheet Al-Liwā’ al-ţarābulusī (The Tripolitanian Banner) by the nationalist leader ‘Abd al-Rāḥmān ‘Aţţām. The tribes, in fact, could understand why they should fight for Islam against Christian invaders, and they understood very well the threat that invaders could pose against the well-being of their tribes, but it would have been very difficult for them to understand why they should fight for “Tripolitania” (or “Libya”), which was a term they hadn’t even heard about before. As the historian John Wright puts it “few heeded the call to the Tripolitanian Nation to rise in defense of liberty.”  

While the statute never became effective in Tripolitania, it was in operation for a while in Cyrenaica, but only after the Italians formally recognized Idrīs al-Mahdī al-Sanūsī as the Amīr (King) of Cyrenaica and permitted him to organize an autonomous administration.

Sanūsiyyah is the name of a Muslim fraternity (ţariqah) founded by the Algerian Muḥammad Bin ‘Alī al-Sanūsī. After traveling for a long time throughout Morocco, Egypt, Arabia, he stopped in Cyrenaica in 1843 and founded in al-Bayḍā’ the first Zāwiyah (religious but also political and economic center) of the order. After his death, his son

12 Lisa Anderson, *The Tripoli Republic* (n 6) 52.
13 C. Marongiu Buonaiuti, *Politica e Religione nel Colonialismo italiano* (Giaffrè, Milano 1982).
Muḥammad al-Mahdī increased the importance of the fraternity extending its influence to part of Tripolitania, Algeria, Senegal, Egypt, Tunisia. After Muḥammad al-Mahdī’s death in 1902, his brother Ahmad al-Sharīf became the leader of a fraternity that by that time had reached the level of a small state within a state (the Ottoman administration).

The history and the organization of the order have been treated in detail in some other relevant works. What is of interest here is the religious thought and the political organization of the order. When the Ṣanūsī state was declared in 1913, in a practical sense it had already developed an elaborate infrastructure. First, there was the Higher Majlis of the Ikhwān (the Fraternity) headed by the leader of the order. It was composed by the senior ‘ulamā’ and by the leading sheikhs of the various Zāwiyah. The Majlis met once a year to decide the general policies of the order. After the meeting, the head of the order would either modify or enact the decisions taken by the majlis as is. There was a second assembly, called Majlis al-Khāṣṣ, or the special majlis. It functioned as an executive body meeting daily and supervising the application of the decisions of the higher majlis. The order founded a Zāwiyah almost near every tribal center. At the head of each Zāwiyah was put a sheikh whose appointment was in the hands of the head of the order. The land belonging to the Zāwiyah was a waqf (religious endowment) and in so far as the Zāwiyah was owned by the order, its lands were usually donated by the tribe to ensure the establishment of a Zāwiyah in their midst. Men of the tribe contributed work in the Zāwiyah and the zakāt (legal alms) was paid to the order. The way the financing of the order was done shows the following characteristic: the order needed to secure financing to cover its expenditures in maintaining and developing its network. Thus it was in the hands of the head of the order to develop, gradually, a modus vivendi by which not only demands on the people and on the order could be answered but rights and privileges could be protected:

The nature of this seemed to be an amicable submissive attitude on behalf of the people vis-à-vis moderate demands on behalf of the Head and both parties worked happily together. In view of the fact that the basic nature of this relation was religious, the submission on behalf of the people was an acceptance of the position of the Head as a spiritual guide and defender of the faith.

The resulting kind of government was a sort of theocracy in which the head never claimed to be a ruler. The war against the French in Fezzān and, more importantly, that against the Italians enhanced the position and role of the order and made the head of the ṭarīqah a military chief as well as a religious one. When later, as Ziadeh states, the head of the order after long-drawn negotiations with the Italian and British governments, concluded, in 1920, the treaty of al-Rajmah, he naturally became the head of a state, recognized by his people as their spokesman and ruler, and by the two concerned European powers as such.

The vision, thus, which the head of the order had of himself, was that of both a religious and a secular leader, but the first form permeated the second. The importance of this aspect will be seen later, when precisely this vision brought Amir Idrīs to progressively concentrate power in his hands to the damage of the constitutions and its guarantees. The religious

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16 Nicola Ziadeh (n 15) 123.
thought of the order was one that preached simple Islam based on well-established religious practices, that is, to learn how to pray and recite religious formulae. The order preached social reforms in a peaceful way, consultation and moderation, emphasis on *ijtihād*, and individual morality were its *leitmotifs*.

The different socio-political structure present in this region solidly governed by the Sanūsiyyah sect and the protection of the British did not allow the Italians to apply here the policy of *divide et impera* that they successfully applied in Tripolitania. By 1923, when the Italians under a new governor began the “Riconquista” very little was left of the Tripoli Republic. For the next ten or so years the war of opposition against the Italians was to be carried out by the fighters of the Sanūsiyyah Brotherhood under the leadership of ‘Umar al-Mukhtār, whose main purpose was getting rid of the Italians and reestablishing the Emirate (*Imārah*) under the Sanūsi authority.

### III. INDEPENDENCE AND THE MONARCHY

After twenty years of foreign occupation of which at least ten were spent in a savage war of “Riconquista” that reduced the population of the country by a third and after the long and destructive battles of World War II, the country that emerged was what a United Nations-commissioned-study in the late forties defined as among the poorest on earth. Very few persons with the skills and the education to build a modern nation with some state infrastructure were left. Also, since all “the earlier efforts at state building—on the part of the Ottomans, the Sanūsiyyah, the Tripoli Republic, and even the Italians were all short lived experiments that ended in horrifying failure,” the only reliable connection that people felt were those of kinship and tribe.

Beside the socio-economic underdevelopment, the other main characteristic of the country, against which the supporters of independence had to struggle, was the internal division and rivalry between Libya’s three provinces of Tripolitania, Cyrenaica, and Fezzān. The problems were compounded by the fact that each province had a foreign patron/supporter who aspired to rule the province under some kind of protectorate or trusteeship: France in Fezzān, Italy in Tripolitania, and England in oil-rich Cyrenaica. The latter case was the most relevant one. In fact, the British had promised to their ally and protégé Idrīs al-Sanūsī the crown of Cyrenaica, if not that of a whole united Libya.

Thus, for a few years a “push and pull” kind of situation caused by the rivalry among the Western powers that had emerged victorious from the world war existed around the issue of Libyan independence and self-rule, compounded by the fear to create an opening for the Soviet Union in the Mediterranean area. A “four-powers” commission of investigation was appointed to ascertain the will of the Libyan people. While the majority of Libyans favored independence, the commission decided that the country was not ready for self-government and in due course the Libyan question was placed on the agenda of the General Assembly of the United Nations. A detailed story of the long and sometimes frustrating process Libya went through to gain its independence is beyond the scope of this chapter. What is interesting is to discuss the conflicting views and opinions that the Libyans expressed, because this will show the basis upon which it reached the compromise that led to the drafting of the constitution of the kingdom.  

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18 A good discussion on the debates and the process that led to independence can be found in the following works: Karim Mezran, *Negotiation and Construction of National Identities* (Martinus Nijhoff Publishers,
Historically, the administration of Libya had been united for only a few years under Italian rule. The social basis of political organization was different in every province. In Cyrenaica and Fezzan the tribe was the main focus of social identification, even in an urban context; in the former, Idris as the head of the Sanusiyyah order commanded widespread popular support, while in the Fezzān the most relevant figure was expressed by the Sayf al-Naṣr clan. In Tripolitania, while the tribe and family still commanded the primary loyalty of the people, there was a spread of what formally were called political parties but which actually were groups of supporters gathered around a notable and his clan. This sort of feudal system has always been in Tripolitania the main divisive factor and a weakness that nationalism could never overcome or supersede. The result was a bunch of parties that could never coordinate their programs. Thus, the basic problem to which the architects of the Libyan constitution addressed themselves was not so much one of harmonizing social classes, protecting minority rights, or determining what constituted an efficient government for the newly established state, but rather the problem of how to maintain a balance among three provinces vying for equality of status, despite the great disparity in resources, population, and cultural levels.  

The Nationalist Party, under the leadership of Ālīmad al-Faqīḥ Ḥasan, stood for complete independence of Libya with a republican system of government. But when in 1946 there were widespread rumors that Libya could be given to Italy as a trusteeship, this party merged with others to form the United National Front and in order to avoid the worst evil of the Italian Trusteeship, they began advocating independence and unity of Libya under Sanūsī leadership “in an effort to enlist the support of Sayyid Idrīs so that he might include Tripolitania in addition to Cyrenaica under his Emirate, against Italian claims.” Nowhere the Tripolitanian elite meant that accepting the political role of the Sanūsī meant accepting his religious role, but many dissident factions, opposed to the influence of the Sanūsī, immediately emerged and split the party, further complicating the search for a political compromise acceptable to all.

In 1949, most parties united in the National Congress Party under the leadership of Bashīr al-Sa’dāwī were pressing for a republican form of government in a unitary state. Tripolitans hoped that since their region was the most populous one and had a relatively more advanced economy, in a unitary state, strongly centralized, political power and influence would gravitate toward Tripoli.

Cyrenaicans, on the other hand, had achieved a larger degree of cohesion under the leadership of the Sanūsī order, and, guided by the National Front party (endorsed by the Amir Idris initially to advocate unilateral independence for Cyrenaica), supported the formation of a federation with a weak central government that would permit local autonomy, with Idris al-Sanūsī as the Amir of the whole country. But even in Cyrenaica there were contrasts. In fact there was another very popular political party called Mukhtār Club that advocated complete national unity and was not indifferent to republicanism. Most members of the Mukhtār Club were elements of a younger generation that was just
beginning to be influenced by Pan-Arab political nationalism, the new rising force in the Middle East.

In the meantime, to implement the General Assembly’s directive, Adrian Pelt, the UN Commissioner, approved the appointment of a “preparatory committee of twenty-one” that was supposed to determine the composition of a National Constituent Assembly which, after lengthy discussion was finally composed of sixty representatives, twenty from each region. Representatives from Fezzān and ‘Alī Rajab from Tripolitania supported the principle that the members of the Assembly should be elected, whereas all the others upheld the principle of selection. After prolonged discussions, negotiations, and compromises, it was agreed that the Amir of Cyrenaica would select the representatives of his region, the chief of Fezzān Ahmād Sayf al-Nāṣr those of Fezzān, and the Mufti of Tripolitania those from his region.

Meeting for the first time in November 1950, the Assembly approved, with the support of the representatives of Cyrenaica and Fezzān and the opposition of those from Tripolitania, the adoption of a federal system of government. In a second step the Assembly proclaimed the form of government to be monarchical and offered the throne of Libya to the Amir of Cyrenaica Idrīs al-Sanūsī. This last step was adopted unanimously by all representatives (but very reluctantly by those from Tripolitania). Committees of the Assembly drafted a constitution, which was duly adopted in October 1951. The independence of Libya was proclaimed on the December 24, 1951.

In this first constitution, Islam and religious principles were, generally, relegated to the background. In the preamble it was stated that the “Nation” offered the crown to the King and declared him “Constitutional Monarch” (al-Malik al-Shar’ī). The word Islam comes in Art. 5, which states with no other specification that “Islam is the religion of the state.” In Art. 45 it is stated that only a “Muslim” can become King. Nowhere it is expressed that Shari‘ah was the law of the country as in many other constitutions, but it was given for granted that it would continue to apply at least to personal status questions.

The federal system (al-ḥukūmah al-ittihādiyyah) as drawn up by the National Assembly continued until December 7, 1962. It was based on the fragmentation of power among the Palace, officials, the organs of the federal government and the organs of the provincial governments. Art. 41 of the Constitution stated that legislative power belongs to the King in conjunction with parliament, the King exercises the executive power “within the limits of this constitution” (Art. 42), while the judicial power “shall be exercised by the supreme court and other courts, which shall give judgment within the limits of this constitution, in accordance with the law and in the name of the King” (Art. 43).

The King was the head of the state and the supreme commander-in-chief of the armed forces. He had the power to appoint and dismiss all senior officials. He was assisted by the Royal Diwān (al-Diwan al-Maliki), or Palace Cabinet, with a chief, two deputies and several other officials, often engaged in power struggles with the federal government. The federal government was constituted of the Cabinet of the Council of Ministers, the parliament with its two houses, and the Supreme Court whose judges were appointed for life. The lower house, whose members were elected, was dominated by the Tripolitians, while the Senate represented evenly the three provinces. Half its members were appointed

22 See Adrian Pelt (n 18).
by the King, while the rest were elected through the legislative councils of the provinces. The cabinet members, according to Art. 86, were collectively and individually responsible before the House of Representatives. The Federal government was in charge of foreign affairs, defense, customs, and the postal system, and it shared power with the provinces in various economic, financial, educational, and legal matters (Arts. 36, 38).

The provincial political system was made up of a Wālī, representing the King, and an executive council appointed by the King, and a legislative council, most of whose members were elected (Arts. 179, 181, 182, 183).

As it was pointed out above, this long, expensive, complicated constitution was the product of compromises made along few points. First and foremost, the federal system was agreed upon as a compromise between the strong unitary will of most Tripolitians and some Cyrenaicans, mostly members of the Mukhtār Club, versus the separatist and more province-oriented preferences of the Cyrenaicans and Fezzānese delegates united around the Amir of Cyrenaica Idrīs al-Sanūsī. Supporters of the first position gave up their stand in favor of a strong and centralized republican government for a federal system that would guarantee at least formal unity, when they perceived the risk of losing the possibility of obtaining independence.

The supporters of unity always considered the notion of federalism as a plot of the foreign powers (mostly England at that time) to divide the Ummah and keep the Libyan people divided and thus incapable of opposing foreign influence and exploitation of the country. While it is commonly thought that opposition to the federal system came mainly from Tripolitians, it is interesting to note what Muṣṭafā bin Ḥalīm, one of the Prime Ministers of Libya, and a Cyrenaican and a close supporter of the monarchy, wrote in his memoirs published in exile in 1994:

I personally have not the slightest doubt that those who recommended it [the federal system of government] did so in order to perpetuate the state’s financial plight, so that Libya would always be in the position of a supplicant who would yield to their demands. They also wanted to fragment the country, to prevent national unity and raise constitutional disputes that would distract the people from National and Pan-Arab causes. 23

The fact that Libya became a constitutional monarchy instead of an absolute one, was due to the relative strength of few groups within the Libyan society that succeeded in playing a countervailing factor against the pretensions of the supporters of the Sanūsī monarchy.

These forces were composed by the majority of the Tripolitanian leaders and notables, the majority of the youth that was increasingly active in its quest for more democratic governance, and Cyrenaican members of middle and upper middle classes united around the Mukhtār club. All these forces were strongly influenced by European ideas that had spread in the Middle East at least since the turn of the century. Not only were French and British ideals familiar but also the results of the debate in Italy within the constituent assembly formed after World War II to draft a constitution for the new republic. All these forces were influencing Libyans to an increasing degree. 24 A strong influence also came from Egypt and

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24 This notion is the result of a series of interviews that the author had with eminent personalities of the monarchical regime that were either participants to the discussions at the time of the Constituent Assembly or were eye witnesses of its proceedings. None of them has accepted to be quoted by name.
from the works of the eminent jurist ‘Abd Al-Razzāq al-Sanhūrī who was counseling many Arab countries in drafting legislation that would harmonize Islamic principles of law and faith with modern Western liberal norms and values.25 The strength of this opposition group in Libya was strong enough to be able to include many provisions in the constitution to limit the traditionally limitless power of the King (limited, as has been shown above, only by the boundaries of Shari’ah). For example, in the important matter of sovereignty, Art. 40 states that “sovereignty is vested in the nation and the nation is the source of power.”

Art. 44 continues by stating that “by the will of God the people entrust it to King Muhammad Idrīs al-Mahdī al-Sanūsī and after him to his male heirs . . .” Sovereignty, legitimacy, and power were put in the hands of the people and from there delegated to the King. This constitution made it clear to the King where his power was supposed to come from, the people, not the Order or God. No word was written on the role of the religious establishment, of the ‘Ulamā’, or on the role that the religious law Shari’ah was supposed to play. By all means it appeared as a very “secular” constitution. It was made clear what kind of constitution this was and what kind of regime it was expected to be.

On December 7, 1962 the constitution was amended and the political status of the provinces was abolished, putting an end to the federal system. The official reasons were the need for a better rationalization of expenses, since too much money was wasted in innumerable bureaucratic hurdles, the excessive bureaucracy due to the fact that it was necessary to deal with four governments, and the expressed will of most of the population for a stronger centralization and union that would better be able to project influence and activism abroad.

Another way to look into the question is the one that sees the abolition of the federal system as the result of a process of strengthening of the power of the King (or of his Diwān) and the progressive weakening of the republican democratic opposition.26

The King started this process of concentration of power as early as 1952, when he banned all political parties and outlawed all opposition. Press freedom was rejected and only government newspapers were allowed. The parliament was slowly reduced to a rubber stamp for what the King and his Diwān decided. Thanks also to the new income that was beginning to come in from oil exports, a system of patronage and co-optation was instituted. Politics in Libya became the contest of family, tribal, and parochial interest, as networks of kinship and clan provided the organizational structures for competition.

The rhetoric of the revolution accused the monarchy of corruption, theft, hunger for power; while this might have been true for some of the members of the inner circle of the monarch, the King himself could not be accused of any of such malfeasance. Amir Idrīs himself was led by a different line of thought. He was the chief of a mystical Ṣūfī Tariqah.

25 Most of the laws of Libya, but principally its system of constitutional and administrative justice substantially reproduce the Egyptian system. The latter is mostly modeled upon the French system, on this point see Vito Gianturco “La Corte Suprema Federale del Regno Unito di Libia” (1945) 2 Rivista di Studi Libici 28. The relevance of the influence of Egypt on the Libyan Constitution was stressed in an interview with the author (December 12, 1999) by Francesco Castro, Professor of Islamic law at the University of Rome and one of the most renowned specialists of the law in Libya. On Al-Sanhūrī, see 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 18991971” (1988) 3 Arab Law Quarterly 33.

He was very pious and learned in Islamic sciences. He led his whole life for Islam and according to Islamic principles. All his thinking, ideas, values, were deeply rooted in religious beliefs as he understood them. While in power he revived several traditional religious institutions and introduced them in modern form. He established a higher religious college in al-Bayḍāʾ where the Grand Sanūsī started his first Zāwiyah (religious establishment) in 1843. It was later developed into an Islamic university with a special religious-political status which involved it in power politics. Amīr Idrīs also reactivated most of the Sanūsī Zāwiyahs and allowed them to be administered as government offices with salaried staff, completely different from the original autonomous and self-administered form. Idrīs knew that his power over the whole country was due to his position as Sanūsī leader, and he knew very well that he wasn’t really popular in Tripolitania but was accepted as the lesser evil, so he put most of his efforts in strengthening the Sanūsiyyah.

Evidence of the supremacy that his ideology as a traditional leader of an Islamic Ṣāriqah had over that of a constitutional monarch of a modern state comes also from the observation of how the constitution was rectified in 1962. Many changes were made to alter many “secular” aspects of the document and make the whole constitution look more “Islamic” and more consonant to the vision that Amīr Idrīs had of his role. Art. 40 of the revised constitution now recited that “sovereignty shall belong to God, and by the most high God’s will it shall be entrusted to the nation from which all powers stem.” The same article, in its previous form only stated that “sovereignty is vested in the nation.” This article was modified in accordance with the traditional classical Islamic thesis on the divine origin of every authority according to which “supreme power cannot derive but from God, and can only be founded upon his will, because no man as such has the right to govern another man.” Even more important is the modification of Art. 44, which from the original “the sovereignty of the United Kingdom of Libya is vested in the nation. By the will of God the People entrust it to Amīr Muḥammad Idrīs al-Mahdī al-Sanūsī . . .” to the new version: “Subject to what has been provided in Art. 40, sovereignty shall be vested by the Nation, in trust with the Amīr Muḥammad Idrīs . . . .” While these changes entailed no real practical difference, the symbolic change is on the other hand very apparent. Now, only God is above the King, at best the people are equal to the King, not above him as before.

Amīr Idrīs regarded the form of government provided for in the UN resolutions that established the independence of the country as being of secondary importance to his own understanding of the form of government that was based on God’s divine law. According to Bin Ḥalīm,

he came to this conclusion because of his own religious upbringing; he had grown up in an atmosphere of the call to the true religion and to the establishment of a form of government based primarily on God’s law. The King, having received the allegiance of the Libyan people, regarded himself as responsible for all their affairs,

so that no constitutional covenant could convince him of the contrary. Moreover, “the discrepancy between the King’s view and the provisions of the constitution did not annoy

28 It is interesting to note that the Libyan Constitution is the only one among those that establish Islam as the state religion that expressly affirms the divine origin of the sovereignty.
29 Mustafa Ben Halim (n 23) 61.
the King or make him hesitate in putting what he believed to be his religious duty before the provisions of the constitution.” The King’s vision of democracy was that of the Islamic principle of *Shūrā*, or “consultation.” In his eyes, his duty was to listen and then decide. In sum, Amir Idrīs ignored some of the liberal features provided for in the Libyan constitution because he wanted to establish the system of rule by the “good and just man.” The King’s hostility to party politics also derived from his religious ideology. Around this traditional (Islamic) vision of power and authority the King rallied all his supporters, cronies, and all those who had become an integral part of his patronage system.

Many reasons have been given to explain the fall of the monarchy, from too much corruption, to the illness of the aging King that weakened his capacity to control the system, to the changed international situation that was bringing to the fore a new generation of people that wanted change and a different political outlook for the country. Pan-Arabism, socialism, and nationalism had become the watch words of the day. Obviously, these ideas contrasted with the traditional ones upon which the legitimacy of the monarchy rested, and defeated it.

In the meantime, and for the purpose of this chapter, it is not too farfetched to say that the attempt to create a more democratic regime, imbued with the values of liberal constitutionalism, as supported by the Libyan nationalists of the late 1940s was, in reality, defeated by the traditional Islamic values supported by the conservative establishment of the country, which had in Idrīs the major personality and supporter. What could have become a step forward on the road of liberalism became in reality a step back. The fall of the Monarchy brought in a completely different system of leadership, government, and ideology.

**IV. THE REVOLUTIONARY REGIME**

On September 1, 1969, a group of young army officers and enlisted men seized control of the government and abolished the Monarchy. The Free Officers Movement, which claimed credit for carrying out the coup, was headed by a twelve-member directorate that designated itself the Revolutionary Command Council (*Majlis Qiyādat al-Thawrah*), or RCC. This body constituted the government of the country after the coup.

In its initial proclamation the RCC declared the country to be a free and sovereign state called the “Libyan Arab Republic” (*al-Jumhūriyyah al-'Arabiyyah al-Lībiyyah*). The slogans “Freedom,” “Socialism,” and “Unity” were those used as reference point to indicate the future direction of both domestic and foreign policy. A young lieutenant by the name of Mu'ammar al-Qadhdhāfī soon emerged as the leader of the RCC.

After overthrowing the government of Amir Idrīs, the Revolutionary Command Council issued a “Constitutional Proclamation” (*I'lān al-Dustūr*) on December 11, 1969.

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30 Mustafā Ben Halim (n 23) 63.
31 Mustafā Ben Halim (n 23) 65.
The constitution was supposed to be a temporary one (Art. 37), but no new constitution was to be promulgated until the end of Qadhafi’s rule. There was, however, another important document, the “Declaration on the Establishment of the Authority of the People” (I’lan būkm al-Sha‘b), proclaimed and effective since March 2, 1977. According to this document, the General People’s Congress (Mu’tamar al-Sha‘b al-‘āmm) was the legislator in Libya: some of its resolutions had the content of fundamental laws. Another important source was the Green Book (al-Kitāb al-Akhār) written by Colonel Qadhdhāfī, which had its genesis in his speech of April 3, 1975. This book was a kind of “Summa Teologica” of Qadhdhāfī’s thought and was meant to provide the ideological blueprint for the government of the country. Actually, since the message was forwarded to and applicable in all the countries of the world, the kind of government predicated for Libya was meant to be good for anyone.

The temporary Constitutional Proclamation of 1969, even though never enforced, was important because it was the legal expression of what was the nascent ideology of Qadhdhāfī and his partners. In the preamble it was stated that the RCC in the name of the Arab people in Libya pledged to fight reactionary forces and colonialism and to fight all the obstacles that prevent Arab Unity, and the preamble summarized the Revolution’s goals in the name of the popular will as “Freedom,” “Socialism,” and “Unity.” Art. 1 stated that sovereignty was vested in the people, that the Libyan people were part of the Arab Nation, that their goal is total Arab unity, and that Libyan territory is part of Africa. This latter concept took on a new meaning first in the late seventies as Qadhdhāfī’s efforts toward Arab Unity failed and he began devoting all his energies to reaching the new goals of Pan-African or Pan-Islamic unity. Again in the late nineties when, frustrated by the lack of support from the Arab countries against the embargo put on Libya by the United States and the UN, Qadhdhāfī turned to Africa and Africanism as his main ideological and political object. Art. 2 of the Constitutional Proclamation of 1969 established Islam as the religion of the state, but nowhere in the constitution was Islam given the emphasis that would later characterize the Libyan revolutionary regime. Eight of the fifteen remaining articles in the first chapter dealt with some aspects of Libyan socialism. The second half of the Proclamation outlined the operative governmental structure. The RCC was to constitute the supreme authority in the Libyan Arab Republic, and it had both executive and legislative powers.

Even this Constitutional Proclamation was probably the fruit of a compromise between the ideas of a Qadhdhāfī who was not yet holder of absolute power, and the other forces that participated with him in the coup d’état. The scant attention paid in the constitution to Islam as an identity factor and to Shari‘ah as the law of the country, when Qadhdhāfī was known as a strong supporter of Islamic moralization of society and implementation of

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34 In the last years of Colonel Qadhdiha’s rule there was an attempt to draft of a constitution for the country. A commission of experts was gathered around one of the sons of the “Guide of the Revolution,” Sayf al-Islām al-Qadhdhāfī, informally developed a plan to formalize the existing system of government of the country and insert more liberal guarantees. However, no official document was ever published. The author of this contribution saw two different drafts and had only few chances to talk to members of this commission. In the fall 2009, the whole “reformist” agenda was downgraded and scaled back and the plans to introduce a constitution was not realized until the end Qadhdiha’s rule over Libya in 2011.
Islamic laws\textsuperscript{35} (or the enactment of symbolic Islamic laws), may be an indicator of some divergence of opinion within the RCC at the beginning of its existence.

Be that as it may, with this Proclamation, Libya had shifted almost overnight from the camp of conservative Arab traditionalist regimes to that of the radical nationalist ones. The primary task of the RCC after the seizing of power was to solidify control of the country by reducing tribal and regional power and identification, increasing political mobilization, and implanting a new local leadership supportive of the goals of the Revolution. Thus, every effort was made to accuse the traditional leadership of ties to the former colonial powers and to the “corrupt” monarchical regime. Trials were set up, where special People’s Courts were to try members of the former regime and other notables. The country’s political and administrative boundaries were redrawn so as to reduce the influence of traditional leaders. Former tribal areas were divided into administrative zones or sections that crossed old tribal boundaries and combined different tribes into one zone, or split one tribe into more zones.

By the end of 1972 the RCC leadership realized that all its attempts to mobilize the general populace in support of its revolutionary goals were failing. Qadhāfī, by now and increasingly the real holder of power, realized that something dramatically new was needed to shake the country. On April 15, 1973, in the city of Zwārah, Qadhāfī announced a new Popular Revolution based on a five points program:\textsuperscript{36}

1. All existing laws must be repealed and replaced by revolutionary enactments designed to produce the necessary revolutionary change.
2. All feeble minds must be weeded out of society by taking appropriate measures towards perverts and deviationists.
3. An administrative revolution must be staged in order to eliminate all forms of bourgeoisie and bureaucracy.
4. Arms must be distributed to the people who will point them at the chests of anyone who challenges the revolution.
5. A cultural revolution must be initiated to get rid of all imported poisonous ideas and to fuse the people’s genuine moral and material potentialities.

To consummate this (political, administrative, and cultural) revolution, Qadhāfī declared that the people were to seize power through People’s Committees (\textit{al-Lijan al-Sha’biyyah}), which were to be elected throughout Libya. Other institutional changes were initiated in 1975 and 1976 and continued to be implemented in an erratic and inconclusive fashion for at least another decade. All these reforms obtained the effect, which was desired, of raising the level of political confusion, legal uncertainty, and administrative anarchy, especially at the local level and in everyday life. It should be pointed out that at no time did anyone ignore where the real power in the country rested. Thus, since the launch by Qadhāfī of the popular cultural revolution in 1973, in theory in Libya there was no head

\textsuperscript{35} Ann Elizabeth Mayer, “Reinstating Islamic Criminal law in Libya” in Dwyer Daisy (ed), \textit{The Politics of Law} (J.E. Bergin, South Hadley 1990).

of state, government, or administration, since according to the principles expressed by the Colonel in his *Green Book*, the sovereign people are called to exercise power and authority directly through “People’s Congresses, People’s Committees and Professional Unions.” The Qur’an was to be the only source of constitutional law. The old 1969 constitutional proclamation simply disappeared (although it was never formally abolished), in favor of a “Declaration on the Establishment of the Authority of the People,” which was drafted in Sabhā March 2–28, 1977.

The political and administrative organization of the country, as finally resulted from the decrees of January 20 and February 5, 1979, was essentially based on Basic People’s Congresses (*al-Mu’tamarāt al-Sha’biyyah al-Asāsiyyah*) and Popular Committees (*al-Lijan al-Sha’biyyah*) that respond to a General Popular Committee (*al-Lajnah al-Sha’biyyah al-āmmah*) and to the General People’s Congress (*Mu’tamar al-Sha’b al-āmm*). The General People’s Congress met annually, formed the local resolutions into national resolutions (laws), and nominated the members of the National Executive, the General Popular Committee, often described as the “Council of Ministers.” In practice, the General Popular Committee was the government of the country, composed by the ministers nominated by Qadhdhāfī and elected by the General People’s Congress.

In theory the General People’s Congress was meant to be the most powerful body but, in reality, the real holders of power were the Revolutionary Committees (*al-Lijan al-Thawriyyah*), which Qadhdhāfī created in 1979. Based on non-geographical structures, such as universities and schools, the revolutionary committee system was created in a parallel way to the people’s committee system. Where the latter reported to the General People’s Congress, the former system was designed in a way that it responded directly to the leader of the revolution and was responsible only and generically of “maintaining the revolutionary ardor.” It was clear that the revolutionary committees were, in practice, the watchdogs of the regime vs. the whole of the administrative body.

This system was modified in October 1998 when twenty-six regional units, called *sha’biyyāt*, were created to take the place of forty-two municipalities (*baladiyyāt*) that had been established since 1975. Each *sha’biyyah* had its own People’s Congress and People’s Committee. The Secretary of the People’s Committee of the *sha’biyyah* was supposed to be

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37 Especially since December 1978, Colonel Qadhdhāfī, whom until that time was officially the Head of the RCC, relinquished all his positions to simply assume that of the “Guide of the revolution,” wanting to be seen only as a “teacher” and a “thinker.”

38 In this work Qadhdhāfī presents his solutions to the political, economic, and social ills, not only of Libya but of all the countries of the world. See also Green Book Part I: The Solution of the Problem of Democracy: the People’s Power (January 1976); Part II: The Solution of the Economic Problem: Socialism (Nov.1977); Part III: The Social Base of the Third Universal Theory (June 1979).


41 Id. See also Vandewalle, *Libya Since 1969* (n 39).
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elected by the People’s Conference of the sha’biyyah (formed by all the secretaries of the different Basic People’s Congresses within each sha’biyyah) but in reality was nominated by the leadership of the Revolution. This shows that, despite all attempts to decentralize power, it remained substantially in the hands of the central organs of the Revolutionary Government.42

Moncef Djaziry describes very well how through this system Qadhdhāfī could become the absolute holder of power in Libya and how, with few dedicated supporters, he managed to control all the state apparatus.43 Constitutionalism means, at least in general terms, limited government, adherence to the rule of law, and the protection of fundamental rights. It is evident, from the discussion above, that none of these principles corresponds to the concerns of the revolutionary leadership of Libya. All the rights, values, and principles that modern constitutionalism have heralded since its inception in the eighteenth century, according to Qadhdhāfī’s Green Book, are to be achieved through the establishment of a popular democracy devoid of classes, elites, political parties, and all other forms of false representation.

The People, through the Popular Revolution, in Qadhdhāfī’s thought, seek the destruction of an instrument of governing, not to replace it with another, but to institute themselves as sovereign and to remain so. This is what Jamāhīriyyah meant, and the Third Universal Theory44 outlined in the Green Book detailed the concept of Jamāhīriyyah or popular sovereignty (the government of the masses).

The Jamāhīriyyah concept implied that the people were the only representatives of themselves and their sovereignty could not be transferred to a public institution such as government. The people should dictate and implement their own policies; “thus, both the administration and the supervision becomes popular and the outdated definition of democracy as the supervision of the government by the people, comes to an end. It will be replaced by the right definition: Democracy is the supervision of the people by the people.”45 Sovereignty was also conceived as “indivisible.”46 Having ascertained that the people’s will is the source of all legislation, Qadhdhāfī went on to touch on the issue of the law of the society. He rejected the idea of a constitution in a system of popular sovereignty:

Constitutions are not the laws of the society. A constitution is a basic man-made law. That basic man-made law should have a source for its justification. The problem of freedom in the modern age is that constitutions have become the law of society, and

42 For a more detailed discussion of this point, see Hanspeter Mattes, Formal and Informal Authority (n 39) 59–60.
44 The Third Universal Theory refers to a style of government created by Qadhdhāfī in Libya in the early 70s. It is partly inspired by Islamic socialism and Arab Nationalism. The theory proposes an alternative to capitalism and communism for third world countries, and is based on the belief that both of these ideologies have proved invalid. The theory relies on the Qur’ān for most of its philosophical foundations. Mohammed el Khawas, Qaddafi: His Ideology in Theory and Practice (Amana Books, Brattleboro, Vt. 1986); Mahmoud Mustafa Ayoub, Islam and the Third Universal Theory: The Religious Thought of Mu’ammar al Qadhafi (KPI Limited, London 1987).
46 Id. 16.
constitutions are based on nothing other than the views of the instruments of the dictatorial rule prevailing in the world, ranging from the individual to the party.\textsuperscript{47}

Qadhdhāfi said that he recognized that societies have fundamental laws derived from either “tradition” or “religion”: “Any other attempt to draft law for any society, outside these two sources is invalid and illogical.”\textsuperscript{48} “This law of society, derived from tradition and/or religion, was the one that the “instrument of government” had to abide by. One might expect that, for Qadhdhāfi, the only limitation of power would come from the religion as traditionally understood and developed, which in Libya means mainly adherence to the Mālikī school of law interpretation. But since control was vital for the colonel, he would not give such a power to an interpretation that would, in practice, restore authority to that same traditional establishment that he wanted to destroy. So, Qadhdhāfi gave his own interpretation of Islam in order to reach his purpose of crushing every opposition while at the same time anchoring his revolutionary government to the legitimizing effects of formal adherence to Islam, the primary factor of identity of the Libyans. As Djaziri pointed out:

\ldots in order to make his political experiments appear in line with the most deeply felt values of Libyan society, Qadhafi is forced to adapt his political experiments so that they appear to conform with these values. To do so, he deliberately introduces a confrontational dynamic between the Ulama (religious scholars) the traditional guardians of that value code and himself, who wants to reinterpret that value code.\textsuperscript{49}

Thus, Qadhdhāfi based his call for Islamic revival on the Qur’ān. He preached the need to reject formal interpretation of the holy book as blasphemy and sin, contending that the Qur’ān was written in Arabic so that every Arab could read it and apply it without the interpretation of the others.\textsuperscript{50} He criticized the Ḥadīth, the collected traditions and sayings of the Prophet Muhammad as received through oral transmission, on the grounds that the Qur’ān is the only real source of God’s word.\textsuperscript{51} In the same way Qadhdhāfi considered illegitimate the teaching of the various schools of jurisprudence charging that they were only the product of power struggles between individuals and had little to do with the real religion as expressed in the holy book.

As Bruce St. John pointed out, “The reformist elements of Qadhdhāfi’s approach—such as progressive role for Islam, the rejection of the Ḥadīth, the transcendence of God, and the purely human role of the Prophet—are a deliberate attempt to reduce the role of the ‘ulamā’ and to bring Islam under the control of the Revolution.”\textsuperscript{52} The wheel came round full circle. Islam, which was supposed to be the source of and the only limit to absolute power, was in reality subject to the interpretation and control of the Leader

\textsuperscript{47} Id. 33.
\textsuperscript{48} Id. 32.
\textsuperscript{49} Moncef Djaziri (n 39) 195; see also Moncef Djaziri, \textit{Etat et société en Libye} (Editions L’Harmattan, Paris 1996).
\textsuperscript{50} Foreign Broadcast Information Series—Middle East and Africa (FBIS-MEA) September 1, 1981, Q 10-Q 13.
\textsuperscript{51} FBIS-MEA July 14, 1980, I 1.
of the Revolution. A demonstration of this state of affairs can easily be drawn from the observation of the trends in the evolution of the legal framework in Libya since 1969. It can be noted that most of the Islamic reforms promulgated under the regime’s commitment to Islamization were very superficial and most of the time were never enforced in practice. As Ann Mayer explained:

At the theoretical level, his (Qadhāfī) ideology has continued to assign a central role to religion and custom as the basis of Libyan law. However, in practice, secular laws—officially promulgated by the People’s representatives, but in practice largely dictated by Qadhāfī’s own shifting policies—have all but eclipsed religion and customary law.  

The 1977 Declaration affirmed that the Qur’ān was the constitution of the Socialist People’s Libyan Arab Jamāhīriyyah, but provided no guarantee for the respect of political and civil rights. The reinterpretation of Islamic laws and values made by Qadhdhāfi provided the theoretical legitimization for actions such as the limits posed on private property rights—that were otherwise clearly prohibited under Shari’ah’s principles.

By the second half of the eighties Qadhdhāfi realized that all this political jargon, administrative chaos, judicial ineptitude, and complete lack of any legal guarantees and certainties were beginning to seriously damage his image, domestically and internationally. Therefore, Qadhdhāfi “appealed to human rights in an effort to shore up the legitimacy of his regime. Human rights were briefly treated as a new kind of sacred law.” In this light it should also be seen the promulgation of the “Great Green Charter of Human Rights in the Era of the Masses” (al Wathiqah al-Khadrā’ al-Kubrā li–ḥuquq al-Insān fī ‘asr al-Jamāhīr) by the General People’s Congress on June 12, 1988. This charter reported almost verbatim some of Qadhdhāfi’s speeches, and its content was very general. The real intention behind it was to gain some legitimacy while giving out very few, if any, rights or legal guarantees. In fact, in the charter there is no sign of reconnaissance of principles such as freedom of conscience or religion, or freedom of worship, of expression or association, nor is there any prohibition of torture nor any guarantee against arbitrary arrest and detention.

A close analysis of the charter would clearly show its deficiencies. In this situation, under the revolutionary regime there was no precise and clearly defined rule of law nor limitations on power. The best representation of the situation was the one given in the conclusion of Ann Mayer’s chapter on the legal system of Libya: “In Libya, under Qadhdhāfi, no law was sacred.”

V. CONCLUSION

In Libya, the relationship between constitutionalism, as defined in this chapter, and Islam has had different meanings at different times. Under the Tripoli Republic, Islam was the constituent element of the identity of the Republic, which was understood by most of its members as the embodiment of an Islamic system. As the counselor to the Republic, the famous Egyptian nationalist ‘Abd al-Rahmān ‘Aẓzām explained on behalf of the

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54 Id. 131.
55 For a detailed discussion of the charter, see id. 132 ff.
56 Id.132.
Tripolitanian leadership that consultation was the basis of Islamic religion and that therefore in democracy Muslims find themselves in their authentic element, and that, even though the rules and laws of the representative system in Europe are unknown to them, Bedouins were by their very nature Members of a Parliament and disliked the idea of submitting to despotism.\(^{57}\) This is the reason why the Republic functioned, if only for a short period, even without taking into consideration the new constitutional order enacted by the Italians with the Basic Law of 1919. The provisions of the Statuto in fact implied Christian-Muslim collaboration in applying a social contract and a political philosophy based on Western notions of government. Most of the Tripolitanian leadership was imbued with traditional Islamic notions, and thus saw their relation with the colonial power as confrontational: Islam versus Europe. The Republic was weakened because of internal factional and provincial disputes. But as again stated in 1920 at the Gharyân congress, the vision of the ideal state was “A legitimate and capable government that would rule in accordance with the Islamic Sharī’ah under the authority of a Muslim Amir elected by the nation.”\(^{58}\)

The whole idea of a republic and of an Islamic constitution was born out of the necessity to coalesce against a foreign enemy by forces that were very different in origin, strength, and ideology, but all shared Islam and its values. They accepted the compromise as well as the limitation to power, and what today is called civic guarantees (at least those recognized at that time) that were built into the Islamic system of values. However, this attempt at republicanism was soon to be aborted, and unfortunately the seeds that were planted at that time never came to fruition. The more sophisticated and more modern constitutional system that emerged after independence and under the Monarchy was built, at the beginning, under the same conditions as described above. A strong republican opposition was capable of imposing a constitutional monarchical system to a reluctant King, who imbued it with his traditional Islamic notion of authority and power but never really understood or accepted it. As soon as the Monarchy consolidated its grasp on power, it slowly started to take away many constitutional guarantees and a more despotic system was enacted, thus ending the hopes of those that, in the pre-independence years, dreamed of the possibility of installing a liberal regime in Libya. Here the Islam that dominated was that of the Sanūsī King, a vision of the role of the head of a sect, not that of the leader of a larger Muslim country entangled in a web of international relations.

The Revolutionary regime did not even try to go back to the values of liberalism and constitutionalism, but enacted a series of reforms that turned Libya into a highly centralized and authoritarian country. While the regime did, formally and superficially, all it could to be depicted as Islamic, there has been very little Islam in the way the country has been run lately. Political scientists and sociologists have claimed that the slow drive of Libya toward an increasingly authoritarian regime was due to the necessity, perceived by the various elites in power, to create a state (and maybe a nation) out of a bunch of tribes and few urban dwellers divided by internal and regional quarrels. Whether this is true or not, from the point of view of the constitutionalist, Libya under Qadhāfī’s rule represented quite a sad case. All the hopes that were raised at the turn of the century and again in the few years of complete political freedom that the country enjoyed before the granting of independence were disappointed in the following years. In 2008, an analyst of Libyan political development, it can be easily concluded that: “As long as revolutionary Leader Qadhafi

\(^{57}\) Letter from ’Aẓzām to an Italian friend resident in Tripoli, dated Feb. 10, 1920. In Jacques Roumani (n 7).

\(^{58}\) Note addressed to the Governor of Tripolitania communicating the decisions of the National Congress of Gharyân, dated December 11, 1920. ISMAI 122/24-222. In Jacques Roumani (n 7) 161.
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lives, and thus personally embodies revolutionary legitimacy, the Jamahiriyya (as the ‘Republic’ is called today) will not require a constitution, and revolutionary control of the Libyan sovereign will continue.\(^\text{59}\)

In light of the 2011 events this analysis needs to be re-addressed. Indeed, in the middle of February of this year following the revolts in Tunisia and Egypt, hundreds of people took to the streets in Libya to protest against the rule of Mu’ammar al-Qadhāfī. The peaceful and spontaneous demonstrations soon turned into an insurgent movement whose leadership was assumed by the Transitional National Council of Bīngāzī (TNC). Headed by ex members of the regime, politicians and intellectuals of Cyrenaica—the region where the demonstrations originated—the TNC invoked the military intervention of the West in order to arrest the brutal repression that Qadhāfī was ready to perpetrate against them. The UN authorized a military intervention on humanitarian grounds led by France, the United Kingdom, and the United States. The situation soon reached a stalemate that neither NATO, that took control of the military operations at the end of March, nor the rebels of Bīngāzī or the forces loyal to Qadhāfī seemed able to overcome.

The country that will emerge from this war will need not only a constitution but, even more important, Libya will have to build a new democratic and pluralistic political system anchored in those state structures that were always missing because of the peculiar nature of the state created by Qadhāfī. After the fall of the regime, the TNC must guide the transition toward a broader, more inclusive, elected body that will then lead Libya’s transformation into a free, democratic society. An elected body representing the whole country should be responsible for writing a new constitution with the oversight of the United Nations or some other international civil institution, as was the case following Libya’s independence declaration in 1951. This would be only the first step in the reconstruction of Libya, a step necessary in order to leave behind forty years of dictatorship and move ahead toward a pluralistic and democratic Libyan state in the twenty-first century.

\(^{59}\) Hanspeter Mattes, Formal and Informal Authority in Libya since 1969 (n 39) 76.
I. INTRODUCTION

On July 9, 2011, Africa’s continent gave birth to its fifty-fourth state, South Sudan, six months after the people of southern Sudan voted almost unanimously for independence. With the secession of its southern part, many challenges and chances lie ahead for Sudan. One of them relates to the constitutional architecture with respect to Human Rights and Sharī‘ah. Noteworthy, pursuant to its Art. 226, the Interim National Constitution (INC) does not lapse after the secession of Southern Sudan. Instead, its para. 10 stipulates that its status remains intact except for those provisions that provided for southern Sudan institutions, representation, rights, and obligations. In other words, the basic structure of the constitution, including the nature of the State, the relevant human rights provision and the accommodation Sharī‘ah law is still the applicable supreme law of Sudan. But also in the process of revising or replacing the INC, some pertinent provisions and their application may serve as point of departure for the design of the new constitution.

1 The Republic of Somaliland and the Sahrawi Arab Democratic Republic are not considered as States in this context.
4 Art. 226 (10) of the INC stipulates: If the outcome of the referendum on self-determination favours secession, the parts, chapters, articles, sub-articles and schedules of this constitution that provide for southern Sudan institutions, representation, rights, and obligations shall be deemed to have been duly repealed.
Thus, this article analyzes how the Interim National Constitution has been designed to accommodate Shari’ah and human rights with a specific focus on the freedom of religion (section III) and whether the relevant sections of the INC have been properly implemented so far (section IV). The concluding remarks highlight the need to avoid unnecessary labeling in the Shari’ah and human rights debate (section V). To gain a better understanding of the INC’s complex structure that resulted from previous experiences, a short overview of the role of Shari’ah in Sudan’s constitutional live since independence precedes (section II) after this introduction.

Sudan was not only the largest country in Africa, with a territory covering about 2.5 million square kilometers, it had also one of the most heterogeneous societies. The approximately 600 different indigenous groups with over 100 languages did hardly form a common national identity. Besides being an ethnic mosaic, it was also a religious one: about two-thirds of the population have been Muslims and adherents to the Sunnī branch of Islam, the remaining third has ascribed to either Christianity or traditional beliefs.

Until 2005, Sudan also hosted Africa’s longest running civil war, which had been raging for decades between the government and the rebel movement in the south of Sudan. In attempts to put that conflict into perspective, it was often cast in terms of political, religious and ethnic antagonisms, the most frequently invoked being that between Arab Muslims on the one side, and African Christians and animists on the other. Although this juxtaposition is not wrong, it reflects only some of the causes of the conflict. The civil war in Sudan was not about religion in the first place, yet there were various motivations why it became so overburdened with religion that this aspect played a key role in the negotiations on the Comprehensive Peace Agreement (CPA) and the Interim National Constitution (INC) deriving thereof. at various occasions throughout the history of post-independence Sudan, Islam and parts of Shari’ah were used and mis-used as a means to maintain and strengthen political power. Hence, the INC had to balance the needs to provide sufficient autonomous space for southerners traumatized by the past and, concomitantly, to appease the Islamic views within the regime. The challenge to find a proper balance translated into the need to accommodate Shari’ah and human rights in the new constitutional setting.

It is not the aim of this chapter to discuss how far Shari’ah and human rights might be consistent from a substantiative point of view. Shari’ah as a normative system is far from being monolithic; instead, it is an extreme case of “jurists’ law.” Despite considerable ijmā’ (consensus) in the classical literature on the fundamental propositions, significant diversity remains in its application due to extensive resort to ijtihād (juristic interpretation).

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9 See A.M. Abdelmoula, An Ideology of Domination and the Domination of an Ideology—Islam, Politics, and the Constitution in the Sudan (United States Institute for Peace, Washington D.C. 1998), who felicitously comments at p. 1: “...the politically dominant elite of the so-called northern Sudan have increasingly found in their shared version of Islam an ideology that readily serves their hegemony and gives that hegemony the sanctity of religion.”
reform ideas regarding the rights of all non-Muslims continue to exist alongside demands for the reinstatement of a narrowly interpreted dhimmī system according to more classical jurisprudence. Of particular relevance to the Sudanese context is the school of thought founded by the late Sudanese Maḥmūd Muḥammad Ṭāḥā and the Republican Brothers, which offered a meticulous analysis of the Qur'ānic verses and their relation to one another, suggesting that Islam is in harmony with international human rights standards. In addition, some pertinent ijtihād of the probably two most respected Islamic scholars in today’s Sudan addressing two controversial issues at the interface of Shari‘ah and human rights should be mentioned in this context: Ṣādiq al-Mahdī’s interpretation on dhimmī states that “non-Muslims are not dhimmi in Sudan, because this is a historically governed principle for the treatment of conquered people. The non-Muslims in Sudan are not conquered, they are co-citizens.” Ḥasan al-Turābī’s interpretation on apostasy argues that “the death sentence on the apostate was not mandatory but conditional on his engaging in a war against the Muslim community.” Considering both quotations but also being aware of deviating interpretations from other Islamic scholars, it becomes obvious that without further specification which jurisprudence to follow, any attempt to test Shari‘ah against human rights falls short. The INC remains silent insofar.

II. OVERVIEW: THE ROLE OF SHARI‘AH IN POST-COLONIAL CONSTITUTIONAL SETTINGS UNTIL 2005

Sudan’s past is complex and was shaped by many factors, internal and external alike. Only focusing on aspects of Shari‘ah in Sudan’s history after independence to a certain extent disregards the complex web of causes that shaped the realities of the past. But as much as this mono-causal perspective blanks out other factors, it highlights the significance of Islam, both as a religion and as a “political card” played to gain and maintain power.

A. The Constitutional Setting at the Eve of Independence

Sudan was no exception with regard to its demarcations that were set at the drawing table of foreign colonizers. Although partly deriving from the limits of Ottoman Egyptian expansion (1821 onward), Sudan’s present boundaries were drawn in the early twentieth century when Britain reoccupied the territory under the guise of the Anglo-Egyptian condominium (1898) and concluded a series of border agreements with its French, Italian, Belgian, and Ethiopian competitors. Colonized mainly for strategic purposes in order to keep their colonial rivals, notably the French, out of the area, the British hardly contributed to unifying its territory or giving its very diverse population a sense of nationhood. To the

12 Dhimmī is related to the treatment of non-Muslims under the Ottoman millet system where Christian and Jewish groups who belong to the “People of the Book” were regarded as “protected people.”
13 El-Gaili (n 10) 528.
14 A.M. Abdelmoula (n 8) 3. Ṭāḥā was accused of apostasy and subsequently executed by former dictator Nimerie.
16 Id. 12.
17 Rogier (n 5) 7.
18 Rogier (n 5) 8.
contrary, for most of the colonial period, the British anticipated a divided future for the north and the south, with the latter being integrated into British East Africa. Consequently, they administered the south as a separate entity and developed a “Southern Policy.” However, at the Juba Conference of 1947, London modified its policy with a view to reincorporating the south into Sudan.

In 1953, the colonial administration enacted the Self-Government Statute. With independence gained in 1956, the statute was adopted as the country’s first (transitional) constitution with only few, mainly cosmetic amendments. It provided for the creation of a parliamentary democracy along the so-called Westminster model and established a secular state based on citizenship and equality before the law. Any reference to Islam or Shari’ah as “a source of law” was missing.

B. The Constitutional Cycles Between Independence and 2005

Since independence, constitutional life in Sudan was embedded in a fluctuation between democratic rule and military regime. During its first fifty years of national rule, Sudan experienced some minimal form of democracy in the periods of 1956–1958, 1965–1969, and 1985–1989. At the beginning of each “democratic” cycle, the Constitution of 1956 was reinstated with only minor alterations. In 1956, deliberations on a permanent constitution began. Wrangling over its content contributed to the first military coup. General Ibrahim ‘Abbūd overthrew the government, suspended the constitution, dissolved parliament, and banned all political parties. In the attempt to create a national identity, he launched aggressive Islamization and Arabization programmes. As a consequence occasional unrest escalated into a fully fledged civil war. The threat of, inter alia, introducing universal Shari’ah also sharply inflamed north-south tensions and guaranteed a stalemate on a national constitution. Great popular discontentment with the ‘Abbūd regime and its inability to address the “southern problem” finally caused a popular uprising that brought down the ‘Abbūd regime in October 1964. Another brief parliamentary interlude started

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20 This change resulted from another deal between the former colonial rulers according to which Egypt promised to permit the United Kingdom to keep control of the Suez canal, while the UK committed not to separate the south from the north of the Sudan, the latter Egypt hoped to annex as a whole (see Rogier (n 5) 7).
21 El-Gaili (n 10) 505.
22 The bones of contention had been about the secular or Islamic character of the state and its federal or unitary nature (an autonomous status had been assured to southerners during pre-independence negotiations), see D. H. Johnson, The Root Causes of Sudan’s Civil Wars (James Currey, Oxford/Bloomington 2003) 30.
24 Other policies adopted were the introduction of Arabic (instead of English) as the medium of instruction in southern schools, altering weekly holiday in the south from Sunday to Friday (Muslim weekly holiday), and finally, the introduction of the Missionary Societies’ Act, 1962. This Act required individuals and organizations planning to do missionary work in the country to first obtain a license from the Council of Ministers.
and the Constitution of 1956 was resurrected as an interim solution until a new document was adopted. Despite a promising start, the situation deteriorated rapidly. No southern representation was present in the constituted parliament as fighting in the south prevented its participation in the elections.\textsuperscript{25} Shortly thereafter, the Communist Party was expelled unconstitutionally from parliament.\textsuperscript{26} The ideology of Islamism imposed through dictatorial force during the ‘Abbūd regime was now to be entrenched through constitutional power.\textsuperscript{27} Art. 1 of the Constitution Bill defined Sudan as a “democratic socialist republic guided by Islam” and Art. 113 stated that “Islamic Shari’ah is the basic source of law in the state.” Shortly before the final reading in parliament, in May 1969, General Ja’far Muḥammad Nimairī seized power through a military coup, backed by the Soviet Union. However, an abortive communist coup against him in 1971 and the death of Jamāl ‘Abd al-Nāṣir (Egypt) led to Nimairī’s political turnaround and his firm alignment with the West. Within this political context, a rapprochement with the south occurred in 1972. In the same year, the Addis Ababa Peace Agreement was signed, which paved the way for the “Permanent Constitution” of 1973. The south was accorded certain rights of autonomy, especially with regard to religion. Islam did not become the religion of the state and the cautiously worded Art. 16 found its way into the constitutional document:

\begin{itemize}
  \item[(1)] In the Democratic Republic of the Sudan Islam is the religion, society should follow Islam as the religion of the majority, and the state shall endeavor to express Islam’s values.
  \item[(2)] And, in the Democratic Republic of the Sudan Christianity is the religion of a large number of citizens, they follow its guidance, and the state shall endeavor to express Christianity’s values.
  \item[(3)] Divine religions and honorable spiritual beliefs of the citizens should not be insulted or degraded.
  \item[(4)] The state shall treat followers of divine religions and those who profess honorable spiritual beliefs without any discrimination with regard to their rights and freedoms guaranteed to them by this Constitution as citizens, and the state has no right to impose any limitations on citizens or any groups of them on the basis of religious belief.
  \item[(5)] Misuse of religion and honorable spiritual beliefs for political exploitation shall be prevented and every act intended to or likely to cause the development of feelings of hatred, animosity, or splits between religious groups shall be considered a violation of this Constitution and shall be legally punished.\textsuperscript{28}
\end{itemize}

The black letter laws did not reflect realities for long. Opposing both the well-balanced religious approach and the concessions toward the south, Islamic elites increasingly isolated Nimairī. After an attempted putsch failed in 1976, Nimairī felt the need to launch a process of national reconciliation with the Islamist opposition. While it did secure his

\textsuperscript{26} The bill banning the Communist Party (and expelling its representatives in parliament as a consequence) was declared unconstitutional by the final High Court but the ruling was ignored by the government. A sufficient majority was now available to create an Islamic constitution. \textit{See} Abdelmoula (n 8) 6.
\textsuperscript{27} Abdelmoula (n 8) 7.
\textsuperscript{28} Translated into English by A.M. Abdelmoula, \textit{see} Abdelmoula (n 85) 8.
political survival at first, this move allowed radical Islamists to corrode the administration of the state and resist the agreements of the peace treaty. When oil was found in the south, the administration of the areas in question was transferred from the southern to the northern authorities. Various other autonomy rights were cancelled, and Arabic was made the official language of the south. The “September Acts” of 1983 placed the entire country under Shari‘ah law. So-called “emergency courts” were instituted under Shari‘ah judges of which only one had proper legal training. Books were burnt, and a moderate Islamic cleric, Maḥmūd Muḥammad Ṭāḥā, was hanged. Civil war broke out once again, the government’s opponent this time being the Sudanese People Liberation Army (SPLA) led by Dr. John Garang.29

A popular uprising in 1985 ousted Nimaīrī and a slightly amended version of the 1956 Constitution was adopted subsequently. Ṣādiq al-Mahdi was elected as the new Prime Minister in 1986, and although his government mitigated the enforcement of the September Acts, it did not actually revoke them. As the government finally decided to repeal them as a step forward toward a negotiated Peace Agreement with the south in 1989, the third parliamentary period in Sudan’s history abruptly ended with another coup. The day the assembly was to vote on new laws as part of the Sudan Peace Initiative, Lieutenant General Ṭūmar Ḥasan al-Bashir took over, masterminded by Islamist ideologue Ḥasan al-Turābī. Another autocratic regime was established.30 Under al-Bashir, Islam became even more of an instrument of political power. The September Acts were reinstated fully and a jihād—a holy war—was called against the regime’s enemies, including moderate black African Muslims. In 1991, the Criminal Code was passed which was applied territorially in order to exempt the southern states from certain provisions, such as the ḥudūd punishment (corporal punishment, including amputation or crucifixion for certain crimes), but without exempting non-Muslims in the north.31 In the Garnison towns in the south, however, there was de facto application of Shari‘ah because the Shari‘ah-trained judges were unfamiliar with local laws.32 On paper, the regime transformed itself from a military to a civilian one in 1993. Bashir held elections in 1996, which were boycotted by all other political parties and allegedly manipulated.33

Ethnic rivalry within the south coupled with the frustration about Garang’s authoritarian leadership split the SPLA for most of the 1990s. The regime exacerbated the rift by providing aid and encouraged the splinters to attack its former compatriots. Former SPLA commanders including Riek Machar, Arok Thon Arok, Lam Akol, and Kerubino Kuanyin eventually signed a separate Khartum Peace Agreement with the government in April 1997, under a process that the regime described as “Peace from Within.” As a consequence, another constitution emerged after years of rule by presidential decree. The Constitution of 199834 tried to strike a balance between Islamism and secularism. As a consequence, both sides felt betrayed. The ambiguously drafted Art. 1 on the Nature of the State mirrors best

30 Institute for Security Studies (n 24) 5.
32 El-Gaili (n 10) 532.
33 Not surprisingly, he won 75.7 percent of the vote, with only an estimated 7 percent to 15 percent of eligible voters in Khartum going to the polls (ICC (n 18) 18).
the respective source of dissatisfaction: it declared that “the State of Sudan is an embracing homeland, wherein races and cultures coalesce and religions conciliate. Islam is the religion of the majority of the population. Christianity and customary creeds have considerable followers.” While Islamists lament that the article does not proclaim Islam as the religion of the state, non-Muslims insist that references to a religious majority (Muslims) and not to a racial majority (Black Africans) confirm it as an ideology-based constitution. Furthermore, on the critical issue of sources of legislation, Art. 65 includes Shari’ah among the sources of law which no legislation shall contravene. Again, Islamists were frustrated by having Shari’ah not as the principal source of legislation whereas non-Muslims did feel uncomfortable with its inclusion into the canon. In addition, Art. 4 vests sovereignty in God and restricts the exercise of sovereignty to those who will use it in the “worship of God.” Read literally, the text excludes non-Muslims, particularly those who do not belong to the “People of the Book” (ahl al-kitāb), from exercising sovereignty. Art. 10 does not restrict the duty to pay the Islamic zakāt (alms) to Muslims. Art. 24 warrants the freedom of religion, subject to limitations in the interest of “public order” or by subsequent legislation.

How the various ambiguities were to be implemented remained unanswered, since President Bashir declared a state of emergency and dissolved parliament in December 1999, only two days before it was to vote on a bill designed to reduce presidential powers. At the beginning of the millennium, constant pressure from the international community with the United States at its head led to serious negotiations about peace under the direction of the regional organization IGAD. In June 2002, a framework agreement was reached on the fundamentals of a peace treaty (Machakos Protocol). The treaty, the Comprehensive Peace Agreement (CPA), was signed early in 2005. The CPA was comprehensive in one sense only: it covered the core disputes between Sudan’s former national government represented by the National Congress Party (NCP) and the SPLA/M. Only those two actors were sitting at the negotiation table, excluding many other groups in Sudan, be they regional (with regard to the East or the West of the country) or political (with regard to the various actors in Khartum and in the south). Although the CPA explicitly acknowledged peace and stability as aspirations shared by all people of the Sudan, it regarded itself only “as a concrete model for solving problems and other conflicts in the country.” However, since the CPA served as the blueprint for the Interim National Constitution of the Republic of Sudan (INC) and was incorporated by the latter, this recital of the preamble read like

35 See el-Gaili (n 10) 532.
36 Art. 65 states: “The Islamic Shari’ah and the national consent through voting, the Constitution and custom are the source of law and no law shall be enacted contrary to these sources, or without taking into account the nation’s public opinion, the efforts of the nation’s scientists, intellectuals and leaders.”
37 Pursuant to the Qur’ān (5:15), the “People of the Book” are non-Muslims who received scriptures which were revealed to them by God before the time of Muḥammad (most notably Christians and Jews).
38 ICC (n 18) 20.
39 The Comprehensive Peace Agreement consists of six protocols (Machakos Protocol, Protocol on Power Sharing, Protocol on Wealth Sharing, the Security Arrangement, the Protocol on the two States (Southern Kordufan and Blue Nile States), and the Abyei Protocol), a chapeau, and the Schedules on Implementation.
40 Chapeau of the CPA, recital 4 and 9.
41 Art. 225 INC stipulates that “[t]he Comprehensive Peace Agreement is deemed to have been duly incorporated in this Constitution; any provisions of the Comprehensive Peace Agreement which are not expressly incorporated herein shall be considered as part of this Constitution.”
lip service. Frustration grew among many groups sidelined in the political processes taking place under the CPA, and partly erupted into violent conflicts.42

The main pillars of the CPA/INC were: the far-reaching autonomy in religious as well as other matters for the south, the integration of southerners in the national government, the sharing of oil revenues, and “a right to self determination” that amounted to the option to secede.

III. THE ACCOMMODATION OF SHARI‘AH AND HUMAN RIGHTS IN THE INTERIM CONSTITUTION OF SUDAN

A. The Structure of the Interim National Constitution of 2005

The structure of the late Sudanese state owed a great deal to the experiences of the south in the decades after the independence of Sudan. Being aware of the role of Islam in political life and its exploitation as a means to retain power, one might not be surprised that the issue “state and religion” was paramount in the negotiations that lead to the CPA. Large parts of the Machakos Protocol were dedicated to this issue, which became a driving force in the creation of an innovative state structure. As mentioned above, it had to balance the needs to provide sufficient autonomous space for southerners traumatized by the past and, concomitantly, to appease the Islamic views within the regime. The structural framework created by the CPA and fine-tuned in the INC might be best described as a double asymmetrical federal state on probation.43 This frame allows for the implementation of the “one country–two systems” approach.

1. A State on Probation

The constitution was meant to be an interim one. It was planned to remain in force for a period of six years, after which the people of Southern Sudan would vote in an internationally monitored referendum on whether they would like to remain part of Sudan under the present structure or become an independent state. The late John Garang negotiated for the inclusion of the referendum as guarantor for the proper implementation of the CPA/INC drafted with the commitment to give unity a chance. In view of “too many agreements dishonored,” it was seen as a safety valve if the regime in Khartum continued with its traditional way of treaty implementation. For the separatist wing of the SPLA/M, the period of six years is considered to be an internationally recognized “divorce waiting period.”

2. The Federal Structure

Below the national level, Sudan consisted of twenty-five federal states endowed with far-reaching competences. Fifteen of these states belonged to the north and ten to the south. All states had their own directly elected governor and parliament and were equally represented at the national level through a second chamber in the national legislature, the “Council of States.” Since constitutional amendments required inter alia the support of a two-thirds majority of the Council of States, an alteration was dependent on the consent of

at least some southern states.\textsuperscript{44} Powers between the national and the state level were allocated according to the Schedules A (exclusive national powers), C (exclusive state powers), D (concurrent powers), and E (residual powers). Those traditional formulas of vertical power-sharing were complemented by other, religion-based ones which did not harmonize entirely with one another, as will be examined further below.

3. The First Asymmetry:
In two of the northern states that border directly on the south (Southern Kordofan/Nuba Mountains and Blue Nile), special rules applied because during the civil war, a large part of the population fought with the SPLA, which wanted to protect its followers from discrimination in times of peace.

Khartum, capital and seat of the national government, also enjoyed a special status. As the capital is situated in the Muslim-dominated north of the country, the CPA/INC accorded particular importance to the religious freedom of the population. Special institutions were introduced to safeguard the rights of non-Muslims in the capital.

4. The Second Asymmetry:
Wedged in between the national level and that of the federal states was the Government of Southern Sudan (GoSS), equipped with a full-fledged state structure. Its territory covered all ten southern states. It had its own government, parliament, and judiciary. According to Art. 162 INC, the primary functions of the GoSS included exercising the regional autonomy of the south and providing a link between the national government and the southern federal states. This asymmetry created another imbalance: the exclusiveness of powers allocated to the states in Schedule C was only granted with respect to the national level but did not apply in the relations between the southern states and the GoSS. In how far the reallocation of those powers were entirely at GoSS’s will or only allowed for some kind of framework legislation depended on the reading of paras. 9 and 10 of Schedule B and their interplay.\textsuperscript{45} Nevertheless, from the perspective of southern states, the constitutional structure deprived them of the strength of federal sub-units with regard to the South Sudanese level of government.

B. The Accommodation of Shari‘ah Law in the Constitutional Setting
Within the legal structure described above, the INC implemented the “one country–two systems” approach postulated in the CPA. The term “two systems” basically referred to the structure of the legal system in two different territories, namely that of the ten southern

\textsuperscript{44} See Art. 224 INC.

\textsuperscript{45} According to para. 9 of Schedule B, one of the exclusive competences given to GoSS, is to encroach upon all major competences of the southern states as provided for: “The co-ordination of Southern Sudan services or the establishment of minimum Southern Sudan standards or the establishment of Southern Sudan uniform norms in respect of any matter or service referred to in Schedule C or Schedule D, read together with Schedule E, with the exception of Item 1 of Schedule C, . . . .” In contrast, pursuant to para. 10, “any power that . . . for reasons of efficiency the Government of Southern Sudan itself requests to exercise in Southern Sudan and that other level agrees.” Narrowly interpreted, B.9 might apply for the creation of “minimum standards” and “uniform norms,” whereas the state’s consent according to B.10 is required if “reasons of efficiency” had been the motivation. However, this distinction becomes superfluous, since the threshold to trigger B.9 (uniform norms) is always given.
states that form the GoSS and that of the fifteen northern states. Established as an umbrella that covered both these systems, the national government was free from specifically religious overtones in all matters relating to Sudan as a whole. According to the INC, Sudan was not an Islamic republic, nor was Islam the religion of the state. Unlike the Sudanese Constitution of 1998, it did not include a clause that specifies that any law that applied to the entire nation must harmonize with the Shari’ah. Nor must the president belong to any particular religion. Despite this secular appearance, Shari’ah continued to play a significant role in the constitutional setting of Sudan at various levels of government. Its scope was only restricted to the extent necessary to provide sufficient autonomous space for southerners. The establishment of two legal systems was achieved through various means:

1. Accommodation through Vertical Separation of Power

Relevant competences were assigned to the level of states. Sensitive issues such as most criminal and religious matters were meant to be regulated exclusively at that level. The Government of Southern Sudan made wide use of creating uniform norms at the GoSS level according to Schedule B para. 9. Former SPLM laws served as a blueprint for the new GoSS laws.

2. Accommodation through Different Sets of National Law

Due to the fact that the North Sudan lacked an intermediate level of government, special arrangements were established at the national level through Art. 5 INC which reads:

(1) Nationally enacted legislation having effect only in respect of the northern states of the Sudan shall have as its sources of legislation Islamic Shari’ah and the consensus of the people.

(2) Nationally enacted legislation applicable to Southern Sudan or states of Southern Sudan shall have as its sources of legislation popular consensus, the values and the customs of the people of the Sudan, including their traditions and religious beliefs, having regard to Sudan’s diversity.

(3) Where national legislation is currently in operation or is to be enacted and its source is religion or custom, then a state, and subject to Article 26 (1) (a) herein in the case of Southern Sudan, the majority of whose residents do not practice such religion or customs may:

(a) either introduce legislation so as to allow practices or establish institutions, in that state consistent with their religion or customs, or

(b) refer the law to the Council of States to be approved by a two-thirds majority of all the representatives or initiate national legislation which will provide for such necessary alternative institutions as may be appropriate.

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46 See Art. 65 of the Constitution of Sudan of 1998: “[Source of Legislation] The Islamic Shari’ah and the national consent through voting, the Constitution and custom are the source of law and no law shall be enacted contrary to these sources, or without taking into account the nation’s public opinion, the efforts of the nation’s scientists, intellectuals and leaders.”

47 See Art. 6.3 of the Machakos Protocol, which is incorporated in the interim constitution by reference in Art. 225: “Eligibility for public office, including the presidency, public service and the enjoyment of all rights and duties shall be based on citizenship and not on religion, beliefs, or customs.”

48 Schedule C, paras 10, 18, 20.
Apparently, the INC distinguished between two sets of national laws: Those only applicable in the northern states and those (also) applicable to southern states/Southern Sudan. Whereas the former should have “Islamic Sharī'ah and the consensus of the people” as their sources of legislation, the latter should have as sources of legislation “popular consensus, the values and the customs of the people of Sudan including their traditions and religious beliefs, having regard to Sudan’s diversity.”

It remained unclear how both provisions were to be implemented: should the national legislature decide prior to enacting a law whether or not it is applicable for the entire territory or only for the northern part? Depending on this decision, did parliamentarians then need to identify the pertinent sources of legislative inspiration? Some bizarre consequences could arise, considering that representatives from Southern Sudan sitting in the legislative assembly were also part of a drafting process of national laws only relevant in the northern part of the country. Most of them were not be familiar with the pertinent source of legislation but were nevertheless involved in a law-making process whose outcome did not affect those they were meant to represent.

Art. 5 (3) INC illustrates how to proceed if a national law had a specific religion as its source of legislation. It offered three options to those states/Southern Sudan whose majority of citizens did not practice that religion: According to the first one, the affected state/Southern Sudan should have the power to introduce legislation that is consistent with its respective religious majority. Thus, a previously national competence of Schedule A was transferred to the relevant state/Southern Sudan. Art. 5 (3) lit. a reads as permitting the national assembly (with a 52 percent majority of the National Congress Party (NCP) prior to the 2010 elections) to draft national laws inspired by one religion and to provide at the same time “religiously affected” states with an opt-out scheme. Granting those affected states the right to draft their own law in line with the majority’s beliefs somehow resembled a majoritarian-driven version of the *cuius regio, eius religio* doctrine of early modern times in Germany.

In the second option, the state/Southern Sudan would refer the national law to the Council of States, the second chamber at the national level. The Council needed to approve the law by a two-thirds majority of all representatives. If those representatives would vote along the line of the religious composition of their states (considering that the majority of citizens in the ten states in the south do not adhere to Islam), a quasi-veto of the states with a non-Islamic majority was virtually assured. It remained unclear what the consequences of a council’s disapproval were. At a first glance, Art. 5 (3) lit. b INC seemed to suggest that it was up to the Council of States to initiate new “national legislation which will provide for such necessary alternative institutions as may be appropriate” in order to have a commonly

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49 One might read Art. 5 (2) INC as applying *only* to states in the south/Southern Sudan. However, whereas the parallel provision in the Machakos Protocol indeed referred to “the southern States and/or the Southern Region” (Art. 3.2.3 MP), the INC eliminated the word “southern.” In addition, such an interpretation would not sufficiently explain why it refers to the customs and values of all people of Sudan and to the diversity of the entire Sudan.

50 See Art. 80 lit.a INC.

51 Latin phrase meaning “Whose realm, his religion.” The principle that the king or other leader could choose his religion, which then also applies for his subjects within his realm was part of the Peace of Augsburg treaty signed in 1555 between the forces of the Holy Roman Emperor, Charles V, and the forces of the Schmalkaldic League. It designed the religious setup of Germany in a compromise between Lutheran and Catholic forces.

52 Art. 5 (3) lit. b INC, first option.
acceptable law. However, the second part of Art. 5 (3) lit. b INC was not connected to the first one but separated by an “or.” Thus, a disapproved law just seemed to lapse.

The third option offered another additional competence to the affected state/Southern Sudan. It could initiate national legislation providing for alternative appropriate institutions in the relevant context. According to Art. 106 INC, the initiation of a national bill was generally reserved to those national institutions listed in the provision. The new national legislation envisaged by Art. 106 thus seemed to exist as an annex to the original law, thereby creating two parallel national laws applying in different regions.

3. Accommodation through a Dual System
The INC provided for the legal structure of two economic systems. According to Art. 201 (2) INC, a “dual banking system shall be established, and shall consist of an Islamic banking system that shall operate in the north of Sudan and a conventional banking system to operate in southern Sudan.” In contrast to a “two windows arrangement,” which would have allowed both systems to operate throughout the country, a strict separation of the banking systems was thus established. Similarly, Art. 20 (2) INC envisaged the collection, expenditure, and administration of zakāt, a special tax for Muslims, only in the northern states.

As has been shown so far, the accommodation of Shari‘ah law took place on a territorial but not on an individual basis. Only the Machakos Protocol addressed the individual approach at an early stage of the negotiations with respect to personal laws: Art. 6.4 MP stipulates that “[a]ll personal and family matters including marriage, divorce, inheritance, succession, and affiliation may be governed by the personal laws (including Shari‘ah or other religious laws, customs, or traditions) of those concerned.” However, neither the Protocol on Power Sharing of 2004 nor the INC reaffirmed this principle and transformed it from a programmatic approach (“may”) into a legally binding provision. As far as the author knows, no state has so far undertaken any effort to implement that paragraph.

C. The Accommodation of Human Rights in the Constitutional Setting
Considering that the constitutional structure aimed to ensure the religious autonomy of the states rather than the religious freedom of the individual, the question arose whether a canon of human rights was available within the framework of the INC that sufficiently protects religious minorities/individuals within the states.

Even though the Shari‘ah was a source of legislation in the north, any laws adopted under that premise must be in harmony with the constitution as the supreme law of the country. The bill of rights in Part Two of the INC (Arts. 27–48) covered a prevalent catalogue of civil and political rights and some social rights, including a manifestation of the inherent right to dignity. It is futile to examine in how far the human rights standards in the catalogue met the requirements of Sudan’s international obligations since Art. 27 (3) INC incorporates all International Human Right Treaties ratified by Sudan as part of the constitution. A potential divergence with the provisions of international Islamic human

53 Art. 3 INC stipulates: “The Interim National Constitution shall be the supreme law of the land. The Interim Constitution of Southern Sudan, state constitutions and all laws shall comply with it.”
54 Art. 27 (3) INC stipulates: “All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill.”
55 International Covenant of Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights. For a compilation of all relevant Treaties for Sudan, see M. Böckenförde et al. (eds), Max
Quo Vadis Sudan?

In addition to Part Two, Art. 6 INC contained a detailed set of provisions ensuring the free manifestation of a religion/belief, including the setting up of an institutional structure for this purpose, the right to own property, the right to train, appoint, and elect religious leaders, etc. The provision did not limit itself to “religion” but regards “beliefs” equivalent to it, thereby broadening the historically narrowly defined concept of dhimmī. According to Art. 48 INC, the constitutional court should uphold, protect, and apply the Bill of Rights (see also Art. 122 (1) lit. d).

On paper, the INC did comply with international human rights standards. It protected citizens from being discriminated before the law and provided for the option (through the Machakos Protocol) that religious/traditional groups were governed by their respective personal laws. Beyond that, in the northern states, statutory laws inspired by or based on Shari’ah could apply to all citizens regardless of their beliefs as long as this was consistent with relevant provisions of the INC.

Looking at Part Ten of the INC . . ., which addresses issues with regard to the national capital Khartum, one detects the inherent mistrust of South Sudanese negotiators with regard to a proper implementation of the constitutional balance between religious and human rights as stated above. As Khartum was the capital of the country, civil servants from Southern Sudan worked and lived in the city, which was situated in the north of Sudan.

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56 The 1990 Cairo Declaration of Human Rights in Islam has not yet come into force, nor has it been ratified by Sudan. As it is not included in the constitution, it ranks below other international human rights conventions. The same holds true for the Arab Charter of Human Rights of 1994 that was adopted by the Arab League. As it has not yet been ratified by a quorum of seven member states, it is not a binding document. For the same reason, the revised Arab Charter of Human Rights of 2004 that was initiated by the standing Arab committee on human rights has no binding force, either.

57 Art. 6 INC stipulates: The State shall respect the religious rights to: (a) worship or assemble in connection with any religion or belief and to establish and maintain places for these purposes, (b) establish and maintain appropriate charitable or humanitarian institutions, (c) acquire and possess movable and immovable property and make, acquire and use the necessary articles and materials related to the rites or customs of a religion or belief, (d) write, issue and disseminate religious publications, (e) teach religion or belief in places suitable for these purposes, (f) solicit and receive voluntary financial and other contributions from individuals, private and public institutions, (g) train, appoint, elect or designate by succession appropriate religious leaders called for by the requirements and standards of any religion or belief, (h) observe days of rest, celebrate holidays and ceremonies in accordance with the precepts of religious beliefs, (i) communicate with individuals and communities in matters of religion and belief at national and international levels.

58 However, it remains a controversial debate to what extent sanctions imposed on the apostasy of a Muslim do contravene with pertinent provisions of international human rights treaties ratified by Sudan. In contrast to the clear wording of Art. 18 of the Universal Declaration on Human Rights (“this right includes freedom to change his religion or belief”), Art. 18 (2) of the International Covenant on Civil and Political Rights had been drafted more ambiguously, explicitly refusing the clear wording of Art. 18 of the Universal Declaration on Human Rights, stipulating: “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” See M.J. Bossuyt, Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights (Nijhoff, Dordrecht 1987) 351–362.
Directly affected by insufficient implementation, negotiators and drafters from Southern Sudan reemphasized common principles to be respected in “a multi-cultural, multi-lingual, multi-racial, multi-ethnic, and multi-religious country where such diversities co-exist” \(^\text{59}\) and created additional institutions to safeguard their implementation in the capital: Art. 154 INC reiterated the enforcement and guarantee of human rights as specified in the INC, including respect for all religions, as being of particular significance in the National Capital; Art. 155 INC required law enforcement agencies of the National Capital to be adequately trained, and made sensitive to the cultural, religious, and social diversity in the Sudan; pursuant to Art. 156 INC, judges and law enforcement agencies shall, in dispensing justice and enforcing law in the National Capital, be guided by, inter alia

- tolerance as the basis of peaceful coexistence between the Sudanese people of different cultures, religions and traditions;
- the presumption that behavior based on cultural practices and traditions, which does not disturb public order, is not disdainful of other traditions and not in violation of the law, shall be deemed in the eyes of the law as an exercise of personal freedoms,
- the judicial discretion of courts to impose penalties on non-Muslims shall observe the long-established Shari'ah principle that non-Muslims are not subject to prescribed penalties and therefore remitted penalties shall apply according to law.

Noteworthy, the content of Art. 156 INC did not include any exception to Shari'ah, but reiterated a tolerant interpretation of its principles.

Art. 157 INC foresaw the establishment of a Non-Muslims Rights Special Commission to ensure that the above-mentioned provisions/principles were protected. Again, one could wonder why only non-Muslims in Khartum should benefit from that surveillance of proper implementation. In addition, the commission should “ensure that Non-Muslims are not adversely affected by the application of the Shari'ah law in the National Capital.” If “not adversely affected” implied not to be under the jurisdiction of Shari'ah inspired laws whenever this might have a negative effect on the situation of the person concerned, it would indeed amount to a substantive privilege with regard to other non-Muslims in the north. Beyond being not subject to hudud penalties, non-Muslims in Khartum must not be convicted of a Shari'ah specific delict adversely affecting them. Other mechanisms to guarantee the implementation of the principles in the capital were judicial circulars guiding the courts, specialized courts, and specialized public attorneys in their application (Art. 158).

### IV. CONSTITUTIONAL PRACTICE IN SUDAN

As in most other states with an authoritarian government, there was a considerable discrepancy in Sudan between the rights guaranteed by the letter of the law and their practical significance. Fundamental democratic rights such as the freedom of the press, the freedom of assembly, and the freedom of opinion were curtailed particularly severely.\(^\text{60}\) Proper implementation of the INC was insofar still in its infancy. Relevant laws were not tested against the INC and revised accordingly and parliaments at the state level were hesitant to draft laws in the areas explicitly assigned to them by the INC. In addition, for courts that

\(^{59}\) Art. 1 (1) INC.

had been established under the influence of the British common law system and still applied its methodology, the authority to test acts of parliament against the constitution was a rather unfamiliar competence. Institutions meant to support the proper implementation of Human Rights were either set up belatedly (Human Rights Commission Act was only passed in April 2009) or were subject to prohibitively high fees, thereby effectively denying access to most Sudanese (e.g., the constitutional court). Criminal laws in the north continued to be regulated at the national level.

Despite these numerous challenges, conditions for the effective protection of religious rights did continuously improve over the years. Discrimination and marginalization continued to take place along ethnic or quasi-ethnic rather than religious lines. Religious rhetoric was frequently used by the government in international politics, but toned down against religious minorities within the country. Restrictions on Christians in the north were relaxed and continuous gains realized with the creation of the Government of National Unity (GNU). The Non-Muslims Rights Commission was established, handled a number of complaints successfully, and created a forum for dialogue on religious matters that was previously nonexistent. Special Courts for non-Muslims according to Art. 158 INC were not created. However, there were attempts to establish, under the Non-Muslims Rights Commission, a mobile task force composed of specially trained judges and police officers to monitor the respect of non-Muslims’ rights. Nevertheless, judgments based on religious doctrine or beliefs were still a reality in Sudan. However, the most prominent case so far was not settled through the judicial system: in the “Teddy Muḥammad” case, the convicted British teacher was pardoned by President Bashir before her appeal could be filed at court.

V. CONCLUSION AND OUTLOOK

In post-independence Sudan, Islam and Shari‘ah law have played a vital and multifaceted role. Forming the religious and cultural basis of a large majority of Sudanese citizens, they have repeatedly been exploited as a means to retain power and to forcefully (but unsuccessfully) form a common identity in Sudan. The impact of Islam/Shari‘ah in the various constitutional settings after independence has differed. Originally based on the secular “Westminster model,” constitutional discourse in Sudan has increasingly come under the sway of the Islam/Shari‘ah debate. At various stages of Sudanese constitutional history, Islam was considered the religion of the whole country and Shari‘ah was recognized as a source of legislation throughout the territory. However, on each occasion on which representatives from the predominantly non-Muslim south of Sudan were genuinely involved in the process of drafting a constitutional document and a serious effort was made to reach a

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63 Id.
common understanding on the constitutional framework between northern and southern representatives, elements of Shari'ah were accommodated in a manner permitting religious pluralism in Sudan. Even more progressively, innovative provisions were drafted to prevent the misuse of Islam as a tool to retain power: The "Permanent Constitution" of 1973, resulting from the Addis Ababa Peace Agreement, penalized the misuse of religion for political exploitation. Unfortunately, the provision did not survive President Nimaiir's attempts to placate the Islamic opposition in the early 1980s. The Interim Constitution of Sudan (INC, 2005) accommodated religious pluralism mainly on the basis of territorial coexistence: in northern states, Shari'ah law and the consensus of the people are the source of legislation, in contrast to the southern states where the values and the customs of the people of the Sudan and popular consensus are the sources of legislation. Only with regard to the capital Khartoum were a variety of options introduced to implement religious pluralism on an individual basis (e.g., Non-Muslim Rights Commission). Especially this approach should not only be maintained but also extended to areas beyond Khartoum. Noteworthy, the pertinent provision of the INC (Art.156) does not provide for exceptions, but rather stresses the recognition and application of the tolerant aspects of Shari'ah with regard to non-Muslims.

Compared to large parts of Sudan's previous history after independence, inter-religious tensions fuelled by the government decreased constantly within the last years. For a long time, parties to the CPA refrained from agitating along religious lines in domestic politics. This internal development was challenged again. At the eve of the referendum, President 'Umar al-Bashir announced to strengthen Shari'ah if Southern Sudan votes for independence. Again, religious rhetoric was used for political means in an attempt to frighten Southern Sudanese living in the north and to influence their way of voting.

The most important challenge to the constitutional framework of Sudan has been the lack of capacity and/or will to promote and implement the constitutionally guaranteed individual human rights, although prominently established in the text of the INC. Governmental actions violating these rights have sometimes been attributed to the influence of Shari'ah law. Being aware of Sudan's ominous experiences with regard to the instrumental use of religion for political ends, it does not help to unnecessarily link authoritarian governmental actions to Islam/Shari'ah from the outside. Occasionally, one gains the impression that international media tend to attribute a religious dimension to the general abuse of human rights in Sudan. A recent incident that attracted international attention was the conviction of Sudanese women in Khartoum for "indecent" dressing (wearing trousers) on the basis of Art. 152 of the penal code. The provision penalizes, inter alia, the wearing of "an indecent, or immoral dress which causes annoyance to public feelings." Is Art. 152 an Islamic provision? Hence, should this case be debated in the context of Shari'ah and human rights? Although the pertinent penal code of 1991 prides itself on being an Islamic

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penal code, it does not consider Art. 152 an Islamic provision. However, some media commented on the incident by stating, for instance, that “Sudan’s government implements a conservative version of Islamic law in the north.” Considering that many women in Sudan wear trousers in government offices and institutions and bearing in mind that women in Southern Sudan have been arrested on similar grounds by wearing jeans in 2008, one wonders why “Islamic law” was widely blamed for the incident in Western news. Art. 152 (as various other provisions in the penal code listed under the sub-chapter “public morals”) rather serves as a basis for the “public order” police to arbitrarily arrest persons (predominantly women) on trumped-up charges. Linking it to “Islamic law” neither helps the people concerned in the case at hand nor does it facilitate the implementation of the INC or the beginning of a meaningful dialogue on the sensitive issue of human rights and Shari‘ah law in Sudan.

The constitutional history of Sudan offers a variety of options how to accommodate Islamic tenets and other beliefs within the legal structure. At the eve of another constitutional revision, the achievements gained in the INC as part of the peace negotiations are coming under scrutiny. Still under authoritarian rule and no longer urged by its former southern part, some of them might not be sustained.


70 Comment of government spokesman Rabie Abdel Attie, Id.

71 Based on an order (to ban “all bad behaviors, activities, and imported illicit cultures”) issued by the commissioner of Juba county, young women had been picked up by the police and were brought to a “Public Order Court.” As soon as the incident gained attention, the women were released and the commissioner dismissed by decree no. 124 of President of Southern Sudan, Salva Kiir Mayadrit. See “Southern Sudan President Sacks Trouser’s Commissioner” Sudan Tribune (Khartoum October 11, 2008). Available at http://www.gurtong.org/ResourceCenter/weeklyupdates/wu_contents.asp?wkupdt_id=2442, accessed September 20, 2009.
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Statehood and Constitution-Building in Somalia

Islamic Responses to a Failed State

HATEM ELLIESIE

Ever since acquiring independence, the African states have been challenged to simultaneously maintain stability, as well as gaining its people’s acceptance; in essence, what Bertrand Badie has called “l’état importé.” This requires proper governance such as control over national territory, oversight of the natural resources, and capacity to govern and maintain law and order. In a world of nation states, Somalia today is a case which demonstrates what happens if the state breaks down. Some of the causes of and responses to the breakdown of statehood might have been shaped by Somali-specific political and cultural contexts, while others might have emerged anywhere under similar conditions. In this context, Somalia has been simply characterized as a society without order. This way of describing Somalia’s

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1 Deep-rooted Somali proverbs stating that “politics are not stable” and “as regards justice everyone is a Muslim.”
political structure has been amplified recently by focusing upon the armed conflict among different “clans.” The benchmark for judging the nature and scale of the Somali crisis is the condition of statelessness, often measured by the absence of central political authority and disregard for the modern claim to a universal order and rule of law.4 True in the case of Somalia at any rate is that the basic trend during the last two decades has been one of fragmentation and decentralization of political power. Thus, one might question the usefulness of a state centrist paradigm in the case of Somalia.5 Consequently, this chapter starts off describing and examining the crisis of statehood and its legitimation in the specific Somali context.

II. SOMALIA BETWEEN STATEHOOD AND STATELESSNESS

One has to admit that contemporary African statehood is “weak” when compared to Western European statehood, and when evaluated against the background of an ideal-typical, rational-legal state apparatus as described by Max Weber.6 Drawing on the Weberian definition of the state, Barry Buzan suggests a triad of component parts of any state:7 (1) the idea of a state; (2) the physical base of the state, i.e., its territory and population; and (3) the institutional expression of the state.

A. The Concept of State in the Somali Context

First of all, one has to note that prior to colonization Somali nomadic pastoral life was a classic example of a “stateless” society.8 The modern idea of a state as a mode of political organization was introduced by the European colonial powers, together with an export-oriented economy based on livestock production. This does not mean, however, that the Somali people had no experience of statehood and that no “state constructs” previously existed in the territories which the European colonial powers came to call Somalia (and Somaliland).9 Particularly in the coastal regions, basic forms of centralized power, an emerging commercial class and links to the world market could be found: Important trading spots such as Marka (Merca), Baraawa (Brava), and Muqdisho (Mogadishu) in the south were under the suzerainty of the Sultan of Zanzibar, northeastern Somalia was under the rule of the Majeerteen sultanates, and the port Zayla’ (Somal. Saylac) in the northwest, once part of the ancient Sultanate ‘Adal, was in the nineteenth century a small sultanate and part of the Ottoman

Somali politics in pre-colonial and colonial times were dominated by pastoral-nomadic and agro-pastoralist conditions. In pre-colonial Somalia, the clan was a cornerstone of social organization. Political organization was, apart from the aforementioned sultanates existing between the twelfth and the nineteenth centuries, flexible, family-based, and not centralized. Economic and political life was largely centered on flexible alliances and multi-layered clan identities.

Historically, political order and social relations were maintained through kinship systems (i.e., mainly within the so-called “segmentary lineage systems”) through collective social institutions and through reciprocal, rule-bound behavior delineated in customary law (xeer). A body of customary law called xeer Soomaali, which is linked to elements of Shari'ah based regulations, defined basic social norms and values. In addition to xeer, traditional values (xeer caado) and a code of social conduct (xeer dhaqan) also


11 A Somali family usually consists of a husband, one or more wives and their children. Several closely related families, such as grown-up sons with their wives and children, form a reer. A family and a reer are the lowest stages of the social organization in Somalia. Several reers descended from a common ancestor form a jilib (“a knee”). Several jilibs make up a laf (“bone”) and several lafs a qabil (clan); s. Georgi Kapchits, Faaliyihii la bilkeyday / A Soothsayer Tested (The Way, Moscow 2006) 10. Depending on how one counts, Somalia is divided into 4 or 6 clan families [in the broader sense]. The traditional nomadic clans are the Dir (usually the Isaaq are originally considered as a sub-clan of the Dir, whereas some scholars count them as a own clan family), Daarood, Hawiye, while the clans of Digil and Mirifle (summarized as Rahanweyn) are considered to be sedentary. However, it is important to note here, that the distinction between nomadic and sedentary clans does not fully fit with the Somali reality since most of the ‘sedentary’ clans adopted an agro-pastoral system, i.e. a combination of mobile livestock-keeping and farming.


serve to mitigate conflict and maintain public order. During the period of colonial and post-colonial state-building this traditional societal organization underwent changes. The contemporary Somali concept of statehood which emerged from this process and reflected its political identity and the bond between state and society, i.e., the leading ideology of the Somali leadership, was a mixture of three basic elements: the idea of a “Greater Somalia,” the concept of “Socialistic Somalia,” and the alleged homogeneity of its nomadic people.

1. The Idea of “Greater Somalia”

First, the idea of a “Greater Somalia” as shorthand for the unification of all Somali-inhabited territories in the Horn of Africa within one nation-state was a sacrosanct idea for the early post-colonial state. The Somali nationalist movement, for example, advocated the creation of a “Greater Somalia” with the merging of French Somaliland (Djibouti) and the Somali-speaking areas in Ethiopia (Ogaden) and Kenya (Northern Frontier District). Their Somali sense of unity was not effaced even by the divisive impact of alien rule. Great Britain herself, which held under different titles—apart from Djibouti—all the lands coveted by Pan-Somali movement, had fostered the project of a “Greater Somalia,” but in vain. After 1969 the socialist Somali state, too, pursued the idea of “Greater Somalia” to rally people behind its policies.

One has to recognize, however, that the concept of “Greater Somalia” lost momentum after Somalia’s defeat in the Ethiopian-Somali war over the Ethiopian-Somali borders, known as the Ogaden War, in 1977–1978. The territorial integrity of Ethiopia and Kenya

17 Mark Bradbury (n 8) 17. See also A.S.B. Ahmed, Xeerkii Soomaalidii Hore (Somali National Printing Agency, Muqdisho 1977) 3.


was to prove a more important goal than the fulfillment of Somali ideals, which after all lacked a sufficiently solid historical basis and a valid patronage on the international scene. Moreover, Djibouti rejected unification with Somalia, as a result of the 1977 referendum; this, in effect, terminated any possibility of a “Greater Somalia.” The project of Somali’s unification was, therefore, overtaken both by Realpolitik and factional rivalries.

2. The Concept of “Socialistic Somalia”

Scientific socialism—hantwadaagga cilmiga ku dhisan, literally “wealth-sharing based on wisdom”—was officially announced as the ideology of the state on the first anniversary of the Revolution in 1970. Together with it went the political goal of eradicating tribalism within the Somali society. Clanism was considered to be the main reason for the degeneration of the political system and the rejection of the nationalist cause. Through the 1971 Ololeh campaign, the military regime abolished every traditional institution, including the regulation of compensation (mag or diyah). Afterward, part of the docile traditional leadership was revived or newly promoted: the caaqil, the head of a clan-lineage and mediator between state and traditional political authority during the colonial times, was renamed nabaddoon, literally meaning “peacemaker,” but with a completely different role. The social framework which the majority of Somalis depended on subverted. The prohibition of

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24 Cf. Ioan Myrddin Lewis (n 23) 76 ff.
30 Brad Poore (n 25) 127; David D. Laitin / Said S. Samatar (n 20) 82.
speaking about clans was linked to the impossibility of discussing this power base, or indeed of questioning legitimacy. 31

These socialist ideals, however, if ever a genuine goal, faded away with the increasing decay of Somali state politics into coercion, ruthless state terrorism, and the perfecting of sophisticated tactics of “divide and rule,” based on clan antagonisms. 32

3. State Based “Homogenous (Nomadic) Populace”

Third, the bond between Somali society and state was based on the perception of Somalia, by Somali politicians as well as by foreign and Somali academic analysts and political commentators, as an ethnically homogenous nation of camel nomads, 33 with pious legends of genealogical origins in the Quraysh, the tribe of the Prophet Muḥammad, and descent from migrant Arab sheikhs (shuyūkh). Were one to subscribe to these legends, it would mean that all Somalis were “Arabs” by patrilineal descent. 34

Due to the “ideological vacuum” of the recent stateless years, this perception has been increasingly challenged by Somali and non-Somali scholars, who stress the diversity within Somali society and who have unveiled the history of domination by nomadic Somali over sedentary Somali. 35 The critique points out how the myth of Somali origin, which classifies the Somali people as a mixture of African and Arab elements, 36 was politicized and became a tool of political power in the hands of clans with nomadic background. The origins of their distinctive language and national characteristics 37 —of everything that makes Somalis Somali—are not explained in traditional accounts. Moreover, different versions of the

31 Whereas earlier governments had co-opted elements of various clans to widen their power base, Maxamed Siyaad Barre’s government has been described as “MOD”: the “M” stood for his clan, Marrexaan, the “O” for the Ogaadeen, the President’s mother’s clan (or as one would say in Somali, the clan of his mother’s brother: reer abti), and the “D” for Dhulbahante, the clan of his son-in-law, who was head of State Security. Cf. Jack L. Davies, Reunification of the Somali People (Intitut für Entwicklungsforschung und Entwicklungspolitik der Ruhr-Universität Bochum, Bochum 1996) 15; Ioan Myrddin Lewis, Somali Culture, History and social Institutions: An Introductory Guide to the Somali Democratic Republic (Th e London School of Economics and Political Sciences, London 1981) 16; Günther Schlee (n 9) 7.
33 Maria H. Brons (n 19) 31.
34 Günther Schlee (n 9) 2.
genealogies contradict one another. Thus, as an ethnic category, “Somali” is not clearly delineated.

B. State Territory

In colonial times the Somali region was divided among Italy (south, central, and northeastern region), Britain (north and southwest), France (northwest), and Ethiopia (west). On July 1, 1960 the Somali Democratic Republic gained independence. Its territory was formed through the merger of the newly independent British Somaliland with the UN Trusteeship-territory under Italian administration (L’Amministrazione Fiduciaria Italiana della Somalia). The independent state was characterized as one with a fragile bureaucratic structure and with a deficit of minimum legal standards. The Northern Frontier District stayed with Kenya, the Ogaden, Eastern Haraghe, and Bale regions remained part of Ethiopia and, in 1977, French Somaliland (Côte française des Somalis, i.e., French Somali Coast) became Djibouti. The territorial base of the Somali state, therefore, never reflected the territorial base of Somali society or the Somali-inhabited areas in the Horn of Africa.

The government of Somalia—if it ever really functioned—collapsed in 1991 when former President Maxamed Siyaad Barre, his family, and selected political entourage were overthrown and had to flee. Afterward, no political faction was able to gain control over the whole of the former Somali Democratic Republic’s territory. Despite the collapse, the Somali state is still internationally recognized, although there has been no central


39 Günther Schlee (n 9) 2.


government in Somalia since 1991. As a result, the territory of the former Somali state has been controlled by different military factions and fell apart, politically, into various territorial units. As a result, the territory of the former Somali state has been controlled by different military factions and fell apart, politically, into various territorial units. The United Nations and other international organizations, however, still consider the borders of the ex-Somali state as the reference point for their policies toward Somalia.

C. State Institutions
The state institutions which carried out the executive, legislative, and judicial powers of the Somali state stopped functioning after the aforementioned incidents in 1991. Government employees, most of whom were in one way or another related to the politically powerful clans dominating Maxamed Siyaad Barre’s regime, fled from violence that was fuelled by emotions of hatred and revenge. His flight resulted in an absence of infrastructure and a jockeying for power and authority among the clans. Not only did the state institutions cease to function, but also buildings and equipment were looted beyond recognition. What happened was an extreme devastation of the institutional framework of the Somali state.

D. Preliminary Conclusion
Based on the Weberian definition, one has to conclude that the implosion of effective government has led to the emergence of a state totally lacking government. The state as an (ideal) institution collapsed. Accordingly, former Somalia moved from statehood to statelessness. It could be considered a stateless society, without functional central government, making it the longest running instance of complete state failure (or collapse) in

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49 Due to the complex nature of the concept(s) of failed, collapsed or even disintegrated state, discussed at length elsewhere, no well established definition of the concept exists. A number of definitions have been suggested. See, e.g., Neyire Akpinarlı, *The Fragility of the “Failed State” Paradigm: A Different International Law Perception of the Absence of Effective Government* (Martinus Nijhoff Publishers, Leiden / Boston 2010) 96 ff.; Ira William Zartman, “Introduction: Posing the Problem of State Collapse” in Ira William Zartman, *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (Lynne Rienner, Boulder/
postcolonial African history. Practically, since the 1991 state collapse, the “Somali society” splintered into its component clan divisions. Thus, today, clan, sub-clan, and even sub-sub-clan allegiances need to be taken into account in Somalia’s politics. This is, of course, no easy undertaking since the nature of clan affiliation is complex, enhancing the risk of unanticipated conflict.

III. CONSTITUTION-BUILDING

In such an atmosphere, a constitution-building process provides considerable opportunities for reconciliation, for negotiating solutions to major divisive issues in a non-violent context, for reaching consensus on the modalities of federal models or other forms of decentralization best suited to a fractured state, for a symbolic break with the past, for creating an atmosphere of hope and renewal, and for the establishment of a legitimate and stable, if minimalist, state. Participatory constitution-building processes increase the perceived legitimacy of a constitution and thus bolster support from the population, which is essential if the constitution is to play a meaningful role in creating a stable state. Popular consultation brought about public support for constitutions in Rwanda, South Africa, and Uganda. In all three of these countries, the constitutional processes were participatory. Hence, the resulting constitutions received strong popular support and a comparatively high level of perceived legitimacy. By comparison, new constitutions in Nigeria, Zimbabwe, and Bahrain have been controversial after being formed through relatively less participatory process for the very reason that these constitutions were seen as imposed from above rather than made by the people. Thus, any process in Somalia needs to operate in a peace-inducing and inclusive manner in order to avoid the considerable risks of constitutional failure and of increasing conflict in the country.


Kirsti Samuels (n 47) 606.
For almost twenty years, every attempt to rebuild a unified Somali state has failed.\(^53\) Somalia not only represents the most protracted case of a failed state with no statewide institutions,\(^54\) but has witnessed the emergence of multiple local governance systems, both formal and informal, which are seldom recognized internationally or acknowledged in the state failure debate.\(^55\) While Somalis living in eastern Ethiopia formally belong to a sovereign state run by a functional central government, most rural inhabitants of Ethiopia’s Somali Regional State (Amhar. (properties)\(^56\)) live beyond the effective reach of state administration. Conversely, inhabitants of the self-declared Republic of Somaliland in northwestern Somalia enjoy a relatively higher degree of statehood than the southern region of Somalia but are deprived of international recognition.\(^57\) Its aspirations to independence are vigorously opposed by sections of the international community, especially the African Union and the League of Arab States. Successive resolutions issued from the aforementioned organizations as well as the European Union and the United Nations have reaffirmed their recognition of the unity and territorial integrity of Somalia.\(^58\) In Puntland in northeastern Somalia, an embryonic public administration has emerged, supported by an alliance of different Daaood and Harti clans. It does, however, according to its constitutional charter, remain a part of Somalia.\(^59\) In contrast to southern Somalia, de facto

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\(^54\) Kirsti Samuels (n 47) 600.


administrations have thus been successfully established in Somaliland which at least partly fill the state vacuum.  

A. Somaliland

In the northwest of the former unitary state of Somalia, the *Dhaqdhaqaaqa Waddaniga ah ee Soomaaliyeed* (Somali National Movement—SNM), a guerrilla organization dominated by members of various Isaaq clans (*Reer Sheikh Isaxaaq*), took control in January 1991, strongly motivated by the desire to improve security, and engaged in peace negotiations with representatives of the region’s other clans who had supported Maxamed Siyaad Barre’s government. As a result of a series of local meetings, the continuation of the civil war in the northwest was prevented, and on May 18, 1991, Somaliland was declared an independent republic encompassing the whole of the former British Protectorate. In 1993, after two years of rather chaotic SNM rule and contained conflict, a clan conference elected Maxamed Xaaji Ibraahim Cigaal, an experienced civilian politician, as President. Under his rule, peace and a stable political framework were established in Somaliland. The members of the republic’s bi-cameral parliament (*Baarlamaanka*, the *Golaha Guurtida* (House of Elders) and the *Golaha Wakiillada* (House of Representatives), partly selected by their respective clans and sub-clans, partly hand-picked by President Maxamed Xaaji Ibraahim Cigaal; governmental positions were also allocated according to “clan quotas.” This state-building process took place through cooperation among traditional authorities such as elders and sheikhs, politicians, former guerrillas, intellectuals, and diaspora committees for peace. In 2001, the current Somaliland constitution was adopted in a public referendum, described as the beginning of a transformation of the “clan democratic” system of governance into a multi-party democracy. Between 2002 and 2005, political parties flourished and three elections, including presidential elections, were held. It is noteworthy that the Somaliland government does not have a monopoly on the use of force in any comprehensive manner. Security in Somaliland is dealt with in a rather decentralized manner guaranteed by local politicians and elders. These actor intervene immediately when conflict between individuals or groups arises. Only in exceptional cases, e.g., when the integrity and stability of Somaliland is at stake, central government institutions such as the House of Elders or the national armed forces intervene directly.

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63 Markus V. Höhne (n 14) 89; Markus V. Hoehne (n 57) 314.


B. Puntland

Puntland draws its major political support from the local Majeerteen, Dhuulbahante, and Warsangeli clans and was established by a clan conference in 1998, launching its own experiment in statecraft on the building block model of Somalia as an (autonomous) regional administration (maamul goboleed). Originally, the administration derived its legitimacy from a series of locally sponsored conferences in which the traditional council of elders (Isimada) played a key role. They were instrumental in founding the regional administration called Puntland State of Somalia (Dawlad-goboleedka Puntland ee Soomaaliya). Constitutionally, as stipulated in Art. 1, Puntland is part of Somalia and its government is working toward rebuilding a unified Somali state. Hence, unlike the secessionist region of Somaliland to its west, Puntland is not trying to obtain international recognition as a separate nation. Both regions, however, have one thing in common: they are essentially ruled by clan elders and organized along lines based on clan relationships and kinship. With their xeer, traditional clan elders are responsible for local security and rule of law, and they play a crucial role as gatekeepers between the state and society. Similar to Somaliland, Puntland authorities rarely pursue and arrest a suspect directly. Clan elders are contacted and they negotiate terms of surrender. The clan elders also represent their constituencies in the selection of leadership in Puntland; e.g., when Puntland President Cabdullaahi Yuusuf’s term expired in 2001, it was an assembly of clan elders who selected Jaamac Cali Jaamac as his successor because Cabdullaahi Yuusuf had governed in disregard of the Constitution of the Puntland State of Somalia.

C. (Southern) Somalia

In southern Somalia, the prolonged civil war and instability, particularly in and around the capital Mogadishu, have become synonymous to the Somali state collapse. After the

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67 Cf. Markus V. Höhne (n 64) 262; Markus V. Hoehne (n 57) 323; Ioan Myrddin Lewis (n 23) 100; Markus V. Höhne (n 14) 91.
69 The Puntlanders have always described their region as the “Puntland state of Somalîâ,” avoiding the clear breach which Somaliland makes; Ioan Myrddin Lewis (n 23) 101. See also Boudewijn R. A. Bouckaert (n 45) 711.
70 Cabdullaahi Yuusuf challenged the decision by force, leading to the armed stand-off from 2001–2002. There has been a tenuous peace between the Puntland State of Somalia’s administration and opposition groups.
72 Jutta Bakonyi / Kirsti Stuvøy (n 18) 365 ff.
failure of the UN-led intervention (UNOSOM II), and the withdrawal of the international community from Somalia in 1995, (southern) Somalia did not return to outright civil war, but to a state of statelessness, of “no war and no peace,” with some military conquests, and re-conquests by armed clan-factions, continued armed confrontation, fierce political rivalry and intense competition for the scarce resources. Political rule backed by force and based on warlordism emerged already throughout the 1990s. The ensuing political confusion in the southern parts of Somalia was characterized by widespread insecurity, recurring famine, and a mosaic of polities mixing warlord-rule, self-imposed governors, district and regional authorities, and a widespread return to traditional clan-based governance. Many of the local governance systems can best be described as security arrangements based on protection rackets and warlord fiefdoms. They provided some degree of security to households and communities, and in at least a few instances appeared to be capable of making the transition from predatory expropriation of resources to taxation of resources in return for services rendered to the local community. What is significant about the warlord fiefdoms is not the poor disguise of their occupation of someone else’s land by appointing governors but the way in which they function, i.e., by providing a minimal level of security and other services in exchange for popular support (legitimacy based on benefit). However, this may not be sustainable in the longterm due to their status as dictating occupiers who base their rule on fear rather than trust and loyalty.

IV. FORMAL AND INFORMAL RULE OF LAW

Even in the absence of a recognized central government in Somalia from 1991 to the present day, de jure Somalia cannot be considered as being in a “state” of total anarchy. Despite major political divides between Somaliland, Puntland, and (southern) Somalia, similar structures of judicial systems, based on the structures and laws of previous Somali governments, have been adopted. At large, the law of de jure Somalia is a unique case of confluence of legal institutions deriving from English, Italian, Islamic, and customary law. While dealing with the development of the Somali legal system, it is necessary to demonstrate the respective role and interdependence of those legal circles and intersections.

A. Structure of the Legal System

Although the former L’Amministrazione Fiduciaria Italiana della Somalia and the British Somaliland Protectorate gained legislative autonomy in the late 1950s and formal

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73 Somali warlords rule by means of violent exploitation of resources and military domination over weaker groups ranging between larger scale gangsterism at the lower end to quasi-insurgent movements at the upper end; cf. Paul B. Rich, “Introduction” in Paul B. Rich (ed), Warlords in International Relations (Macmillan Press / St. Martin’s Press, Houndmills / Basingstoke / Hampshire / New York 1999) XII.

74 Jutta Bakonyi / Kirsti Stuvøy (n 18) 365 ff.


independence as a unitary republic in 1960,\textsuperscript{77} much of the pre-independence law dates back from the colonial area. During the autonomy period as well as during the independence era the formal law that Italy and Britain had imposed on their colonies was largely left intact.\textsuperscript{78} The record of the first nine years of independence show that the Somali people and authorities made use of their formal legal rights and powers.\textsuperscript{79} Constitutional checks and balances among state authorities seemed to work and courts seemed to exercise their powers independently.\textsuperscript{80} In retrospect, however, one might ask what Marco Lombardo, speaking to Dante in Purgatory, Canto XVI, verse 97, asked: "Le leggi son, ma chi pon mano ad esse?" ("There are laws, but who implements them?"). On this note, the question in Somalia's context of whether legal safeguards are dead letter or a living reality depends in large measure on how effectively rights are enjoyed and powers are wielded. The basic features of the legal and judicial systems which are operating in Somalia today\textsuperscript{81} are the following: (1) each system is sanctioned by a charter which proclaims the supremacy of Islamic Shari'ah (law);\textsuperscript{82} (2) a three-tier judicial system has been established, including a supreme court, a court of appeals, and courts of first instance;\textsuperscript{83} (3) the laws of the period prior to 1991 remain applicable until and unless they are amended.\textsuperscript{84}

1. Somaliland

As what has happened across Somalia, the formal judicial system in Somaliland was entirely destroyed during the civil war to oust Maxamed Siyaad Barre. In 1993, a clan conference in Boorama\textsuperscript{85} agreed that reconstruction of the legal system would begin with the constitution of a judicial system based on laws passed by the Somali government before Maxamed Siyaad Barre's military coup of 1969. The current Somaliland constitution\textsuperscript{86} states that all laws in Somaliland, including the constitution as the supreme law of the land itself, will be based on Shari'ah principles, and that any existing law conflicting with Shari'ah will be rendered void.\textsuperscript{87} That said, it should be noted that the Somaliland legal framework remains a


\textsuperscript{78} Haji N. A. Noor Muhammad (n 76) 45.

\textsuperscript{79} Paolo Contini (n 76) 80.

\textsuperscript{80} Ibid., 78.

\textsuperscript{81} The structure of the judicial system of present-day Somaliland (and also Puntland) is in most parts based on Legislative Decree No. 3 of June 12, 1962 adopted by the National Assembly of Somalia.

\textsuperscript{82} Even though Shari'ah is applied primarily for family matters, including marriage, divorce, and inheritance issues as well as minor civil matters.

\textsuperscript{83} N.B.: Either as a single court per region, or divided between Regional and District Courts; cf. Haji N. A. Noor Muhammad (n 77) 192.


\textsuperscript{85} Cf. J. Peter Pham (n 2) 193; Markus Virgil Höhne, Somalia zwischen Krieg und Frieden: Strategien der Friedlichen Konfliktvertragung auf internationalen und lokaler Ebene (Institut für Afrika-Kunde, Hamburg 2002) 90 ff.

\textsuperscript{86} Cf. section III.A: "Constitution-Building“—Somaliland.”

\textsuperscript{87} Art. 128 Constitution of the Republic of Somaliland.
contradictory mixture of laws and procedures drawn from both the British Common Law and Italian Civil Law heritage, as well as Shari‘ah and clan xeer. In reality, the application of diverse legal codes continues, and interpretation of laws remains ad hoc, non-uniform, and highly subjective. A survey conducted by the Hargeysa-based Academy for Peace and Development (APD) in 2002 identified problems, such as the incoherent amalgamation of overlapping and at times contradictory legal principles and laws based on British Common Law, Italian Civil Law, traditional clan xeer, and Shari‘ah; lack of professionally trained staff, including judges, lawyers, clerks, and civil servants; limited number of functioning courts across the region; poorly equipped offices and courts where they exist; regular interference in court matters by both politicians and influential clan communities, leading to a lack of judicial independence; and lack of public knowledge of the role and functioning of the judiciary, as well as lack of public access and trust.88

The primacy of customary clan justice over the formal judicial system is ubiquitous. For instance, someone guilty of homicide may be brought before court for trial on the basis of formal law, but if settlement is reached outside the court in accordance with xeer (in the sense of traditional social contracts), he or she may be set free without punishment. This is particularly so where law enforcement and the courts are weak or non-existent, where warrants cannot be enforced, and when relatives apprehend the offender. When the relatives settle an offence according to customary law outside the formal judiciary system, judges and law enforcement officers cannot prevent the release of the offender brought to them by relatives who now insist on his release.89 The focus of any legal decision is to arrive at a “win-win” solution that the parties to the dispute are willing to implement.90 Thus, pressure on the government to enforce legal decisions is virtually non-existent.

While the Somaliland administration has appointed an official Law Review Committee in 2002 to assess all existing laws and propose changes where necessary, the committee has neither moved quickly nor given much attention to aspects of xeer or Shari‘ah that are not already included in formal state law. Furthermore, accusations of inefficiency, lack of transparency, and corruption were exacerbated by a political controversy between the Minister of Justice and the Chief Justice over the leadership of the Justice Committee which has been established to ensure the impartial appointment, monitoring, and management of judges. The Somaliland constitution expressly recognizes the independence of the judiciary.91 However, the implementation of the principle is hampered by the fact that it is the Ministry of Justice that administers the courts, salaries, and budgets. Furthermore, the constitution gives the president the power to appoint and dismiss judges to the Supreme Court.92 Although any such decision should be taken in consultation with the judicial commission and parliament, in practice this leaves the president with virtually unchecked power over the judiciary.93

89 Ibid.
90 Andre Le Sage (n 84) 28.
91 Art. 97 Constitution of the Republic of Somaliland.
92 Art. 105 Constitution of the Republic of Somaliland.
93 Andre Le Sage (n 84) 28 (fn 30).
2. Puntland

Upon its creation in 1998, Puntland re-established the judicial system based on the law of the judiciary, adopted by the National Assembly of Somalia in 1962. The charter made the standard caveat, however, that no existing laws would be applicable if they contradicted either Shari’ah or other articles of the charter. According to the Puntland charter, “laws and regulations legally enacted by the previous governments provisionally remain in force until they are replaced by new legislation.” As elsewhere in Somalia, this meant that the Puntland judicial system is based, for the time being, on the former three-tier system, as described earlier. In addition, a separate constitutional court was established. The state interest is represented by the Ministry of Justice and Religious Affairs, which oversees both public prosecution and custodial services; the Higher Judicial Council, responsible for judicial appointments and dismissals; and an Office of the Attorney General, including the General Prosecutor, Assistant Prosecutor General, and local-level prosecutors. In April 1999, however, the Puntland parliament adopted Law No. 2, which streamlined the structure of the judiciary by replacing the regional and district courts with a single court of first instance. Following the 1962 precedent, Shari’ah is applied to personal matters like marriage, divorce, inheritance, etc. Three judges (including a mix of secular and Shari’ah trained jurists) shall sit on each court, and adopt rulings by majority. But according to assessments conducted in 2003, only 45 judges were serving in Puntland. Of these, about half had a university degree in either secular law or Shari’ah. The remainder generally had “traditional” and “non-formal” qualifications, including locally acquired knowledge of Shari’ah and “on-the-job” experience in the courts’ system under previous Somali governments.

3. Southern Somalia

Originally, the Transitional National Government (TNG), which was established in 2000 as the predecessor of the Xukuumadda kumeelgaarka ah ee Soomaaliya (Transitional Federal Government—TFG) set up in 2004, aspired to become Somalia’s first internationally recognized government since the state collapsed. According to the TNG’s charter adopted at the Arta peace conference, “[t]he system of the new state of the Somali Republic is transitional and it shall be based on sharia [. . .].” Art. 38.12 states that “the Somali constitution which was adopted in 1960 and other laws of that period which are not contrary to that charter shall have the force of law in the Somali Republic.” Arts. 4.3 and 5.1 adopted the “generally accepted rules of international law,” recognized the UN Declaration on Human Rights and the Convention on Civil, Political, Economic, Social and Cultural Rights, and established a Higher Judicial Council to maintain judicial independence.

Officially, the TNG judiciary system was structured ambitiously to provide for law and order across Somalia. However, since the TNG was never able to expand its presence outside Mogadishu, the system grew to comprise only the following elements: the Minister of Justice, the Attorney General, the police force, a supreme court (including four judges), the regional court for the Benaadir / Mogadishu area, six district courts (all operating in Mogadishu), and the Mogadishu Central Prison and its custodial police force. After all, the
new TNG justice system had stopped receiving financial support from the TNG and, as a result, its level of activities decreased to the point of hardly functioning by 2003 and 2004.

Immediately after the creation of the TNG, its judiciary system was merged with informal Shari’ah courts that were created in Mogadishu during the civil war. The TNG assimilated approximately 70 Shari’ah judges including a small number of militant Islamic clerics who had been leader of Al Ittihad al Islami (Arab. al-ittihad al-islami), a group listed by the United States of America as a “Specially Designated Terrorist Entity.” This merger lasted for a period of one year, and even during that time, many of the Shari’ah courts refused to place their militias fully under the command and control of the TNG police or military. The accommodation came to an end in early 2002, when judges in the TNG system were forced by a new law passed by the TNG parliament to take an exam to demonstrate their legal qualifications. Many former Shari’ah judges who had joined the TNG refused to take these exams for various reasons and thus quit the TNG judiciary system. After the judicial exam was implemented, a large number of vacant posts existed within the TNG judicial system.

Thereupon, the TNG appointed people with a secular law background—mostly individuals who worked in the judicial system of the Maxamed Siyaad Barre government. The lack of coordination between the TNG and the Shari’ah systems was demonstrated by the fact that the decision of the Shari’ah courts were neither registered nor considered legally binding by the TNG. To the extent that they functioned, the TNG courts essentially followed the old canon of Somali law as it existed under the Maxamed Siyaad Barre regime. For the TNG judges, this represented an adequate mixture of a secular legal system and a Shari’ah system sui generis. Effectively, no latitude remained for the coordination with xeer.

According to the International Crisis Group, over five years into the transition, the reform agenda is completely paralyzed. The attempt to rebuild key state institutions has largely failed. Beyond the endemic internal power struggles, the TFG has faced far more serious problems in establishing its authority and rebuilding the structures of governance. Its writ has never extended much beyond Baydhabo. Its control of Mogadishu is ever more contested, and it is largely under siege in the rest of the country. There are no properly functioning government institutions. Even the few pockets once controlled by loyal local administrations, such as Kismayyo and Jawhar, have disintegrated into clan fiefdoms or are now controlled by the insurgency. Where the TFG tried to take over local administrations, the reaction was usually hostile. The root cause of distrust was a perception that the government was arrogant, out-of-touch, and trying to parachute its officials in the regions without consulting clan elders and other influential community members. TFG officials seemed to assume their constitutional mandate would be sufficient to bring all territories under their control. Yet, since Somalia’s descent into a kind of anarchy in 1991, clans have re-asserted control of areas they deem theirs, and they are unlikely to return this control to any central government easily. In a typical incident, in May 2008, four officials named as administrators in the central region of Hiiraan declined to take up their posts, hinting they had no interest in serving a government that was not trusted. In another example, a UK national of Somali origin was plucked from obscurity in London and told to take charge of Beled Weyne, a key

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98 Either due to their pride, due to the fact that they could not read/write, or because they were just likely to fail.
99 Andre Le Sage (n 84) 30.
100 The TFG has never had full control over Mogadishu—just parts of it, and these have been shrinking.
strategic town in the west. The reaction was a near revolt, as angry clan elders accused the government of disdain for the customary protocol.101

B. Somali Customary Law (Xeer)

In areas outside the immediate control of Somalia’s regional administrations, Somali customary law or *xeer* continues to be the predominant structure of justice. It has never been fully codified and remains an oral law passed down through generations.102 The universality of *xeer* is contested. According to one point of view, all *xeer* is local, emanating from specific bilateral agreements between specific sub-clans that traditionally live adjacent to one another, and “application of its rules is flexible and varies from place to place depending on circumstances and situations.”103 According to others, however, it is possible to refer to a single, general Somali *xeer*, given that the most significant principles of *xeer* are shared by all Somali clans.

1. Xeer Adkaaday

These generally accepted principles of *xeer* are referred to as *xissi adkaaday*: a term which designates the most fundamental, immutable aspects of *xeer* that have unquestionable hereditary precedents. They show some similarity with the *jus cogens* principles in international law, and include, in the *xeer* context, (1) collective payment of *diyah*104 for death, physical harm, theft, rape, and defamation, as well as the provision of assistance to relatives; (2) maintenance of inter-clan harmony by sparing the lives of “socially respected groups,”105 entering into negotiations with “peace emissaries” in good faith, and treating women fairly without abuse;106 (3) family obligations including payment of dowry, the replacement of a deceased husband by his brother (*dumaal*), a widower’s rights to marry a deceased wife’s sister (*xigsiisan*), and the penalties for eloping; (4) resource-utilization rules regarding the use of water, pasture, and other natural resources, and provision of financial support to newlyweds and married family relatives as well as the temporary or permanent donation of livestock and other livestock of the poor.107 In addition to these general principles, it is commonly agreed that *xeer* can be divided into the broad categories *guud* and *gaar*. *Xeer guud* includes the general aspects of traditional clan law that regulate common day-to-day social interactions, civil affairs, and means of dispute settlement within a clan and between different clans. *Xeer gaar ah* includes specific laws that regulate localized economic production relations in clans and sub-clans specifically involved in pastoralism, fishing, frankincense harvesting, etc.108

102 Andre Le Sage (n 84) 33.
104 Blood compensation, usually paid with camels and other livestock.
105 Including the elderly, the religious, women, children, poets, and guests.
107 Andre Le Sage (n 84) 33.
108 Cf. Puntland Development Research Center (n 103) 19 ff.
2. The Xeer Process

Xeer is applied after a violation of customary laws has taken place. Generally speaking, xeer cases take one of two forms—either a “mediation” process (masalxo) or an “arbitration” process (gar dacwo). Once an incident has occurred, a delegation of elders, known in Somali as an ergo, is dispatched by one or both of the concerned clans, or a neutral third-party clan, to begin mediating the dispute and preventing it from spreading. “The emissaries’ sole mission is to convey a message to the other side and to prepare the ground for holding a [xeer] court or jury council to settle the case.” According to xeer, the aggrieved clan is called upon to make the necessary investigations into an incident and determine the harm committed before presenting their case to other clans. Those clan xeer cases have a traditional, ceremonial procedure. The case’s oral presentation takes place in public and usually outdoors under a tree. A very structured seating arrangement exists for the principal participants, which includes both parties, their representatives in the case, elders and guarantors of the claims to be awarded. Xeer “does not recognize a professional group defined as lawyers. In practice, any adult who has the required merits in the eyes of his clan, including speaking and negotiation skills, and a reputation of propriety can act as a lawyer.” Pleas of guilt and innocence, oral presentations of the case, the use of witness and evidence, and cross-examination are employed as in any secular court case. After a decision is reached, the case’s protagonists and their clans hear the elder’s decision, take a few minutes to discuss, and give their reply as a clan group. It is possible to accept the ruling, or to object to it and seek a new hearing. If a group rejects the decision of the elders, they call for an appeal or new hearing. Up to three hearings may be held in a case using different xeer beegti, i.e., elders chosen to decide in a xeer dispute. Only in the most extreme circumstances are appeals taken to the highest level of a clan and its most senior elders of appeal.

C. Sharī’ah (Islamic Law)

As already mentioned, Sharī’ah has been a traditional feature of xeer Soomaali, and vice versa. In principle, according to all Somali constitutions, Sharī’ah has been the basis of legislation—a factor which has provided symbolic religious legitimacy to the government. Although from a societal point of view Sharī’ah and xeer remain highly confounded, differences between the two could possibly be better understood by considering the different levels of legitimization they involve: To put it simply, if Sharī’ah refers to God (i.e., respectively Allāh), xeer Soomaali belongs to the society. Yet, in the aftermath of Somalia’s state collapse, different patterns have been followed: in northern regions—Puntland and Somaliland—the role of Sharī’ah was limited to the constitutional level (as one or the main source of law) to please potential donors from the “Islamic World.” In contrast, in

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109 Cf. Puntland Development Research Center (n 103) 133.
10 In extreme cases, where fighting has erupted and the men of the two contending sides cannot approach each other without a clash taking place, women play the role of emissaries; Puntland Development Research Center (n 103) 127.
111 Puntland Development Research Center (n 103) 126.
112 Andre Le Sage (n 84) 35.
113 Puntland Development Research Center (n 103) 130.
114 The most senior xeer beegti within a clan (qolo) is usually the personal legal advisor of the sultan or chief of the clan.
more clan-differentiated areas like Mogadishu and other urban regions of the south, the first attempts to reshape the legal system involved the establishment of Shari’ah courts.\textsuperscript{115}

In practice, Shari’ah has always been relegated to the level of courts of first instance within the formal justice system, and been applied in civil cases, including family matters, marriage, divorce, and inheritance.\textsuperscript{116} Since the early 1990s, however, a new form of Shari’ah has emerged in a number of different cities and towns across Somalia with the establishment of Shari’ah courts. In the absence of a government, varying combinations of Somali militia-faction leaders, businessmen, clan elders, and community leaders have worked with Somali religious leaders from within their sub-clans to establish these courts in attempts to improve local security conditions. These courts had become a \textit{modus operandi}—a localized special way of addressing security problems in troubled areas.\textsuperscript{117} While the presence of a Shari’ah court may have improved security in their immediate zone of operation, the courts played a limited role in mediating inter-clan disputes. The aforementioned courts’ mediation is depended on clan elders’ approval.\textsuperscript{118}

As Andre Le Sage illustrates, the structure of Somalia’s Shari’ah courts tends to be simple, but effective. They include a standard hierarchy of a chairman, vice-chairman, and four judges. A small but well-equipped militia acts as a “police force” that reports to the courts and supports the implementation of the judges’ decisions, but also functions independently to intervene in community disputes and to arrest suspected criminals.\textsuperscript{119} In theory, the operative legal code, or rather manual of jurisprudence, of Somalia’s Sunni Muslims, predominately of the Shāfi ’ī denomination,\textsuperscript{120} is the four-volume \textit{Minhaj at-Ṭalibin}.\textsuperscript{121} In fact, however, none of Somalia’s Shari’ah courts appears to follow a specific \textit{madhhab}; they simply apply their personal interpretation according to their existing knowledge of Islam in general and the Qur’ān and Sunnah in specific. Due to the judges’ lack of formal training, the Shari’ah courts have not been operating according to any formal procedure. Yet, in reaching decisions that will satisfy their various constituents the Shari’ah courts have adopted the guiding principle of \textit{sulux}, which sometimes have been roughly translated as “resolution.” According to \textit{sulux}, Shari’ah, \textit{xeer} and relevant state laws will be combined to find a workable, “win-win” solution to a case that all parties will accept. Interestingly, at the

\textsuperscript{115} Frederico Battera (n 53) 137–138.
\textsuperscript{119} A separate finance committee was established to collect and manage a proportion of tax revenues levied on regional traders by the local administration; see UN Development Office for Somalia, \textit{Situation Analyses Assessment Report on Hiran Region} (UNDP-Somalia, Nairobi 1998); see Andre Le Sage (n 84) 39.
\textsuperscript{121} Girolamo Marotta Gigli, “The active Functions of Judges” in L’Associazione Italiana di Diritto Comparato (ed) (n 116) 15.
same time, any overt request for barax or “mixing” of different laws is flatly rejected as a corruption of Shari’ah.\(^\text{122}\)

**V. APPROACHES TO RESPOND TO THE FAILED STATE IN SOMALIA**

It is clear that any form of national government in Somalia in the foreseeable future will have only limited power and authority.\(^\text{123}\) The rebuilding of the Somali state will require a huge effort, including a comprehensive review of shared core values, appropriate state structures, and human resources needed to run the state institutions. Each reconstruction effort has to take into account that Somalia is a Muslim, clan-based society striving to re-establish its nation-state institutions.\(^\text{124}\)

1. **Feasible (Inter)national Political Approaches**

A solution to the issue of Somali statehood has to be found through concerted political dialogue. Unresolved, it could lead to violent conflict between Somali unitarians and the proponents of an independent Somaliland.\(^\text{125}\) For both sides, the issue of recognition is not merely political or legal; it is existential. Most southern Somalis, including the Harti in the northeast, are very much attached to the notion of a united Somali Republic, while many reer waqooyi\(^\text{126}\)—scarred by the experience of civil war, flight and exile—refer to unity only in the past tense.\(^\text{127}\) According to some observers, a way out of this conflict scenario would be to limit the sovereignty of the Somali government established in Kenya.\(^\text{128}\) At any rate, with sufficient goodwill on both sides, the initial reservations felt by Somalia/Puntland and Somaliland about bilateral dialogue could probably be overcome. Admittedly, yet, the views held by the two sides on the current status of Somaliland will be difficult to reconcile. The Somaliland leaders consider that their polity has broken away from Somalia, and will therefore insist that meetings be conducted as between two sovereign states. A (southern) Somali government, on the other hand, is going to approach Somaliland as an unequal secessionist

\(^{122}\) Andre Le Sage (n 84) 41.


\(^{125}\) Matt Bryden (n 58) 23.

\(^{126}\) “Northerners,” i.e., a self-designation of people in Somaliland, whereas people in Puntland use the other clan-affiliated denotation Isaaq referring to “Somaliander” in order to repudiate oneself, mainly related to the Harti-clan, from reer waqooyi. Somaliland politicians, on the other hand, prefer to speak of Majerteenay when talking about Puntland(er). On the political and genealogical divisions in northern Somalia, see Markus V. Höhne, “Puntland and Somaliland Clashing in Northern Somalia: Who Cuts the Gordian Knot?,” available at http://hornofafrica.ssrc.org/Hoehne/printable.html, accessed on November 1, 2009.


\(^{128}\) Markus V. Höhne (n 53) 411.
entity, and will, therefore, insist that its view, i.e., an unequal relationship, to be manifested at the bargaining table.  

2. Constitutional Constraints to Political Approaches

The position of the two parties will reflect not only their respective preferences or principles, but also the legal constraints they are facing. Somaliland’s leaders are bound by their 2001 constitution to uphold the sovereignty and independence of their state, while Art. 2 of the Transitional Federal Charter of the Somali Republic commits the TFG to defending the territorial integrity and unity of Somalia. In order to enter negotiations at all, one of the two governments (possibly both) would have to be prepared to contemplate altering or violating the legal instrument from which it derives its authority. A way of splitting the difference between north and south might be an asymmetrical federation or confederation, bridging the gap between a kind of confederal arrangement and a federal structure. Asymmetry might entail a “confederation” between a unitary Somaliland and a federal Somalia. Under this arrangement, Somaliland would receive a far greater degree of autonomy than other member states of the union, a larger share of national representation and possibly the option of a referendum on independence at some specified point in the future (à la Sudan). Such settings would allow Somaliland to subscribe to elements of the Transitional Federal Charter of the Somali Republic, while imposing certain conditions. These would probably take the form of restrictions on the deployment of military forces and/or police in the territory, decentralized control over revenues or foreign assistance, etc.

VI. ISLAMIC RESPONSES

In the debate on the reconstruction of Somali statehood, some commentators emphasize the unifying potentials of Islam. Islam in Somalia is deeply and widely entrenched not only as a principal faith, but also as one of the vital foundations of Somali culture. A strong part of Somali national identity is its ever present tie to Islamic cultural community. It is believed that Islam can unite the disunited Somalis. Thus, constitution-building in Somalia should include the reconsideration of Islamic values and law. However practicing and implementing an Islamic moral code presupposes that people have a certain knowledge and

129 Matt Bryden (n 58) 26.
131 N.B.: Comparing it to the development in Sudan and the Comprehensive Peace Agreement (CPA), the key difference between Somalia and Sudan has to be emphasized: There has been a strong donor coherence in Sudan, and in the case of Somalia we simply don’t have it; see interview with EC Security Advisor Jeremy Brickhill reproduced in Andrea Ricci, From Warning to Action: Reportage on the EU’s Instrument for Stability (Office for Official Publications of the European Communities, Luxembourg 2008) 177. As to the CPA, see Hatem Elliesie, “Quo vadis bilad as-Sūdān? The Contemporary Framework for a National Interim Constitution” (2005) 8 Recht in Afrika (Law in Africa—Droit en Afrique) 1, 63–81.
133 David D. Laitin / Said S. Samatar (n 20) 44.
understanding of the holy scripts. For that reason, some support the incorporation of the elder-institution into the formal political system where their main role would be to ensure political stability by acting as final instance in matters of conflict resolution.  

In this context, Islamic movements in Somalia have taken various courses to realize their agendas and formulated different methodologies and strategies. Traditionally, Islam in Somalia, i.e., the Shāfi‘i denomination, has been dominated by apolitical Ṣufi orders (Arab. sg. ṭarīqah), such as the Qādiriyah, the Ahmadiyah (also known as Idrisiyah), the Ṣālihiyah and, to a lesser extent, the Dandarāwīyah and Rifā’īyah. Any trans-clan organization’s involvement in community affairs in an environment as dominated by clan rivalry as the Somali one remains challenging. Anyhow, two main trans-clan organizations, in particular, have risen to prominence since the late 1970s / early 1980s, namely the Muslim Brotherhood–affiliated Iṣlāḥ (Reform) Movement and the neo-Salafiyah-associated al-Ittiḥād (Islamic Union) Movement and its successive offshoots. Neither Islamic movement was well prepared to deal with the new situation arising from the 1991 state collapse since its training programs were focused mainly on reforming a society with functioning state institutions.

Inspired by the example of Egypt’s Muslim Brotherhood (al-ikhwān al-muslimūn), the first Islamic groups that were formed were the Waḥdat al-Shabāb al-Islāmī, the Islamic Youth Unity—in Somali known as Waxda—and the Jamā‘at Ahl al Islām (al-Ahlī). Both wanted to apply Islamic principles in an independent Somali state. Until 1992 at least seven different Islamic organizations were established. In the various Islamist groups in Somalia different doctrinal approaches can be found, traditionalist and reformist as well as Salafist ones. Most of those Islamist groups share more or less the same intellectual reference points of Muhammad b. ‘Abd al-Wahhāb, Ḥasan al-Bannā, and Sayyid Qūṭb. In general, it is hard to distinguish them along clear ideological boundaries. The most visible and radical group, however, has been the al-Ittiḥād. The picture of Islamist politics in Somalia is quite complicated, especially if one focuses on the establishment of the Shari‘ah court system, that some observers perceived as deliberate strategy by Islamist groups to seize power in Somalia. But this is, of course, a simplistic view which does not take into consideration the history of the

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137 Cf. Shaul Shay (n 136) 43.

138 At first, the neo-Salafiyah Movement in Somalia was named “al-Jāmi‘ah al-Islāmiyyah” (1980); after uniting with the Waḥdat al-Shabāb Islamic organization, the name was changed to "al-Ittiḥād al-Islāmī" (1982); this was changed again to "al-I’tisam bil-kitāb wa as-Sunnah" in 1996 after their conflicts with the armed factions in Kismayo (1991), Puntland (1992), and Gedo (1995–96). The most recent name, “Jamā‘at al-wiṣāq al-Islāmī,” appeared in 2008 in the aftermath of the Islamic Court defeat with the allied forces of the TFG and Ethiopia. Al-Ittiḥād is the backbone of the Union of the Islamic Courts.
establishment of the courts and its complex relationship with al-Ittiḥād. As already shown, various motives can be found for the establishment of the courts.139

When its mandate expired in 2003, the TNG was not able to establish a functional administration and uphold security in southern Somalia. Therefore, it was not surprising that the Islamic courts experienced a revival. This started with the foundation of a new umbrella organization for the Mogadishu Shari‘ah courts, the Golaha Sare ee Maxkamadaha Islaamiga ee Soomaaliya (Supreme Council of Islamic Courts of Somalia—CIC). The courts’ promise of order and security appealed to Somalis across the religious spectrum. However, the CIC itself increasingly showed signs of strain, as the court militia was involved in several clashes with other factions and was perceived as one more actor in the chaotic and violent situation at the time. Thus, in the retrospective and seen from the CIC’s perspective, the formation of the Transitional Federal Government (TFG) in October 2004 was a great help to overcome CIC’s difficulties: it gave a new lease on life to the Mogadishu court system. Interim President Cabdullaahi Yuusuf Axmed’s anti-Islamist credentials were anathema to hardliners within the court leadership, while his close affiliation with the Ethiopian government offered Islamists an easy foil against which to mobilize support. Cabdullaahi Yuusuf Axmed’s plans to bring foreign forces into the country, especially troops from Somalia’s neighbors (including Ethiopia), pushed the courts into a tactical alliance with other Islamic leaders, Cabdullaahi Yuusuf Axmed’s political rivals, and Somali nationalists.140 On the other hand, other Islamic movements did not support the CIC. Particularly the al-İslâh group rejected CIC’s concept.141 Their rejection is caused by the courts’ giving credence to the personal judgments of poorly educated sheikhs. By contrast, al-İslâh’s Secretary General, İbrahim Dusuuqi, stated that al-İslâh would promote a fiqh similar to the one which applies in Kuwait. In his reasoning, this places a strong emphasis on ijtihād.142 Yet, quite interesting, these ideas have hardly found any support among mainstream legal consultants.

Thus, it came as a surprise to many that the Midowga Maxkamadaha Islaamiga (Islamic Courts Union—ICU), a broad umbrella group, including Islamists, moderate Islamists, traditional Śūfi adherents, nationalists and, unsurprisingly, political opportunists,143 swept through Mogadishu and then across southern Somalia with ease and apparent local support in a few months in mid-2006.144 The newborn ICU promised to unite Somalia under the banner of Islam, bringing it order, unity and justice. Faced with this well-organized, highly motivated Islamic movement, the resistance of many rag-tag militias crumbled quickly. The ICU became the Somali territory’s dominant force. Its sudden ascent to power was certainly unexpected—its leaders themselves were surprised and unprepared to administer

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139 See section IV.C: “Formal and Informal Rule of Law—Shari‘ah (Islamic Law).”
142 Andre Le Sage (n 84) 48.
the territory under their control. However, although initially there had been some regional attempts to negotiate between the “secular” but self-appointed, powerless executive de jure authority TFG and the de facto authority ICU, it became clear that the ICU’s spectacular rise was less appreciated outside Somalia: The U.S. feared that al-Qā’ida would obtain a new safe haven in Africa’s Horn and Ethiopia accused the ICU of allying with Eritrea, hosting Wahhābī and sending troops across the border.\footnote{Harry Verhoeven, “The self-fulfilling prophecy of Failed States: Somalia, State Collapse and the Global War on Terror” (2009) 3 Journal of Eastern African Studies 405, 411; see also Matthias Seifert, “The Ethiopian Intervention in Somalia: Theoretical Perspectives” in Eva-Maria Bruchhaus / Monika M. Sommer (eds), Hot Spot Horn of Africa Revisited: Approaches to make Sense of Conflict (LIT-Verlag, Berlin 2008) 28 ff.} Subsequently, differences proved to be insuperable and a battle between the TFG and the ICU for power erupted. In response, the international community backed the TFG, and the Isbuheyysiga La-dagaallanka Argaggixisada (Alliance for the Restoration of Peace and Counter-Terrorism—ARPCT) attacked the ICU. The confrontation escalated into a full-scale war in Mogadishu. By deploying well-organized militias, evoking popular “national” sentiments against Ethiopian troops on Somali “soil,” and providing order, the ICU managed to establish rule over most parts of southern Somalia—for the first time since the collapse of the Maxamed Siyaad Barre government.\footnote{Roland Marchal, “A tentative Assessment of the Somali Harakat Al-Shabaab” (2009) 3 Journal of Eastern African Studies 381, 390; Amira Muḥammad ‘Abd al-Ḥalim, “ay-Sūmāl wa-taḥaddiyāt marḥalāt jadīd,” 182 al-Siyāsah al-Dawliyyah (2009), 210, 211; Dirk Spilker (n 23) 23–25; Shaul Shay (n 136) 95; Tobias Hagmann / Markus V. Hoehne, “Failed State or failed Debate? Multiple Somali political orders within and beyond the nation-state” (2007) 42 Politorbis (Zeitschrift für Aussenpolitik—Revue de politique étrangère—Rivista di politica estera) 20, 25; Peter T. Leeson (n 47) 695, 707; Afyare Abdi Elmi, (n 51) 95; Tobias Hagmann / Markus V. Hoehne (n 59) 51.}

After the Mogadishu takeover, structures set up by the ICU were based on the existing courts’ organization. The courts were comprised of the chairman of the Islamic court militia and the chairman of the local shūrā (council). The original aim was to bring together clans and sub-clans providing a forum for justice and the handling of disputes. In Mogadishu, the ICU focused on dismantling the notorious roadblocks, thereby effectively demobilizing the clan-based militias and neutralizing the warlords and local faction leaders.\footnote{Shaul Shay (n 136) 99; Kirsti Samuels (n 47) 604.}

The ICU victory meant the de facto disappearance of the factions, but it left open the question of building a political order. The challenge in the post-victory era was to extend and broaden the organization without being weakened by inter-clan politics or being seen to impose the kind of central authority so feared by Somalis. This expectation contrasted sharply with the keenness of Somali professional classes and the international community to identify a “type” of government as defined by centralized administrative structures and a definitive political ideology. In addition, the unsteady balance in the courts between followers of different groups of Islamic denominations became even less stable after June 2006.\footnote{Shaul Shay (n 136) 95; Roland Marchal, “Somalia: A New Front Against Terrorism,” available at http://hornofafrica.ssrc.org/marchal/printable.html, accessed on November 1, 2009.}

With Ethiopia’s assistance the TFG succeeded in early 2007 in taking control of the capital city. However, despite the TFG’s victory over the ICU and its seizure of Mogadishu, Somali statelessness persisted.\footnote{Annette Weber, “State Building in Somalia—Challenges in a Zone of Crisis” in Eva-Maria Bruchhaus / Monika M. Sommer (eds), Hot Spot Horn of Africa Revisited: Approaches to make Sense of Conflict (LIT-Verlag, Berlin 2008) 14; Amira Muḥammad ‘Abd al-Ḥalim (n 146) 210 ff.} The TFG enjoys the support of the international community, but like the TNG, lacks the domestic support needed to establish genuine
authority.\textsuperscript{150} Wasting another opportunity, no progress was made toward reconciling Somalia, not in the least because Cabdullaahi Yuusuf Axmed refused to bring aggrieved former ICU supporting constituencies into the government.\textsuperscript{151} During the period of statelessness the three greatest disruptions of relative stability and renewed social conflict have occurred precisely at times when the most determined efforts to establish an effective central government were made—first with the TNG, later with the TFG, and finally, most recently, when the TFG moved to oust the ICU. In each case the specter of effective central government disturbed the delicate equilibrium of power that exists between competing factions, and led to increased violence and death due to armed conflict.\textsuperscript{152} Generally speaking, reluctance to engage in earnest with the ICU and its steady increase in bellicose rhetoric led to a self-fulfilling prophecy of radicalizing the movement as Islamist moderates lost influence.\textsuperscript{153}

The diversity of the ICU’s leadership makes it difficult to generalize about the perceptions and motivations that led it to confront the TFG and Ethiopia. In a way, the courts themselves have been, with very diverse ties, clan institutions. This political reality was taken into account for nominations to the Executive Committee and the shūrā. On the other hand, the Islamic affiliation reduced to some extent the identification with a clan.\textsuperscript{154} Thus, it is important to keep in mind that the ICU, although driven by religious and ideological divisions, played into the clan partisanship which has sustained the conflict during many years.\textsuperscript{155} The ICU’s remarkable rise and fall and, more broadly, the dynamics of Somali political Islamic movements, known as “Somali Islamism,” have been subject to much misunderstanding in recent years. Historically, Islam has been very important to Somali society, but always remained embedded in traditional cultural practices: the emphasis has been on Sufi-inspired mysticism and pragmatic interpretation of the Qur’ân, not on a literal reading of Islamic doctrine. Crucially, Islam has seldom been allowed to trump clan identity and was systematically kept out of politics. The birth of Islamic courts in the 1990s should be situated precisely against this background. While businessmen provided funds for the courts and clan elders used their traditional authority to persuade youngsters to disarm, the ulamā’ used flexible interpretations of Shari‘ah to end the impunity and constant predation against a superficial central authority.

\textbf{VII. CONCLUSION}

While other African states at least pretended to embrace the liberal principles promoted by foreign donor, inter alia, multi-party democracy, and good governance, Somalia embarked on a different path altogether. It was mostly subjected to ethnocentric assumptions along the lines of what Mahmood Mamdani calls “history by analogy.”\textsuperscript{156} Strictly speaking, the problem in Somalia is not that constitution-building and state-building itself is doomed to fail; it is rather the type of state that both external and local actors have sought to construct

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\textsuperscript{150} Peter T. Leeson (n 47) 707.
\textsuperscript{151} Harry Verhoeven (n 145) 411.
\textsuperscript{152} Peter T. Leeson (n 47) 708.
\textsuperscript{153} Harry Verhoeven (n 145) 420.
\textsuperscript{154} Roland Marchal (n 148) Boudewijn R. A. Bouckaert (n 45) 715.
\textsuperscript{155} Kirsti Samuels (n 47) 604.
is unattainable and has as a consequence set up Somali political leaders and their external mediators for failure time and again. The fact that observers have described more than a dozen years of Somali politics negatively, i.e., by what does not exist (a state apparatus) rather than by what does exist (a variety of fragmented authorities), indicates clearly the ideological power of state-centered concepts. Given that existing informal and local systems of governance have enjoyed real success and that a central government will necessarily have to be minimalist in nature in the near future, the most promising formula for success in constitution-building backed by the populace leading to a well-grounded statehood in the modern sense is likely to be some form of a “mediated state” in which the government relies on partnership (or at least co-existence) with a diverse range of local intermediaries and rival sources of authority to provide core functions of public security, justice, and conflict management. This mediated state formula is a necessary step in a transitional phase leading to consolidation of formal state authority.

Recalling, within the aforementioned context, the basic premise of the German Historical School of Law, a nineteenth-century intellectual movement in the study of German law, law is not to be regarded as an arbitrary grouping of regulations laid down by some authority. Rather, those regulations are to be seen as the expression of the convictions of the people, in the same manner as language, customs and practices are expressions of the people. Accordingly, the law is grounded in a form of popular consciousness called the *Volksgeste*. Laws can therefore stem from regulations by the authorities, but more commonly they evolve in an organic manner over time [with less or] without interference from the authorities. The ever-changing practical needs of the people play a very important role in this continual organic development. Thus, further profound research and “testing” of Somali’s legal concepts is de rigueur. This is particularly the case for Shari’ah and the importance attached to it, as Somalia and its culture are part of the “Muslim World.” Shari’ah is not merely a legal or cultural phenomenon but also a political factor: Shari’ah is able to confer a strong legitimacy on the system in force.

Given its condition of permanent transition, Somalia is one of the most challenging fields of study investigating the role and potentials of *taḥḥiq al-shari‘ah al-islāmiyyah*, its relations to state formation and the political institutions, as well as customary law and traditions. The latter is by definition flexible and relations between modern and customary law are complex and often dialectical. Modern and official law certainly affects customary law, although customary law can resist modern and official law or adapt itself to modern conditions. Customary law can also influence the official jurisprudence. This seems to be the case for “modern” Somalia which has seen the stratification of different legal concepts.

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158 Cf. section III: “Constitution-Building.”
159 Likewise Kenneth Menkhaus (n 50) 190.
162 Frederico Batt era (n 29) 278.
and traditions. This point of view is currently being debated among anthropologists as well as among legal scholars. The debate largely concerns concepts such as the effectiveness of positive law in different cultural contexts. In the case of Somalia, the historical weakness of what one considers as a “modern” statehood seems to confirm this assumption. Moreover, what happened at least in Somaliland and Puntland to a certain extent at a constitutional level is what legal scholars and anthropologists call the impact of informal institutions on formal ones; i.e., the influence local legal cultures and concepts have in transforming “transplanted” law and procedures. Having said this, one has to take into account that, at least until colonization, Somali Islam was mainly characterized by Sufism and Sufi brotherhoods. Shari’ah and, in particular, the Shafi’i madhhab, the prevailing Islamic school of law in Somalia, admit the application of local customs, ‘urf. The legal doctrine, as it had been elaborated by Shafi’i, was elaborated with reference to a highly developed method of analogical and systematic reasoning, largely based on Sura 7: Verse 199 and a prophet tradition as well as, methodically, through istiṣlāḥ. Given the absence of the state in Somalia and the society’s natural bond to both Shari’ah and xeer, these could form the basis of a statehood sui generis, at least in the transitional phase, and give fresh impetus to a bottom-up method of constitution state-building. In practice, due to the lack of a stable state, the religious institutions in charge of applying Shari’ah in the sense of the Shafi’i madhhab could emphasize and promote the flexible understanding of Islam typical of Somali practice. In doing so, the ‘urf-gateway” could be used to avail oneself of xeer’s very pragmatic purposes, since Somali “tradition” is more than a system of laws and proceedings, but presupposes a code of ethics and honor whose rules are indispensable to the society in general and the individual in specific—so to speak the Volksgeist. Having said this, the fact that the constitutive criteria of Somali Shafi’i understanding is linked to the genealogical myths of Somali clan identity and is characterized by the veneration of saints as well as ancestors of various Somali clans has to be taken in account, too. The aforementioned “Somali Islam” adds depth and coherence to those common elements of traditional culture which, over and above their many sectional divisions, unite Somalis and provides the basis for their strong national consciousness. Although the Somali did not traditionally form a

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164 Norbert Rouland distinguishes between “customary” and “traditional” laws. I am using both indifferently in this specific paper.
166 Frederico Battera (n 29) 279.
170 Marco Guadagni states, to the point, that Shari’ah is sufficiently flexible to adapt itself to new conditions; cf. Marco Guadagni, “Il diritto dei singoli paesi: Somalia” in Rodolfo Sacco, Il diritto africano (UTET, Turin 1995) 348.
unitary state, it is this heritage of cultural nationalism which, strengthened by Islam, lies behind Somali nationalism today.\\(^{171}\)

Hence, the Shāfi‘i-approach matches Somalia’s social fabric and could serve as the most suitable scope of a root-based legitimate balance among clans’ legal traditions and political interests. In other words, the aforementioned approach could ensure basic legitimacy in a society divided into patrilineal descent groups. Thus, instead of purely arguing state failure/collapse narratives against the background of the hegemonic Weberian lens, one should reclaim, or at least consider, Ibn Khaldūn’s paradigm for re-emergence of legitimate authority and bottom-up response in view of a transitional phase of constitution-building. Although Ibn Khaldūn’s theory cannot, of course, be transferred indiscriminately from the fourteenth century Maghreb to the twenty-first century Horn of Africa, it challenges Weber’s analysis at any rate: The same cohesive forces of tribal organization described by Ibn Khaldūn in his volume *Muqaddimah*\\(^{172}\) are at work in today’s Somalia—just as is now clear in the case of Libya; a result in the very least affected, if not controlled, by tribal allegiances. In Somalia, more than ever, the integrative factor of Islam in this [Shāfi‘i] respect serves as a “national” ideology of integration,\\(^{175}\) of sustainability.\\(^{176}\) Ultimately, there is no better way to confront *jihādi* Islamism than to assist Somalis in realizing such a root-based approach. Unless foreign governments are not prepared to embrace that simple fact, they may continue to score victories in their battles against terrorism in the Horn while losing the wider war.\\(^{177}\)

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\(^{177}\) Frederico Battera (n 53) 141.
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I. INTRODUCTION

In modern times, the “constitution” is considered to be the most appropriate legal instrument to perpetuate a political compromise between entities, groups, and individuals composing the state. It intends to guarantee the respect of this “social contract” to which individuals and groups adhere, in order to stop reclaiming rights through violence but rather to obtain them through law. Thus, a modern constitution is often conceived as the last act of a revolution.¹

In the Palestinian context, drafting a constitution is not a result of statehood but rather part of the package of preconditions for achieving it. In other words, creating a new state, if not by the use of force—thus by imposition, needs now to be merited. The Palestinian case proves the relevance and dangers of dealing with this approach to constitutions and statehood. In order to have their own state, Palestinians must prove to the international community that they are serious about liberal democracy and free market policy. They furthermore need to prove their willingness and seriousness about reform; in other words, they have to merit their state, which is no more considered as part of their right to self-determination.

Drafting a “constitution” was initially related to the “Palestinian state” declared in Algiers in 1988. Nevertheless, initial drafts appeared only after the Oslo Agreements, thus, undertaking the limitations imposed by the agreements with Israel in the constitutional text, and the new realities that came from them. The Basic Law is not a constitution for a sovereign state; it is transitional and will be replaced by the constitution, once (and if) the state

is established. Nevertheless, preparing a constitution is considered as a step toward statehood: three drafts of a Palestinian constitution were prepared and presented for public debate in 2001–2003. The “constitution,” its role, its timing and its objectives were at the center of public debate.

Following the second legislative elections in 2006 and the victory of Ḥāmās, political actors increasingly made reference to the “constitution” (or, more precisely to the Basic Law), and when conflict started to escalate between them, the Basic Law was largely used as a standard to delineate respective authorities; but there was no consensus on which binding provisions parties in dispute refer to. In case they do refer to the same provisions, they often do not share the same interpretation of the text. However, one thing was becoming increasingly clear: there was an urgent need to resolve internal conflict by dialogue and through permanent functioning institutions, in order to avoid clashes between individuals and groups that may have different ideologies, priorities, and interests.

Besides, there was an urgent need to find a way out of the political impasse that resulted from the different agendas of the international community and the Palestinian people. In fact, the Palestinian choice of Ḥāmās at the helm of the Palestinian Authority’s (hereafter PA) institutions had proven the fragility of the equilibrium between international and internal legitimacy of political leaders. Here as well existed an urgent need to find a solution, in order to ensure a minimum of legality of the new holders of power that was not based exclusively on majority choice but also on the way people would be governed, namely through the respect of individuals’ and minorities’ rights and by encouraging a peaceful coexistence between nations and states.

Following the Mecca agreement between the main Palestinian factions in February 2007, Palestinians opted for a solution “outside the law,” and outside constitutional arrangements: reference was often made to what is called “national unity” or “national concordance,” a quasi-tribal arrangement between factions, based on repartition of the public sphere between political factions. The expected reform and change seemed to mean the rehabilitation of old and odd attitudes in new disguises. The results here were very dangerous on the Palestinian system and institutions. From one-party institutions, civil servants, and security forces, Palestinians passed to more diverse but still heavily politicized public institutions. Professionalism and public interest, in both situations, were not the relevant criteria.

This article argues that the constitutional and institutional anomalies described above contributed to the cracks among Palestinian factions, territories, and narratives in 2007, following Ḥāmās control by force of occupied Gaza Strip. Since then, reference to the same Basic Law, often interpreted differently, was made to justify respective actions and decisions. Law was used—as often was the case in Palestinian modern history—to accommodate political objectives, causing damage to the process of state-building. However, the clash between Palestinian factions is not only about political objectives but also, this chapter argues, related to their national aspirations, objectives, and visions.

II. “WE THE [PALESTINIAN] PEOPLE”

In order to explain the fact of the establishment of a legal order ex novo, there is a need to return a step backward, to the originating power, and the act behind the establishment of

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2 Art. 115 of the amended Basic Law of 2003 reads as follows: “The provisions of this Basic Law shall apply during the interim period and may be extended until the entry into force of the new Constitution of the State of Palestine.”
that order. This is the simple conclusion that was formulated by Sieyès—the first to present a sophisticated and revolutionary theory of constituent power—“une constitution suppose avant tout un pouvoir constituant,” as distinguished from other constituted powers created by the constitution itself. However, the same fact (and here is the contradiction) of having an act of self-constitution, means that “someone” pretends he is talking for or in the name of that self. In other words, the presence of a self is revealed through the representation. The question, accordingly, converts from what or who are the “We,” in the “We the [Palestinian] People” to what or who represents that “We.”

This author argues that the Oslo process and the creation of the PA over parts of the occupied Palestinian territory revitalized this question. The term used here (revitalized) insinuates that this is not the creation of the Oslo process. In fact, the Palestine Liberation Organization (hereafter PLO), as sole legitimate representative of the Palestinians, was challenged throughout decades by different actors, pretending to represent the Palestinian people, starting with the international community (mandate over Palestine, Partition Plan, etc.) and ending with Arab states (especially Jordan, and indirectly Egypt, through Arab nationalism that took different forms and shapes). Besides, the PLO was challenged as representative of the Palestinian people with the eruption of the first intifada as a genuine reaction of the Palestinian people of the occupied Palestinian territory toward the brutality of occupation in which Islamic groups like Ḥamās which were not represented in the PLO played a central role.

With Oslo the PLO entered, through the PA, in direct contact, and for the first time, with the Palestinians of the occupied Palestinian territory and with their legal system. However, the recognition of the state of Israel meant indirectly the recognition of Israeli citizenship that is enjoyed by more than one million Palestinians, thus excluding them from that “We” that the PLO represents. Besides, Oslo institutionalized most of the illegal acts undertaken by Israel in violation of international law. The PLO acceptance of leaving the issues of refugees, Jerusalem, borders, and Israeli settlements for a later stage meant the acceptance of the fragmentation of Palestinian land, people, and legal system. This fragmentation challenged the claim of the PLO to be the sole representative of the Palestinian people as it demonstrated that the inability of the organization to represent the wishes and needs of the Palestinian people in a convincing and effective manner.

The following paragraphs shall prove how the kind of relationship that existed between the PA and PLO passed from complete hegemony to timid separation, then to the prevalence of PA institutions over the PLO. The reference to “relationship” instead of “separation” is justified by the fact, as will be shown, that the PLO tried not to separate itself from...
“its baby,” the result of the strange couple (PLO and Israel). Probably the PLO did not have another option as a complete separation between the PA and the PLO would have implied the de facto extinction of the latter. Some may even go further, suggesting that the peace process as a whole was the only way out for the “dying PLO” in the early nineties, for various reasons that are outside our consideration here. However, as shall be shown, the PA gradually substituted the PLO in many domains.

The second legislative election in February 2006 signaled the second revitalization of the issue of PLO–PA. However, what followed the election was a return to the origins, i.e., to the PLO. This return was due to the will to escape the PA institutions, dominated by Ḥamās. It also signaled increasing requests for the reform of the PLO, its substitution, or even its dissolution. However, what followed the second elections was not due to the electoral results. Rather, the reality that followed this election showed symptoms of an earlier sickness in the body of the PA, and showed that the gaps in the PA legal system, combined with the flawed constitutional mechanisms, proved overall to be inadequate for ensuring cohabitation between both institutions.

Some believed that the PA was not intended to, did not, and shall not replace the PLO as the sole legitimate representative (political entity and institution) of the Palestinian people, both in the occupied Palestinian territory and the Diaspora. However, despite the absence of discourse calling for the replacement of the PLO by the PA’s institutions, certain facts on the ground suggest that the Palestinian leadership (regardless of their intentions) has guided the PA in this direction. Four main trends have begun to take shape in the emerging system created in the occupied Palestinian territory following the signing of the Oslo Accords: 1) a shift in the center of Palestinian political life from “outside” (i.e., abroad) to the occupied Palestinian territory itself; 2) a growing conflict between the formulas governing Palestinian politics in exile and those appropriate to the “new” situation inside the occupied Palestinian territory; 3) a shift in the goal of demanding the right to a state on all of historic Palestine to the more “modest” goal of recovering territory occupied by the Israelis since 1967; and 4) the end of the “revolutionary” stage of the national liberation struggle and the political structures that accompanied it.

However, the PA, at least from the PLO perspective, was not intended to substitute the PLO unless all legitimate rights of the Palestinian people have been realized. There is no sufficient ground to believe that this moment was realized with the establishment of the PA. The objectives of the PLO will not necessarily be exhausted even with the establishment of a state.

Accordingly, the PLO remains the reference point for the PA. It is true that it was possible to establish the PA to govern parts of the occupied Palestinian territory only thanks to

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or because of the agreements with Israel, however it was the PLO Central Council that agreed on the formation of the PA in Tunisia October 10–12, 1993. The resolution entitled the PLO Executive Committee to form the PA Council and nominated the chairman of the PLO Executive Committee (Yāsir 'Arafāt at the time) as President of the PA Council.

Despite the above, the center of Palestinian political gravity de facto has shifted away from the PLO toward the PA. In this sense, the PA increasingly plays the role of “state in waiting” thus influencing and shaping the Palestinian political system and institutions. The PLO presence has become increasingly symbolic as a political convenience to be utilized as required and whose role is limited to the signing of agreements on behalf of, and for the benefit of, the PA. This tendency was consolidated by the international community, which preferred the PA as an authority governing Palestinians of the occupied Palestinian territory, rather than the PLO, a liberation movement. The most relevant example of this was the presentation of the Road Map peace plan by the Quartet (i.e. the EU, the U.S., Russia, and the UN) to the PA Prime Minister, the first prime minister nominated after the introduction of this office, following the amendments to the Basic Law in 2003. (Abbās resigned shortly thereafter, after less than six months in office.)

Some authors observed this tendency with suspicion, and some even considered it almost a conspiracy, while others saw the PA's increasing centrality as a natural phenomenon commensurate with its (limited) territorial jurisdiction and administration of those Palestinians living in the occupied Palestinian territory. The transference of most of the PLO institutions and leadership to the territory under PA control initiated the gradual marginalization of PLO institutions as key departments, such as the PLO Political Department, which remained outside the occupied Palestinian territory. According to some authors, this process is irreversible and the PLO will never recuperate its initial role.

The role of the PLO was discussed in talks on forming a National Unity Government following the second legislative elections and subsequent victory of Ḥamās. For Abrash the arrival of Ḥamās in power has consequences not only for the separation of powers within the PA itself but also for the Palestinian political system as a whole and particularly for the representativeness of the PA. In other words, the participation of Ḥamās (whose

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11 Qubba'ah (n 7) 73.
12 Nawfal (n 6) 85.
13 Nawfal (n 6), 86.
14 Śayigh (n 10) 63.
18 Qubba'ah (n 7) 68, 73.
20 Śayigh (n 10) 66.
21 Al-Tannānī (n 17).
members are not members of the PLO) in the PA elections gives the PA institutions an increasingly representative role. For the same author, Ḥamās has always presented itself as an *alternative* representative of the Palestinian people, as it is a religious-motivated group rather than the nationalistic-secular PLO.

The reconstruction of the PLO to potentially include religious parties such as Ḥamās and Islamic Jihad would primarily resolve the question of the “secularism” of the PLO (which the two Islamic groups categorically oppose) in addition to resolving the question of quotas for these groups in the Palestinian National Council (hereafter PNC), the parliament-like body of the PLO. On the other hand, the refusal of the PLO Executive Committee to endorse the program of Ḥamās Prime Minister İsmā‘īl Haniyyah’s first government reignited discussion at the highest levels on the relationship between the PA and the PLO. The PLO Executive Committee further criticized the lack of reference to the PLO as the sole legitimate representative of the Palestinian people.

Khalīl Shikākī suggested, as early as 1997, two areas of possible conflict between the PLO and PA: first, the “ratification” of treaties, such as the “Hebron Protocol” of 1997, which the Palestinian Legislative Council (hereafter PLC) asked to review but was refused by President ‘Arafāt, who determined that it was a matter for the PLO. The second area of possible conflict was the drafting of a “nationality” law, which would have inevitable repercussions on the Diaspora despite the fact that the Charter had already attempted to define who is a Palestinian. However, the participation of (West Bank and Gaza Strip) refugees in the legislative, presidential, and municipal elections (thus treating them effectively as “citizens”) should not be interpreted as a renunciation of their right to return. Several other examples can be presented concerning possible conflicts between the PLO and the PA, such as the reference to the PLO in the Basic Law, the need of the PLO Executive Committee’s approval on certain laws, the membership of the PLC deputies in the PNC, and the nomination of delegates to foreign countries.

### III. THE PROCESS OF CONSTITUTION-MAKING

Those entitled to constituent power, as appears in the classical theory of constituent power, remain the people, who exercise that inner power through legitimate institutions. It can be a council or an assembly constituted or elected ad hoc, or the same legislative body also empowered to practice constituent power, or directly, through referenda. Nevertheless, the way the constitution is adopted, and the level of popular participation, reflects the degree of democracy in those procedures, and provides legitimacy for the text that has been approved. In other words, if the elaboration and redaction of the same constitutional text is left to a group of specialists or to a commission, it is necessary, to be qualified as democratic, that the constitution, once ready in its final shape, is presented to the people for final approval.

The way the constitution is elaborated is important, but the way it will be adopted is also important; for this reason, the way constituent power is exercised, and the organs doing so, are in reality much more important than knowing, theoretically, who is entitled to...

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24 Abrash (n 22) 50.
25 Shikākī (n S) 61.
that power. In fact, the “temporary government” that organizes the drafting process usually exploits the situation for its own benefit.

The participation of the Palestinians from West Bank and Gaza Strip in the process of drafting the Basic Law and, at a later stage, in drafting the constitution for the Palestinian state, acquires additional significance. Palestinians showed enthusiasm in that they would be contributing to the Basic Law through their participation in the public conference that had been organized.

An important question inevitably arises: Will Palestinians, through the PLO institutions, continue to have constituent power regarding amendments to the constitution, in the process of creating the State? Will it be exercised by Palestinians of West Bank and Gaza Strip and citizens of the future Palestinian State—new arrivals included? Will the PLO participate in legislation principally affecting the situation of the inhabitants of the West Bank and Gaza Strip?  

When the PNC declared the Palestinian State in Algiers in 1988, it also decided that the new State would require a constitution or a basic law; the first attempts to prepare a basic law, then, were related to the State. A committee was appointed by PLO Executive Committee and given the task of preparing the first drafts of Basic Law in December 1993, and in February and December 1994; these drafts were the object of public discussions inside and outside the Palestinian territories but not by the Central Council of the PLO.

The situation changed after the Oslo Agreements, when the attempts to prepare a Basic Law were related to the PA, a temporary authority administering the autonomous territories until a final agreement was reached. In fact, the PA started to effectively exercise its authority directly on Palestinian territory and people. After election of the PLC in 1996, the structure of the PA was changed and the draft Basic Law needed to accommodate those changes; the committee prepared four other drafts that were never under consideration by the president of the PA.

The elected PLC showed immediate interest in drafting a Basic Law for the transitional period. Despite the original plan that the Basic Law would be endorsed by the PLO Central Council, the PLC insisted on its power to discuss and endorse the Basic Law. Drafting Basic Laws (in plural) was possible under the Interim Agreement; in fact, those Agreements detailed most of the provisions that the Basic Law had to include (concerning the structure of the Council). Besides, the same agreement provides that the Basic Law shall not contradict the Declaration of Principles and other agreements (between the government of Israel and the PLO), otherwise it would be rendered null and void. The preamble to the Election Law of 1995 confirmed that drafting a Basic Law was the PLC’s main task.

It should be noted that the nomination of that constitutional text with “basic law” (qānūn asāsī) or “basic system” (nīgām asāsī) but never “constitution” (dustūr) was never questioned by PLO or PLC legal committees. It is a way to distinguish that constitutional text from the constitution to be endorsed after the state is established. What was rather the object of disagreement within the PLC was the adoption of different Basic Laws as appear in the Interim Agreement text (and as it is the case in Israel, where there is no constitution, but Basic Laws) or the adoption of one unique and complete Basic Law.

27 It is of great importance to keep in mind that the PLO Charter remains a document in force, but would officially cease to be effective if or when the same power that endorsed it (the PNC) declared its suspension. It has had an influence on Basic Law and the constitution but remains separate, since those who intend to regulate power relations within the PA or the Palestinian State are distinct entities of the PLO.
The PA minister of justice transmitted the draft prepared by the PLO legal committee, but the PLC rejected it and commissioned its own legal committee to prepare a new draft. It is true that the final draft the PLC legal committee had presented adopted most of the articles the PLO legal committee had prepared, but what is significant here is the power struggle between PLO and PA institutions regarding who is entitled to adopt the constitutional text. The PLC approved almost unanimously the Basic Law draft in its third reading (Law No. 1/96) on October 2, 1997.

It should be noted that the Basic Law contains provisions similar to most of the Arab world constitutions. This is the case of the reference to Islam and Shari’ah (Islamic law). According to the Basic Law (Art. 4), the principles of Shari’ah are a primary source of legislation in Palestine and Islam is the official state religion. This reference to Islam and Shari’ah in a constitutional text does not create per se a religious or an Islamic state. It simply means that, even in a secular state, religion may not be totally absent from public affairs. Such interpretation of the constitutional reference to Islam and Shari’ah is more concerned with constitutional mechanisms aiming at protecting individuals’ and minorities’ rights. Accordingly, the reference to Islam in the constitution should not create any unnecessary perplexities. The same applies to Shari’ah, which is confined to the remit of positive law, as expressed in a legislative text issued by state authorities, mainly confined to personal status issues. In other words, the binding character of the Shari’ah in the above sense is nothing else but the free will of human authority. The empowerment of Shari’ah through the Basic Law means that a “secular will” is the origin of its nature and not “divine will.”

Regardless of the way constitutional texts refer to Islam and Shari’ah, the important thing is to ensure the supremacy of the constitution. Shari’ah is not a source of law but rather of legislation. This means that, if not codified by the legislature, it does not constitute a source of law. The Basic Law, immediately after referring to Islam and Shari’ah, provides that other monotheistic religions, Christianity and Judaism, should have their sanctity respected and maintained. The respect is not enough if not translated into granting to every citizen, regardless of his religion, the same rights and duties. The above position is not shared by Palestinians and foreign observers who commented on this provision, starting from complete rejection to absolute support. Some even considered that the provision was too soft, in that it referred only to “a” source instead of the “the” and to “legislation” instead of the “law.”

Putting aside the above discussions, some considered the Basic Law as being the most liberal of Arab world constitutions, especially the list of rights and freedoms that it contains. Besides, the PLC’s main preoccupation was to approve a Basic Law that would define the relations between the Council and the executive, and the transparency of PA members on the one hand, and the protection of basic human rights, the implementation and respect for the PNC, and the independence of the judiciary, on the other.

The President of the PA refused for many years to endorse the Basic Law, creating more tension between the PLC and the Executive Authority in general, and the President of the PA, in particular, pretending that adopting a Basic Law is not the task of the PLC but of the

PLO, because a constitutional text is not a matter of only West Bank and Gaza Strip Palestinians but of all Palestinians.\textsuperscript{30}

President ‘Arafāt endorsed the Basic Law of the PA for the Transitional Period on May 29, 2002, which came into force on the date of its publication, July 7, 2002, in the official Gazette.\textsuperscript{31} Signing the Basic Law came in a very controversial political context, as a step toward reforms, according to the 100-day Reform Plan. This late endorsement of the Basic Law contains a clear contradiction: on the one side it is the constitutional text that entered into force in 2002 and was to apply during the Interim Period, while on the other side the Interim period was theoretically already over since 1999. The Basic Law was amended in 2003 to introduce the office of Prime Minister\textsuperscript{32} and in 2005 to introduce changes in the electoral system and to limit the mandate of both President and PLC to four years rather than for the interim period.

The PLO Executive Committee created a (new) legal committee in 1999, different from the one that was nominated earlier, after the declaration of independence in 1988, to draft a Palestinian constitution in preparation for statehood, and Yāsir ‘Arafāt appointed Minister Nabil Sha’th as its chairman. This committee was composed of qualified Palestinian constitutionalists and jurists, following an agreement with the Arab League to form an advisory committee of experts. The Draft of a Palestinian Constitution was completed on February 14, 2001,\textsuperscript{33} while negotiations with Israel totally collapsed. The same text was the object of revision in 2003 (a second and third draft were subsequently published) and of interest in the international arena, as important groundwork toward statehood.

As appears in the preamble of the Third Draft of the Palestinian Constitution, the draft was submitted to the Palestinian Central Committee on March 9, 2003. The Council approved the draft and voiced appreciation for the work of the committee, its experts, and advisors. The Council advised the committee to pursue its work and meet with the legal committee of the Central Council and other committees to discuss the draft in view of its final discussion and approval at the next Central Committee meeting.\textsuperscript{34}

The preparation of a Palestinian constitution was part of the reforms requested by the internationally-backed Road Map for Peace, which called for reforms and the establishment of a Palestinian State by 2005 (later postponed). It was also conceived as one of the steps

\textsuperscript{30} Milhem (n 28) 184.
\textsuperscript{31} The Official Gazette of PA (called “al-Waṣāʾīʾ al-fīlaṣṭīniyyah”) was distributed to journalists in a press conference in Gaza on July 8, 2002.
\textsuperscript{32} President ‘Arafāt nominated Mr. Ṭaḥṣīl Maḥmūd ʿAbbās as Prime Minister on March 10, 2003. The PLC voted 64:3—with 4 abstentions—in favor of creating the office of Prime Minister, an amendment to the Basic Law, which did not include this office, and the number of ministers was extended to a maximum of twenty-four, not nineteen as originally stated in the Basic Law. Mr. ʿAbbās became the Secretary General of the PLO Executive Committee. He headed the PLO’s Negotiations Affairs Department created in 1994 to oversee permanent status negotiations, but resigned from the post and Abū ʿAlā’ was designated Prime Minister.
EMERGING CONSTITUTIONS IN ISLAMIC COUNTRIES

necessary for statehood. The way the constitution will be adopted in the Palestinian context is of extreme importance. According to Art. 185 of the Third Draft of the Palestinian Constitution, there are different steps necessary to take, before adopting the constitution. First, the PNC (or the Central Council if the PNC were unable to convene) would approve the draft constitution, before the establishment of the State. Second, a two-thirds majority in the first elected House of Representatives would approve the draft, after the creation of the State. Third, in the case where the absolute majority decided to submit the constitution to a referendum, the constitution would be adopted if it obtained the simple majority of votes.35

IV. INTERNATIONAL IMPACT ON THE PALESTINIAN CONSTITUENCY

Modern constitutionalism has shown that the enactment of a nation’s fundamental law can no longer be seen as a matter of purely domestic concern, although it is rightly considered as the first act (in terms of importance, and not necessarily in chronological terms) of national or popular sovereignty. States and international organizations become central actors in constitution-making, while the people, those entitled to sovereignty, remain, at least theoretically, those entitled to constituent power also, and adopt (or reject) the constitution in toto. The people are “free” to accept that constitution with the political and economic system it represents. This legal fiction is necessary since popular adherence is needed to ensure legitimacy for the state and the authority, and not only to provide a legacy for that text.

The international impact on the Palestinian constitutional system can be measured by three major aspects:36 first, by the adoption of norms that are directly inspired from occidental democratic constitutions; second, by the adoption of similar institutions based on occidental models; and third, by taking part in, and the incorporation of, theoretical debates about the new democracies.

The international community stresses the incorporation of a series of rights and liberties protecting individuals within the constitutional documents of the newly formed states. These demands are part of the movement of universalization of human rights that dates to the pre–World War II concepts. Yet, it seems that there is more than one theory of human rights that can acquire the constitutional status in the Western legal jurisprudence today;

35 Nathan Brown commented, rightly, that “[t]here are three glaring omissions from this article. First, it is not clear if any amendments can be made in the draft, and if so, how and by whom. The second omission is a provision for possible rejection at any of these stages. The third omission is of any body to review the draft.” Nathan Brown, The Third Draft Constitution for the Palestinian State: Translation and Commentary (Palestinian Center for Policy and Survey Research 2003), http://www.pcpsr.org/domestic/2003/nbrowne.pdf, accessed April 24, 2009. It should be noted that here also is a blatant contradiction in the common sense and logic. How would Art. 185 regulate the way the draft constitution will be adopted while it is part of the text still to be adopted? In other words, Art. 185 is part of the still-to-be-endorsed text, thus, without any legal and binding value. For more information concerning the way the Draft of the Palestinian Constitution will be endorsed cf. N. Al-Rayyis and R. Sanyūrah, “Mafāhim asāsiyyah ḥawla al-dasātir wa anwā’ihā wa ʿurūq inshā’ihā wa ta’dīlihā” in: Al-Dustūr al-fi  īlasīnī wa mutaallaḥāt al-tanmiyah (Research and Working Papers, Birzeit University, DSP 2004) 51; Khalil (n 3) 296.

36 This part was elaborated in collaboration with Yarā Jalājil while effectuating research at the Institute of Law.
the classical rights also called formal, or the rights of the first generation, in addition to other sets of rights such as the social rights, bioethics, and environmental rights.

The Palestinian constitutional documents have largely incorporated those different sets of rights. However, the inclusion of those rights in the constitutional texts, although an important step, may be insufficient or even counter-productive. It may be insufficient because constitutional texts are often not accompanied with constitutional and legal mechanisms to enforce, protect, and guarantee those constitutional rights. It may be counter-productive because states often misinterpret the inclusion of those rights in the constitutional texts as authorization for the state to discard them, since created by it, through the inclusion in the constitutional text.

On a different note, it seems that the French presidential model has particularly seduced the Palestinian constituent in the same way it seduced many Arab neighboring states. In Palestine there is a parliamentary system, but with two executive heads, a President directly elected and a Prime Minister sharing some of his functions with the President. Yet it seems that the Palestinian constituent had additional models of inspiration concerning the way the powers are separated, as more “orthodox” parliamentary choices were made based on the German or the English model, such as cabinet meetings, or the motion of no confidence against the government.

The Palestinians seemed also to integrate some parts of the American model and to even go further; the United States was one of the first systems that created independent agencies to deal with matters that should be kept separate from the bureaucratic system, in order to ensure their partiality and independence. Palestinians seemed to adopt this model by constitutionalizing certain agencies, especially concerning the protection of citizens’ rights, and financial transparency. The two main examples are the Palestinian Independent Commission for Citizens’ Rights, which is the Palestinian ombudsman, and the Financial and Administrative Control Bureau.

It seems like the jurisprudential discussions about the shape of modern democracies have also been a matter of a Palestinian constitutional debate. Is Palestine going to follow the continental European vision of democracy or the Anglo-Saxon?

According to the European approach, specialized institutions are given the task to review the legality and constitutionality of acts taken by the state authorities (through specialized administrative bodies and even courts). A special tribunal is even given the power to control the parliament’s actions, ensuring its conformity with the supreme law, the constitution. On the contrary, according to the monist approach to law and justice individuals, as much as state apparatus, are under the scrutiny of the same judge, applying the same common law.

The continental approach ensures the respect of the law by all institutions of the state via the procedure of judicial review, including parliament. This possibility of review gives the state of law its meaning, where every normative creation by the state abides by the supreme legal document that is the constitution; thus there must be a clear hierarchy of norms in which the inferior act acquires its validity from the higher, a document that contradicts the norm that validates it must be annulled.

It seems that Palestinians, by creating a constitutional court, have chosen the continental Europe approach. This choice might constitute some legal problems in Palestine as long as the transitional situation is not over yet, because a clear hierarchy must be established to norms created by different entities, such as the relationship between the PA’s institutions and those belonging to the PLO.

In addition, the Palestinian legal system is separated between one set of law applicable to state’s actions in its capacity as public authority (administrative law) and another set applying to equal individuals (civil law). The Supreme Court in its capacity of High Supreme Court is entitled to judge all administrative disputes as first and last instance court.
V. CONCLUSION

Palestinian constitution-making is no different from other constitution-making experiences that followed World War II. It shows and proves what was referred to in the constitutional literature as the internationalization of constituent power.\textsuperscript{37} In this sense, it may be considered as a healthy phenomenon that contributes to developing constitutional law and enhancing constitutional movement in contemporary states.

This phenomenon, nevertheless, may have negative symptoms. The international community may confuse the need of constitutions for new-born states with the imposition of a particular constitutional model. The foreign and cooperation policy of certain democracies may be partially determined by the adherence of new and weak states to such a model. The risk here is to suffocate the local population, its particularities and its culture. This may have a boomerang effect, with negative consequences, even as far as complete rejection, since the constitution may be considered as an outside product.

Modern constitutions, in fact, tend to convert from a highly desired expression of self-determination to a highly rejected self-limitation (or rather, a pseudo self-limitation). Modern constitutions become the domestic legal instrument to “impose” international conditions and limits. In this sense, the constitution becomes an instrument to impose on new-born entities wishing to be part of the “club of states,” a minimum of rules considered as the basis of the international community: the pacific coexistence between territorially defined states. In this direction, several international resolutions were made concerning a solution for the Palestinian-Israeli conflict. Several bilateral and multilateral treaties were signed by the PLO with the Israelis and some other countries; all these treaties seem to aim for a solution based on the creation of two separate states.\textsuperscript{38}

While reviewing existing literature on what can be called largely the “Palestinian constitution,” one can notice that there is not a consensus on what is being scrutinized exactly. This is reflected in the analysis made by Palestinian authors. This difference explains many of the existing dichotomies in conclusions and positions.

Scholarships related to Palestinian constitution reflect three different kinds of assumptions. Some perceive the PA as central authority of sovereign state. For this group, a constitution refers simply to the Basic Law, adopted by the PLC in 1997, endorsed by President ‘Arafat in 2002, and amended later on in 2003 and 2005. Others refer to the “Palestinian state” in the abstract, outside of the current status of the Palestinian people and land. Such vision is expressed in the PLO charter of 1968 and the Declaration of Independence in Algiers in 1988. Finally, others refer to what can be called the “official version” of the state. This vision is the one of the draft(s) Palestinian constitution, prepared by a constitutional committee in 2001 and 2003.

The discussions on the constitutional framework of the PA (thus, taking into account the Basic Law’s provisions and limitations of the Oslo Accords) indirectly contribute to an

\textsuperscript{37} The examples of the internationalization of constituent power are multiple. For more details cf. Khalil (n 3).

\textsuperscript{38} Has this been the option taken by the Palestinian constituent? To what extent has he considered himself abiding by the international obligations in which the Palestine representatives have engaged? This brings on two main questions: what is the legal value of the international law according to the constituent; is it higher than the internal laws? And did the constituent include norms in respect of the treaties abiding the Palestinians, and how? Did the Palestinian constituent make a clear choice about the two state solutions, or did he avoid the question? Those and other questions need further research that goes beyond the limitations and scope of this chapter.
understanding of how a future State of Palestine would look. This approach can be considered pragmatic and realistic. Some look at the existing institutions and imagine the possible political system of their future state, while others look at the PA and simply see the state (at the same time seeing Palestine as an existent reality under occupation or in status nascendi).

One may argue, rightly, that a “state” refers to a totally different experience from that of the PA with its limited powers, jurisdiction, and related uncertainties of the interim period: indeed the Basic Law was enacted for the interim period, although there is always the possibility that the transitional will become permanent. This is not to argue, however, that the particular experience of the PA need not be considered, and the reason is simple; the nascent PA institutions and laws will most likely serve, at least in the beginning, as the new institutions of a new Palestinian state. The state will not start ex nihilo because it will inherit existing PA institutions and laws, including those pre-PA legislation that remained in force during the interim period, and even some PLO-produced texts (such as the PLO Penal Code and Procedures of 1979, still applicable on military courts).

In this sense the Palestinian state does not represent a clearcut departure from pre-existing concepts and institutions. The Palestinian state is not a new building; rather, it is a new floor in the same building. In fact, the Basic Law created constitutional and political arrangements, as well as interests and institutions that will be difficult to dislodge. The State of Palestine, therefore, will necessarily absorb these preceding institutions while abiding by the legal and political texts produced by them. In fact, each historical/political period has impacted on the development of the Palestinian legal system.

In fact, the tendency of the authorities that controlled Palestine, or part of it, since the early 1990s, was always to build on the existing legal system, making the necessary adaptations to accommodate the new regime. In this sense, there has never been a complete rejection of previous laws and regulations but rather they have been maintained until amended by new ones. In 1994, PLO Chairman Yāsir ‘Arafāt issued Decree No. 1—“Continuation of the Laws, Regulations and Rules Operative in the Palestinian Territories (West Bank and Gaza Strip) before and since 5 June 1967”—until such time as it may be replaced by a unified PA legislation. The same technique was adopted by the Basic Law (Art. 119) and also the Third Draft of a Palestinian Constitution (Art. 187), thus linking the current PA with a future Palestinian state.

The Palestinian state may also be viewed in abstract terms as a historical entity that either already exists (without knowing where it is precisely) or which ought to exist (without deciding where it should be). Such a state is based on religious, moral, or cultural considerations, or on international law and legitimacy, or is simply a reflection of imagined or recognized “rights.” This image is then compared, analyzed, and enriched by the experiences of other countries. In other words, this group sees other states, including neighboring Arab states, and then they imagine how the Palestinian state looks or what it shall look like, irrespective of the facts on the ground. This is the vision of the PLO Charter, successive resolutions of the PNC, and several declarations of Palestinian leaders. This vision of the state clashes with realities on the ground.

39 Qubba‘ah (n 7) 97.
The Draft of a Palestinian Constitution was prepared largely in response to the PA’s international obligations under the Road Map peace plan but also as a step toward preparation for statehood, considered by Palestinians as the final objective of the interim period, the core of final status negotiations. The lack of legal value of such a text before its adoption and endorsement must surely be noted. However, the Draft of a Palestinian Constitution, and the discussions about it, may provide a vision of how Palestinians conceive the state, the way powers will be separated, and the principles that will guide public institutions, and most importantly, how the new constitution would be adopted. They best express the vision of the state prevailing among Palestinians.

The publication of the three drafts initiated several discussions and studies at different levels, although arguments were presented according to party political affiliations. The most important characteristic of these discussions concerns the difference between the “official” version and “unofficial” version of events. The official version comes from the declarations of various PA personnel and/or from members of the Constitutional Committee, which was nominated by President ‘Arafāt in 1999, consequently leading to allegations of impartiality and unwarranted control by the executive. For Palestinian civil society, notwithstanding the importance of PA obligations to the international community, the importance of the constitution stems from its role in determining the social contract between the state and the individual. The Draft of a Palestinian Constitution, in comparison to the Basic Law, does not introduce any substantial changes to the legal and political system under the PA.

In this chapter, the discussion turned around the way constitutional documents were drafted, the way the Basic Law was adopted, and the way the Draft of a Palestinian Constitution will be endorsed. Shall constitution-making lead to the creation of viable and democratic institutions, and contribute to state-building, or shall it contribute to its demise? In all circumstances, this chapter has argued, constitution-making and state-building contribute to and urge for the redefinition of the Palestinian nation and of those who represent it.

43 Al-Rayyis and Sanyūrah (n 35) 51.
44 Sa’īd (n 42) 7.
The Protection of Human Rights in the Palestinian Territories

EUGENE COTRAN AND EMMA BROWN

1. INTRODUCTION

The protection of fundamental freedoms and human rights have been a core principle that has been reflected in the various creating documents that have evolved as the State of Palestine has moved from conception into reality. From the inception of the Palestinian National Authority (PNA), the creation of an independent human rights commission that also functions as a watchdog on the actions of the state institutions has been a priority. This article traces the protection given to fundamental freedoms and human rights in the Palestinian Territories and the work of the Independent Commission for Human Rights in converting legislative intention into practical reality within Palestine.

On November 15, 1988 the Palestine National Council (PNC), which was in effect the Palestinian parliament in exile, which consisted of liberation organizations, professional organizations, trade unions, refugee camps, independents, and diaspora Palestinians, proclaimed an independent State of Palestine. The PNC authorized the creation of a provisional government for the state and Chairman Yāsir ‘Arafāt was appointed as President.

Subsequent to the declaration 120 states recognized the State of Palestine. The UN General Assembly affirmed the proclamation on December 15, 1988. From this time on, work commenced on drafting the legal instruments for the State, including provisions concerning the protection of fundamental freedoms and human rights. The chairman of the

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Legal Committee of the PNC, Anis Al-Qāsim, was appointed to draft a Basic Law for the State. The proclamation establishing the State of Palestine stipulated that:

The State of Palestine is the state of Palestinians, wherever they may be. The State is for them to enjoy in it their collective national and cultural identity, theirs to pursue in it a complete equality of rights. In it will be safeguarded their political and religious convictions and their human dignity by means of a parliamentary democratic system of governance, itself based on freedom of expression and the freedom of parties. The rights of minorities will duly be respected by the majority, as minorities must abide by decisions of the majority. Governance will be based on principles of social justice, equality and non-discrimination in public rights of men or women, on grounds of race, religion, colour or sex, under the aegis of a constitution which ensures the rule of law and an independent judiciary. Thus shall these principles allow no departure from Palestine’s age-old spiritual and civilizational heritage of tolerance and religious coexistence. 3

Palestine was beginning to take shape as a state in the political and legal sense. The PLO was evolving from a political organization into a government in exile with a President, a provisional government, and a diplomatic presence overseas.

Even at this early stage, recognition was given to the importance of protecting fundamental freedoms and human rights.

II. START OF THE PEACE PROCESS

The peace process began with the Madrid Conference in October 1991, hosted by the Spanish government and sponsored by both the Russian and American administrations. One of the legacies of that conference was the appointment of a group of individuals to negotiate for a peace settlement in Washington, D.C. On the Palestinian side they were headed by the late Ḥaydar ʿAbd al-Shafi and included notable members of the Palestinian community in the West Bank and Gaza, including ʿĀnān Ashrawī, ʿEyād Sarrāj, and Māmduḥ ʿĀkir. 4 There was no direct representation from the PLO, although it is an open secret that the PLO was directing the talks behind the scenes. Unfortunately, the Washington talks failed to secure a peace settlement. 5

III. OSLO

A secret channel of dialogue between the Israelis and the PLO was going on, however, that eventually led to direct talks for the first time and the real beginnings of the peace process, commonly referred to as the Oslo Process.

The protection of fundamental freedoms and human rights continued to play an important role in the negotiations between Israel, the PLO, and the international community,

4 All of whom later became Commissioner-Generals of the Palestinian Independent Commission on Human Rights (PICHR).
5 However, the Washington talks paved the way for further negotiations. Cf. for more information on the Washington talks Rai Singh, “Palestinian Conflict and the Peace Progress” (1994) 50 India Quarterly 1ff.
which culminated in the Agreement on the Gaza Strip and the Jericho Area (Cairo Agreement). This document was the foundation stone for the Oslo Accords and for the creation of a recognized governing framework for political power within Palestine.

The political negotiations under Oslo culminated in the Declaration of Principles (DOP). The Accords were finalized and agreed in Oslo, Norway on August 20, 1993 and were officially signed at a public ceremony held at the White House in Washington, D.C., on September 13, 1993 in the presence of the chairman of the PLO and President of Palestine, Yāsir Arafāt, the Prime Minister of Israel, Yitzhak Rabin, and the President of the United States, Bill Clinton. Maḥmūd Šabbās (Abū Māzin), who subsequently became President after the death of Yāsir Arafāt, was also present and was the signatory for the PLO. Shimon Peres, who was Minister for Foreign Affairs, signed for the State of Israel.

The Declaration of Principles established a timetable and a framework for transition. The Cairo Agreement established Phase I (Gaza and Jericho) of the DOP. The PNA arrived in Gaza in May 1994 and the five-year interim period commenced then. The negotiations to agree Phase II (elections and redeployment) were concluded in Taba, Egypt. In September 1995 the Israeli-Palestinian Interim Agreement for the West Bank and the Gaza Strip (Oslo II) was signed in Washington.

Art. XIV of the Cairo Agreement stipulated that all powers were to be exercised in accordance with internationally recognized principles of human rights and the rule of law. This article was subsequently superseded but repeated word for word by Art. XIX of the Oslo II Agreement, which stated that: “Israel and the Council [the Palestine Authority formerly under the Cairo Agreement] shall exercise their powers and responsibilities pursuant to this Agreement with due regard to the internationally-accepted norms and principles of human rights and the rule of law.”

IV. THE DRAFT BASIC LAW

The task of translating the principles enshrined in the political agreements into legal instruments that would provide a framework for the governing of Palestine and the protection of fundamental freedoms and human rights was given again to Anis Al-Qasem, who was responsible for the drafting of the Basic Law for Palestine. In effect, the Basic Law represents the constitution of the National Authority of Palestine referred to in the DOP. The latter describes in detail the drafting process of the Basic Law in chapter 6 entitled, “The Draft Basic Law for the Palestinian National Authority During the Transitional period.”

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Work on this commenced in the autumn of 1993 and it was hoped that the framework would be completed before the new National Authority for Palestine arrived in Palestine in 1994.

Art. 35 of the fourth version of the draft Basic Law reflected the political commitment contained in the negotiations for the establishment of the PNA and also the Presidential Decree of 1994 that created the Commission. It stipulated:

An Independent Commission for Human Rights shall be established by law to monitor and to ensure the observance of human rights and freedoms in Palestine. Its formation, function and powers shall be defined by law and shall be without prejudice to any powers given to individuals, to the Attorney General, to the Audit Office and to the Courts under this Basic Law or any other law.\textsuperscript{10}

The same wording was adopted in Art. 31 of both the Basic Law\textsuperscript{11} and the Amended Basic Law,\textsuperscript{12} which was promulgated by President ‘Arafāt in 2003. However it is important to note that the Amended Basic Law did not create the Commission but provides consistency and legitimacy under the constitutional framework of Palestine for a Presidential Decree passed by Yasser ‘Arafāt in 1994, which created the Commission.

V. THE ESTABLISHMENT OF THE PALESTINIAN INDEPENDENT COMMISSION FOR HUMAN RIGHTS (PICHR)

Shortly after signing the DOP in Washington, Yāsir ‘Arafāt from Tunis issued a Decree, which reads as follows:

The President of the State of Palestine Chairman of the Executive Committee of the PLO

By virtue of the powers vested in him and based on the requirements of public interest

Decrees:

The formation of the Palestinian National Supreme Commission on Human Rights

The Commission, at the earliest time possible will establish its constitution, by-laws, and basic rules which govern its work in a way that would ensure its independence and effectiveness.

The mission of the Commission will be to follow up and ensure the existence of the requirements for the protection of human rights in various Palestinian laws, enactments and regulations as well as in the work of all the institutions and departments of the State of Palestine and the PLO.

This decree shall become effective as of the date hereof and all concerned shall be so informed of its implications.

Tunis September 30, 1993.\textsuperscript{13}

\textsuperscript{13} Palestine Official Gazette No. 2 (no. 59 of 1994).
The motivation behind this Decree and the concept of a Human Rights Commission in Palestine was very much the work of Ḥanān Ashrawī, who had been actively involved in the negotiations with Israel that took place in Washington. On that occasion the Palestinian delegation was led by Dr. Ḥaydar ‘Abd al-Shafī’. The internal discussions of the Legislative Council led to agreement for the need for a commission on human rights to be established in Palestine. These discussions were very much spearheaded by Ḥanān Ashrawī.

In light of the Decree, work began to create a commission and again Ḥanān Ashrawī played an active role in ensuring that what was born from President ‘Arafāt’s Decree was a Commission that was empowered with authority not only to protect human rights, but also to function as a watchdog or ombudsman (Diwān al-Maṣālim) on the activities of government officials and state institutions.

The internal constitution and by-laws that govern the work of the Commission were made under Art. 2 of the Presidential Decree.

Thus the Palestinian Independent Commission for Citizens’ Rights (PICCR) was established. The word “Citizens” was later changed to “Human.” Hanan Ashrawi was appointed as its first Commissioner-General. To reflect the nature of the Palestinian Nation, which, because of the occupation, is not just a geographical entity but a people scattered throughout the world, seven commissioners were appointed from the West Bank and Gaza and seven from the Diaspora. The Commissioners appointed from the Diaspora included the late Edward Sa’īd, the late Maḥmūd Darwīsh (the poet), two U.S.-Palestinian Professors, and one of the authors of this chapter, Eugene Cotran.

The Commission in fact started its work before the first elections for the Legislative Council, which took place in January 1996. The Commission itself made suggestions and amendments to the fourth draft of al-Qāsim’s Basic Law and there were also other proposals by other bodies and commentators, including a new draft by the government itself.

After the legislative elections, the draft Basic Law went to the new Legislative Council, which also made various amendments in the first and second reading of the Law, but finally approved it as the Basic Law in its third reading in 1997. That version reflected the wording of the Decree and Art. 35 as quoted above. Unfortunately, although it was sent repeatedly to President ‘Arafāt, who was by then the President of the National Authority, he absolutely refused to sign and promulgate it as required in the Basic Law itself. However, it is right to say that although it was not promulgated, it was to a large extent adhered to and followed by the executive government, the legislative council, and the judiciary. In relation to the chapter on human rights it was taken for granted that the provisions relating to that chapter of the constitution are justiciable and also enforceable by the Commission and by the Courts.

In 2002 President ‘Arafāt finally promulgated the Basic Law, which was amended in 2003 (and called The Amended Basic Law) to include provisions for the appointment of a Prime Minister. Art. 35 quoted above remained intact as to the establishment of a Commission. The law and the decree and its by-laws provided the PICCR with a broad mandate in accordance with national and international standards of human rights, ensuring the Commission had the authority to deal with cases of human rights violations; complaints submitted by citizens concerning the maladministration, abuse of power, and squandering

14 The argument for changing the word “Human” to “Citizens” was made at the suggestion of the government who claimed that the protection of human rights is a duty of government not of an independent commission. This attitude unfortunately continued after the setting up of the Commission. However recently in 2006 the Commission was renamed back to The Palestinian Independent Commission for Human Rights (PICHR).
of public funds; education and promotion; monitoring; and generally integrating human rights into Palestinian legislation and practices. It also empowers PICHR as well to bring legal action before the Palestinian Courts and to secure access to information. In other words, the law defines the role of the PICHR in protecting basic liberties and freedoms as prescribed in the Basic Law and international and humanitarian law.

There was then an attempt to pass a new law to replace the Decree and by-laws. This did not succeed and it was then in 2006 that the name of the Commission was changed back to the wording used initially in the Presidential Decree No. 59 of 1994 (PICHR).

In addition to the Commissioner-General (presently Dr. Mamdū ḥ ‘Akir’) and several Commissioners, a Director General was also appointed. This position is currently held by Randa Siniora, who was previously the Director of al-Ḥaqq.

VI. THE ROLE OF THE PICHR IN PROTECTING FUNDAMENTAL FREEDOMS

As an independent national commission the PICHR operates first as an ombudsman, investigating state compliance with international standards of human rights law and making recommendations to the Legislative Council on legislation and the need for further investigations and second as a monitor of human rights conditions in Palestine assessing the extent of commitment that the three branches of power, public and private institutions, and detention centers’ authorities adhere to human rights principles in undertaking their responsibilities.

To fulfill its mandate, the Commission concentrates on:

- Monitoring human rights violations;
- Enhancing respect for human rights; and
- Seeking greater protection for human rights by the Authorities in Palestine.  

The Commission does this by investigating complaints it receives from the public that relate to alleged violations of citizens’ rights, making recommendations on draft legislation to ensure all legislation respects fundamental freedoms and human rights. The Commission also monitors the activities and decisions of the PNA and all public institutions, including the security services. In the current political climate in Palestine this final activity has taken on an increased significance as the judiciary has been paralyzed by the political infighting between Ḥamās and Fataḥ.

Monthly reports and an annual report are produced, which assess the degree of compliance of Palestinian legislation, agreements, and the practice of state authorities and institutions with international standards of human rights. The Commission also seeks to inform and educate citizens of their rights and their protection in accordance with international human rights declarations and conventions as well as national laws and legislation. Education has focused primarily on vulnerable groups and victims of human rights violations.

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The PICHR further receives complaints from individuals and groups whose rights have been violated, and undertakes the task of following up and addressing those violations both publicly and directly with the institutions involved.

Since its inception the Commission has annually published a report, which assesses in detail to a very high standard, the status of human rights in the West Bank and Gaza and the conduct of the government authorities in their compliance with international standards of human rights.

Thus the Commission plays a fundamental role in the protection of fundamental freedoms and human rights in Palestine. In doing so, it also plays a vital role in establishing and strengthening governance by the rule of law in Palestine.

VII. THE PICHR AFTER THE DEATH OF PRESIDENT ‘ARAFĀT

As mentioned above, the Commission was created by decree by President ‘Arafāt. After his death, presidential elections were held under Art. 37 of the Amended Basic Law and Maḥmūd ‘Abbās (Abu Mazen) was elected. Subsequent to his election, Legislative Council elections resulted in a majority for Ḥamās and it formed a government with Ismā‘īl Ḥāniyyah as Prime Minister. The ruling party Fataḥ lost. This has marked the start of a very troubled period in the history of Palestine and has drastically affected the ability of the Commission to fulfill its role as protector of human rights in Palestine.

VIII. THE “GAZA COUP”

Since the Ḥamās coup in Gaza, which erupted in June 2007 after months of political deadlock and external intervention, there has been significant political fragmentation in Palestine. This has made the role of the Commission all the more important in the protection of fundamental freedoms and human rights in Palestine as the legislative and judicial institutions have been paralyzed.

The unprecedented waves of violence between Palestinians in the summer of 2008 culminated in the creation of two separate governing factions, the Palestinian Authority in the West Bank and the de facto regime in the Gaza Strip governed by Ḥamās.

As a result, respect for the rule of law and human rights by the ruling parties has significantly deteriorated. Rule is by Presidential Decree in the West Bank. In Gaza, Ḥamās appointed a legislative council consisting entirely of the deposed Ḥamās legislators and a separate judiciary.

Despite the fragmented political situation in Palestine, the PICHR continues its work investigating allegations of human rights violations committed by the agencies and

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institutions of the Palestinian Authority and the de facto regime of Ḥamās within the Palestinian-controlled territory.

The Commission’s monthly reports and its annual report for 2008 highlight the continued increase in the number of politically motivated cases of arbitrary detention, torture, and extrajudicial killings at the hands of the security services of both the ruling parties in Palestine. The Commission relentlessly works to highlight these and to lobby the authorities to ensure greater protection for citizens and compliance by the institutions with the relevant laws.

In addition, the investigations confirm the suspension of the rule of law by both ruling parties justified on the basis of “security concerns,” “public safety,” and in accordance with existing legislation. A dangerous consequence of this suspension is that security forces appear to operate in a culture of impunity.\(^{20}\)

In March 2009, PICHR presented its most recent annual report to the President. It also presented its semi-annual progress report from January to June 2009 and dealt with the situation and difficult circumstances of the twenty-two, day aggression by Israel on Gaza from December 2008 to January 19, 2009.\(^ {21}\) It referred to how the Commission shifted its work toward monitoring and reporting on the serious human rights violations committed against the Palestinian civilian population. The Commission played an important role in the Goldstone Investigation.

In March 2009 PICHR was accredited with “A” status within the UN International Coordinating Committee for National Human Rights Institutions (ICC), making it a full member within the ICC.

**IX. CONCLUSION**

An understanding of the context in which the Commission operates is essential to understand the significance of the Commission’s role in not only protecting fundamental freedoms and human rights in Palestine, but also in the ongoing process of developing democracy in the Palestinian Territories. The Commission was the first of its kind to be established throughout the Middle East.

Further, the political tradition of autocratic rule in the Middle East where the actions of those responsible for the governance of a state are not strictly limited by compliance with international standards of human rights has meant that in the short history of the Commission it has had to fight for legitimacy within the political arena in Palestine and its mandate has contradicted the prevailing political culture.

In addition to this, it must be remembered that ever since its creation, this Commission has operated under a period of occupation by Israel, which continues to the present day. In a situation where it operated under conditions of occupation and opposition from the government in Palestine, the verdict must be that the Commission has remained faithful to its mandate and done its utmost to uphold its mandate and to protect human rights in Palestine.

\(^{20}\) The executive summary of the PICHR Annual Report for 2008 is available at http://www.ichr.ps, accessed January 15, 2010, as are copies of the monthly reports that catalogue specific violations in detail, as well as the steps taken to remedy the violations.

It is important to stress firstly that against constant attempts at interference by the National Authority, the Commission has retained its independence and has received general acquiescence from the public for its role in both its capacities as an ombudsman and a human rights body.

As far as the Commission’s relations with the Palestinian Executive are concerned, initially there was a short “honeymoon” period during which the PICHR received complaints from citizens and the PNA was cooperative with the Commission’s investigation of the complaints. However, as the work of the Commission enjoyed increased publicity and the number of complaints the Commission was investigating increased, relations with the PNA changed. Despite the fact that the Commision was created by the PNA, soon the Commission became unpopular with the PNA because of the consequences of the Commission’s commitment to protect human rights in Palestine without compromise.

The response of the PNA at first was to ignore the Commission, which led to a culture of non-cooperation between government institutions and the Commission, thus rendering the Commission’s function as ombudsmen ineffective. The PNA believed that strong and effective government took priority over compliance with international standards of human rights. It was not long before this belief resulted in open hostility toward the work of the Commission.

Equally important are the relations the Commission has forged with the various NGOs that operate in Palestine, principally of which is Al-Haq, as well as those NGOs that operate internationally.

Postscript:

There have been three important developments since writing this that will most probably affect the future of the PICHR:

1. The Arab revolutionary awakening in particular in Egypt and Syria seems to have brought inspiration to a would-be Palestinian third Intifada with marches in Ramalla, Gaza, and the Syrian/Lebanese borders with Israel.
2. A movement for unity between the various political factions, in particular, Fatah and Ḥamās, has led to an agreement between them for the formation of a united coalition government to prepare for elections in a year’s time.
3. On the diplomatic front, there has been an active movement by Palestinians and at the forefront, their President Mahmoud Abbas, to receive recognition for an independent State of Palestine within the 1967 borders in the UN Security Council and General Assembly, at the sessions in September 2011. If successful, institutional changes could follow which might also affect the position of the PICHR.
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I. INTRODUCTION

The post-2003 period in Iraq saw the drafting of two constitutions in rapid succession. An interim constitution was drafted in 2003–2004 and a permanent constitution in 2005. Liberal-secularists were largely ascendant during the drafting of the interim constitution, while the Shi‘i religious parties, in alliance with the Kurdish coalition, dominated the drafting of the permanent constitution. Themselves secular, the Kurds nonetheless conceded much ground to the religious parties during the latter negotiations as a quid pro quo for concessions enshrining regionalist rights especially in Iraqi Kurdistan. As might be expected, therefore, the two documents set the equipoise between civil law and Islamist principles at very different points along the spectrum. In the process, the latter constitution, through the intermediation of an Islamist sensibility, sought substantially to weaken the civil institutions of the Iraqi State. This article will analyze these very different philosophical approaches of the two documents by focusing on their differing treatments of the role of Islam and, ultimately, Islamic law, the Shari‘ah.

A constitutional review process has been under way since 2006. As that process has to date failed to result in parliamentary action, it is widely expected that the new parliament...
will begin the process again once it begins its work in 2010. In light of the resurgence of the secular-nationalist bloc after the March 2010 elections,\(^4\) and because of the temporal proximity of the drafting of the two constitutions, it is probable that any such revision process will be informed by elements of each constitution. If the interim constitution was too secular for Iraq at the dawn of the twenty-first century, perhaps the permanent constitution went too far in constitutionalizing Islamic principles. Though beyond the scope of the present work, a similar argument can be made with respect to the issue of federalism: the true balance of Iraq's current constitutional politics may be a point intermediate of the documents hitherto produced.

There are four parts to this chapter. Following section I, which is this introduction, section II presents a digest of the formal constitutional relationship between the State and Islam. It is divided into two sub-parts. The first sub-part presents a brief analysis of that relationship in Iraq's constitutional history prior to 2003 by examining the six constitutions under which Iraq has been governed since the Ottoman Basic Law and includes consideration of a seventh constitution proposed but not promulgated by the previous regime. The second sub-part assesses the constitutional relationship between the state and Islam as those concepts evolved in the two post-2003 constitutions. Section III analyzes the different approaches of the two post-2003 constitutions to the judiciary, noting especially their different approaches to personal-status laws. Section IV focuses on the 2004 and 2006 constitutions and their respective treatments of civil rights.

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sharp contrast to the 2004 and 2006 Constitutions in their treatment of Islam and its role in Iraq’s legal life. While perhaps adequately painting a broad picture of the major constitutional trend over the twentieth century, Iraq’s actual constitutional history vis-à-vis this issue is more nuanced.

It is factually mistaken, for instance, to assert that the constitutional debate over the extent of the interaction between the state and religion arose only after 2003. It is also mistaken to assert that its evolution was mono-directional in the pre-2003 era. In order to put the latter texts in their appropriate contexts, the history of the relationship between Islam and the State of Iraq will be considered briefly. As in much else of Iraq’s legal history, the roots of the constitutional debates about the relationship between Islam and the state were inherited from the Ottoman Empire. It will be recalled that the claim of Ottoman legitimacy had much to do with the status of the sultan as the caliph of Islam, combining, as it were, the role of pope and emperor. Indeed, the sultan’s first duty, detailed among the organizational provisions of the Ottoman Basic Law, was to swear to respect the sherī‘at [i.e., Sharī‘ah] and only afterward to respect “the Constitution […] and to be loyal to the country and the nation.” As the Ottoman Basic Law declared Islam as the official state religion, something constitutions throughout the Islamic world would later emulate, the fundamental interdependence of the state on the Sharī‘ah was thus underscored in the Ottoman text, making the religious law supreme over the constitution itself.

By contrast, the modern state of Iraq was founded on firm secular foundations, with only the merest nod to Islam as “the official State religion” in the 1925 Iraqi Basic Law. Significantly, this vague, formulaic nod to Islam occurred not in the provisions organizing the state, but in the bill of rights. The balance of this article, moreover, contained a guarantee of the freedom of conscience and of religious praxis. It thus appears that the drafters of the 1925 Basic Law were consciously downplaying the role of Islam as the established state religion, while emphasizing the free exercise of religion as a matter of civil rights. Moreover, whereas the raison d’être of the Ottoman sultan was his role as khalīfah and protector of Islam, the duty of the Iraqi king was, first and foremost, to observe the terms of the constitution, and then to preserve the independence of the country and to further its interests. The 1925 Basic Law imposed no religious obligation on the king whatsoever.

The 1958 Provisional Constitution maintained the declaration that Islam was the “state religion.” Perhaps conscious that members of the Iraqi royal family they had just murdered were descendants of the Prophet Muhammad and thus to buttress their religious bona fides in a country where religion still mattered, the drafters of the 1958 text significantly removed this declaration from the bill of rights. For the first time in post-independence constitutional history, the state-religion clause was placed within the constitution’s

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8 See Ottoman Basic Law (1876) Art. 4 (referring to the Sultan, insofar as he was Supreme Caliph, as the “protector of the Muslim religion” and as “the sovereign and pādishā [i.e., pādishāh or emperor].”
9 Id. Art. 3 (as amended in 1909).
10 Id. Art. 11.
11 Iraq Basic Law (1925) Art. 13. In any event, the declaration of a state religion as such has always struck this author as a Western, non-Islamic concept. Under Islamic law, a state cannot pray, fast, perform the pilgrimage, etc. In no sense, therefore, can a state be said to “have” religion. Nonetheless, this author’s view aside, it is a very common formulary throughout the Arab and Islamic worlds.
12 Id. Art. 21.
organizational provisions. The irony that a leftist/communist coup d’état would thus result in the strongest declaration of Islam as the state religion since independence seemed to have been lost on the new leadership. In any event, this term (or one like it) would remain among the organizational provisions through all subsequent texts.

Secularism was dealt a constitutional blow after the coup of 1963. The new Iraqi president, ‘Abd al-Salām ‘Ārif, was known for his outward pietism, but he also wanted union with Egypt, which demanded changes to Iraq’s constitutional and legal infrastructure to align it with Egypt’s nominally socialist outlook. Having the unenviable task of somehow merging Islamic and socialist principles, the 1964 Provisional Constitution claimed that Iraq’s brand of “democracy” and socialism were derived, at least in part, from “the Spirit of Islam.” Further, the 1964 text elevated the role of Islam even higher than its post-Ottoman predecessors. Not only was Islam declared the official state religion, presaging a debate which would recur some forty years later in the post-2003 period, it designated Islam as “the principal foundation [al-qā‘idah al-asāsiyyah] of [Iraq’s] Constitution.” More significantly, for the first and only time in Iraqi history, this constitution required that the President of the Republic be a Muslim, a requirement that was not included in either the Law of Administration of the State of Iraq for the Transitional Period (TAL) nor the 2006 Constitution. Underscoring this new official religionist sensibility, and hearkening back to the Sultan’s oath requiring loyalty to the religious law above all else, the 1964 Provisional Constitution required the President to swear an oath to be loyal first “to my religion” and only then “to my country and my nation.”

Considering the secular nature of the Ba’th, it is surprising that the first Ba’thist Provisional Constitution of 1968 did not eschew the intertwining of Islam and the state. It retained the 1964 declaration of Islam as the state religion and the “principal foundation of the constitution.” It also retained the 1964 Ottoman-inspired presidential oath, though it deleted the requirement that the president be a Muslim. In better keeping with the secular ideology of the Ba’th Party, these emphatic religious affiliations of the 1964 and 1968 texts were dropped in the 1970 Provisional Constitution. Returning to Iraq’s more secular roots since its foundations as a modern state, this text declared simply that Islam was the official state religion. The presidential oath of office was modified to delete any declaration of loyalty to Islam, requiring the president to declare instead loyalty “to the State and its institutions.” The 1990 proposed text largely followed the 1970 version.

14 Nikita Khrushchev once joked with ‘Ārif, “We have explored the sky and we found no evidence of the God you believe in.” Majid Khadduri, Republican Iraq A Study in Iraqi Politics since the Revolution of 1958 (Oxford University Press, Oxford 1969) 229 n 15. This tendency toward pietism notwithstanding, ‘Ārif was a particularly brutal man.
15 Id. 213–214.
17 Id. Art. 3. Prof Stilt appears unaware of the 1964 and 1968 Constitutions, as she asserts that “Islamic law as a source of law had not been mentioned” in the pre-TAL constitutions. Stilt (n 6) 741. In the event, the TAL, like the 1964 Constitution, made Islam, not Islamic law, a source of legislation.
19 Id. Art. 42.
21 Id. Art. 57.
23 Id. Art. 60.
B. Post-2003 Developments

Parties and individuals with varying degrees of religious orientation dominated the occupation-era Iraqi Governing Council (IGC). The U.S. occupation authority, the Coalition Provisional Authority (CPA), appointed twelve representatives of religious parties to the IGC, and one who, though ostensibly a secularist, often voted with the Shi’i religious parties.\(^{25}\) Thus, generally, the religious parties could command thirteen of the twenty-five votes, especially when joined by the Kurdish parties, who had announced a strategic alliance with the Shi’a religious parties. The odds were thus against the secularists, except that the chairman of the TAL drafting committee was ‘Adnān Pāchachī, Iraq’s elder statesmen, a man one leading scholar described as the most liberal member of the IGC.\(^{26}\)

A declaration in 2003 that Islam was the official state religion was not controversial. There was, as demonstrated above, hoary constitutional precedent for such a provision. Far more difficult, however, was precisely what role Islam would play in the legislative life of the nation. As noted above, the 1964 Constitution had asserted that Islam—not the Sharī’ah, but Islam—was the foundation of the constitutional order. Hearkening back to this language, the religious parties now insisted that the TAL declare Islam not only the state religion, but also “the principal source of legislation.” Obviously, if Islam became the principal source, other sources would be at best secondary. This position was unacceptable to the secularists on the IGC.

The secularists proposed a compromise: instead of the definite article, they were willing to accept an indefinite article, making Islam not the principal source, but a principal source among other principal sources. After much debate—and the intervention of the Kurdish members in favor of this compromise—it was adopted. So matters stood for several weeks, until the Shi’ah parties consulted with the Grand Āyatullāh ‘Alī al-Sīstānī, regarded by the Shi’a as the senior-most cleric not only in Iraq, but elsewhere, including in all likelihood in Iran.\(^{27}\) He purportedly believed this provision watered down the role of Islam too much, because the religious parties returned with a renewed demand that their original language be restored.

In response, the secularists then fell back on Iraq’s constitutional history: except for the brief period from 1964–1970, Iraq’s constitutions had declared Islam the state religion, and nothing more. This position constituted a constitutional precedent over decades that an unelected body such as the IGC had no legitimacy to reverse. If the religious parties insisted on a re-negotiation, the secularist position also hardened. In the event, the religious parties backed down and actually lost ground: the newly compromised text declared that Islam was the state religion and that it constituted “a source” of legislation. Islamic principles no longer constituted a principal source; they were merely a source among potentially any number of other sources of equal—perhaps even superior—weight. But matters would not remain in this state of rest for long.

\(^{25}\) The ostensible secularist was ‘Ahmād Chalābī. In one rather bizarre episode, Chalābī instructed his representative to vote with the secularists in rejecting an attempt to establish the Sharī’ah in lieu of the Iraqi civil personal status law, but then instructed that representative to join in a Shi’ah walkout in protest of the vote. Larry Diamond, *Squandered Victory: The American Occupation and the Bungled Eff ort to Bring Democracy to Iraq* (Times Books, New York 2005) 144.

\(^{26}\) Id. 142.

\(^{27}\) Abdulaziz A. Sachedina (tr), *The Prolegomena to the Qur’ān of al-Sayyid Abū al-Qāsim al-Mūsawī al-Khū’ī* (Oxford University Press, New York 1998) 11–12 (noting that the Grand Āyatullāh Ali al-Sīstānī of Najaf has emerged as the supreme religious authority for “Shi’ites outside, and probably within, Iran”).
In the midst of the TAL negotiations, the Constitutional Lōya Jirgā approved the new Afghan Constitution, which was thereafter ratified by President Hāmid Karzai.28 In Baghdad, the parties became aware that the United States had consented to much stronger Islamization provisions in Afghanistan.29 The religious parties in Baghdad had evidently believed that, to the extent that CPA was one of the principal interlocutors in the TAL negotiations, it would not accept Islamization provisions. Once it became obvious that the United States, in fact, was willing to accept such provisions, the religious parties again hardened their positions, and yet again re-opened negotiations on the issue. United States malleability on Islamization clauses was thus the impetus for a new insistence, with the purported support of the Grand Āyatullāh, that the TAL contain a repugnancy clause barring laws inconsistent with Islam.

After much negotiation, the eventual compromise settled on in the TAL was:

Islam is the official religion of the State and is to be considered a source of legislation. No law that contradicts the universally agreed tenets of Islam [tawābit al-Islām al-mujmaʿ alayhā], the principles of democracy, or the rights cited in Chapter Two of this Law may be enacted during the transitional period. This Law respects the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice.30

Though the religious parties gained nothing on the source issue, they succeeded in inserting a repugnancy clause. That repugnancy clause was itself watered down, in an amendment offered by Pāchachī, so that the Islamists could not circumscribe Chapter Two containing the bill of fundamental rights. Moreover, the addition of the “principles of democracy” was thought to be an escape hatch for any secularist-minded constitutional court to use in the future.

Several observations about this compromise language are appropriate. First, it should be noted that it is Islam, and not the Sharīʿah, that is a source of legislation. This is not merely a subtle difference. “Islam” is obviously a much broader term, and it is possible to find liberal trends in Islamic thought that have not been codified into the Sharīʿah. Moreover, the Sharīʿah is the domain par excellence of the clerical establishment, typically representing a conservative body of men. Thus making Islam a source of legislation implied a very wide margin of potential sources, including some which might have been influenced by modern conceptions of democracy and liberalism.31

29 Afghanistan Const. (2004) Arts. 1 (declaring Afghanistan to be an Islamic republic); 2 (declaring Islam the state religion; 3 (containing a repugnancy clause barring laws “contrary to the sacred religion of Islam”); 35(1) (barring the formation of parties whose charters are contrary to Islam); 45 (mandating the creation of a state educational system based in part on Islamic teachings, including a religious curriculum); 62(1) (requiring the Afghan president to be a Muslim); and 63 (requiring the president to “obey and safeguard” Islam).
31 E.g., ‘Abd al-Razzāq al-Sanhūrī, Maṣādir al-haqq fi al-Fiṣḥ al-Islāmī: Dirāsah Muqāranah bi-l-Fiṣḥ al-‘Arabī (Dār Ilyā’ al-Turāt al-Arabi, Beirut 1953–54). This work is based on Professor al-Sanhūrī’s lectures to law students in the early 1950s.
In respect to the repugnancy clause, there was perhaps less than meets the eye. The critical phrase forbade the passage of laws “that contradict[ed] the universally agreed tenets of Islam [jawābit al-Islām al-mujma‘ alayhā].” Again, this phrase is far from being coterminous with the Shari‘ah. The key phrase here was “universally agreed,” not the words “tenets of Islam.” Consensus or ijmā‘ is a term of art in Islamic jurisprudence. It requires that there be no jurist of note who dissents from the proposition proffered. Complicating matters from an Islamist’s point of view, Iraq’s population is numerically very evenly divided between Shi‘ah and Sunnah, taking the Kurdish population into account. Consensus in a relatively homogenous country such as predominately Sunni Egypt or Shi‘ī Iran might mean consensus within a religious sect. In a heterogeneous country such as Iraq, however, it would mean consensus of the jurisprudential communities across sectarian lines. As it happens the two sects do not interpret in the same way even the requirement of the five daily ritual prayers, which constitutes one of the pillars of Islam. The secularists believed, therefore, that, for most legal propositions, at least one reputable scholar’s opinion could likely be produced to destroy consensus. In practice, therefore, it would be relatively difficult to invalidate legislation on this basis.

Not surprisingly, a similar debate recurred a year-and-a-half later, at the time of the negotiations for the permanent constitution. Of course, by then, the Shi‘ī religious parties were in ascendancy. The negotiations took the expected turn, therefore, with the religious parties seeking to increase the role of Islam in the constitutional life of the country. They very largely succeeded.

Initially, the religious parties, increasing their demands from the TAL negotiations, pressed to have Islam described as “the source” of legislation.\(^\text{32}\) The obvious implication of this phrasing is that it entirely excluded other potential sources of legislation. The same dispute digested above regarding the TAL was re-ignited, with attempted compromises around “a” or “the” “basic source,” “fundamental source,” and so on.\(^\text{33}\) The Grand Āyatullāh al-Sīstānī let it be known that he would accept “a source” in lieu of the definite article.\(^\text{34}\) Still, the religious parties wanted more. They sought to insert such adjectives as “foundational” or “principal” to modify “source.”\(^\text{35}\)

The final text of the 2006 Constitution significantly elevated the role of Islam over that described in the TAL, though certainly not to the same level as the 1964 and 1968 provisional constitutions. Art. 2 stated:

First. Islam is the official religion of the State and is a principal source of legislation.
A. No law may be enacted which contradicts the fixed principles [or judgments, Ar. jawābit aḥkām] of Islam.
B. No law may be enacted which contradicts the principles of democracy.
C. No law may be enacted which contradicts the fundamental rights and freedoms contained in this Constitution.

Second. This Constitution guarantees the Islamic identity of the majority of the people of Iraq, and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and the Mandaeans Sabeans\(^\text{36}\).
The first clause was an important departure from the TAL, adding the adjective “principal,” while sub-parts B and C were not quite verbatim repetitions of the TAL. Thus, at first blush, Art. 2 might not appear a radical departure from the TAL text. Significantly, subpart A is another matter entirely. The legal counsel at the U.S. Embassy at the time took some comfort in observing that several constitutions in Islamic countries incorporate such “repugnancy clauses” into their constitutions. But the ramifications of subpart A may be far more than the embassy realized.

To begin with, it seems the Americans translated the phrase ‘تَوَّابِیت اَهْکَم’ as “established principles.” That is perhaps its most innocuous-sounding translation, not so far from the one proffered above, “fixed principles.” But **ahkām** can also mean “judgments” (sing. **hukm**). If the word **ahkām** is understood in that sense (i.e., judgments), this provision could well facilitate the wholesale incorporation of the Sharī‘ah into Iraqi constitutional life—a first and a real departure from prior Iraqi practice. It could give the religious clergy the balance of power in determining which laws do or do not violate the constitutional mandate that the laws conform to تَوَّابِیت اَهْکَم of Islam.

Moreover, while the TAL contained an important escape provision, the 2006 Constitution notably (and from a liberal-secular outlook, ominously) deleted that language. It will be recalled that the repugnancy clause in the TAL barred legislation which violated the “universally agreed” tenets of the faith. This requirement of universal agreement is absent from the final text of the permanent constitution. Again, in the case of the TAL, it was calculated by the liberals that, on a very wide range of issues, consensus of the jurists across the five schools of jurisprudence (Ḥanafī, Mālikī, Shāfi‘ī, Ḥanbali, and Ja‘fari) demonstrably did not exist. By deleting the limiting language, the TAL’s escape hatch was welded shut in the 2006 text. Whereas the TAL required objective consensus among the jurists to overturn legislation under the repugnancy clause, the standard of review in the 2006 Constitution was far more subjective. The reviewer’s own view of what constituted تَوَّابِیت اَهْکَم of Islam could allow him to overturn legislation as un-Islamic. It was, therefore, untenable to conclude, as some hopeful commentators did, that the differences between the TAL and the permanent Constitution on this point were merely “subtle.”

The liberals can find no comfort in subpart B, barring legislation contravening the principles of democracy. That clause is obviously taken verbatim from the TAL. The two different sets of drafters, however, are likely to have radically differing interpretations of the phrase. Its concomitant effect, therefore, is likely to be very different.

For the liberal drafters of the TAL, the phrase “principles of democracy” certainly meant liberal constitutional democracy. It would of course include the notion of constitutional limitations on majoritarian rights and the protection of minorities and their rights. The word “minorities” would, in this context, include political as well as ethno-confessional and other minorities. For the drafters of the 2006 Constitution and their clerical mentors, the term democracy is understood almost exclusively from a majoritarian perspective. Minorities in this view barely have a right to be heard.

37 Deeks and Burton (n 32) 11.
38 Id.
39 Feldman and Martinez (n 6) 902.
40 Deeks and Burton (n 32) 15 (quoting Larry Diamond’s explanation of the definition of a modern democracy as he traveled to various governorates in Iraq promoting the TAL. Diamond was one of the technical advisors to the TAL drafting committee).
The chairman of the Constitutional Drafting Committee, Sheikh Humām Ḥammūdī, a cleric who belongs to what was then called the Supreme Council for the Islamic Revolution in Iraq (SCIRI), has stated as much. In his view, “democracy” does not engender an obligation upon the majority to accommodate and protect the interests of a minority. He has written that it is not incumbent on “the majority . . . to consider all that is demanded by the minority; this would be the reverse of democracy.” In this view, then, merely to require a majority to consider the views of the minority is a violation of the principles of democracy. If this constricted view of democracy prevails in the new Iraq, one can hardly be buoyed that the principles of democracy could operate as a meaningful check on any majoritarian impulse.

The religious parties aside, the commitment of the Shi’ī religious establishment in Najaf to constitutional democracy has too often been exaggerated. Some commentators, for instance, have made rather optimistic claims praising the Grand Āyatullāh al-Sīstānī’s democratic credentials. His fatwā demanding an elected assembly to draft a constitution, in this view, was a rebuke and an abject lesson in democracy to the Americans, who wanted to impose their view of a constitutional order. There is no doubt justification for the view that al-Sīstānī believed that the Shi‘āh, being the majority, would dominate the constitutional deliberations, and that they would, therefore, be able to protect a majoritarian view of a constitutional order. But there is nothing in al-Sīstānī’s writings to buoy one in the hope that the Grand Āyatullāh has any notion of a constitutional democracy, one which protects minorities meaningfully against the caprices of a democratic majority. It is thus incoherent to al-Sīstānī that a negative vote in three governorates could defeat the will of an absolute majority in fifteen governorates in the constitutional referendum, as stipulated in the TAL. For the Grand Āyatullāh it seems, democracy meant one thing only: one person,

43 To Feldman, the fatwā represented:

[A]n epochal event in the annals of the interaction between Islam and democracy: an unelected cleric laying down the law to the United States, holding that legitimate constitutional processes required democratic underpinnings. The irony that it was a religious scholar standing up for democratic process—and using his religious authority to do so—should not be lost on us. But neither should we miss the deeper irony that it was the democracy-exporting United States that was being reminded of the undemocratic character of its plans for the Iraqi constitutional process. Far from resisting U.S. pressure to democratize, Sistani was telling the Coalition how democracy ought to work.

Id. 7. Another adherent of this view waxes equally poetic about al-Sīstānī’s fatwā:

That the United States—the great liberator of Iraq and the putative world exporter of democracy—should be schooled in basic democratic theory by Sistani, a Shi‘ā jurisprude whose traditional practices and public pronouncements consistently eschewed the political involvement of religious leaders, is deliciously ironic—and not just a little embarrassing.

45 Under the TAL’s terms, if three governorates voted against a proposed constitutional draft by a two-thirds margin, the draft would be defeated, notwithstanding a majority approval in the remaining
one vote. In this Weltanschauung, “principles of democracy” is coterminous with “the will of the majority.” To the extent, therefore, that a future interpreter of this provision also has such an understanding of the “principles of democracy,” Art. 2(B) constitutes no limitation whatsoever on a majoritarianism at the expense of constitutionalism.

The third subpart of the Constitution’s Art. 2, barring legislation diminishing the fundamental rights and freedoms guaranteed in the constitution, must also be read with great ambiguity and uncertainty. To begin with, it is not clear which “fundamental rights and freedoms” the text means. The TAL was explicitly clear that legislation could not be enacted which derogated the rights enshrined in Chapter Two. Thus the rights protected from majoritarianism were expressly known: those rights enumerated in Arts. 10 through 23 of the TAL which constituted Chapter Two. An Islamist majority in the transitional National Assembly, for instance, could not pass legislation violative of women’s equality rights.

By contrast, the 2006 Constitution, whether deliberately or through inartful drafting, is ambiguous. It is not clear whether all the rights enumerated in Arts. 14 through 46 constitute “fundamental” rights and freedoms. Perhaps they do, but there is room for doubt. It is difficult, for instance, to conceive that the nebulous right of the tribes and clans to have the state seek their advancement is on a par with the right to freedom of expression or religious worship. In contrast to the TAL’s clear definition of the limits of legislative infringement on basic rights, the 2006 Constitution invites interpretation by the Supreme Federal Court on what does and does not constitute a fundamental right.

In both the TAL and in the 2006 Constitution, the Shi’i religious parties insisted on (and obtained) a provision ensuring the protection of the Islamic identity of the majority of Iraq’s population. These provisions underscore again the majoritarian nature of the religious parties’ sensibilities. It is not minorities’ rights that must be protected in the first instance; it is the majority’s rights which must first be enshrined and preserved. No doubt the perceived need for such a provision is partly rooted in the trauma inflicted upon the Shi’ah of Iraq by the previous regime. But in light of the quote from Sheikh Hammudi, noted above, it is also clear that the religious parties viewed the constitutional process as first and foremost ensuring the will of the majority, not assuaging or protecting Iraq’s multifarious minorities, including multiple ethnicities and confessions.

Indeed, the protection for religious minorities in the 2006 Constitution is parsimonious by contrast to that of the TAL. The 2006 text protects particular religious minorities indigenous to Iraq. The constitution protects the religious beliefs and praxis of Christians, Yazidis, and the Mandaean Sabeans. By contrast, the TAL guarantees “the full religious rights of all individuals in Iraq to the freedom of creed and religious praxis.”

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46 Deeks and Burton (n 32) 15.
47 TAL Art. 7.
48 Id. Art. 12.
50 Id. Art. 38(A).
51 Id. Art. 43(Second).
52 Id. Art. 2(Second).
53 TAL Art. 7(A).
2006 text is far more narrowly drawn than the TAL and constitutes lost ground from a liberal perspective.

The 2006 Constitution, then, represents a significant departure from liberalism. Rather than engendering a constitutional order protective of the rights of Iraq’s minorities, it enshrines the majoritarianism of the Shi‘i religious authorities. Moreover, by expanding the scope of the Islamization clause, it is far more amenable to Islamist principles than was the TAL. Except for the 1964 Provisional Constitution, the 2006 Constitution goes further toward incorporating Islamic principles into Iraq’s civil laws than any other constitution under which Iraq has been governed, at least since the demise of the Ottoman Empire. Two issues evince themselves in this context. The first involves the constitutional mechanisms through which Islamic legal principles might encroach on Iraqi civil law. The second relates to how an Islamist disposition might interact with the civil rights and liberties protected in the constitution. Each of these issues will be dealt with below.

III. BATTLES FOR THE COURTS

With many instances of ambiguities in the 2006 Constitution, it is quite probable that Iraq’s constitutional court, the Supreme Federal Court, will play the decisive role in future constitutional debates. This court was created by the TAL for the first time in Iraqi history as a standing, exclusively judicial body. Its importance in the minds of both the religious parties and the liberal-secularists was underscored by their differing visions of influence and control over this nascent institution. These competing visions—and who wins the competition—will determine how basic legal questions, including those involving protections of civil rights, will be resolved.

The TAL created three bases for the exercise of jurisdiction by the Supreme Federal Court. The first was exclusive and original jurisdiction over disputes between the federal government in Baghdad and any other governmental or administrative entities (e.g., regional or governorates governments). The second was exclusive and original jurisdiction over a suit by a plaintiff, or referral from another court, alleging that laws or regulations violated the TAL. The third was appellate jurisdiction as established by appropriate legislation (if any).

Decisions of the Court were generally by simple majority, except for decisions under the first basis of jurisdiction, disputes between the federal government and regional or other governmental units, which required a two-thirds majority. This was a requirement insisted upon by the Kurdish parties. They obviously sought to protect the prerogatives of the Kurdistan Regional Government by making it more difficult for the Court to find in favor

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54 Civil rights aside, there are many ambiguous clauses in the constitution. The most prominent such ambiguity at this writing relates to what constitutes “the largest parliamentary bloc” under Art. 76 for purposes of determining who has the first right to attempt to form a government. See Anthony Shadid, “Iraqi Court Ratifies Election Results” The New York Times (New York June 1, 2010) A7. There are also important ambiguities relating to control of “new” oil fields as between the Federal and regional governments. Cf. Iraq Constitution (2006) Arts. 111, 112, and 115.

55 TAL Art. 44(A).

56 Id. Art. 44(B)(1).

57 Id. Art. 44(B)(2).

58 Id. Art. 44(B)(3).

59 Id. Art. 44(D).
of the federal government when disputes arose with the KRG. To the extent, however, that an individual sought relief from regional legislation alleged to be in violation of the TAL, a simple majority would decide the case.

For its part, the permanent constitution strengthens the Supreme Federal Court as an institution in three ways. First, it expands the express, as opposed to the TAL’s implied, bases of the Court’s constitutional jurisdiction. The Court continues to have jurisdiction to ensure constitutional compliance of “legislation and regulations in effect.”60 There is no language in Art. 93(First) limiting this power to federal laws and regulation; rather, the Court’s jurisdiction extends to all such enactments. This fact is noted, because it has generated some commentary. Peter Galbraith erroneously contends that the Supreme Federal Court has no right of judicial review over the laws of the KRG.61 Yet the phrase “existing legislation and regulations” is very broad, and contains no limitation reasonably excluding regional or other laws from its ambit.62 Moreover, regional legislation aside, the constitution requires even regional constitutions to comport with the federal constitution.63 Further, Art. 141 of the Constitution requires all KRG laws “legislated since 1992” to comply with the constitution.64 This provision, coupled with Art. 93(First), make abundantly clear that KRG laws are subject to judicial review in the Supreme Federal Court. The possibility cannot be excluded that Galbraith’s announced view is tainted by his previously undisclosed financial and commercial relationship with companies that do business with the KRG, facts which were divulged in late 2009.65

Andrew Arato also states that the Kurds “received the all-important concession stripping” the constitutional court of the power of judicial review over KRG laws.66 Yet Arato expresses some hesitation in coming to this conclusion, acknowledging that his understanding of the constitution is only as authoritative as the translation before him.67 Arts. 93(First) and 141 aside, the constitution creates another basis for jurisdiction over regional laws. The Supreme Federal Court is seized of jurisdiction to decide disputes between the “Federal Government and the governments of the regions, governorates, municipalities, and local administrations,”68 without any limitation as to the nature of the dispute. The translation available to Arato mistakenly omitted the word “regions” from its iteration of Art. 93(Fourth).69 Obviously, Arato is right: had the constitution in fact omitted the word “regions,” the omission would be highly significant. Viewing the actual text of Art.

61 Cf. Peter Galbraith, The End of Iraq: How American Incompetence Created a War Without End (Simon & Schuster Paperbacks, New York 2006) 200 (stating that the constitution did not provide for Supreme Federal Court jurisdiction over the KRG’s laws) and Iraq Const. (2006) Art. 141 (stating that legislation, decisions, and contracts entered into by the KRG commencing in 1992 would be considered valid to the extent not otherwise amended by the competent authorities and “provided they do not violate this Constitution”).
62 The U.S. negotiating team also understood that there would be such review. Deeks and Burton (n 32) 84.
63 Iraq Const. (2006) Art. 120.
64 Id. Art. 141.
66 Arato (n 44) 237.
67 Id. 340 n. 87.
69 Arato (n 44) 340 n. 87. The official Arabic text on the Iraqi parliament’s web site does, however, contain the word “regions.” http://www.parliament.iq/Iraqi_Council_of_Representatives.php?name=singal9asdasda
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93(Fourth) with the Court’s general jurisdiction over all “legislation,” there can be neither constitutional nor legal justification for the proposition that the KRG’s laws are exempt from federal judicial review.

In addition to expanding the Supreme Federal Court’s express scope of review over constitutional disputes, the 2006 Constitution expands its jurisdiction in a second way, involving it in several new legal areas. One area relates to disputes arising from any laws, decisions, regulations, instructions, or procedures issued by any federal authority. Any minister or the Council of Ministers collectively may refer such an issue to the Court. The text confers over disputes involving the “application” of such regulations, and thus seems to encompass disputes much broader than those involving only constitutional issues. This expanded jurisdiction appears, then, to come at the expense of Iraq’s hitherto separate system of administrative courts. It remains to be seen whether this development will be salutary. Moreover, while the TAL like its successor, creates jurisdiction in the Supreme Federal Court over disputes between the federal government and other governmental entities, the constitution significantly expands the Court’s jurisdiction by including disputes between regional and governorate governments, not involving the federal government. The TAL’s two-thirds requirement for decision in cases involving the regional governments is notably eliminated in the constitution. The Court also has jurisdiction to settle jurisdictional disputes between the judicial organs of the various governmental units (federal, regional, governorate).

The third expansion of the Court’s jurisdiction occurs by virtue of its having a role in disputes bordering on the political. It has, for instance, jurisdiction to pass on accusations made against the sitting president, prime minister, and members of the cabinet. It also ratifies the final results of parliamentary elections. This latter function perhaps signals that the judiciary may be one of the few state institutions whose reputation survives the deprivations of the previous regime relatively intact: judges are trusted to pass on the elections more than other state officials. It is noteworthy that the final decision rests in the hands of the Court, not the Independent Electoral Commission.

It is appropriate to observe that the provisions on judicial review contained in the TAL and the 2006 Constitution are not innovative in Iraqi constitutional history. Iraq was itself an innovator where judicial review is concerned. The Basic Law of 1925 made Iraq the first country in the region—and one of the first in the world—to institute a form of judicial review. If questions of constitutional interpretation arose, or to ascertain whether a law contravened the constitution, a Supreme Court was to be convened by Royal Iridah

s9dasda8w9werwv8vw54wvw5w0v98457475v38937456033t64tg34t64gi4dow7wnf4w4y4t386b5w65 7675page&pa=showpage&pid=55, accessed November 9, 2009.

71 Id.
72 Id.
73 TAL Art. 44(B)(1).
75 Id. Art. 93(Fifth).
76 Id. Article 93(Eighth)(A) and (B).
77 Id. Art.93(Sixth).
78 Id. Art. 93(Seventh).
79 Nathan J. Brown, Constitutions in a Nonconstitutional World (State University of New York Press, Albany 2002) 145: “Prior to the Second World War, a very small and quite disparate group of political systems had unambiguously instituted some form of judicial review. Among the very few were the United States,
(decree) upon the concurrence of the cabinet. This ad hoc Court was not, however, a purely judicial body. Its members were selected by the Senate, four from the ranks of senior judges, and four from the Senate itself, with the ninth member, who presided over the Court, being the Senate President.

Other norms which reemerge post-2003 have precedents in Iraq’s constitutional history. The TAL’s requirement that certain cases be decided by a two-thirds vote is one example. Decisions of the monarchical-era Supreme Court interpreting the Basic Law itself, or declaring legislation unconstitutional, also required a two-thirds vote of its members. Also the provision of the 2006 Constitution vesting jurisdiction in the Supreme Federal Court for cases involving accusations of official misconduct against high-ranking officials has a constitutional precedent in the Iraqi Basic Law. The monarchical Supreme Court had jurisdiction in cases where ministers, Members of Parliament, or judges of the Court of Cassation were accused of “political offences.”

If both the TAL and the 2006 Constitution provide expansive judicial-review powers in the Supreme Federal Court, it is easily predictable that the Court will play a major role in the constitutional and legal life of the country. Thus the approach of the two post-2003 documents to membership in the Court, which varies tremendously, acquires added significance. The TAL intends an unabashed agenda with respect to the provisions dealing with the courts: To strengthen Iraq’s civil judiciary. Thus justices of the Court were to be nominated by the Higher Juridical Council, an independent body consisting of senior judges overseeing the affairs of the Iraqi judiciary. Although there is no stipulation as such that only civil judges would be nominated, it can be assumed safely that the Council, consisting as it does of civil judges, would almost certainly nominate only civil judges to fill the Court’s bench.

The 2006 Constitution has a very different agenda. Although it allows the appointment of civil judges to the Supreme Federal Court, it also calls for the appointment of “experts in Islamic jurisprudence” (‘khubarā’ fi al-fiqh al-Islāmi’) and “civil-law jurists” (‘fuqahā’ al-qānūn’). The category “experts in Islamic fiqh” potentially constitutes a major inroad by the clerical establishment into the prerogatives of the judiciary. This is especially so for the Shi‘ah religious parties, which currently dominate Iraqi politics. Some in the Shi‘ah clergy constitute an obvious pool of potential appointees under this category, though it is unlikely that the senior-most clerics (marāji’ al-taqlid) would themselves receive such appointments. Still, given the hierarchical nature of the Shi‘ah clergy, appointments of such experts, drawn from whatever pool, would likely mean a relatively direct exercise of influence by marāji

Austria, and a few Latin American countries [. . . .] A few other countries (such as Iraq and Norway) had taken the step of entrusting constitutional interpretation to bodies with judicial representation.”

Iraq Basic Law (1925) Art. 83.

Id. Art. 82. The Ottoman High Court of Justice, too, consisted of judges and non-judges, including Members of the Senate, though this Court did not possess judicial-review jurisdiction. Ottoman Basic Law (1876) Arts. 93 and 95.

Iraq Basic Law (1925) Art. 87.

There was an Ottoman precedent for this function. A High Court of Justice could be convoked by Imperial Irādah to try ministers, members of the Court of Cassation, and anyone accused of treason or making attempts against the state. Ottoman Basic Law (1876) Art. 92.

Iraq Basic Law (1925) Art. 81.

TAL Art. 44(E). The Presidency Council would then appoint the members of the Court. Id.

Id.

al-taqlid over the Court’s decisions, including its constitutional jurisprudence. Such an exigency would constitute a phenomenon unprecedented in Iraqi legal history.

Obviously, Sunni experts in fiqh appointed to the Court could also import the influence of their religious authorities into Iraq’s constitutional jurisprudence. On the other hand, the Iraqi Sunni clerical establishment is much more diffuse, with far more ambiguous and uncertain lines of authority. Iraq’s Sunni clerics lack a single focal-point of received wisdom, such as al-Azhar University in Egypt. Their ability, therefore, to influence directly the result of any case might be more attenuated than their Shi’i counterpart. In any event, given the likelihood that the Supreme Federal Court will decide such basic questions as what constitutes a constitutional “fundamental right” incapable of legislative derogation, it is beyond doubt that the conservative clerical establishments in Iraq of both sects will have a very different view of what constitutes such rights than might the civil judges. It can easily be predicted that the appointment to the Supreme Federal Court of experts on Islamic law from outside the class of Iraq’s civil judges will result in greatly enhancing the power of the religious authorities to whom those experts hold allegiance.

Clearly, repudiation of the exclusive right of civil judges to sit on the Court is a successful assault on the prerogatives of the regular judiciary in Iraq. The self-evident intent appears to be to weaken this institution, perhaps because it is thought to be too secular. Even the appointment of civil-law jurists weakens the civil judiciary by opening the bench to academics, a class not typically within the pool of potential judicial appointees under Iraqi law. This situation takes Iraq in an entirely new and uncharted constitutional direction.

On the other hand, several observations merit attention. First, it should be noted that the 2006 Constitution does not mandate the appointment of clerics (‘ulamā’) as such. Rather, it authorizes the appointment of “experts” in Islamic jurisprudence. That term is broad enough to encompass civil lawyers, jurists, and other scholars who can claim expertise in Islamic fiqh. Obviously, it is more likely that the religious parties might nominate ‘ulamā’ or those closely affiliated with them to the bench, but more secular parties could find sufficient ambiguity in the phrase “experts in Islamic fiqh” so as legitimately to be able to nominate secular experts to the Court.

Second, it is significant in this context that the liberals negotiating the 2006 Constitution managed to defeat attempts by the religious parties to require the appointment of ‘ulamā’ directly. The original text proffered by the religious parties did not formally propose the appointment of ‘ulamā’ as such. Instead, they used a circumlocution requiring the appointment of ‘fuqahā’ al-Shari‘ah or “jurists of the Shari‘ah.” The difference between the phrases, fuqahā’ al-Shari‘ah and khubara’ fi al-fiqh al-Islāmi is potentially monumental. The former suggests practitioners of fiqh—clerics in all but name. The latter would also include, for instance, academicians with expertise in Islamic fiqh. Had the constitution endorsed the appointment of fuqahā’, it would almost certainly have assured the appointment of individuals whose views are in strict accord with the views of the clerical establishment at the highest levels. It would be tantamount to ensuring the orthodoxy of the opinions of such appointees, which, in the current Iraqi environment, is tantamount to ensuring the appointees’ conservative credentials.

In the case of the khubara’ fi al-fiqh al-Islāmi (experts in Islamic jurisprudence), the situation could be quite different. Any individual with sufficient scholarly credentials as an “expert” in Islamic jurisprudence, for instance, could qualify for an appointment onto the bench. Since the requirement of being an “expert” is distinct from a requirement that an
appointee be a practitioner of *fiqh*, such an “expert” could be appointed to the Supreme Federal Court even if his views did not more strictly comport with views regarded as orthodox by the respective religious establishments. Since the phrasing involving experts prevailed, the appointment of justices to fill vacancies on the Supreme Federal Court could be more a matter of political suasion and the results of the elections, rather than (necessarily) involving the imprimatur of the religious authorities. By removing the appointments to the Supreme Federal Court from the Higher Juridical Council, it is foreseeable that future appointments to this Court will become highly contested and politicized, much in the same manner as are appointments to the U.S. Supreme Court. Whether this situation constitutes progress or not remains to be seen.

The practical implications flowing from the different pools of potential appointees are difficult to overstate in terms of the future of constitutional jurisprudence. Egypt may well be the example par excellence of the difference which civil judges can make. Egypt’s constitutional Islamization clause is far less ambiguous—and much more robust—than Iraq’s. It establishes the Shari’ah as “the principal source” (*al-maṣdar al-ra’īs*) of legislation. In the Iraqi context, when this phrase was proposed for TAL Art. 7, the secularist negotiators could only imagine a near outright rejection of modern human rights jurisprudence, before the effort to introduce reforms had even begun. Yet that has not been the Egyptian experience. Why not?

At least one apparent answer to the question has been Egypt’s safeguarding of its civil judiciary. To begin with, Egypt has preserved a system of appointing judges to its Supreme Constitutional Court (SCC) that is very similar to the manner adopted in the TAL. A general assembly for the Court, consisting of judges, reports nominations to the president of the republic through a Supreme Council for Judicial Organizations. Though the president theoretically retains power over appointments, in practice he has always accepted the individuals nominated through this process, thus preserving the prerogatives of the Egyptian civil judiciary. The consequence has been that the Egyptian SCC has become “a strong and effective supporter of liberal legality.” Given the strictures seemingly imposed on the Court (and the legislature) by Art. 2 of the Egyptian Constitution, it might *a fortiori* seem a strange observation to make about the Court.

Of course, the answer lies not in the constitutional text, but in the jurisprudential context and method of the SCC. To be sure, challenges to a liberalizing sensibility have confronted this Court. For instance, the predecessor of the SCC opined that the Universal Declaration of Human Rights was merely exhortatory and thus did not create binding treaty obligations on Egypt. Alternatively, it held that the Declaration only had only the effect of legislation and so could be altered by subsequent, specific (national) legislation. The extent to which Islamists could use such a ruling to constrict human rights protections is obvious. Yet in its subsequent jurisprudence, and while not expressly overruling this dubious ruling, the SCC has simply ignored it, using the Universal Declaration as a touchstone in interpreting rights provisions of the Egyptian Constitution.

91 *Id.*
92 *Id.*
93 *Id.* 120.
94 *Id.*
This subtle approach has been used by the SCC in its Art. 2 jurisprudence. According to at least some commentators, the SCC has succeeded in interpreting the Sharī‘ah as consistent with the promotion of international human rights standards. Yet it does so while maintaining a rhetorical discourse “attractive to a range of Islamists.” The lesson here—familiar to lawyers the world over—is that the question of who interprets the text can be far more important than the text itself.

This imperative of competing interpretive rights is in even sharper focus in Iraq. The Shi‘ī religious parties made an ostentatious showing of repeatedly consulting with the Grand Āyatullāh al-Sīstānī during negotiations both for the TAL and the 2006 Constitution. Al-Sīstānī himself became involved in the minutiae of the negotiations, and not just with respect to the clauses dealing with religion and the state. Clearly, he expects to play a role in the constitutional life of the country, and he expects to be listened to. It would stretch credulity to suppose that, having so involved himself in the drafting of both constitutions, he would be content to return to Quietism, which has been the hallmark of many within the Iraq Shi‘ī clerical establishment since at least the late Grand Āyatullāh Abū al-Qāsim al-Mūsawī al-Khū‘ī. Given his outspokenness over the past seven years, it is unlikely that al-Sīstānī will countenance civil judges interpreting the constitution freely.

Juan Cole, a thoughtful observer of the Shi‘ī religious establishment, sees matters slightly differently. While he agrees that the Grand Āyatullāh al-Sīstānī “combines aspects of quietism with aspects of activism,” he sees al-Sīstānī as fundamentally far closer to Quietism. He stresses that al-Sīstānī has been “an absolute political quietist for most of his life,” and that his principal concern was with the “structural” issues that arose in respect to the drafting of the constitution. Once those issues were resolved to his satisfaction, his political activity ultimately waned. Yet this view cannot be entirely squared with his letting his preference be known regarding the electoral law, advice which the Iraqi parliament ultimately followed by passing legislation mandating open lists for the 2010 elections.

95 Lombardi and Brown (n 5) 417.
96 Id. 418.
97 Diamond (n 25) 147; Allawi (n 45) 222, 403–405.
99 Allawi (n 45) 208–211.
100 Statement by Juan Cole (Personal e-mail correspondence November 6, 2009).
101 Id.
102 Id.
Regardless of whether Cole is right that the Grand Āyatullāh al-Sīstānī remains closer to Quietism, or whether this author is correct in believing him to be closer to the middle ground between Quietism and activism, one thing is clear: he is no longer a “pure quietist.” It is difficult for this author to conceive that the man who advises parliament on the details of legislation would sit as an impartial observer over an issue interpreting the constitution in a way that touches on a point of Islamic law.

To the extent, therefore, that “experts in Islamic fiqh” are appointed to the Supreme Federal Court, it is highly unlikely that such “experts” beholden to their respective religious authorities would be nearly as amenable to principles of international human rights law as the Egyptian civil judges have been, and as Iraqi civil judges probably would be. They are far more likely to find stratagems to eviscerate such protections. During the negotiations for the TAL, for instance, one interlocutor for the Shi‘ah religious parties argued to the author that Iraq was not bound by international human rights treaties ratified by the previous regime. In this view, the Shari‘ah trumped international law in all cases.

Nor is it necessary to appeal only to the Egyptian example to contemplate how interpretations of civil rights provisions might vary as between the religious authorities and the civil judges. One of the major decisions of the Iraqi Supreme Federal Court since the promulgation of the 2006 Constitution concerned the case of a parliamentarian who traveled to Israel in violation of a Ba‘thist-era regulation barring such travel. Parliament voted unanimously to lift the parliamentarian’s immunity from criminal prosecution and to bar him from taking his seat in the chamber. The stakes did not merely relate to whether the parliamentarian could sit in the chamber or not: the regulation made traveling to Israel a crime punishable by death, and a criminal investigation was already under way. A unanimous Supreme Federal Court held that the travel ban was unconstitutional, because an Iraqi citizen’s constitutional right to travel was unrestricted. It ordered his immunity and seat reinstated, and quashed the criminal investigation.

Admittedly, the Court did not cite principles of international law in its decision. It based its decision exclusively on the verbatim text of the Iraqi Constitution. But it is significant to note that the current composition of the Court consists entirely of civil judges. It is not difficult to imagine a court consisting of clerics or religiously-oriented experts in Islamic jurisprudence finding some maṣlahah, or public interest, supporting a ban on travel to Israel, the constitutional text notwithstanding. Iraq’s civil judges, it must be recalled, are immersed in Iraq’s strictly positivist legal tradition, and are thus strictly bound to the text before them. Yet judges and scholars trained in the techniques of Islamic fiqh share much with the methods of their common-law counterparts, and can be much more flexible with the text than civil judges. That is a theoretical distinction in how the case might have been decided differently. But the difference to the parliamentarian would have been anything but theoretical: his life was quite literally hanging in the balance.

105 Id.; Iraq Const. (2006) Art. 44(First) (“Each Iraqi has the right of movement, travel, and residence inside and outside Iraq.”).
106 MJ (n 104).
Another area extending the reach of the religious establishment into the courts is in the area of personal status laws. This branch of the law is where most individuals encounter law, not only in Iraq, but probably throughout the world. It includes laws relating to marriage, divorce, inheritance, and the like. It has been the object of much strain between the liberal and religious sensibilities, which have competed for dominance in Iraq throughout its modern history. As is the case with much of the religious and secularist divisions in Iraq, it has a history dating from the earliest foundation of the modern state of Iraq.

The 1925 Basic Law provided for the establishment of Sharī'ah courts with exclusive jurisdiction over matters relating to the personal status of Muslims as well as issues relating to the administration of religious trusts (awqāf). Judges from either the Sunnī or Shī'ī schools of jurisprudence were to be appointed, depending on the prevailing majorities in a particular geographic area, with members of both sects to be appointed in Baghdad and Basrah, reflecting the heterogeneity of their populations. Judges on these tribunals were to rule in conformity with their respective religious doctrines. The Basic Law also provided for Spiritual Councils for Iraq’s Jewish and Christian populations, which had similar jurisdictions over their respective religionists. These issues then, including marriage, dowry, divorce, separation, alimony, attestations of wills, etc., were not regarded as matters fundamentally within the purview of the state as such. Rather, they were regarded as issues in the first instance within the competence of the various religious authorities. From a constitutional perspective, at least, the 1925 Basic Law simply did not recognize a secularist sensibility with respect to personal status.

It was highly significant, therefore, in light of the foregoing history, that the 1958 Provisional Constitution made no mention whatsoever of the religious courts. In fact, in December 1959, the first post-monarchical regime introduced a Personal Status Law, which mandated the application of the new legislation in lieu of the religious law, though it did not challenge the existence of the religious courts. The law provided for somewhat of an increase in women’s rights than was the case under the Sharī'ah. For instance, the new law raised women’s age of consent to marriage to eighteen, and also granted women expanded rights in divorce, child custody, and inheritance. This law remained in effect until it was substantially amended by Šaddām Husayn to return to Islamic principles after his invasion of Kuwait, a time when he was burnishing his credentials in the Islamic world.

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108 Iraq Basic Law (1925) Art. 75(1).
109 Id. Art. 76.
110 Id. Art. 77.
111 Id.
112 Id. Arts. 75(2), 78, and 79.
113 This fact was in marked distinction to issues relating to civil, commercial, and criminal laws, which were entirely within the competence of the civil, not the religious, courts. Id. Art. 74.
115 Hamoudi (n 114) 544–543.
116 Haider Hamoudi believes that the improvements for women were relatively modest and that the 1959 Personal Status Law was “blatantly discriminatory and profoundly anti-modern” in its treatment of women. Id. 546. The new law was no doubt animated by a desire to make the laws uniform for all Iraqis, as suggested by Prof. Stilts, but she erroneously ascribes the motivation to a desire to unify the country “under the banner of Ba’thism.” Stilt (n 6) 749. The Bath Party, though it participated in the 1958 coup d’état that overthrew the monarchy, was only a minor player until after the coup of 1963 and again in 1968.
The TAL made no mention of personal status laws, nor did it make mention of religious courts. Rather, it consciously promoted the civil courts, and made provisions for the appointment of civil judges only. Through this stratagem, it was thought that future claimants could utilize the provisions of the TAL mandating the equality of the sexes before the law to insist upon reciprocal and coterminous rights to inheritance, divorce, etc. To the extent that the TAL failed to constitutionalize the Shariah rules on personal status, the specific TAL provision on gender equality might trump any competing claim by religious authorities. The effort was short-lived, however.

Although the 2006 Constitution also contains a provision mandating gender equality before the law, it re-constitutionalizes the Islamic personal status law in line with monarchical-era praxis. Specifically, the Constitution states:

Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, which shall be regulated by law.

Several observations are noteworthy. Of course, by constitutionalizing the religious law on personal status, the drafters of the constitution foreclosed any chance of equalizing personal status across gender as a matter of constitutional law. Equally significantly, the provision is contained in the section of the constitution dealing with personal liberties, suggesting that the choice of religious law is a matter of civil rights, even though such a choice would likely result in a diminution of the rights of one of the parties before the court—the woman. It should be noted, moreover, that there is a theoretical possibility of creating incoherence. It is possible—indeed probable—for a man in a divorce or inheritance dispute to insist upon his rights under either Sunni or Shi’i religious law, but it is equally possible that the wife in the divorce might assert her “belief or choice[ . . . ]” in whatever the secular law might be. In theory the two litigants would be in equipoise, with a judge unable to rule in either’s favor without violating the other’s constitutional rights. In praxis, one might be forgiven for being cynical at the chances of a woman prevailing in such a scenario, even assuming she were not coerced into choosing religious law.

More subtly, the provision undermines not only the civil judiciary, but potentially the state itself. As Haider Hamoudi points out, at least some of the Shi’i religious parties wish to have issues of personal status resolved not by state-appointed judges, but by non-state-affiliated actors answerable only to the Shi’i religious establishment. Of course, with respect to religious law, there is no reason that even state-appointed judges might not take their cues from the religious establishment. That is certainly the case in Iran, where the Shi’i religious establishment co-opted the state. On the other hand, in much of the Sunni world,

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117 TAL Chapter Six.
118 Id. Art. 46(A).
119 Id. Art. 12.
121 Id. Art. 41.
122 See Feldman and Martinez (n 6) 906. Feldman and Martinez cite Art. 41 as Art. 39, likely due to a later renumbering.
123 Hamoudi (n 114) 546. Hamoudi speaks in more absolutist terms, suggesting that all Shi’i religious parties share this view. The extent to which such an assertion is true is problematic. Though far beyond the scope of this study, there are profound differences between the various Shi’i religious parties on a host of political issues, including the relative power of the state, and it is advisable not to generalize on any issue.
the religious authorities have themselves been co-opted by the state and placed on the government payroll. It is difficult to predict how these considerations will obtain in Iraq, which is far more diverse confessionally than either Iran or much of the rest of the Arab world.\footnote{As Hamoudi has stated, \"[The] Shari'ah is, across all relevant schools of thought, a complex normative system of often-conflicting rules developed by jurists of competing schools or jurisprudential trends, none of which is more or less legitimate than any other. This makes its imposition as a matter of positive law conceptually impossible.\" \textit{Id.} 538 n. 66, citing Abdullahi An-Na'im, \textit{\"Shari'ah and Positive Legislation: Is an Islamic State Possible or Viable?\"} in Eugene Cotran and Chibli Mallat (eds) \textit{5 YB of Islamic and Middle Eastern Law 1998–1999} (Kluwer Law International Ltd, London 1999) 29–41. While its wholesale application as positive law in a heterogeneous state such as Iraq may be problematic, its application on a case-by-case basis, as contemplated by Art. 41, certainly is not. In this context, it should be recalled that the Shari'ah shares much with the common law method. Nor is it impossible to conceive of some version of the Shari'ah being imposed.}

The attempt to weaken the state generally and the civil judiciary in particular is unmistakable in the 2006 Constitution. As noted above, the constitution permits the appointment of Shari'ah jurists to the constitutional court, weakening the civil judiciary. It constitutionalizes the Shari'ah law on personal status, apparently promoting non-state-affiliated judges in the application of its principles. Aside from personal status, these assaults on the civil judiciary potentially have important ramifications for civil rights generally in Iraq’s current constitutional schema, the subject to which this article turns next.

\textbf{IV. CIVIL RIGHTS IN THE POST-2003 CONSTITUTIONS}

The philosophical differences between the liberal-secularists and the religious parties were most clearly displayed in the contrasting treatment of civil rights in the two post-2003 constitutions. It is interesting to note that the liberal civil rights provisions of the TAL seemed wholly uncontroversial at the time they were drafted. Chapter Two of the TAL setting forth the bill of rights was the least contested part of the TAL.\footnote{Feisal Amin al-Istrabadi, \textit{\"Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law\"} (2005–2006) \textit{50 N.Y.L. Sch. L. Rev.} 269, 278–89 (describing some of the debates on the most controversial provisions of the bill of rights).} The Shi'i religious parties were far more interested at that time in increasing the powers of the prime minister (a post they correctly assumed they would dominate) at the expense of the presidency and other cabinet colleagues.\footnote{American interlocutors supported such moves against the secular-liberal coalition, seemingly because they believed in attempting to replicate a model closer to the U.S. presidential system than to European parliamentarianism.} Given the relatively brief drafting period, which would nonetheless be longer than the actual time during which the permanent constitution was drafted, and given the short-lived duration of the TAL, it seems the religious parties were rather indifferent to the relative liberalism of the TAL: they knew it would not last.\footnote{As Professor Arato put it, rather more sarcastically (though amusingly and perhaps with a great ring of truth), \textit{\"No one thought it worthwhile to spend a lot of time on [the bill of rights]: it was permissible to let Mr. F. Istrabadi, using American, international, and Middle Eastern precedents, just go ahead and draft.\"} Arato (n 44) 176.}

One observation is worth noting here. The religious parties, of course, were divided into Shi'i and Sunni camps. Putting aside issues of mutual fears of dominance on the part of these two contenders, during the negotiations for both post-2003 constitutions, issues of
federalism emerged as the major line of cleavage between the groups. Whereas the Shi‘i parties, especially SCIRI, became advocates for a regionalist vision of the state, the Sunni parties strongly resisted any notion of federalism. Indeed, their resistance was stronger during the negotiations for the Constitution of 2006 than it had been for the TAL—again, perhaps because of the interim nature of the TAL, but perhaps also because of the relative difficulty of creating federated regions outside Kurdistan posited in the TAL. Yet it was clear to the author that, had the parties purporting to speak for the two religious sects found a *modus vivendi* on the issue of federalism/regionalism, i.e., if the two sides had been willing to brook a compromise, they might have discovered that they had a mutually shared vision for the central role that religion and religious law should play in the constitutional and legislative life of the state. Because of the cleavage over the federalism issue, the two sides seem never to have met around these issues, however. Instead, the Sunni parties have generally allied themselves with the secular-nationalists.

A detailed catalogue of the differing constitutional visions as between the secular-liberals and the religious parties would require far more space that this article allows. Rather than cataloguing each of the differences between the TAL and the Constitution, this section will instead focus on the differing conceptual frameworks of the two camps. It will then illustrate some of the differences with specific examples. It is hoped that this approach will at least highlight the ongoing constitutional discussions respecting civil rights, as the current parliament (elected in March 2010) considers amending the constitution.

One of the most contentious issues confronted during the negotiations for the two post-2003 constitutions vis-à-vis human rights was the issue of the applicability of international human-rights law to Iraq. The religious parties viewed the international law of human rights as generally in conflict with principles of Islamic law, and they were thus hostile to it in principle. First and foremost, the issue of women’s rights exercised them. Even the previous Iraqi regime was hesitant with respect to women’s rights, despite its ostensibly secularist outlook. For instance, it noted reservations specifically with respect to the marital-equality provisions of the Convention on the Elimination of All Forms of Discrimination against Women. Indeed, during early negotiations for the TAL, the representative of the Dawah Party, a Shi‘i party from which both elected prime ministers post-2003 were selected, dismissed the idea of the application of an international human rights treaty to Iraq. When the author noted that Iraq had ratified the relevant international instrument and was, therefore, bound by its terms, the Dawah interlocutor responded, “Iraq did not ratify the treaty. Šaddām Ḥusayn ratified the treaty.”

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128 For a synopsis of the contentiousness of the federalism debate and its reasons, see al-Istrabadi (n 2) 1629–1633

129 TAL Art. 53(C) required the approval of the National Assembly as well as the approval of voters in the affected areas for the creation of a federated region. By contrast, Art. 119 of the 2006 Constitution made the matter exclusively within the competence of the voters within the proposed region, with no role for the federal authorities, legislative or otherwise.

It thus became essential to abandon any express claim of the applicability of any treaty or treaties to the civil rights provisions of the TAL. The solution posited by the author was to bring in international human rights law through indirect reference.\textsuperscript{131} Rather than expressly naming the international treaties (especially CEDAW), thereby engendering the opposition of the religious interlocutors, the TAL instead included the following provision:

The enumeration of the foregoing rights should not be interpreted as constituting the only rights enjoyed by the people of Iraq, for they enjoy all rights befitting a free people possessed of its human dignity. Among these rights are those specified in international treaties and agreements and other instruments of international law signed or agreed to by Iraq, or which otherwise bind Iraq pursuant to international law.\textsuperscript{132}

Whatever momentary confusion the above language might have generated while the religious parties were concerned with issues (to them) seemingly more important than international human rights standards, the above article was deleted entirely from the 2006 Constitution. There is language in the latter document in which Iraq declares that it will observe “its international obligations.”\textsuperscript{133} That language, however, appears in the organizational section of the constitution, and does not relate expressly to human or civil rights. Moreover, it occurs in an article which seems directed to the conduct of foreign relations in line with international legal principles: good neighborliness, non-interference, pacific settlement of disputes, and the establishment of relations on the basis of mutuality of interests and reciprocity. Still, perhaps a future parliament, or even a future constitutional court, might one day domesticate international law as it applies to human and civil rights through this provision.

International law aside, the TAL and the 2006 Constitution have fundamentally different philosophical approaches to the issue of civil rights more generally. The TAL seeks to protect fundamental civil rights in absolutist terms, consciously choosing language more familiar, perhaps, to common lawyers than to lawyers in continental systems. Thus, for instance, the TAL eschews limitation provisions protecting rights “consistent with law.” The guarantee of freedom of speech is thus expressed in such absolutist terms,\textsuperscript{134} as is the right of peaceful assembly.\textsuperscript{135} The right of privacy is also protected in absolute terms.\textsuperscript{136}

It was hoped by many that the statement of such individual rights in absolute terms would have two salutary effects. The first effect would be to help to deter the legislature from enacting laws that constricted such rights. In an environment in which the religious parties were so strong, it was easily conceivable that certain forms of speech—particularly those offensive to religionist sensibilities, for instance, might be targeted for limitation or curtailment. Stating the protections of civil rights in such terms would, therefore, tend to promote individual liberty. The second hoped-for effect would be to strengthen Iraqi judicial institutions by shaking them out of their torpor after so long a period of tyranny. It was

\begin{itemize}
  \item \textsuperscript{131} Diamond (n 25) 146.
  \item \textsuperscript{132} TAL Art. 23.
  \item \textsuperscript{133} Iraq Const. (2006) Art. 8.
  \item \textsuperscript{134} TAL Art. 13(B).
  \item \textsuperscript{135} Id. Art. 13(C).
  \item \textsuperscript{136} Id. Art. 13(H).
\end{itemize}
also hoped that drafting the rights provisions in absolutist terms might soften the judiciary’s strict positivist approach to the law, allowing it to enter a more activist era.

The view that ultimately prevailed in the 2006 Constitution, however, was markedly different. This view, promoted at least by the religious parties if not necessarily by Islam itself, seeks to protect communitarian rights, or perhaps more accurately the common weal, in the first instance. Doing so occurs at the expense, it would seem, of the individual’s rights. An example of this phenomenon occurs in Art. 17: “Every individual shall have the right to personal privacy so long as it does not contradict the rights of others and public morals.”

Given the fairly constricted nature of the right guaranteed (not only privacy but personal privacy), it might be wondered how an exercise of so closely-held a right could conflict with the rights of others or public morality.

A similar exemption (respecting public order and morality) attaches to the rights to freedoms of expression, the press, and assembly. Further, the state is required to promote cultural activities and institutions, but only those which befit the “civilizational and cultural history” of Iraq. It can readily be imagined, therefore, that cultural or artistic expressions which are provocative or controversial might easily be suppressed in ways perfectly consistent with the 2006 Constitution. Indeed, the same is almost certainly true, if it is provocative enough, for what is called in U.S. constitutional jurisprudence “core political speech.” If such political speech is sufficiently offensive to “violate public order or morality” it can evidently be banned.

Furthermore, the 2006 text contains the formulaic reference limiting the exercise of enumerated rights in accordance with law. Thus the freedom to join associations and political parties is to be “regulated by law.” Constitutional lawyers in states with continental systems will, of course, be familiar with such limitations provisions, but there are some oddities, and some room for concern in the Iraqi context. The state, for example, is directed to strengthen civil society organizations, but such organizations seem to have authority to operate only insofar as their goals are “legitimate.” There is obviously some palpable reason to fear that such limitations provisions might be used substantially to eviscerate the rights in question.

On the other hand, the constitution also contains an innovation (for Iraq) of its own. Art. 46 contains a provision that bars parliament from limiting the enumerated rights in ways that “violate the essence of the right or freedom.” This provision is clearly derived from Art. 14 of the International Covenant on Economic, Social, and Cultural Rights. Its application to core civil rights and liberties in the Iraqi context (as opposed to only in the

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138  Id. Art. 38(A)–(C).
139  Id. Art. 35.
140  Id. Art. 38.
141  Id. Art. 45(First).
142  Id. Art. 46.
sphere of the ICESCR) is an encouraging sign in itself, but it is unlikely, without more, to protect some of the basic rights at the level of the individual. Where at least some fundamental civil rights may only be exercised consistent with public morality, surely there is reason to worry that there is greater ability for the state to suppress fundamental freedoms than a liberal order should tolerate.

To be sure, there are some unencumbered enumerated rights guaranteed to Iraqi citizens in the 2006 Constitution. These rights include the freedom from political or religious coercion. Religious practice, regardless of religion or creed, is also guaranteed in absolute terms as is the freedom of thought, conscience, and creed. The freedom of movement within Iraq and the right of Iraqis not to be exiled or barred from returning to Iraq are also guaranteed in absolute terms. Such provisions granting unencumbered rights are a rarity in the 2006 Constitution.

Thus the religious parties succeeded ultimately in constricting the application of human rights protections. They did so in several ways. They refused the wholesale application of international law and international legal standards, even with respect to treaties to which Iraq is a party. Further, they employed a variety of stratagems to circumscribe civil rights, by asserting a higher protection for “public morality” and the like. These strategies are consistent with the overall majoritarian outlook, one which comes at the expense of the protection of minorities and the weak. It is, as the old saw goes, those who espouse unpopular views who need protections, not those proclaiming the political orthodoxy of the day.

The nature, extent, and meaning of the civil rights protections will, predictably, be decided by the Supreme Federal Court. The parties with the most restrictive view of civil rights have ensured that the pool of individuals in the Iraqi polity most likely to be influenced by the conservative religious establishments and therefore to share such a restrictive view—experts in Islamic fiqh—will qualify to sit on the Court to decide these issues. Doing so, of course, comes at the expense of that pool of individuals most likely to be independent of the religious authorities—as their colleagues in Egypt have demonstrated—Iraq’s civil judges. Barring substantial changes to the constitution on these issues in the current parliament, the constitutional ebb and flow which played out during the negotiations in 2003–2005 will likely recur on the court bench. How a genuine rule of law will reemerge in Iraq in this environment remains to be seen.

V. CONCLUSION

After the removal of the previous regime in 2003, two competing and almost mutually exclusive sensibilities contended to reestablish a constitutional order in Iraq. The first, which had ascendancy in the writing of the TAL, was a liberal-secularist coalition of political groupings. This coalition sought to place limitations on the extent to which a religious sensibility would inform the constitutional and legislative institutions of the state. It was generally helped (though not always) by the presence of U.S. interlocutors who were generally (though not always) sympathetic to the liberal-secular Weltanschauung, one

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146 Id. Art. 43(First)(A).
147 Id. Art. 42.
148 Id. Art. 44.
149 Mattar (n 144) 148.
which sought to place limits on the ability of the majority to dominate Iraq’s various minorities.\textsuperscript{150}

A coalition of Shi’i religious parties together with their Kurdish allies dominated the drafting of the permanent constitution in 2005, when the non-Kurdish secularists failed to secure meaningful representation in the first parliamentary elections. The result has been a constitution which seeks to weaken many of the institutions of the state. It does so by weakening the prerogatives of the civil judiciary while simultaneously increasing the potential for direct influence which the religious authorities will play in the constitutional and legal life of the country in the future. Furthermore, the civil rights provisions of the constitution, in contrast to the TAL, sacrifice certain basic individual rights and liberties in favor of communitarian rights and moral sensibilities. Both of these phenomena represent expressions of the majoritarian sensibilities of the Shi’ah religious parties.

In the meantime, the liberal-secularists were further weakened in this process. Their ostensible fellow liberal-secularist allies, the Kurds, allied themselves instead with the religious parties in exchange for concessions in favor of greater regional rights, at the cost of weakening the center in Baghdad. Indeed, the Kurdish leadership, with its announced agenda favoring maximalist autonomy, perhaps including eventual independence, might well have calculated that it would benefit later from further weakening the Iraqi state. Whether this calculation was wise, even from this narrow perspective, can only be known with time.

As to the ultimate fate of the provisions discussed in this article, it too remains to be seen. The penultimate draft of the 2006 Constitution contained a provision which forbade any constitutional amendments for a period of no less than two parliamentary cycles. When it became fairly obvious that the proposed draft was about to be defeated, the United States Embassy in Baghdad brokered a deal whereby the draft was changed to allow, though not to require, an amendment process to occur within the first four months of the first parliament.\textsuperscript{151} A Constitutional Review Committee has reported a draft of proposed amendments. Yet as of this writing in July 2010, parliament has not acted on the report.

The inability of the first parliament elected under the 2006 Constitution to settle these and other issues obviously suggests that there is a stalemate on a variety of constitutional issues, including, it is reasonable to suppose, on those issues digested above which were in contention throughout the two sets of negotiations in 2003–2005. It is now widely expected that proposals for amending the constitution will be addressed by the new parliament. There are reasons to believe that the religious parties are much weaker now, in light of what many in the Iraqi polity reportedly regard as inept governance over the past five years.\textsuperscript{152} The parties that have advocated most vociferously in favor of a religionist vision of the state—both Shi’i and Sunni—are greatly reduced in the current Parliament, while the two coalitions that ran on a nationalist agenda won a comfortable majority of the seats.\textsuperscript{153} It is not

\begin{itemize}
\item \textsuperscript{150} Indeed, in the negotiations for the 2006 Constitution, U.S. Ambassador Zalmay Khalilzad, perhaps because his imperative was to complete a text according to Washington’s timeline at all costs, actually advocated on behalf of the religious parties’ position insisting on the appointment of experts in fiqh to the Supreme Federal Court. Arato (n 44) 236.
\item \textsuperscript{151} Al-Istrabadi (n 2) 1641.
\item \textsuperscript{152} E.g., Sameer N. Yacoub, “Iraqis Take to Streets to Protest Government” \textit{Associated Press} (Baghdad, October 10, 2009), http://news.yahoo.com/s/ap/20091010/ap_on_re_mi_ea/ml_iraq, accessed October 12, 2009.
\item \textsuperscript{153} See note 4, above.
\end{itemize}
clear whether the prevailing parties will succeed in advocating for a strengthening of federal institutions, including the civil organs of the state, at the expense of the religious establishments. It is also unclear whether the Kurdish leadership might, in light of the lessons of the past few years, revert to its liberal-secularist orientation and support such an effort, or whether it will continue to suppress its liberalism to protect its regionalist gains.
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I. INTRODUCTION

There is today a growing consensus among policy-makers and international scholars that norms relating to human rights and democracy are binding on all nations, as well as a growing trend of increased involvement of the international community in internal constitutional processes with a view to ensuring that such norms are respected. Despite these trends, an increasing number of constitutional systems are considered to be legitimate by both the international community and by constitutional scholars despite the fact that they do not enjoy any form of internal legitimacy within the territory that they are designed to govern. The constitution that entered into force in Iraq in 2006 (hereinafter the 2006 Constitution) falls under that category: despite clear approbation by the international community of the new system of government that came into existence as a result of the 2006 Constitution, the text is devoid of any form of internal legitimacy as exemplified in the state’s incapacity to establish order and to provide basic services to its population and by the fact that a large number of its provisions are not being applied.

1 From 2005 to 2010, Zaid Al-Ali was a legal advisor to the United Nations, focusing on constitutional and parliamentary reform in Iraq. The views expressed in this chapter are entirely his own. The author is indebted to Faisal Al-Istrabadi, Asanga Welikalaa, and Reidar Visser for their comments and criticism, and to Hakan Seckinelgin at the London School of Economics’ Department of Social Policy for allowing the author to test many of the ideas set out in this chapter in front of his class.

2 The Arabic original of the Iraqi Constitution was published in the Iraqi Official Gazette Issue 4012 (December 28, 2005). An official English language translation of the Iraqi Constitution has not been published and is not available online. An unofficial translation of the final draft is available here: http://www.uniraq.org/documents/iraqi_constitution.pdf, accessed March 15, 2010. All translations contained in this article are the author’s own. Note also that the 2006 Constitution came into force by virtue of Art. 144, which provides that “[t]his Constitution shall come into force after the approval of the people thereon in a
The purpose of this contribution is to explore how it can be that, despite the attention of international institutions and experts in a particular constitutional process, and despite the application of international norms relating to democratic processes and fundamental rights, a constitutional process can give rise to a text that is incapable of achieving acceptance within the relevant country’s borders. The proposition that is put forth here is that local context is the most important factor that should be considered if a constitution is to have any chance of acquiring some form of internal legitimacy in the future. And yet, it has been given scant attention by comparative constitutional law scholars and international organizations such as the United Nations, who have been mostly concerned with issues such as the universal application of fundamental rights.

This article seeks to demonstrate how local context can impact a text’s change of achieving internal acceptance. It begins by defining constitutional legitimacy and by arguing that although the 2006 Constitution has been endorsed by the international community, it was essentially dead on arrival in Iraq (section II). An effort is made, through the use of two case studies, to explain how this situation was brought about. The first seeks to show how the drafters’ lack of understanding of Iraq’s institutional context brought about the collapse of its system of parliamentary oversight under the 2006 Constitution (section III), while the second shows how the constitutional drafters (and the internationals who advised and guided the constitutional process) had misjudged the relative popularity of the parties that were allowed to control the drafting process and that dictated the final text’s content (section IV). Finally, an effort is made to define what is meant by “local context” and to identify its different components, particularly with a view to encouraging greater attention and understanding of local considerations and interests by all parties involved in a constitutional process in the future (section V).

II. CONSTITUTIONAL LEGITIMACY WITHIN AND WITHOUT IRAQ

A. Constitutional Legitimacy Defined

Different groups of scholars have been debating the issue of constitutional legitimacy for some time, more or less in isolation of each other. For the most part, these debates have concerned themselves with discrete factual, historical and legal contexts and fall within the following three categories:

1. The legitimacy of the U.S. Constitution: This debate is informed by the manner in which the U.S. Constitution came into existence, the particular wording that it uses, and by the long history of institutional and legal creation and revision that has taken place since its ratification;  

   
   general referendum, its publication in the Official Gazette, and the seating of the government that is formed pursuant to this Constitution.” Therefore, although the constitution was drafted, approved in a referendum, and published in the Official Gazette in 2005, the first government that was formed pursuant to the constitution was actually seated in 2006, which means that the final text only entered into force in 2006 and not in 2005.

The legitimacy of European integration: This debate, which is mostly driven by the pace of European integration and by the recent efforts to establish a constitution for the European Union, is concerned with a number of distinct issues, most notably that these efforts have been taking place in the context of a democratic deficit; and

The legitimacy of constitutions established under the “triumphalist scenario” (which more or less corresponds to constitutions drafted after struggles of national liberation): Scholars interested in this area are concerned with issues such as whether there is a commitment in the new social order to limitations on ordinary political power and whether citizens have any faith that the values embodied within their particular constitutions will be legitimately pursued.

As each of these debates is informed by its own specific context, and is stimulated by specific circumstances and concerns, the standards that they establish cannot be automatically applied to all constitutions or constitutional processes. However, the scholars that have engaged in these debates provide us with the tools, the terminology, and the mechanism to study and evaluate constitutional legitimacy. Indeed, several types of legitimacy can be derived from the principles that they established and applied to situations such as the Iraqi context. As such, a constitution can be considered to be legitimate where:

1. a sufficient number of citizens accept the governmental system that it establishes, such that a stable government can be established (legitimacy as stability);
2. the constitution accurately reflects the particular political morality, or at least reconciles the different political moralities that exist within the country in question (normative legitimacy); and
3. the international community recognizes the system of government that the constitution sets in place (international legitimacy).

The first two of these forms of legitimacy are, for the most part, dependent on internal matters. In the case of legitimacy as stability, it would be impossible to expect that a particular constitution could be accepted by all the citizens that it is intended to govern. The main concern is therefore to obtain either the active or passive approbation of enough citizens to allow the system of government that it establishes to function as intended. The concern is also to create an environment that will discourage dissenters from expressing their disapproval through violent means, or at least to limit any acts of violence to the extent that the state can satisfy its essential functions regardless. In so far as normative legitimacy is

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5 Bruce Ackerman, "The Rise of World Constitutionalism" (May 1997) 83 Va. L. Rev. 771, 780.


concerned, very few if any states can claim that its entire population shares the same vision of how its state should function or what its specific powers should be. The concern is therefore to strike the proper balance between the aspirations of all major social, ethnic, or religious groups within that same country.

International legitimacy has its own particularities. Its most obvious manifestation is membership in the United Nations, while the most obvious manifestation of international illegitimacy is expulsion from that same organization. The most prominent precedent of this phenomenon is the exclusion of apartheid South Africa and its subsequent readmission into the international community in the 1990s. However, despite the increased number of international treaties, conventions, and norms relating to democratic and individual rights, and despite the growing number of scholars who maintain that such norms should be binding on all national constitutional orders, it would appear that apart from a small number of extreme examples such as apartheid South Africa, the only genuine requirement for a state to acquire international legitimacy is the ability to exercise authority within internationally recognized borders.

**B. The International Legitimacy of the 2006 Constitution**

In the case of the Iraqi constitution-making process, the international community played a more substantial role than it would normally have done as a result of the internationally recognized occupation that was established in 2003. This is to the extent that the United Nations Security Council imposed on the Iraqi authorities the requirement that to work toward a “federal” Iraq (a departure from Iraqi legal tradition), and provided that “direct democratic elections [should be held] by 31 December 2004 . . . to [elect] a Transitional National Assembly, which will, inter alia, have responsibility for . . . drafting a permanent constitution for Iraq leading to a constitutionally elected government by 31 December 2005.”

During the drafting process itself, the international community was represented by the United Nations Assistance Mission for Iraq and by a number of foreign embassies, most notably representatives from the U.S. Embassy. The individuals who were providing advice on the ground to the Iraqi constitutional drafters (typically referred to as the “Constitutional Committee”) disagreed as to the role that they should be playing, and to the type of advice

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9 See, for example, the discussion on how the dispute between the People’s Republic of China and the Republic of China (Taiwan) was resolved before the United Nations in Gregory H. Fox, “The Right to Political Participation in International Law” (Summer 1992) 17 Yale J. Int’l L. 539, 599.


that should be provided. By and large however, the international community’s main concerns were that: (i) the drafting process should take place within the time frame imposed by the Security Council; (ii) international human rights standards should be enshrined in some form in the constitution; and (iii) the constitution should allow for the establishment of a democratic and functioning system of government. These three goals were pursued with varying degrees of determination.

By way of example, Art. 2 of a draft that was circulated by the Constitutional Committee on August 11, 2005 (four days before the officially sanctioned deadline for producing a final draft) provided that Islam should be the official state religion, and that it should be either “the principal source of legislation” or “a principal source of legislation.” It also provided that “it is forbidden to enact laws which contradict the principles of Islam.” Representatives from the U.S. Embassy were particularly concerned that Iraq, which had previously been considered a relatively secular state, was in the process of becoming an Islamic theocracy under its watch. The U.S. Ambassador therefore intervened and forced the adoption of a formulation that was more acceptable to the international community. The final version of Art. 2 therefore provides not only that “Islam is the official religion of the State and is a foundation source of legislation” but also that “[n]o law may be enacted that contradicts the principles of democracy.” Despite the fact that there is obviously no agreement between international or Iraqi scholars as to what “the principles of democracy” actually are, the purpose of this particular formulation was to preempt any future interpretation of Islam that could bring about the establishment of an Islamic theocracy or that could lead to a violation of internationally recognized rights.

The international community also intervened to protect the rights of women, a matter of great concern. On July 26, 2005, the Constitutional Committee circulated a draft according to which “[t]he state guarantees the fundamental rights of women and their equality with men, in all fields, according to the provisions of Islamic Sharī’ah, and assists them to reconcile duties towards family and work in society.” A number of internationals immediately protested that this wording, far from establishing gender equality, imposed a certain role as well as family duties on women in a way that does not conform with the principle of equality. Four days later, that provision was changed to what eventually became Art. 29 of the final text, according to which

. . . family is the cornerstone of society. The state shall preserve the family’s principles and religious, moral and national values. The state shall guarantee the protection of motherhood and childhood, and oversee minors and adolescents and provide them with suitable environment to develop their capacities and capabilities.

The advantage that this wording presented was clear: it no longer imposes any obligations on women, and merely provides that those women who choose to become mothers will have their rights (which in an Iraqi context translates as the right to maternity leave and to free health care) protected. The wording has in fact caused consternation among some

\[\text{Draft Constitution (August 11, 2005), Unpublished. The Constitutional Committee had not at that point reached unanimity on the exact wording that Art. 2 should adopt, which explains the fact that it contains different options.}\]

\[\text{Art. 6, Chapter 3, Draft Constitution (July 26, 2005) Unpublished.}\]

\[\text{Draft Constitution (July 30, 2005) Unpublished.}\]
men that fatherhood (and the corresponding right to paternity leave) is not guaranteed under the constitution.

By contrast, international advisors and observers were far less moved to intervene where Iraq’s governance structure was threatened by poor drafting or by particular political interests. A striking example is Art. 110 of the 2006 Constitution, which lists the powers that are to be exercised exclusive by the federal government, combined with Art. 115 which provides that “[a]ll powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and provinces.” The manner in which Art. 110 is formulated (the federal government has exclusive authority in “formulating fiscal and customs policy” but no mention is made whether it can actually execute or implement fiscal policy) has led a number of scholars to conclude that the federal government is prevented from levying any taxes.15

That deficiency, combined with the constitution’s provisions relating to the formation of regions (which are so permissive that any number of provinces (also known as governorates), whether contiguous or not, can join together to form a single region), caused a great deal of consternation among some internationals. Nicholas Haysom, former legal advisor to Nelson Mandela, was appointed by the United Nations in 2005 to serve as the director of the Office of Constitutional Support in Baghdad. In an internal report written before the constitutional negotiations were concluded, he wrote that “the provisions for the conversion of governorates into a region outside Kurdistan create a model for the territorial division of the State which in our view leaves the central government underpowered and possibly under-resourced.”16 Professor Yash Ghai, one of the world’s leading constitutional scholars, was also retained by the United Nations to act as Process Advisor to the Constitutional Committee. In an internal report completed before the referendum date, later published online, he expressed “serious reservations whether the [draft constitution] as it stands can be fully and effectively implemented, without grave danger to state and society.”17 Despite these concerns, and despite the risks that this wording created, the international community did not mobilize in the way that it did to protect the fundamental rights of women or to mitigate the influence of religion, and declared that it was satisfied with the constitution’s final text. After the referendum date, and by virtue of another Security Council Resolution, Iraq was reintegrated into the community of nations.18

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15 One account of how the debate around the taxation issue took place can be found in Peter W. Galbraith, The End of Iraq (Simon & Schuster, 2006) 199 (“A British treasury official serving as an advisor to his country’s embassy nearly derailed the constitution two hours before the final deadline. He was reading an English translation being made as drafts of the Arabic text became available, and realized the federal government had no tax power. He was about to charge into a meeting of Iraq’s political leaders when a quick-thinking Kurdish constitutional advisor grabbed an available westerner—me—to explain the situation. The omission, I told him, was no mistake and he might want to consult with his ambassador before reopening an issue that could bring down Iraq’s delicate compromise”).


18 UNSC Res 1637 (November 11, 2005) S/Res/1637 (in which the Security Council welcomed “the drafting of a new constitution for Iraq and the recent approval of the draft constitution by the people of Iraq on
C. The Internal Illegitimacy of the 2006 Constitution

Pursuant to the definition set out above, the 2006 Constitution could be considered to be legitimate within Iraq’s borders if it enjoyed a sufficient degree of acceptance among the general population to guarantee stable government, or if it resolved Iraqi political morality.

The 2006 Constitution was adopted by virtue of a referendum that took place on October 15, 2005 and which saw close to 80 percent of voters approve the final text. While some commentators have upheld the seemingly overwhelming support that the constitution enjoys among the general population as evidence of its internal legitimacy, the issue is more complicated than it appears at first reading. First, there is no dispute that the vast majority of the Iraqi population never had the opportunity to review the 2006 Constitution’s final draft before the referendum date, as a result of the fact that a number of changes were introduced two days before the referendum date. Iraqis therefore approved a text that they had not seen, let alone read.

Second, Iraqis voted in favor of the 2006 Constitution on the basis that it was to be amended immediately after its passage. Two days prior to the referendum date, in an effort to stave off a possible rejection at the polls, the drafters incorporated Art. 142, according to which a constitutional revision process should be established immediately after the new parliament was to enter into session, with a view to making recommendations for amending the constitution which should then be put to another referendum within four months. Leading politicians organized a press conference to announce the change on October 13, 2005 in order to announce that this revision process would take place and to encourage Iraqis to vote in favor of the text. Although the process did begin shortly after the 2006 Constitution entered into force, very little progress has been made and, at the time of writing, it has still not ended, in clear violation of Art. 142 and therefore of the will of the Iraqi people.

Third, a number of commentators have noted that Iraq’s constitutional process was instigated by a military invasion and that a large part of the process took place under occupation, which is what led one of the country’s major communities to vote in its entirety against the final text in the referendum. Events since the constitution came into force confirm that a number of the country’s other major political and social groups continue to actively reject the new constitutional order, including the Şadrist Movement, which in the

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15 October 2005” and in which it noted “the willingness of the international community to work closely with the Government of Iraq [that was to be elected in application of the recently approved constitution] with respect to efforts to assist the Iraqi people”.


20 Office of Constitutional Support (n 10) 49.


22 See, for example, Jonathan Morrow, United States Institute of Peace, “Iraq’s Constitutional Process II: An Opportunity Lost” (December 2005), http://www.usip.org/files/resources/sr155.pdf, accessed March 15, 2010 (“The draft constitution attracted criticism from a range of Iraqi groups and parties, and in particular Sunni Arab groups. After the National Assembly adopted the draft constitution on August 28, influential secular and religious Sunni Arab political groups, including the Iraq Islamic Party, the National Dialogue Council, and the Muslim Scholars Association, publicly indicated that they would oppose the draft at the national referendum . . . Significantly, opposition to the text was not confined to Sunni Arab groups. Former Prime Minister Ayad Allawi had also publicly opposed the model of regional federalism in
March 2010 election was confirmed as one of the country’s largest political forces. In fact, the 2006 Constitution was regarded with so much suspicion in some quarters that it gave new impetus to the civil conflict that had already been raging for some time: the rate of monthly attacks on Iraqi security forces more than doubled immediately after the constitution entered into force. Many of Iraq’s leading politicians had in fact predicted that this increased instability would occur months before the event.

The constitution’s claim to normative legitimacy is equally debatable, given that it makes no attempt to resolve Iraqi political morality, particularly in relation to the issues that were most important to Iraqis. For example, although Iraqis are overwhelmingly concerned with the issue as to whether their country should be transformed into an ethno-sectarian federation, the constitution merely provides that the issue will be resolved by future legislation. Indeed, Art. 118 of the final Constitution provides that “[t]he Council of Representatives shall enact, in a period not to exceed six months from the date of its first session, a law that defines the executive procedures to form regions, by a simple majority of the members present,” therefore leaving open the possibility that federal regions could be formed on the basis of religious affiliation, something to which a large segment of the population, perhaps even a majority, is completely opposed. Also, in relation to how Iraq’s upper chamber should be formed, Art. 64 merely provides that “[a] law, enacted by a two thirds majority of the members of the [first chamber of parliament], shall regulate the Federation Council formation, its membership conditions and its specializations and all that is connected with it.” To this date, which is to say more than six years since the Constitution entered into force, that law (as well as many others that are required under the constitution) has not been passed or even debated in the country’s parliament. A number of commentators, including participants in the constitutional process, maintain that the 2006 Constitution’s failure to resolve these issues is yet another basis for disagreement and conflict in the country.

the constitutional draft. The influential Shia clerics Moqtada al-Sadr and Ayatollah Mohammed al-Yaqoubi indicated their opposition to the draft at the referendum); Michael Howard, “Moqtada Sadr Throws Iraqi Unity Talks into Disarray” Guardian (London, February 20, 2006), http://www.guardian.co.uk/Iraq/Story/0,,1713411,00.html, accessed March 15, 2010 (in which Muqtada al-Ṣadr, who at the time was arguably the most influential of Iraq’s political leaders, is quoted as saying “I reject this constitution which calls for sectarianism and there is nothing good in this constitution at all”).


26 See Kanan Makiya, “Present at the Disintegration” The New York Times (New York December 11, 2005), http://select.nytimes.com/gst/abstract.html?res=FA0913F83A550C728DDDAB0994DD404482, accessed March 10, 2010 (“All signs suggest that this Constitution, if it is not radically amended, will further weaken the already failing central Iraqi state. In spite of all the rhetoric in that document about the unity of the ’homeland of the apostles and prophets’ and the ’values and ideals of the heavenly messages and findings of science’ that have played a role in ’preserving for Iraq its free union,’ it is disunity, diminished sovereignty and years of future discord that lie in store for Iraq if the Constitution is not overhauled”); and The International Crisis Group, “Unmaking Iraq: A Constitutional Process Gone Awry” (September 26, 2005) Middle East Briefing No. 19, http://www.crisisgroup.org/home/getfile.cfm?id=1978&tid=3703&l=1, accessed March 10, 2010 (“Key passages, such as those dealing with decentralization and with
Given all of the above, the question that must be answered is: how did the constitutional drafters and their international advisors manage to put together a text that both fanned the flames of Iraq’s civil conflict and runs contrary to the principles upheld by large segments of the country’s population? The following case studies seek to show that the drafters’ principal failure was to misunderstand local context. They misunderstood the legal and institutional framework that they sought to amend, and the political context in which they were operating.

III. CASE STUDY 1: PARLIAMENTARY OVERSIGHT UNDER THE 2006 CONSTITUTION

However flawed and undemocratic the system of government established by Iraq’s previous constitutional order, it remained in place for decades and left an important mark on working practices and on institutional relationships (including institutions that are not explicitly mentioned in the 1970 Constitution). The purpose of this case study is to show how the 2006 Constitution modified parts of that culture in ways that were unanticipated. Also, precisely because some of these changes were not anticipated, the constitution and the parties responsible for its implementation did not provide for the type of measures that were needed to ensure effective government. The impact, discussed at the end of this case study, is that the new constitutional order has contributed to the general breakdown of the state, to a lack of trust among the local population in the new constitutional order’s ability to engender stability and good government, and to the corresponding sense of constitutional illegitimacy in Iraq.

A. Oversight under the 1970 Interim Constitution

Parliamentary oversight, the process through which parliament oversees and monitors the performance of the executive branch of government with a view to identifying inefficiency, waste or even instances of corruption, depends on a number of factors to function effectively. Given that parliaments typically do not have the means to investigate the manner in which government agencies invest public funds, they increasingly rely on supreme audit institutions (SAIs) to act as their eyes and ears for this purpose. SAIs, which are staffed by accounting experts who are charged with auditing government accounts, evaluate the efficiency of the expenditure of public funds and publish their findings in public reports that

the responsibility for the power of taxation, are both vague and ambiguous and so carry the seeds of future discord. Many vital areas are left for future legislation that will have less standing than the constitution, be more vulnerable to amendment and bear the sectarian imprint of the Shiite community [which forms the majority of the Iraqi population] given its likely dominance of future legislatures”)

27 Supreme Audit Institutions are defined as “national agencies responsible for auditing government revenue and spending. Their legal mandates, reporting relationships, and effectiveness vary, reflecting different governance systems and government policies. But their primary purpose is to oversee the management of public funds and the quality and credibility of governments’ reported financial data” (The World Bank, “Features and functions of supreme audit institutions” (October 2001) PREMnotes Number 59). For more on the functions and workings of supreme audit institutions, see Carlos Santiso, “Eyes wide shut? The politics of autonomous audit agencies in emerging economies” (May 2007) CIPPEC; and Kenneth M. Dye and Rick Stapenhurst, “Pillars of Integrity: The importance of Supreme Audit Institutions in Curbing Corruption” (1998), http://siteresources.worldbank.org/WBI/Resources/wbi37133.pdf, accessed March 15, 2010.
they will then submit to the legislature. Parliament, armed with detailed and expert information, will act by either questioning or sanctioning the government, but rarely by commending it. One of the difficulties, given that the process is led by such a heavily politicized body, is to ensure that the process remains as apolitical as possible.

Under its previous constitutional order, Iraq’s parliamentary oversight system was led by the National Council (subsection 1, below), which depended on information provided to it by the state’s SAI (subsection 2, below). The collaboration between the two institutions (subsection 3, below) allowed for what was said to have been relatively effective parliamentary oversight under difficult circumstances (subsection 4, below).

1. The National Council

Iraq’s previous constitutional order, which entered into force upon the publication of the 1970 interim constitution (hereinafter the 1970 Interim Constitution), was dysfunctional. It concentrated power in the “Revolutionary Command Council” (hereinafter the RCC), a body of up to twelve members that enjoyed both executive and legislative functions. Art. 42 provided that the RCC has the authority to “issue laws and decrees having the force of the law” and “to issue whatever regulations are required in order to ensure the application of the laws in force.” The RCC’s executive authority was strengthened by the fact that its president was also the president of the Republic (Art. 38(a)), who in turn was responsible for “directing and supervising the works of the Ministries, public establishments and to coordinate among them” (Art. 57(i)). The RCC appointed its own members, all of whom had to be drawn from the “National leadership of the Socialist Arab Ba’th Party” (Art. 38(c)), and was answerable only to itself (Art. 38(f)).

Although the 1970 Constitution does provide for the existence of a legislature (referred to as the “National Council”), its independence and effectiveness as a separate branch of government was seriously compromised as a result of a number of restrictions on its work and independence from the RCC. By way of example, the National Council was not permitted to legislate on “military and financial matters, and matters relating to public security” (Art. 53). The constitution deferred matters relating to the National Council’s formation to future legislation (Art. 46), which could obviously only be passed by the RCC in accordance with Art. 42. Over the coming three decades, three separate legal frameworks for the National Council were established through legislation.

Law 228 (1970) was by far the most restrictive of the three. It established that all 100 members of the National Council should be directly appointed by the RCC (Art. 4) and restricted the Council’s work to a few discrete areas. Law 55 (1980) established a new framework for the National Council, and although it provided that all members should be elected (Art. 2), the impact of this new regime was seriously limited by the conditions that individuals had to meet in order to be eligible for election.

28 Note that although an official translation of the 1970 Interim Constitution was published in Issue Number 10 (1971) of the Weekly Gazette of Iraq, the language used in that translation is often imprecise. All translations of the 1970 Interim Constitution are therefore the author’s own.

29 Note that all Iraqi laws are published and only enter into force by virtue of their publication in the Official Gazette (see http://www.iraqog.org/english/index.asp, accessed March 15, 2010). Access to the Official Gazette outside of Iraq has until recently been problematic. The entire contents of the Gazette can now be accessed and searched (in Arabic only) online at http://www.iraq-ild.org, accessed March 15, 2010.

30 For the sake of context, and as a historical aside, it is worth noting that in 1970, the Iraqi Communist Party (the “ICP”) was a strong political force in the country, and was considered to be capable of mobilizing
individual would have to be “a believer in the principles of the national socialist revolution” to be eligible to stand for election (Art. 14(1)(c)). Law 26 (1995) confirmed that all of the National Council’s members should be elected (Art. 2), but conditions for eligibility were restricted even further. Art. 15(3) provided that each candidate must have “contributed to the Iraq-Iran war and the 1991 Gulf War either by having participated directly, or through the provision of financial and intellectual support.” The impact of these restrictions was to deprive the National Council of any meaningful political function, reducing it to the status of a bureaucratic institution.  

As these restrictions were being erected, some of the National Council’s responsibilities were expanded. On the issue of parliamentary oversight, the 1970 Interim Constitution was amended by Law 385 (1980), according to which the National Council had the authority to exercise oversight over the council of ministers. Law 55 (1980) added some additional detail in relation to how this should take place: it provided that “any member of the Council of Ministers could be required by the National Council to provide clarifications or in order to be questioned, in accordance with the National Council’s bylaws” (Art. 47(6)). Law 55 also provided that the National Council could suggest that “individual members of the Council of Ministers should be relieved from their functions” (Art. 57(7)). Law 26 (1995), which dedicated an entire section to the National Council’s oversight function, added that individual members of the Council were entitled to question ministers (Art. 57), and provided that the President of the Republic could request of the Council that it investigate the performance of particular government departments or state-owned enterprises (Art. 59).  

2. The Board of Supreme Audit

Iraq’s supreme audit institution (known in English as the “Board of Supreme Audit,” or the BSA) also underwent a number of fundamental changes that impacted the effectiveness of the National Council’s oversight function. The BSA, which was first established by Law 17 (1927), originally had a limited mandate. Law 194 (1980) introduced a number of wide ranging reforms. In particular, it widened the BSA’s scope by requiring that it “evaluate the state’s financial and economic policies” and that it “investigate the application of all laws relating to financial and economic matters” (Art. 2). It also granted the BSA authority to investigate “all governmental agencies that invest public monies” (Art. 3), which is to say, to carry out performance evaluation reports for each government ministry and department. The BSA was also required to act in the event of financial malfeasance on the part of any public entity or employee (Art. 11), including the possibility of referring the matter directly to the courts (Art. 12). Finally, it linked the BSA to both the RCC and the National Council by providing that it must submit its annual report to both institutions (Art. 23).
The BSA’s legal regime was amended by Law 6 (1990), which was itself subsequently amended by Coalition Provisional Authority Order 77 (2004). Among other things, Law 6 (1990), as amended, explicitly linked the BSA to the legislative authority by providing that it must “investigate and report on matters relating to the efficient disbursement and use of public funds as formally requested by the Coalition Provisional Authority, the Iraqi Governing Council or any successor body vested with national legislative authority” (Art. 2(6)). In a development that is particularly relevant for this case study, Art. 2 of Order 77 amending Law 6 (1990) abolished the BSA’s authority to refer matters relating to financial malfeasance directly to the courts. The BSA must now refer all allegations or evidence of fraud to the relevant Ministry’s Inspector General or to the Commission on Integrity (Arts. 2(7) and 10).

3. The Collaboration between the National Council and the BSA

One of BSA’s essential roles prior to 2003 was to support the National Council in exercising its oversight function. A specific mechanism was established to facilitate the collaboration between the BSA and the Council, according to which the BSA would send advance copies of its performance evaluation reports to the Council, accompanied by a list of the outstanding clarifications that the BSA required from the relevant government department. A joint committee would then be formed between the authors of the specific report and the relevant parliamentary committee in order to follow up on the draft report’s contents. The relevant minister or government official would be expected to appear before this joint committee and provide testimony in relation to all outstanding issues.

This system was obviously imperfect, notably because it could not be applied in relation to military issues as well as other matters. However, in areas where the National Council was permitted to function by the 1970s Interim Constitution and by the laws in force at the time, parliamentary oversight was effective. Although very little hard data on the oversight of government activities survived the widespread arson of government buildings that followed the war in 2003, a significant amount of institutional memory was retained by the staff members that continue to exercise their functions in the Iraqi state. Thus, whereas the National Council is now completely defunct, none of its staff having been retained in the post-war period, the BSA remains essentially as it was before 2003, and its staff has retained the memory of its former collaboration with the National Council, which it describes as “effective enough to make ministers tremble with fear in the event they were called to provide evidence in relation to a specific audit report.”

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35 The Commission on Integrity, an anti-corruption agency, was established by the Coalition Provisional Authority by virtue of Order 55 (2004). The Inspectors General were established by virtue of Order 57 (2004). Art. 1 of Order 57 (2004) provides that each ministry is to have one Inspector General, who is mandated to “conduct investigations, audits, evaluations, inspections and other reviews in accordance with generally accepted professional standards.” Both institutions are said to have been modeled on the U.S. own anti-corruption framework.


37 Interview with Māhmed Al-Tā’i, Vice President, Iraqi Board of Supreme Audit (Amman January 2009 and Beirut October 2009); and Interview with Muḥammad Al-Saʿādī, Senior Advisor, Iraqi Council of Representatives (Beirut March 2009). Note, however, that from 1990 to 2003, Iraq was subject to an
4. Local Context Considered

Although the pre-2003 system of parliamentary oversight was clearly imperfect, it was deliberately designed to function within Iraq’s undemocratic and single party state, and any success that it may have had in encouraging the efficient use of public funds depended on that framework. More precisely, it depended on a number of factors to function (in the areas that it had a mandate to oversee), including but not limited to: (i) the fact that the National Council represented the President of the Republic in the implementation of its work; and (ii) the National Council’s overtly non-political nature, which allowed oversight to retain a purely bureaucratic character.

In the United Kingdom, parliamentary oversight evolved over a period of more than a hundred years within the context of a stable two-party constitutional system, and in order to reflect a general concern and desire for fairness among the general public and public servants. A number of detailed rules were established in that context. By way of example, the House of Commons’ Public Accounts Committee (PAC), the preeminent parliamentary committee in the UK, is responsible for overseeing the government’s performance and depends on its privileged relationship with the National Audit Office (the UK’s SAI) to carry out its work. Given the UK’s two-party system, and given the PAC’s importance in the parliamentary system, the PAC is always headed by a senior member of the opposition, usually a former minister. Crucially also, in order to avoid acrimonious political argument interfering with the effort to exercise effective oversight, the PAC never requires ministers to provide evidence (so as to avoid encouraging the ruling party to interfere with the process by defending one of its own) and instead limits its interrogatory sessions to senior public servants. 38

The rules and the context in which the Iraqi, the UK, and other oversight systems emerged may be different but the point is the same: specific institutional mechanisms are most likely to function effectively when they are designed to fit the local context.

B. The Transition to a New Constitutional Arrangement

1. Parliamentary Oversight Under the 2006 Constitution

The 2006 Constitution institutes a number of important changes to Iraq’s framework for parliamentary oversight. First, Art. 48 provides for the establishment of an entirely new legislative body (referred to in English as the “Council of Representatives,” also COR), 39 which is to be directly elected by the people with only a few restrictions on membership (Art. 49). In a reversal of the restrictions imposed under the 1970 Interim Constitution and the legislation in force pursuant to that text, Law 16 (2005), which regulated the elections that were to take place pursuant to the 2006 Constitution, imposed as a restriction that individuals who fell under the scope of the de-ba‘thification law (CPA Order 1 (2003)) could not be candidates in the national elections. The COR was also granted a wide range of powers, establishing what is perhaps the Arab region’s strongest parliamentary system

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international embargo (pursuant to UNSC Res 670 (1990)) which distorted all economic activity within the country as well as the state’s finances (see Abbas Alnasrawi, Iraq’s Burdens: Oil, Sanctions, and Underdevelopment (Greenwood Press, Westport 2002)). There is, once again, very little information in relation to how parliamentary oversight was impacted during this period.


of government. By way of example, the constitution explicitly imposes on the COR the obligation to exercise oversight over the executive branch of government, and does not set out any limitations to that function (Art. 61(2)), therefore extending its mandate to the Presidency and to all members of the Council of Ministers, including the ministers of defense and of the interior. The COR is also granted strong discretionary powers to withdraw confidence from individual ministers or the government as a whole (Art. 61(8)).

The COR’s by-laws affirm that it is “the highest legislative and oversight authority” in Iraq (Art. 1), 40 and, in another innovation, grants the COR authority over not only ministers, but also to “any other official in the executive branch of government” (Art. 32(1)). Finally, the 2006 Constitution recognizes the BSA’s status and importance for the first time in its history, guaranteeing its “financial and administrative independence” (Art. 103(1)), while at the same time recognizing that it is answerable to the COR (Art. 103(2)).

In summary, the preexisting relationship between the Iraqi legislature and the BSA has now been granted constitutional status, while the COR’s mandate to exercise oversight has been significantly broadened. The constitution’s drafters clearly hoped that the COR’s new powers, combined with its effective and now unbreakable institutional relationship with the BSA, would firmly establish a check on the executive branch of government, particularly in order to prevent the excesses and abuses of the past, this time in relation to all areas involving public expenditure.

2. Iraq’s New Electoral System and Its Impact on Oversight

A number of other changes were provided for under Iraq’s new constitutional order, some of which were to impact the COR’s oversight functions in ways that the Constitutional Committee did not anticipate. Law 15 (2005), which was decided upon months before the 2006 Constitution was completed and approved in a referendum, provided the framework for the 2005 parliamentary elections, which, it turns out, is extremely permissive. The Law does not impose any thresholds for participation in the COR other than obtaining enough votes for a single seat (which do not even need to be obtained in the same constituency). 41 The impact was that the December 2005 elections gave rise to a parliament that was populated by dozens of political parties, the largest of which enjoyed no more than around 10 percent of seats and some that had only a single representative. 42 Pursuant to Art. 76(1) of the 2006 Constitution, a government was formed by the nominee of the largest bloc within the COR, but only after months of tense negotiations that saw nineteen parties, as well as a large number of independents, take hold of ministries.

Therefore, although government and parliament are inextricably linked under the new constitutional order, both institutions were so internally divided that any meaningful collaboration (whether within each institution or between the two) is practically impossible. Even the expectation (expressed by a large number of observers and policy makers) 43 that the country’s politics would split into separate confessional and ethnic groups proved

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40 The Arabic language original of the COR’s by-laws are available at http://parliament.iq/, accessed March 15, 2010. Note that although an official translation is available on the COR’s website, it is unreliable. All translations here are therefore the author’s own.

41 See Arts. 16 [as mentioned in the comment, this provision was amended in 2009] and 17 of Law 16 (2005).

42 Note that although some of these parties were grouped together in larger electoral alliances, the majority broke down short after the 2005 elections.

43 See, for example, Galbraith (n 15).
misguided, with each individual group breaking down into a plethora of parties that only rarely collaborate with each other.\textsuperscript{44} Under this system, each political party has a sense of fragility that encourages it to place party interests before national concerns. Given the new framework, and given the COR’s fractious nature, it seemed unlikely at best that the COR would be able to organize any meaningful oversight over the executive.

The drafters of the 2006 Constitution had ignored two contextual elements that were set to undermine their chosen framework for oversight. The first is that said framework was merely a replica of the previous system, which itself was designed to function within a larger context that no longer existed. The second was that the BSA, which had grown accustomed to collaborating with the National Council’s bureaucracy within the confines of a one party state and of a command economy, was less than tempted to engage with the COR’s new class of politicians and therefore decided to passively resist their obligations under the 2006 Constitution by avoiding contact with the COR to the extent possible.\textsuperscript{45} Had the drafters anticipated that context would play such a determinant role, they could have provided for some additional mechanisms to counterbalance the impact that politics was to play on oversight. The fact is, however, that it was years before anyone had realized that the COR as a whole was not engaged in any oversight whatsoever, despite its expanded powers.

C. The Decline of Parliamentary Oversight and Its Impact on Constitutional Legitimacy

1. The Institutional Breakdown

What with the COR’s new makeup, and with the tense atmosphere between its members, there was little interest in maintaining the relationship with the BSA, or even in making use of its services. Parliamentary oversight therefore came to a complete halt. In a country with no tradition of judicial review, there remained no check on government apart from elections, which in any event were not only years away but were unlikely to produce any real change.

From 2006 to 2009, virtually none of the COR’s members had read any of the BSA’s reports. The Finance Committee (which should have been the principal beneficiary of the BSA’s work) was not even certain how many reports it had received during 2008.\textsuperscript{46} There was also very little understanding within the COR of what the BSA was, and what its responsibilities were.\textsuperscript{47} Most importantly perhaps, during this same time period, officials from the BSA only traveled to COR’s premises for meetings on a single occasion.\textsuperscript{48} As already mentioned, the BSA was content during this same period not to become involved in the COR’s political difficulties. It continued auditing the state’s accounts but did not approach the COR (which, it argued, it was not obligated to do anyway) with a view to reinvigorating

\textsuperscript{44} Even the traditional union between the two main Kurdish parties has been undermined by the emergence in 2009 of two large opposition parties.

\textsuperscript{45} Interview with Maḥmūd Al-Ṭā‘ī, Vice President, Iraqi Board of Supreme Audit (Beirut March 2009).

\textsuperscript{46} Interview with Sāmī Aṭrushi, Member of the Council of Representatives’ Finance Committee (Beirut April 2009).

\textsuperscript{47} Interview with Êçâlydar al-Ābādī, Chairman of the Council of Representatives’ Economics Committee (London June 2009).

\textsuperscript{48} Interview with Sāmī Aṭrushi, Member of the Council of Representatives’ Finance Committee (Beirut April 2009).
oversight in Iraq. Finally, from 2006 to 2009, not a single government official was called to provide evidence before the COR.

When, in 2009, after the COR's senior leadership position had fallen under the control of some of the government's main opponents, it did start calling government officials to answer allegations of financial improprieties, this was met by strong resistance. A series of retaliatory threats were made by the government's allies within the COR (notably to lift individual MPs' immunity and to launch prosecutions before the courts). The government also used its significant influence within the COR to block any oversight initiatives by imposing dozens of administrative hurdles, succeeding in some cases to delay the process by up to six months. The COR did manage to question four senior officials in 2009, three of whom were ministers close to the Prime Minister, which led to accusations from the government and from most observers that the process was more the result of a political vendetta rather than an effort to increase efficiency in government.\(^49\) Perhaps as a result, the limited oversight that did take place in 2009 did not have any appreciable impact on government.

2. The Impact on the State’s Delivery of Basic Services

These difficulties are more than mere abstract concerns. The breakdown in parliamentary oversight in Iraq is one of the factors that contributed to the state’s diminished capacity to deliver basic services, which has caused significant distress to all Iraqi citizens, and which in turn has contributed to the constitution’s general lack of legitimacy.

Although access to data on budget execution is, once again, difficult to come by in Iraq, the U.S. Government Accountability Office (GAO) has produced several reports on the matter.\(^50\) In January 2008, the GAO concluded that “central ministries had spent only 4.4 percent of their investment budget as of August 2007. The discrepancies between the official and unofficial data highlight uncertainties about the sources and use of Iraq’s expenditure data.”\(^51\) In August 2008, it wrote in another report that “[w]hile Iraq’s total expenditures increased from 2005 through 2007, Iraq spent a declining share of its budget allocations—73 to 65 percent from 2005 to 2007” and that the investment expenditure ratios of central ministries “declined from 14 percent in 2005 to 11 percent in 2007.”\(^52\)

Although Iraq was not a stranger to corruption, it has risen to extraordinary proportions, even by the previous regime’s standards. In its January 2008 report, the GAO wrote that “[w]eak procurement, budgetary, and accounting systems are of particular concern in Iraq because these systems must balance efficient execution of capital projects while


\(^50\) See http://www.gao.gov, accessed March 15, 2010. The GAO is the supreme audit institution in the United States of America. As a result of the fact that US public funds have been invested in Iraq since 2003, the GAO has as part of its mandate to ensure that such funds are being properly utilized. This is achieved partly by ensuring that the Iraqi state is not wasting its own funds, which has prompted the GAO to carry out a number of investigations in Iraq in relation to the state of budget execution and on corruption.


protecting against reported widespread corruption."\(^{53}\) Also, in an untitled report that was marked “Sensitive but Unclassified” and that was leaked to various media outlets in September 2007, the U.S. Embassy stated that “Iraq is not capable of even rudimentary enforcement of anticorruption laws” and that “[i]n addition to the lack of capacity within the anticorruption agencies, politicization and fear of accountability are serious impediments to the enforcement of anticorruption laws."\(^{54}\) Finally, according to the U.S. State Department in June 2008, “widespread corruption undermines efforts to develop the government’s capacity by robbing it of needed resources; by eroding popular faith in democratic institutions, perceived as run by corrupt political elites; and by spurring capital flight and reducing economic growth."\(^{55}\)

The combined impact of reduced capacity to invest and increased corruption has had a severe impact on the delivery of basic services. To take the electricity sector as one example, a household socio-economic survey published by the Iraqi Central Organization for Statistics and Information Technology indicates that although

\[\ldots\]the public electrical grid is identified as the main source of electricity for 76.4\% of individuals, it provides on average only 7.9 hours of power per day. The lowest rate is in Baghdad, with only 5.0 hours of power supply per day. Only 22.4\% of persons are able to rely solely on the public network for electricity to their housing unit. 75\% of individuals supplement the public network with one or two other power sources. On average, community generators provide 6.4 hours and private generators provide 4.0 hours of additional power per day.\(^{56}\)

During a six-day period in June 2009, the daily supply of electricity from the grid met only 52 percent of demand. In addition, average hours of electricity were 7.8 hours in Baghdad and 10.2 hours nationwide, compared to the U.S. 2006 goal of 12 hours of daily electricity and the Iraqi Ministry of Electricity goal of 24 hours. Meanwhile, although the Iraqi Government had allocated USD4.2 billion for investment in the electricity sector from 2005 to April 2008, it had only spent USD0.4 billion of that amount.\(^{57}\)

Government accountability is part and parcel of any constitutional framework. In Iraq, a country with a weak tradition of judicial review, the only mechanism that ensured partial accountability was parliamentary oversight. And yet, although the constitutional drafters in 2005 sought to protect and defend that function, they unintentionally caused its decline, which in turn contributed to the sense of impunity felt by government ministers and senior officials alike.

Once again, it is precisely because local context—in particular, the nature of institutional relationships in Iraq and the reasons why they function—was not properly

\(^{53}\) See Government Accountability Office (n 51).
\(^{57}\) See Government Accountability Office (n 55).
considered that these events transpired and that the current state of affairs emerged. To be sure, parliamentary oversight in Iraq could be redeemed and the state of public finances be improved, assuming there is enough resolve to do so, and assuming appropriate measures are taken. In the meantime however, internal constitutional legitimacy has been undermined and the longer and deeper this illegitimacy, the less likely it can be redeemed in the future.

IV. CASE STUDY 2—THE VERTICAL DISTRIBUTION OF POWERS UNDER THE 2006 CONSTITUTION

Although its supporters continue to argue that the final text of the 2006 Constitution was drafted by the representatives of a large majority of the population, that it enjoys widespread democratic support (given that it was approved by around 80 percent of the population), that it accurately represents the sense of political morality of a large majority of Iraqis, and that it provides an adequate basis for functional government and stability, there is a growing body of evidence that most if not all of these assumptions are incorrect, with far-reaching implications for the constitution’s domestic legitimacy. This second case study will show how local context was completely misjudged by a large number of participants to the constitutional process, including those internationals who participated through the provision of advice, and who sometimes partially administered the process.

The 2006 Constitution provides for a federal system of government that guarantees weak central government (subsection A, below), which was the product of a particular and political alliance between parties that can claim the support of a small proportion of the population (subsection B, below). It now turns out that the federal vision that is enshrined in the 2006 Constitution is far removed from the type of state that the majority of the population would like to live in, to the extent that the constitution’s chances of acquiring popular and moral legitimacy have been undermined (subsection C, below).

A. The Transition from a Unitary State to a Federal System of Government

For better or worse, Iraq has long had a tradition of strong central control, from the times of the 1925 monarchist Constitution to the 1970 Interim Constitution. By way of example, the manner in which Iraq’s provinces were managed, the specific delimitation of jurisdiction between its various local administrations, and the functions of all local officials were previously set out in Law 159 (1969). Art. 13(1) of Law 159 provided that all governors were to be appointed “by virtue of a governmental decree, based on a recommendation of

59 Many have argued that Iraq’s strong unitary state was the source of its many policy failings and for the very significant suffering of its population. See, for example, McGarry and O’Leary (n 19) 683 (arguing that “[m]any in the [Shi‘a] community, like the Kurds, have bad memories of Iraq’s last unitary state, and their worst nightmare is a strong Baghdad-centered state once again falling under Sunni Arab or Ba’athist control”).
Meanwhile local officials could be appointed and dismissed merely by ministerial decree (Art. 13(2)). The provinces in which Kurds formed a majority constituted an exception to this rule first in that the central government in Baghdad had agreed in principle to allow some form of self-rule (a promise that was actually never kept), and second in that in any event Baghdad has often been incapable of exerting any authority in the Kurdish north, particularly after 1991, when the Kurds acquired quasi-independent status.

The departure from this tradition of central control (apart from the de facto separation of the Kurdish north) took place in 2004, when the Law of Administration for the State of Iraq for the Transitional Period (TAL) entered into force. The TAL, which set out the process through which the country’s permanent constitution was to be drafted and contained a number of provisions that would allow for what was hoped would be the proper administration of the country in the meantime, provided for the first time that

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\text{. . . [t]he system of government in Iraq shall be republican, federal, democratic, and pluralistic, and powers shall be shared between the federal government and the regional governments, governorates, municipalities, and local administrations. The federal system shall be based upon geographic and historical realities and the separation of powers, and not upon origin, race, ethnicity, nationality, or confession (Art. 4).}
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That principle was developed further through the recognition of the Kurdistan Regional Government, the authority that has been governing the three northern provinces since 1991 (Art. 54), and through firm rules which precluded the dismissal of provincial and local officials by the central government in Baghdad (Art. 55). Finally, Art. 25 set out a list of powers that were to be exercised exclusively by the federal government in Baghdad, while Art. 57 provided that all powers not already set out under Art. 25 “may be exercised by regional governments and governorates.”

The 2006 Constitution confirms Iraq’s federal nature and provides for a number of innovations. It establishes three main levels of government: the federal government in Baghdad, regional governments (which, for the time being, only includes the Kurdish Regional Government in northern Iraq), and provinces (Art. 116). Art. 110 sets out an exhaustive list of powers that are to be exercised exclusively by the federal government, including foreign policy and diplomatic representation, foreign sovereign economic and trade policy, fiscal and customs policy, and commercial policy across regional and governorate boundaries in Iraq. Art. 114 then sets out the areas in which the federal government will share responsibility with regional governments, including areas such as customs, health, and education policy. Finally, Art. 115 provides that all matters not included in both Arts. 110 and 114 shall fall to the regions and the provinces.

The effect of this new framework is that many of the powers that are not listed in Arts. 110 and 114, almost all of which belonged to Baghdad in the past, have now been transferred to the regions and provinces. This includes a number of important issues, such as control over airspace or the regulation of agriculture, and the power to raise taxes, none of which are included under Arts. 110 or 114. The powers of regional and provincial governments were further strengthened by Art. 121(2), which provides that: “[i]n case of a

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61 See, for example, Law 36 (1974) which provided for the establishment of a directly elected legislature in the Kurdistan Region.

contradiction between regional and national legislation in respect of a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region."

Another innovation for Iraq is that the 2006 Constitution allows for the possibility that additional regions (other than the Kurdistan Region) could be formed in the future, should one or several provinces decide to organize themselves on that basis (with the possibility that different regions could also merge to form a single region). The constitution provides that a referendum on the question would have to be organized in each of the relevant provinces, should one-third of council members of each of the relevant provinces (Art. 119(1)), or 10 percent of the voters in each of the provinces (Art. 119(2)) express a desire to form a new region. Law 13 (2008), which sets out the executive procedures to be followed in order to form a region, confirms that a region can consist of “one province or more,” without imposing a limit on the number of provinces that can merge to form a region, and without even requiring that the provinces that make up a region be contiguous. This mechanism and the possibilities provided for in Art. 119 are a matter of significant dispute in Iraq today. The fact that the parties responsible for drafting the constitution and that sponsored Law 13 have called publicly for the formation of a region that would encompass eight out of eighteen provinces, combined with the federal government’s very limited powers to exercise authority, raised the concern that Iraq could one day be composed of three ethno-sectarian regions, or that it could break apart altogether. Others maintain that the 2006 Constitution’s federal arrangement should be defended on the basis that it is both democratic and the only hope for a united state.

B. The Nature of the Political Alliance that Gave Rise to the 2006 Constitution’s Vertical Distribution of Powers

1. An Imperfect Drafting Process

There is general agreement today that the constitutional drafting process that gave rise to the final text in 2005 was less than inclusive. In May 2005, a fifty-five-member Constitutional Committee was appointed by the Transitional National Assembly. Given that the Sunni community had by and large boycotted the elections that led to the formation of the Transitional National Assembly, the Constitutional Committee accepted to expand its numbers to allow Sunni negotiators to participate in the drafting process. However, as the U.S.-imposed deadline for completion fast approached in mid-August 2005 (and with the referendum date set for October 15, 2005), important differences continued to exist between the various parties’ positions, particularly in relation to the vertical distribution of powers. The Constitutional Committee was therefore essentially disbanded and replaced by an ad hoc body (referred to at the time as the “Leadership Council”) that was composed

63 See Haysom (n 16); and see Ghai and Cottrell (n 17).
64 See, for example, McGarry and O’Leary (n 19).
65 See Galbraith (n 15); al-Istrabadi (n 10); and Ashley S. Deeks, “Iraq’s Constitution and the Rule of Law” (Spring 2007) 28 Whittier L. Rev. 837.
66 The Transitional National Assembly was elected pursuant to Art. 30 of the TAL on January 30, 2005 for the purpose of drafting a permanent constitution for Iraq.
67 Note that the Sunni community was not alone in boycotting the process, but they were the only group without a significant presence in the Transitional National Assembly that was allowed to join the Constitutional Committee.
of only a few members. That Council met continually over the coming weeks (either at the Transitional President’s [who was a member of said Council] residence or at the U.S. Embassy) and agreed upon a final text that was eventually put to a referendum on October 15, 2005.68

The Leadership Council came into existence, and its membership was decided, through a process of self-selection by some and exclusion of others, through the active endorsement by the U.S. Embassy, and through a sense of inevitability and helplessness on the part of those representatives of the international community that were participating in some way in the negotiations. Its membership essentially represented the interests of three main political parties: the Patriotic Union of Kurdistan, the Kurdistan Democratic Party, and the Supreme Council for the Islamic Revolution in Iraq (SCIRI; a Shi’ah-Islamist Party, that has since been renamed the Islamic Supreme Council for Iraq). As a result of their dominance of the Leadership Council, the 2006 Constitution represents a compromise between the positions of these three parties in relation to many issues of contention, including federalism.69 Some of the Iraqi elites that had been excluded at the time voiced their frustrations,70 but the general sense of imposed urgency and the threat of violence led to a settlement that was put to referendum on October 15, 2005. Some of the constitution’s final clauses had been agreed upon less than three days before the referendum date, and the general population was kept largely in the dark as to the substance of the agreement that they were to vote on. Most voters were not given the chance to comment on the various drafts and had little or no knowledge of the text that they were eventually to approve.71

68 See Galbraith (n 15) 192–3 (according to which, within days of taking up his post in early August, U.S. Ambassador Zalmay Khalilzad had summoned Iraq’s top leaders to the capital’s Green Zone, initiating three weeks of nonstop talks that produced the Kurdish-Shiite deal that formed the basis of Iraq’s Constitution; and that, under Khalilzad’s leadership, the U.S. Embassy took over responsibility from the Constitutional Committee’s secretariat: it recorded agreements, incorporated them into the text, and prepared drafts); and see Feldman and Martinez (n 10) 899 (“Despite the existence of a full draft [in early August 2005], many key issues remained outstanding, including those relating to Islam and federalism. . . . As time grew short, the Iraqis bypassed the TNA drafting committee in favor of smaller, ad hoc gatherings of Shi’i and Kurdish leaders”).

69 See Office of Constitutional Support, United Nations Assistance Mission for Iraq, “The Iraqi Constitution-Making Process—Critical Evaluation” Unpublished (December 2005) (“In the end, the Sunni negotiators were presented with a draft text based on agreements made between the UIA and the Kurdish Alliance. This was justified on the basis of inadequate Sunni response and engagement on the textual issues whenever approached”).

70 See Morrow (n 22) 3 (“Many Iraqi groups and parties criticized the draft constitution. While the reasons for opposition varied, they often included procedural complaints of exclusion from the negotiations and major substantive objections. By the end of August, opposition remained despite efforts to appease the Sunni Arab groups. Some women’s groups, the parties of Ayad Allawi and Moqtada Al-Sadr [arguably Iraq’s most influential politician at the time], and ethnic minority groups continued to oppose the draft”).

71 See United Nations Assistance Mission for Iraq (n 10) 49–50 (“after the constitution had been printed and distributed to Iraqi citizens, several additional changes were made, such that most Iraqis no longer knew what text they were being asked to approve. Indeed, on October 13, 2005, two days before the referendum in which Iraqi voters were to decide whether or not to grant their approval to the constitution, the document was changed in an agreement between several political parties, including the Iraqi Islamic Party”).
2. The Local Political Context
As already mentioned, two Kurdish groups and only one party from the Shia community were allowed to dominate the constitutional process, under the assumption that their views adequately reflected the views of their communities, and therefore of the majority of the Iraqi population (approximately 80 percent). In 2005, the two Kurdish parties in question could be said to represent the Kurdish population of Iraq, although the extent of their popularity has been seriously challenged by the emergence in 2008 of a strong opposition that enjoys more than 40 percent of the local population’s support. SCIRI, one of the country’s more important Shia political parties, was the other of these three forces. It is also one of the few Iraqi parties that called for the establishment of a strongly decentralized state, to be made up of a small number of ethno-sectarian regions. As an exile group that was formed outside of Iraq in 1982, it benefited from greater political experience (including superior internal organization and party discipline) in comparison to Iraq’s new home-grown political groups, all of which were much younger as a result of the ban on political activity that had been imposed by the Baath party until 2003. The support that it received from outside Iraq, namely from the Islamic Republic of Iran, included access to funds and to an international network of advisors, as well as training on the formation and administration of political parties.

SCIRI contested the January 2005 elections as a leading member of the United Iraqi Alliance, which obtained 48 percent of the vote. The United Iraqi Alliance was made up of four main components (SCIRI, the Da’wah Party, the Sadrist Movement and the Independents’ List), as well as a number of other smaller parties. SCIRI in particular is said to have obtained 28 seats, or just over 10 percent, of the Assembly’s 275. However, given that the elections were organized on the basis of a system of closed lists, according to which Iraqis voted for particular “political entities,” without knowing which specific individuals made up those same alliances (let alone their positions on some of the major issues of the day), and given that many of Iraq’s important communities boycotted the elections altogether, it is difficult to measure the exact level of popular appeal that SCIRI enjoyed.

See Edward Wong, “Top Shiite politician joins call for autonomous south Iraq” The New York Times (New York August 12, 2005), http://www.nytimes.com/2005/08/12/international/middleeast/12iraq.html, accessed March 15, 2010 (quoting ‘Abd al-Azīz al-Ḥakīm, then SCIRI’s president, as saying at a political rally that “[t]o keep the political balance of the country, Iraq should be ruled under a federal system next to the central government. . . . We think it is necessary to form one entire region in the south”); and Saad Sarhan and Ellen Knickmeyer, “Shiites call for own state in south” The Washington Post (August 12, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/08/11/AR2005081101791.html, accessed March 15, 2010 (quoting Ḥādi Amīrī, leader of the Badr Brigades, described as “an Iranian-trained Shiite militia that is [SCIRI]’s private security contractor,” as asking “[w]hat have we gotten from the central government but death?”).

Iraq’s Sunni community as well as the followers of the influential Muqtadā al-Ṣadr largely boycotted the polls, thereby greatly reducing their presence in the Transitional National Assembly and in the constitutional process that ensued. See Kenneth Katzman, Congressional Research Service, “Iraq: Politics, elections, and benchmarks” (October 21, 2009) 7-5700 RS21968, 1, http://www.fas.org/sgp/crs/mideast/RS21968.pdf, accessed March 15, 2010 (“According to the ‘proportional representation/closed list’ election system, voters chose among ‘political entities’ (a party, a coalition of parties, or persons); 111 entities were on the national ballot, of which nine were multi-party coalitions. Sunni Arabs (20% of the overall population) boycotted, winning only 17 Assembly seats, and only one seat on the 51-seat Baghdad provincial council. That council was dominated (28 seats) by representatives of the Islamic Supreme Council of Iraq (ISCI), led by Abīd al-Azīz al-Ḥakīm. Radical Shiite cleric Moqtada Al Sadr, then at odds with U.S.
in 2005. What is certain, however, is that the party never enjoyed a dominant position, even in its own community.

SCIRI nevertheless managed to control a number of key posts, which skewed the outcome of the constitutional negotiations in its favor. The chairman of the Constitutional Committee was a senior member of SCIRI. Pursuant to Art. 60 of the TAL, according to which the Transitional National Assembly was responsible for "encouraging debate on the constitution through regular general public meetings in all parts of Iraq and through the media, and receiving proposals from the citizens of Iraq as it writes the constitution," a Public Outreach Unit was formed which also fell under SCIRI's control.74 The Unit, which had a mandate to engage with Iraqis to discern what their views were in relation to the major issues at play, only managed to complete its survey of opinion after the Constitutional Committee was dissolved, thereby rendering the entire operation meaningless.75 Meanwhile, SCIRI's political rivals within the Shī'ah community, particularly those that did not share its vision of a federation formed along ethno-sectarian lines, failed to participate in the constitutional process in a way that would have counterbalanced SCIRI's weight in the process. Some boycotted the process altogether, while others failed to appreciate the new constitution's importance, perhaps under the impression that it would only last as long as the U.S. military occupation of the country. Many were also too disorganized, too consumed by internal rivalries, or too concerned by an effort to keep a united front during what was then violent civil conflict, to mount any serious opposition to SCIRI.

C. The Result: Weakening of Constitutional Legitimacy in Iraq

The combined impact of all these factors was apparently enough to convince a large number of observers and policy makers that the 2006 Constitution did enjoy democratic legitimacy

forces, also boycotted, leaving his faction relatively under-represented on provincial councils in the Shiite south and in Baghdad").

74 See Morrow (n 22) 18–19 (according to which “[i]n early June, Chairman Sheikh Hamoudi established, under the management of Dr. Adnan Ali, a skeleton Secretariat for the Committee. The Secretariat was to include an Outreach Unit, responsible for disseminating constitutional information to the public and for receiving and analyzing the public response. . . . Largely because of the SCIRI chairmanship of the Committee, the staff of the Outreach Unit were drawn mainly from religious Shī'ah social networks, and the networks put in place to receive submissions were biased toward Shī'ah areas of Baghdad and other cities”).

75 See United Nations Assistance Mission for Iraq (n 10) (according to which the Public Outreach Unit “prepared a formal report, which summarized the content of the submissions that it had received, but it was only delivered to the Constitutional Committee and announced to the public at a press conference on August 14, 2005—at which point the committee had almost effectively dissolved. It is unclear whether Committee members were apprised of the views of the public, or whether the Leadership Council, which took over the drafting process from the beginning of August onwards, was informed of the existence of the report. . . . [T]he major Iraqi leaders that were involved in the final stage of the drafting process and who were responsible for a major rewriting of the draft have not indicated whether or not the views of the public in fact affected their constitutional negotiations”) and Morrow (n 22) 19 (“the Outreach Unit did not have the ability to circulate a report to the Committee members before August 13. Interviews conducted with various Committee members in early August confirmed that they had not received reports from the Outreach Unit. This was hardly surprising given the time constraints. This meant that there was little or no chance for the views of the public, as expressed to the Committee, to be taken into account in the preparation of the constitution”).
on the basis that the federal system of government that it provided for was both devised by the representatives of the people and was approved by a majority of Iraqis in the referendum that took place on October 15, 2005. This narrative actually constitutes an important misjudgment: the constitution was in fact drafted by parties who today enjoy the support of approximately 20 percent of the population and whose radical views on federalism are one of the reasons of their lack of popular appeal. This was not only obvious at the time when the constitution was drafted, but has been confirmed several times since.

From the time that SCIRI made its aspirations for the establishment of one Shi’ah region in the center and the south of the country known, a number of political forces within the same community expressed strong opposition to the plan, and have continued to

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76 See Roman Martinez, “A working, democratic Iraq” The National Review (New York September 29, 2005), http://www.nationalreview.com/comment/martinez200509290817.asp, accessed March 15, 2010 (in which the author, who was a political advisor to the U.S. Ambassador to Iraq during the 2005 constitutional negotiations, completely misjudges Shi’ah aspirations for the Iraqi state by arguing that “[t]he desire of Iraqi Shia for greater local autonomy will likely to grow over time”); McGarry and O’Leary (n 19) 685 (in which the authors, one of whom has described himself as a “constitutional adviser to the Kurdistan Regional Government in the making of Iraq’s Constitution,” correctly note that there is no “consensus on collective self-government among Sh’ia Arabs” but incorrectly add that “[a]mong the Shi’a, there is a minority that is more centralist than decentralist” and seek to dismiss those in the Shi’a community that hold “centralist” views through the unsupported allegation that “[s]ome Shi’a centralizers aspire to control a centralized Iraq and use it to promulgate Shi’a religious values”); Galbraith (n 15) 203 (in which the author, who was an advisor to the Kurdish Regional Government during the constitutional negotiations, ignores the divisions within the Shi’ah community by arguing that “the constitution is not a national compact. It was made by Shites and Kurds without the Sunni Arabs”); Feldman and Martinez (n 10) 914–915 (in which the authors, one of whom has described himself as a “Senior Constitutional Adviser to the Iraqi Constitutional Process,” correctly acknowledge dissensions within the Shī’ah community, but wrongly and without any support allege that all political parties representing that same community came to support SCIRI’s policy: “The official position of the Shi’i Islamists had shifted from passive acquiescence to the status quo regarding Kurdistan to an affirmative desire to create quasi-autonomous federal regions of their own. The most striking evidence of this new outlook was the aggressive position taken by SCIRI leader ‘Abd al-‘Aziz al-Hakim, who publicly called for the creation of a nine-province Shi’i region in Southern Iraq on August 11. Many of Hakim’s Shi’i coalition partners remained highly skeptical of federalism; nonetheless, they went along with Hakim’s call for the Iraqi constitution to allow for the development of new regional governments outside of Kurdistan. The Shi’i embrace of federalism and the proposal to create new regions outraged the Sunni Arab members of the Constitutional Drafting Committee”); James A. Baker III and Lee H. Hamilton, United States Institute of Peace, “The Iraq Study Group Report” (December 6, 2006), http://wwwusiporg/isisg/iraq_study_group_report/report1206/indexhtml, accessed March 15, 2010 (in which the authors, who were commissioned by the U.S. government to suggest a strategy on Iraq, describe the possibility of an ethno-religious federal system as being “favored by the Kurds and many Shia (particularly supporters of Abdul Aziz al-Hakim), but it is anathema to Sunnis” but in which the authors discourage U.S. policy makers from pursuing this avenue, on the basis that the cost associated with adopting SCIRI’s vision of an ethno-religious federation would be too high); and “Ambassador Khalilzad comments on progress drafting Iraq’s constitution” (August 16, 2005), http://iraqusembassygov/iraq20050816_khalilzad_convention_centerhtml, accessed March 15, 2010 (in which Zalmay Khalilzad, who was U.S. Ambassador to Iraq during the bulk of the constitutional process, mistakenly attributes all opposition to ethno-religious federalism to the Sunni population by stating “I know that some of the Sunni participants on the outside have spoken out against federalism. People have a right obviously to be for or against what they want, but as far as the constitution is concerned—the draft—there is a broad agreement”).
In addition, one opinion poll after another has confirmed that only a small minority of the Iraqi population (and of the Shi’ah community) favor the type of decentralized government that is enshrined by the 2006 Constitution (although it is worth noting that the proportion did rise significantly as civil conflict became increasingly violent in 2007–2008, and then decreased as violence ebbed). The results of those opinion polls were confirmed by the January 2009 provincial elections, in which SCIRI performed particularly poorly, scoring as low as 5 percent in Baghdad province (Iraq’s largest city by far, with a population of around seven million), which the party had previously controlled. In the March 2010 parliamentary elections, SCIRI obtained only 5 percent of the vote, confirming its marked decline. Finally, the first and only initiative to create a new federal

77 See Saad Sarhan and Ellen Knickmeyer (n 72) (quoting Laith Kubba, spokesperson for the Islamic Da’wah Party, on the day that SCIRI announced its plans for an ethnocratic division of the state, as saying that “[t]he idea of a Shi'ite region is unacceptable to us”); see also Michael Howard, “Muqtada Sadr throws Iraqi unity talks into disarray” Guardian (London February 20, 2006), http://www.guardian.co.uk/Iraq/Story/0,,1713411,00.html, accessed March 15, 2010 (in which Muqtada al-Sadr is quoted as saying “I reject this constitution which calls for sectarianism and there is nothing good in this constitution at all”); and “Interview with Iraqi Prime Minister al-Maliki” USA Today (October 15, 2006), http://www.usatoday.com/news/world/iraq/2006-10-15-al-maliki-full-length_x.htm, accessed March 15, 2010 (in which the Iraqi Prime Minister, who is Secretary General of the Islamic Da’wah Party, which is perhaps the party with the greatest amount of popular appeal in Iraq, is quoted as saying that “[even though] federalism has been legally established by our law, I believe that if we succeed in restoring security, political and economic powers to the central government, the need for federalism will diminish. And if federalism has to be, it should be a political system, not a national, ethnic or sectarian federalism. It should be an administrative federalism based on geographical considerations.”).

78 See, for example, “A majority reject federalism in Kerbala” Al-Sabaah (June 5, 2006), http://alsabaah.com/paper.php?source=akbar&mlf=copy&sid=24142, accessed March 15, 2010 [Arabic] (quoting the results of an opinion poll that was carried out in the province of Kerbala, which is the home to one of Shi’ah Islam’s most holy shrines, according to which 52 percent are opposed to the establishment of any federal system of government whatsoever, and that of the 48 percent that do approve of some form of federalism, 86 percent reject any redesigning of Iraq’s internal borders on an ethno-religious basis); “Poll finds broad optimism in Iraq, but also deep divisions among groups” ABC News (New York December 12, 2005) 12, http://abcnews.go.com/images/Politics/1000a1IraqWhereThingsStand.pdf, accessed March 15, 2010 (according to which only 18 percent of Iraqis polled favored the establishment of a federal system of government along the lines of what is envisaged in the 2006 Constitution); ABC News/USA Today, BBC/ARD Poll, “Ebbing hope in a landscape of loss marks a National Survey of Iraq” (March 19, 2007) 23, http://abcnews.go.com/images/US/1033aIrqapoll.pdf, accessed March 15, 2010 (according to which, at a time when the civil conflict was the most violent, 28 percent of those polled favored ethno-religious federalism); ABC News/ BBC/NHK Poll, “Iraq’s own surge assessment: few see security gains” (September 10, 2007) 21, http://abcnews.go.com/images/US/1043a1IraqWhereThingsStand.pdf, accessed March 15, 2010 (according to which, while violence was still raging, 28 percent of those polled continued to favor ethno-religious federalism); and ABC News/BBC/NHK Poll, “Iraq poll February 2009” (February 2009) 10, http://news.bbc.co.uk/1/shared/bhp/pdfs/13_03_09_iraqpollfeb2009.pdf, accessed March 15, 2010 (according to which, at a time when violent civil conflict was drawing down, 20 percent of those polled favored ethno-religious federalism).


80 Shaddid (n 23).
region in accordance with Art. 119 of the 2006 Constitution was launched in December 2008 with a view to transforming Basra province (which is a largely Shi‘ah province) into its own independent region. Despite the fact that Basra is possibly the province with the most to gain from such an initiative, what with its enormous oil wealth and decades of underinvestment from the central government, the initiative collapsed a month later, having failed to garner the 10 percent of signatures that was required to even hold a referendum.81

It has now been clearly confirmed that SCIRI’s vision of ethno-sectarian federalism has been rejected by Iraqis and by the Shi‘ah community that was previously assumed to favor that arrangement. There is little question therefore that, in the words of Feisal al-Istrabadi, “if the permanent Constitution were being negotiated today, it almost certainly would be a very different document,” first and foremost because it would have been written by a different group of individuals, and because the additional time would have allowed Iraqis’ views on matters of major importance to surface.82

In the meantime, as a result of the fact that the Constitutional Committee, the Leadership Council, as well as the other parties that participated in the drafting process disregarded or misunderstood the local context in Iraq in 2005, the 2006 Constitution clearly diverges from the sense of political morality that is shared by a large majority of the population.

One final question has to be addressed, which is whether any of the above matters, given that many of the constitution’s provisions on federalism are optional. Indeed, some scholars have pointed to the constitution’s flexible approach toward federalism, which merely allows for the possibility of creating additional federal regions while at the same time allowing for the possibility for each federal region to negotiate its own relationship with the federal government, but does not dictate any particular outcome.83

The answer is that it does matter, for at least two principal reasons. The first is that the legitimacy of a constitution does not just depend on the manner in which it is applied. Provisions that have no normative value (including declaratory statements within a preamble) or provisions that are merely optional matter in that they allow (or prevent) a people from recognizing their values within the text itself. They also indicate the nature of the particular type of political order that the constitution in question seeks to establish. Significantly, in Iraq, the civil conflict that started in 2003 reached new levels of brutality only after the constitution entered into force in 2006, specifically because many parties to the conflict feared that the provisions on federalism would lead to the breaking up of the country. The conflict therefore took on a new dimension, with armed groups seeking to establish facts on the ground in order to preempt any change in the country’s administrative borders before any provisions relating to federalism could be applied.84

81 See “Vote on autonomy for Iraq’s Basra struck out” Reuters (New York January 20, 2009), http://www.reuters.com/article/idUSTRE50J4GC20090120, accessed March 15, 2010 (confirming that supporters of the initiative to transform Basra province into its own federal region failed to garner the signatures of 10 percent of the population that were required in order to be able to proceed with a referendum on the issue).

82 See al-Istrabadi (n 10) 1651.

83 See, for example, McGarry and O’Leary (n 19) 687 (“while the Constitution allows governorates to become regions, which have more authority and power, it does not require them to do so. Nor is changing from a governorate into a region simply a decision to be made by the governorate politicians, who arguably might have a vested interest in assuming power powers; for such a change to occur, article 119 requires a local referendum and leaves open the possibility of other hurdles to be decided later by Iraq’s federal legislature”).

Second, many of the 2006 Constitution’s provisions on federalism are mandatory in their application, and have been a source of tension since they entered into force. By way of example, the provisions relating to the exploitation of natural resources have been particularly controversial. Art. 112 creates a distinction between “current fields,” which are to be managed jointly by the “federal government, with the producing provinces and regional governments.” Some policy makers and commentators have taken Art. 112, combined with Art. 115 (according to which “[a]ll powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and provinces”), to mean that the federal government has no authority whatsoever in relation to fields that are not “current,” presumably fields that are not currently being exploited, or “future fields.” The Kurdistan Regional Government (KRG) has subscribed to this view, and has entered into a number of agreements with international oil companies in line with what it considers to be its constitutional right. See Law 28 (2007) of the Kurdistan Region (entitled the “Oil and Gas Law of the Kurdistan Region—Iraq”). An English language translation is available at http://www.krg.org/uploads/documents/Kurdistan%20Oil%20and%20Gas%20Law%20English_2007_09_06_h14m0s42.pdf, accessed March 15, 2010. Art. 1 defines a “current field” as “a Petroleum Field that has been in Commercial Production prior to 15 August 2005,” while a “future field” is defined as “a Petroleum Field that was not in Commercial Production prior to 15 August 2005, and any other Petroleum Field that may have been, or may be, discovered as a result of subsequent exploration.” Art. 18 provides that the Kurdistan Regional Government shall “agree with the Federal Government in the joint management of oil and gas extracted from Current Fields in the Region.” The Law’s Chapter Seven, which relates to cooperation with the federal government, does not contain any provisions relating to the exploitation or management of “future fields.”

The point of this discussion is not to argue in favor of one interpretation or the other. The point is merely that the 2006 Constitution’s federal arrangement has been a constant

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85 See Christopher M. Blanchard, “Congressional Research Service, Iraq: Oil and gas legislation, Revenue Sharing, and US policy” (November 3, 2009) 7-5700 RL34064, 6, http://www.fas.org/sgp/crs/mideast/RL34064.pdf, accessed March 15, 2010 (“Many Iraqi government officials have reacted negatively to the impasse between the national government and the KRG and have condemned the KRG’s contracting activities. In November 2007, Oil Minister Al Shahristani warned international oil companies that the national government would not allow the export of oil produced under KRG contracts, and the export ban persisted until June 2009. The Ministry of Oil has since refined its position slightly to emphasize its firm opposition to contracts signed by the KRG after February 2007, when the initial compromise on hydrocarbon legislation was reached between the KRG and Baghdad. According to Shahristani, contracts signed before February 2007 with firms currently producing oil for domestic consumption would be considered valid after review and potential amendments”).
source of tension since its inception, in large part because it was conceived by parties who never represented more than 20 percent of the population (despite the apparent belief shared by many internationals that they in fact represented closer to 80 percent), and whose views on federalism are clearly outside of the Iraqi mainstream. The inescapable consequence is that these provisions are a source of continuing illegitimacy for Iraq’s Constitution.

V. WHAT ROLE LOCAL CONTEXT?

If there is only one lesson that should be derived from all of the above, it is that there is no substitute for local knowledge, or expertise in local realities. Another obvious lesson is that each constitutional process takes place in a local context that is both specific and unique. As a result, the efforts by some international scholars to compile lists of benchmarks that must be satisfied in order for a constitutional process to be “successful” are only of limited interest. Far more useful would be to study each drafting process on its own, to understand the particular dynamics of how international best practice in relation to issues such as fundamental rights and the distribution of powers interact with preexisting local realities.

For example, it is today impossible to imagine a constitutional process taking place outside the context of a preexisting constitutional or legal order. A new constitution, or more specifically, the manner in which a particular constitutional provision is phrased, or even the particular choice of words, will necessarily have an impact on that preexisting order. Individual institutions may have to be dissolved as a result. Reporting lines between individuals or institutions may have to change; regular meetings that have been taking place over the course of decades between particular state officials may have to cease; specific institutions or officials that have been coordinating for decades may be forced to end their communications. Understanding the different components of local context therefore allows a constitutional drafter to better understand and foresee the impact of his or her work. Conversely, a failure to understand local context means that the likelihood of unintended (and usually undesirable) consequences is significantly increased.

In that sense, constitutional drafting processes always take place within the context of:

1. The political realities that are in play at the time when the initiative to draft the constitution is launched, which is to say the reasons for drafting a new constitution (revolution, foreign intervention, accession to an international or multilateral organization, etc.) and the political actors that have been appointed, elected, or nominated to participate in a constitutional process, whether social, ethnic, religious.

2. A preexisting constitutional and legal order. Preexisting rules may be rejected, they may inform some of the new constitution’s provisions or they may be partially maintained. Whatever decision is made, the constitutional and legal order should at the least be considered before it is changed or even amended.

3. A preexisting institutional reality. This includes questions such as which institutions exist, the relationships that specific institutions have with each other, which institutions carry out their constitutional and legal obligations satisfactorily and which do not. Obviously, before a specific institution is dissolved, maintained, or reformed by a constitutional drafting committee, efforts should be made to understand how that institution functions in practice, and the reasons for its success or lack of success as the case may be.

4. A preexisting professional culture (including established economic, administrative, and political practices). In countries with a large governmental bureaucracy such as Iraq, a number of working practices have been in place for decades, including
reporting lines between different institutions, and the relationship between different institutions. The manner in which a constitution is phrased can force these working methods to change.

How should preexisting political realities be considered and to what extent should they be maintained? There is, once again, no magic formula that will answer this question, but the one principle that should never be deviated from is that any departure should always be carried out knowingly. Where a constitutional principle is adopted without even being aware of preexisting conditions, the likelihood that this will accidentally lead to a positive result is very low. This is not as obvious as it seems, purely as a result of the fact that constitutional drafters, or their international advisors, are not always aware of whatever constitutional and legal traditions may be in existence in the country in question. Before any changes are made, questions should be raised about each major aspect of the state’s functioning with a view to determining where reform is necessary and where it is not. If a specific institution functions as it should, efforts should be made to understand the reasons for that success.

Finally, and perhaps most importantly, any decision to maintain or depart from preexisting local conditions should be justifiable from the perspective of some form of legitimacy (either because the departure will improve the state’s performance, or because it will bring the state’s role more closely in line with the people’s sense of political morality). In the case of Iraq, a number of departures were made from preexisting conditions. Some were made in order to respond to particular political concerns, while others were more technical in nature. However, because very little effort was made to understand local context before the constitutional draft was finalized, many of the changes had unintended consequences, from which the Iraqi people are still struggling to recover from today.
I. HISTORICAL INTRODUCTION

A. The Constitutional History of Afghanistan (1923–2001)

The idea of constitutionalism was discussed among intellectuals who called themselves “Young Afghans” in the first decade of the twentieth century. A prominent supporter of this movement was Prince Amānullāh, who ascended to the throne in 1919. Amānullāh Khān saw himself as the “revolutionary king” (pādshāh-e engelābī) and aimed at a thorough modernization of the country. In 1923, he introduced the first written constitution (neʿām-nāmah-ye asāsī) of Afghanistan, which gave the citizens some basic rights but also served to strengthen the position of the absolute monarch. However, Amānullāh Khān faced growing opposition throughout the country, which cumulated in the rebellion of the Shinwari tribe in 1928 and forced him to flee abroad a year later.

The next constitution of the country, introduced by King Nādir Khān in 1931, was in some regards more liberal than that of 1923—it even created a two-chamber parliament with legislative competencies—but the reality of Nādir’s reign was more authoritarian than promised on the paper.

It was the Constitution of 1964 that introduced a constitutional monarchy, with the other branches of state tempering the monarchy’s broad powers. The drafters of the...
A constitution strove to combine the Afghan-Islamic tradition with Western-style constitutional monarchy, creating separation between the executive, legislative, and judicial branches. The constitution was drafted with the assistance of a French advisor, thus symbolizing the cooperation between France and Afghanistan on legal matters. It is this document which was the most closely referenced in the creation of the current Constitution, finished in 2004. Unfortunately, in practice, the separation of powers was not implemented as foreseen in the Constitution of 1964 and democratic process at that time was hindered by low election turnout, high illiteracy, and lack of reform-minded political parties.

Constitutions written after 1973 were less relevant for the current parliamentary government structure. In 1973, the tenth king, Mohammad Zahir Shāh, was overthrown by a military coup and his government dissolved. A Loya Jirga or Grand Council—i.e., the traditional Afghan assembly of important political figures assigned the duty of making important state decisions by consensus including the enactment or amendment of constitutions—was convened in 1977. It constructed a new constitution influenced by socialist thought that would be abandoned only a year later by the Afghan Revolutionary Council. After a period of unrest and a third coup in 1979, the Soviet Army invaded the country. In 1987, during the Soviet occupation, a further constitution was promulgated, giving the country the title Democratic Republic of Afghanistan. This new basic law was presumably inspired by the reformist ideas of Soviet leader Mikhail Gorbachev. It led, however, not to an end of the civil war. In 1989, the Mujahidīn finally ousted the Red Army and toppled the Communist government, and by 1990 had created an Islamic state supporting a multiple party system. In 1992, the Islamic State of Afghanistan under the leadership of President Burhānoddīn Rabbānī was declared, only to be overthrown by the Ţālebān in 1996. From the time they came to power until 2001, the Ţālebān practiced a strictly religious system, using public executions to intimidate the population. They never attempted to draft their own constitution. The Ţālebān regime was finally overthrown by the U.S.-led Operation Enduring Freedom, begun on October 7, 2001.

The story of the current Constitution of Afghanistan, completed in 2004, began with the Bonn Peace Conference on December 5, 2001. The Bonn Agreement resulting from this conference set up an Interim Authority under the leadership of the appointed Chairman, Hamid Karzai. This government was approved in parliamentary elections in the spring of 2005. The Bonn Agreement provisionally reinstated the 1964 Constitution—once described as “the finest in the Muslim world”—and specified certain requirements for a future constitution of the country. It was to follow the 1964 Constitution closely, leaving out the provisions related to the monarchy and former separation of powers.

2 Grote (n 3) 899.
4 In October 1993, Rabbānī signed a strictly Islamic draft constitution which was, however, never promulgated. Arjomand (n 2) 954.
6 Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (“Bonn Agreement”), December 5, 2001 (UN/SC 7234, December 6, 2001).
8 Afsah (n 7).

The process of creating a new constitution after the collapse of the Taliban regime began formally on October 5, 2002, when a Constitutional Drafting Commission was appointed to draft the new constitution. The constitution would later be adopted by the Loya Jirga.

The commission mandated to draft the constitution spent many months preparing a draft, which was afterward reviewed by another Constitutional Review Commission with the participation of a larger number of lawyers and experts. The Constitutional Loya Jirga, which was then convened, endorsed the document after bringing a number of changes to the original draft. On December 14, 2003, 502 delegates assembled in Kabul who finally adopted the new Constitution on January 4, 2004. The constitution was signed by President Hamid Karzai on January 26, 2004. Official versions exist in both official languages of Afghanistan, Dari, and Pashto.11

The Bonn Agreement had established a list of guidelines for the writing of the new constitution. This framework included the Constitution of 1964, especially the provisions regarding the basic rights and duties of the people, and the Loya Jirga. The Agreement also created parameters for a strong presidential system combined with a bicameral parliament, an independent judiciary, and established the sources of law to be used in the justice system, which was still to be reconstructed.12 Afghanistan was to remain a centralized, non-federal state.

Some observers assign the responsibility for some of the ambiguities and inconsistencies revealed during the implementation of the constitution to the members of the Loya Jirga who hurriedly added some words, deleted others, and incorporated sub-sections. The resolution of the problems stemming from some provisions of the constitution would now require its amendment and thus the approval of the Loya Jirga, competent to take the final decision on any such amendments. Art. 110 of the Constitution of 2004 defines that the Loya Jirga consists of members of the National Assembly and the Presidents of the Provincial and District Councils. Ministers, the Supreme Court Justices, and the Attorney General shall participate as non-voting observers. The Loya Jirga may decide upon issues of supreme national interest such as independence, sovereignty and territorial integrity; amendments to the constitution; and the impeachment of the president.

It is important to note that constitutional amendments must be prepared by a commission comprising members of the government, the National Assembly, and the Supreme Court, that the Loya Jirga would then have to be convened by presidential decree, and that it would be dominated by Members of Parliament. Considering the existing frictions between the government and the National Assembly, it is highly unlikely that such cooperation to amend the constitution can be reached in the near future. Only if the government and the National Assembly gave up the partisan bickering they have indulged in so far would it be possible to bring about the necessary changes to the constitution and remove the many ambiguities and inconsistencies.

12 Grote (n 3) 902.
II. THE SEPARATION OF POWERS IN THE AFGHAN CONSTITUTION

A. Presidential Authority

Afghanistan’s separation of powers revolves around a strong presidential system. The new Afghan Constitution has combined the powers of king and prime minister under the 1964 Constitution to create the present-day Presidency. Although there are three distinct branches, the President, as head of state and head of government, presides over all three (Art. 60). The President has the authority and duty, among others, to determine the fundamental policies of the country, to appoint ministers, judges, and other high-ranking officials, to review decisions of the legislature as part of the endorsement procedure, and to decide whether to submit constitutional issues to the Supreme Court.

To be elected president, a candidate must obtain more than 50 percent of the votes “cast in free, general, secret and direct elections” (Art. 61). The election is for a term of five years, with the possibility of direct reelection for one further term (Art. 62). The President is elected along with two Vice-Presidents who run for office along with him. Their duties are only to stand in for the President in case of emergency, but the Vice-Presidents are not prevented from being appointed ministers. The selection of two Vice-Presidents allows the President to make concessions toward other political groups and allies. The President may be impeached by the Loya Jirga for crimes such as crimes against humanity or national treason, the verdict of guilt given by a special court.

The Constitution of 1987 in Art. 97 gave the President the power to dissolve parliament on “reasonable grounds.” The president, in consultation with the chairmen of both houses of parliament, the prime minister, the Chief Justice, and the chairman of the constitutional council, could declare the dissolution of the parliament stating the reasons on which he based that decision.

The constitution enforced in 2004 has taken away the power of the president to dissolve the National Assembly when the need arises. There are different views concerning the power of the President to dissolve parliament under certain legal, predetermined conditions. Constitutions of some countries deprive the head of state from having such a power, reasoning that this power is vulnerable to being misused.

Considering the volatile political situation in the National Assembly—which is made worse by loopholes in the constitution and the Election Law, the rate of illiterate Members of Parliament, vulnerability of parliament to be manipulated by external and internal forces, rivalries between faction leaders, influence of the drug mafia, and lack of an effective code of conduct with disciplinary measures—an effective power of the head of state to dissolve parliament within a clearly defined legal framework may be advisable as a deterrence, with the aim of promoting discipline and law-abiding practices in parliament.

Since unity and strength are indispensable preconditions if Afghanistan is to become a stable country, the 2004 Constitution, continuing the tradition begun in 1964, has created a strong centralized government able to unify the multiple ethnicities with separate languages and the different regions that compose the country. The constitution prohibits discrimination between any citizens of Afghanistan by the government. At the same time, parties created on ethnic or regional lines are not allowed (Art. 35).

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13 Grote (n 3) 904.
14 Grote (n 3) 906.
The President’s powers to review and veto legislation introduced by the National Assembly, to bring constitutional cases before the Supreme Court and to appoint justices and judges obviously give him considerable political influence over all branches of the state. Concerns have been raised that the multiple powers of the Presidency could be a threat especially to the independence of the Supreme Court.

B. Parliamentary Authority

Under the first constitution of Afghanistan, the nezām nāmeh-ye asāsi introduced by King Amānullāh Khān in 1923 (1301), Members of Parliament were appointed by the King and they had a kind of consultative role on state affairs. The budget was submitted to the parliament, which also had the right to discuss treaties and agreements.

In 1964 (1343) parliament became, for the first time in the history of Afghanistan, an independent branch of the state. The parliament had extensive powers including casting votes of confidence on the government. Art. 46 of the Constitution made literacy a requirement to stand for election as a candidate for Member of Parliament. Furthermore, this constitution gave the King the power to dissolve the parliament under certain circumstances.

The current National Assembly or Shurā-ye Mellī is modeled after the parliament of the 1964 Constitution. It is comprised of two houses: the upper house called Meshranō Jirga, or House of Elders, and the lower house called Wulesī Jirga, or House of the People. The Wulesī Jirga is directly elected by the people, and the Meshranō Jirga is partly elected and partly appointed. The President appoints one-third of its members, which have the advantage of a longer term than the other members of the Meshranō Jirga. The President is enjoined by the constitution to choose women as 50 percent of his appointees. The Wulesī Jirga is more powerful than the Meshranō Jirga, reflecting the importance placed on a democratically elected body over the partly appointed upper house.

The two main powers of the National Assembly are to legislate and to control the executive (the President and the government). It works primarily on adopting new laws and abrogating old laws. A bill must be approved by both houses and by the President to become law. However, if the Meshranō Jirga rejects a bill, the Wulesī Jirga ultimately has the last word on whether to accept it. The Wulesī Jirga has the responsibility of resolving conflicts with controversial bills, especially those concerning financial affairs. Responsible for all non-legislative procedures in the National Assembly, the lower house also approves Presidential appointees, and may force resignation of government ministers through votes of no-confidence.

The government has a few checks on the exercise of the legislative powers of the National Assembly. It is the sole policy-maker and can enact regulations in accordance with the law to support those policies. In parliament priority shall be given to the discussion of bills and policies proposed by the government. A presidential veto of a bill can be overturned by a two-thirds majority of the Wulesī Jirga, but that is unlikely to happen. One case occurred in 2009 when the President vetoed a bill passed by the National Assembly on April 14, 2007, which aimed at the establishment of a Commission for the Supervision of the Implementation of the Constitution. However, the National Assembly re-approved the law on August 18, 2008.

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15 Grote (n 3) 906–907.
16 Grote (n 3) 908.
17 Grote (n 3) 909–910.
When the Wulesī Jirga is in recess, the government takes over responsibility for legislation and may issue legislative decrees with the force of law (Art. 79). These decrees may be rejected by the National Assembly when it reconvenes after the parliamentary break.

C. The Judicial Branch

The Supreme Court is composed of nine members appointed by the President and subject to the approval by the Wulesī Jirga. They serve ten-year terms. A justice of the Supreme Court must be an Afghan citizen of a minimum of forty years of age, of good reputation and without criminal record, and must have studied law or Islamic jurisprudence, and demonstrate “sufficient expertise and experience in the judicial system of Afghanistan” (Art. 118). Interestingly enough, under the constitutional requirement for equality, women may be named to the Supreme Court. A justice may only be removed from his position by impeachment (Art. 127). One of the duties of the Supreme Court is to propose judges for appointment by the president (Art. 132, section 2).

The Supreme Court consists of the Chief Justice and the High Judicial Council. Each member of the Supreme Court meanwhile chairs a division of that Court such as the Criminal Division, Civil Division, Commercial Division, and so forth. When necessary, the Supreme Court can create specialized or traveling courts. The Supreme Court is responsible for the administration of the justice system as well.

Judicial independence and accountability are a necessary basis for impartial rulings that uphold the precepts of the constitution. According to Martin Lau, “there is little doubt that in many countries the gap between constitutional theory and political reality is considerable.” The practical application of constitutional principles transforms the constitution from a merely symbolical document into a dynamic guide for the functioning of the state and the protection of its people. A constitution requires a stable government structure to support it. Afghanistan has very little practical experience with an independent judiciary, as the 1964 Constitution’s innovative provisions were not effectively carried out in its short lifespan.

Judicial independence is a core principle in international law; the Universal Declaration of Human Rights states: “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Similarly, the Basic Principles of Judicial Independence developed by the United Nations in 1985 require that judges “must have tenure, and be free from direct or indirect pressure in the performance of their duties.”

The Constitution of Afghanistan gives the Supreme Court the power of judicial review and the duty, as stated in the oath of office, to “support justice and righteousness in accord with the provisions of the sacred religion of Islam and the provisions of this Constitution and other laws of Afghanistan, and to execute the duty of being a judge with utmost honesty, righteousness and nonpartisanship” (Art. 119).

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20 Schwarz (n 18) 264.
21 Lau (n 19) 917.
22 Lau (n 19) 925.
23 Lau (n 19) 924.
character will ideally provide the parties to the proceedings with the “protection that in a modern state is guaranteed by strict rules of procedure.”

The Supreme Court is the official interpreter of the constitution, but the exact parameters and consequences of this interpretative power are yet disputed.

III. OTHER IMPORTANT FEATURES OF THE CONSTITUTION OF 2004

A. Sources of Law in the Afghan Constitution

At the time of the Bonn Agreement in December 2001, Afghanistan did not have an independent national justice system. Instead, the separate provinces and territories applied their own legal systems, mainly based on Islamic law and tribal tradition. The Bonn Agreement stipulated that the new constitution reestablish the national justice system in accordance with Islamic principles, international standards, the principle of the rule of law, and Afghan legal traditions. According to the Agreement, “the judicial power of Afghanistan shall be independent and vested in a Supreme Court of Afghanistan and such other courts as may be established by the Interim Administration.”

Today’s Supreme Court, as the final interpreter of the constitution and other laws and supervisor of the court system, does indeed have “considerable power in shaping the legal system,” and it requires utmost independence and accountability to fulfill that role.

The constitution’s endeavor to combine Islamic beliefs and principles, international conventions, and Afghan statutory law is unique among Islamic states. Art. 3 of the Constitution stipulates that “In Afghanistan, no law shall contravene the tenets and provisions (mu'taqadāt wa aḥkām) of the sacred religion of Islam.” These tenets and provisions consist of theological (mu'taqadāt) and legal principles (aḥkām). Without any doubt, the five pillars of faith are included, but will never be disputed, as over 99 percent of the Afghan population is Muslim. Mohammad Hashim Kamali considers the civil transactions that constitute the business of government as the main area of application of the repugnancy clause (mu'āmalāt). In his view, the clause refers to the “clear and definitive” rulings of Islam, and those of the Qur'ān and the hadith, and much less to rulings that remain open to interpretation. The concept of Art. 2 may thus be used “as a basis for healthy adjustment and reform.” But due to its unclear wording it is also a tool for conservative forces pushing in the opposite direction. The term “tenets and provisions” should therefore be clarified or codified to provide the courts with a standard and to prevent unnecessary claims.

In addition, Art. 7 establishes international law as a further source of law: “The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.” It remains to be

25 Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions of December 5, 2001, Art. II(2).
26 Lau (n 19) 917–918.
28 Kamali (n 27) 9.
seen whether these seemingly diverse sources of law will create constitutional conflict, and whether the Supreme Court will be able to effectively resolve discrepancies.  

With regard to the justice system, Art. 130 requires that:

In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence and within the limits set by this Constitution, rule in a way that attains justice in the best manner.

These references to Islam are wider than the Constitution of 1964, which only required observing the “basic principles” of Hanafi jurisprudence. The Constitution of 2004 continues the 1964 tradition by placing a priority on statutory law, but one must take into consideration that the majority of civil and criminal laws of Afghanistan are based on Shari’a. Only the laws related to rather modern phenomena such as municipal organization, labor relations, industry, and commerce have been regulated by statutory law.  

B. Human Rights and the Role of International Conventions

Respect for universal human rights is a core principle in the Constitution of 2004. This is evidenced by the enumeration in the constitution of several international treaties, including the Universal Declaration of Human Rights, as respected sources of law (Art. 7). This explicit reference was an important concern for the drafters of the current Constitution, given the grave human rights abuses committed from 1996 to 2001 under the Taliban regime. The references in the preamble and Art. 7 to the Universal Declaration of Human Rights are unique to constitutions in Islamic countries, presenting Afghanistan as progressive, if indeed the precepts in the constitution can and will be practically applied. Additionally, Art. 58 creates the Independent Human Rights Commission of Afghanistan, which hears the complaints of individuals who feel their rights have been abused. The only factor creating some concern among critics is the simultaneous acceptance of international human rights standards and the stated supremacy of Shari’ah law. How conflicts between the two are resolved will be the test of the merits of the government and judiciary.

Chapter Two of the Afghan Constitution enumerates the fundamental rights and duties of citizens. Afghanistan has implemented the majority of the rights included in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Convention on Economic, Social, and Cultural Rights. For example, Art. 22 is in full accordance with Art. 2 of the Universal Declaration, reading: “Any kind of discrimination and privilege among the citizens of Afghanistan is prohibited. The citizens of Afghanistan—whether man or woman—have equal rights and duties before the law.” This provision is reminiscent of a similar provision in the Iranian Constitution, which, however adds the phrase “in conformity with Islamic criteria.”

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29 Lau (n 19) 918.
33 Mahmoudi (n 32) 874–875.
1. Rights of Women

Women's rights are an interesting issue in Islamic law, mainly because of the differences from Western culture and norms regarding gender roles and individual rights. Women and men are not considered as having identical rights as they are, at least theoretically, in most Western societies; rather, the status of women and men is “equal but not identical.” Differences between the sexes continue to exist in family law, economic rules, and procedural law. Recently, because of these discrepancies, the Islamic world came together to write its own Declaration on Human Rights. The Cairo Declaration of Human Rights in Islam attempts to establish a code of Islamic norms in this area. It is, however, not a binding international treaty. The Cairo Declaration states: “Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.” (Art. 6 (a))

The Afghan Constitution is very progressive regarding discrimination issues and the role of women in government. Quotas guarantee a minimum participation by women. According to Arts. 21 and 22, women and men are equal before the law, and have equal rights and duties. The requirements for the presidential elections specify that the President can be a man or a woman, which is an unprecedented provision for an Islamic country (Art. 60).

Reality keeps up with constitutional theory at least in regard of women's participation in government. Women were present at every step of the constitution, writing process. With eight women among the thirty-five members of the Constitutional Review Commission and over 100 in the Loya Jirga, they often successfully pushed for stronger language supporting women's rights. After the 2005 elections, women had acquired 68 of 249 seats in the Wulesi Jirga, reflecting the quota, although 17 would have won their districts even without the quota. One-hundred-twenty-one of four-hundred-twenty provincial council members were women, and 41.6 percent of registered voters were women. Guidelines for the presidential appointments to the Meshrano Jirga mean that at least one in six members of the upper house will be women. However, some of the obstacles to greater progress which are not easily or quickly changed—especially the fact that many educated Afghans are living in the diaspora and the lack of educational opportunities for women living in the country—create difficulties in finding enough qualified women for the positions which have to be filled.

While constitutional provisions prohibit gender-based discrimination, and make women equal before the law and within the government institutions, civil law and family law do not reflect this concept of equality. Already isolated, years of Soviet occupation have further removed Afghanistan from the influence of the West, and therefore the reforms of the mid-twentieth century to family law in the Middle East, North Africa, and Pakistan did not occur in Afghanistan.

Tribalism is the factor that affects women's rights most negatively. A revival of tribalism means a return to practices that are not based on Islamic tradition and are very prejudicial toward women. Tribal custom contrasts with Sharī'ah in the areas of inheritance, child marriage, forced marriage, and guardianship. Art. 54 of the Constitution partly addresses this

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34 Arjomand (n 2) 956.
36 Kamali (n 30) 301.
37 Kamali (n 30) 302.
38 Kamali (n 30) 274.
issue, stating: “The state shall adopt necessary measures to attain . . . the elimination of customary practices (rusūm) contrary to the provisions of the sacred religion of Islam.”

The constitution must be more specific regarding instances of gender inequality and adopt measures to enforce them. Over the past decades, there has been no effective enforcement of the principles against discrimination. Kamali has therefore suggested the launching of a new campaign in every department of government to combat discrimination within its sphere of influence. Moreover, lack of educational opportunities, poverty, and security problems hinder progress in the areas of justice and equality. Economic reconstruction and poverty reduction are therefore necessary steps toward more gender equality. Besides, the statutes in the decades-old Civil Code must be revised to reflect new commitments under the constitution regarding women’s issues.

2. Rights of Religious Minorities

Although Islam is the official religion of Afghanistan, Art. 2 of the Constitution grants followers of other religions the right to freely exercise their faith: “The religion of the state of the Islamic Republic of Afghanistan is the sacred religion of Islam. Followers of other religions are free to follow and practice their religions within the limits provided by law.” No distinction is made between the different sects of Islam; no faction is preferred over another, in recognition of universal human rights.

Shī’ah Muslims are not neglected by the current Constitution. The Constitution of 2004 is the first to address Shī’ah jurisprudence. Especially in personal status cases where the parties to the dispute are Shī’ites, the judge shall apply Shī’ah jurisprudence in accordance with the provisions of the law (Art. 131). A new Shī’ah family law signed by the President in March 2009 aroused controversy and international criticisms, as some of its provisions contradicted principles of human rights. The most controversial provisions were then removed following a review order issued by the President. However, there are still some other provisions recently highlighted to be inconsistent with principles of human rights.

IV. THE PROBLEM OF CONSTITUTIONAL INTERPRETATION

A. Competence to Interpret the Constitution

1. Historical Role of the Supreme Court and other Interpretive Bodies

In the constitution enforced during the reign of King Amānullāh (1923–1929), the interpretation of the constitution was vested in the State Council, composed of appointed and elected bodies. According to Art. 71 of the Constitution, any question concerning the interpretation of the constitution and other laws could be referred to the State Council.
which would give an authoritative ruling. By contrast, the constitution introduced during the reign of King Zāher Shāh in 1964 contained no direct provision on the issue. It was discussed at the time whether the interpretation of the constitution was a judicial function at all. If so, the reference to the regulation of the “judicial affairs of the state” by the Supreme Court in Art. 107 could have been understood to imply that the Supreme Court was authorized to interpret the constitution when considering cases based on a constitutional provision.

The Constitution of 1976 (1355), promulgated during the Presidency of Muḥammad Dā’ūd, explicitly gave the mandate of the interpretation of constitution to the Supreme Court, whereas the constitution introduced in 1977 (1359) during the Communist government of Babrak Karmal assigned the interpretation of the “laws” to the Presidium of the Revolutionary Council, the term “laws” being broad enough to include the constitution as well. Finally, the constitution promulgated during the presidency of Dr. Najibullāh in 1986 provided for the establishment of a constitutional council with the power to review the conformity of laws, legislative decrees, and international treaties with the constitution, an institution which was preserved in the subsequent 1987 Constitution. However, as Art. 124 of the 1987 Constitution made clear, the council could not give a binding ruling on the issue of constitutionality: its function was merely to give advice to the President, leaving the final decision on the matter to the head of state.

2. The Role of the Supreme Court under the 2004 Constitution

The Constitution of 2004 in Art. 121 provides that the Supreme Court shall review, at the request of the government or the courts, the laws, legislative decrees, international treaties, and international conventions for their compliance with the constitution and determine their interpretation in accordance with the law. The draft constitution had originally included a provision on a constitutional court which was given the power to examine the conformity of laws, legislative decrees, and international agreements and covenants with the constitution as well as to interpret the constitution, laws, and legislative decrees. However, any reference to a constitutional court was eliminated from the draft finally presented to the Lōya Jirga. In addition, the provisions on constitutional review and interpretation of laws were fused into one section, without realizing the potential ambiguity that this might create.

A fierce controversy has broken out in the past years over the question of whether the Supreme Court may interpret the constitution when no law, legislative decree, international treaty, or international covenant is involved. This is the case when the court is asked to review the constitutionality of any other acts of the legislature or the executive than those mentioned in Art. 121. The Supreme Court is of the view that this competency is inherent its constitutional interpretation mandate, and that this was intended by the drafters of the constitution. In 2008, the Court has proposed to clarify the legal situation by amending Art. 24 of the Law on the Organization and Jurisdiction of the Courts of 2005 as follows:

The High Council of the Supreme Court shall have the following jurisdiction within the scope of drafting, organizing, proposing and interpreting laws:

1. Assess the conformity of laws, legislative decrees, international treaties and conventions with the Constitution upon a request from the government or courts and issue the necessary awards.

47 Arjomand (n 2) 958–960.
2. Interpret the Constitution, laws and legislative decrees upon request from the Government or courts.
3. Refuse to implement laws contrary to the Constitution.
4. Resolve disputes stemming from the implementation of law and exercise of legal authority between the National Assembly and the Government.

This initiative was, however, rejected by the National Assembly. Members of Parliament argue that the wording of Art. 121 is limited and specific, and that additional competencies cannot be read into the constitution. Instead, they tried to assign some powers of constitutional review to a new Independent Commission for Supervision of the Implementation of the Constitution which is foreseen in Art. 157 of the constitution.

The view of the parliamentary majority that the Supreme Court was not empowered to interpret the constitution itself is rejected by the government and many others. It is indeed difficult to believe that the drafters of the constitution, who spent some two years in developing a modern constitution to deal with all relevant issues, could have overlooked such an important question, leaving a major loophole in the constitution.

The phrase “at the request of the government, or courts” both in Art. 121 of the Constitution and in the proposed amendment to the Court Organization Law was also highly disputed. It does not exactly define which members of government and which courts may bring cases for constitutional review. “The courts” most likely refers only to the lower courts, not to a prerogative of the Supreme Court to raise of its own accord constitutional questions. If the Supreme Court were able to raise issues \textit{ex officio}, it would be fulfilling an advisory role prior to a conflict, effectively diminishing the power of the executive to refer cases. Advisory opinions may be permissible under Art. 157.

Parliament seems not to have any access to the Supreme Court for constitutional claims as the term “government” does obviously refer to the executive branch of the state. Moreover, it is unclear whether advisory opinions made by the Supreme Court are binding or not. A non-binding decision could be ignored; it would only be accepted, especially in questions concerning the interpretation of Islam, if the authority issuing the opinion was fully recognized and respected. It is not clear what should be done if a law is found to be in conflict with the constitution by a binding ruling of the Supreme Court, whether the law could be struck down, suspended, or abrogated.48

What is clear, however, is that the lack of a generally accepted path for settling constitutional disputes has led the constitutional system of Afghanistan into a dangerous deadlock. If one takes the position of the National Assembly seriously and accepts its consequences, many if not all recent decisions of the Supreme Court in constitutional cases would be null and void. This would mean that three ministers, who retained their portfolios on the basis of the interpretation of the constitution by the Supreme Court, would have to be removed from their offices. Possibly, decisions made by them for the past two years would also have to be regarded as illegal. This is highly problematic especially in the case of the Minister of Foreign Affairs who acted on behalf of the state in international affairs. Even the Upper House of the National Assembly, which was established at the final stage on the basis of an interpretation of the constitution given by the Supreme Court, would possibly have to be dissolved. These possible consequences show that if the disputes over the competences of the Supreme Court are not settled within the system or through amendments, the state as a whole is at risk.

48 Kamali (n 27) 3.
3. The Possible Role of the Supervisory Commission (Art. 157)

Besides the Supreme Court, the Afghan Constitution in Art. 157 envisages the establishment of a supervisory commission whose members shall be appointed by the President with the confirmation of the *Wulesī Jirga*. A respective legislative bill was passed by the National Assembly on April 14, 2007. Initially, the President of the Republic refused to sign the law, as he believed that Art. 8 para. 1 of the bill contradicted Arts. 121, 122, and 157 of the Constitution. Art. 8 of the Law on the Independent Commission on Supervision of the Implementation of the Constitution provided, among other things, that the commission should have the power to interpret the constitution upon the request of the President, the National Assembly, the Supreme Court and the executive. In a letter to the Speaker of the *Wulesī Jirga*, the Minister of State for Parliamentary Affairs on behalf of the government argued that according to Art. 121 of the Constitution the authority to interpret the constitution is solely given to the Supreme Court. He further pointed out that according to Art. 122, no law should exclude any case or area from the jurisdiction of the judicial organ and submit it to another authority. As such, according to Art. 157 of the Constitution, the commission had only a supervisory role in the implementation of the constitution. He concluded that the objective of the institution provided for in Art. 157 was not meant to interpret or explain the constitution or other laws in any way.

However, the National Assembly overturned the presidential veto and re-approved the law with two-thirds of all votes on August 18, 2008. In response, the President referred the Law on the Independent Commission for the Supervision of Implementation of Constitution on March 6, 2009 to the Supreme Court for a review of constitutionality. The Court decided that several provisions of the law were unconstitutional. First, the Supreme Court referred to the wording of the constitution and held that “supervising” its implementation did not include interpreting it and deciding in constitutionality cases. Second, and very much like the Minister of State for Parliamentary Affairs, the Supreme Court argued that Art. 8 Subsection 1 of the law—which was meant to authorize the commission to interpret the constitution—contradicted Art. 121 of the Constitution, which gave the Supreme Court alone the authority to interpret the constitution. This limitation of constitutional adjudication to the Supreme Court was deemed to be reasonable because only court decisions—not opinions of commissions—could be enforced. A third major argument of the Supreme Court referred to Subsection 4 of Art. 8 of the Law, which stated that “the Commission is authorized to study the existing laws for the purpose of finding out their inconsistency with the constitution and proving those inconsistencies to the president and National Assembly for taking measures against them.” The Supreme Court stated that this provision was not in compliance with Art. 121 of the Constitution which clearly gives the authority to the Supreme Court to review the laws, decrees, and international treaties regarding their compatibility with the constitution. Further arguments of the Supreme Court related to the conditions of assignment and dismissal of the members of the envisaged commission.

Historical arguments support this decision of the Supreme Court. In an early draft written by the Constitutional Drafting Commission, an independent constitutional court was envisaged to have the duty, among other things, to interpret the constitution. However, this raised concerns that the constitutional court may function like the Iranian Guardian Council of the Constitution. Any law enacted by Iran’s Parliament—the Islamic Consultative Assembly—must be approved by the Council of Guardians, which reviews the law in light of the Shari‘ah and the constitution. Unlike Afghanistan’s requirement that “no law shall contravene the tenets and provisions of the sacred religion of Islam” (Art. 2 of the Afghan Constitution), Iran’s penal and private laws are directly based on *Ja‘fari* jurisprudence, the prevailing school in Iran, much like Saudi Arabia’s laws that stem from the
Hanbali school. Incidentally, there were serious tensions between the Iranian Government and the Guardian Council of the Constitution at the same time that the Afghan Constitution was going through its final stages of endorsement. With the apprehension that the constitutional court might develop into a Guardian Council, the drafters of the constitution decided to transfer the functions of the envisaged constitutional court to the Supreme Court. Additionally, they proposed to create an Independent Commission for the Supervision of the Implementation of the Constitution, which was accepted by the Loya Jirga.

The relationship between the Supreme Court, with its uncertain mandate of constitutional adjudication (Art. 121), and the Supervisory Commission was not further clarified in the constitution because the latter was not understood as a permanent state institution. It is important to note the timing of the adoption of the provisions on the commission. The constitution was drafted and approved during the transitional period when the new Afghan state slowly came into existence. Many institutions provided for by the constitution such as the National Assembly did not yet exist. Therefore may be assumed that the function assigned to the Supervisory Commission was only the supervision of the establishment of the state institutions during the transitional period. Neither the drafters of the constitution nor the members of the Loya Jirga intended to provide it with the mandate of constitutional interpretation or adjudication.

However, the Supervisory Commission has been established in 2010. According to Art. 8 of the law establishing the Commission, its mandate is to supervise the observance and application of the constitution by the President, government, National Assembly, and other state and non-state organizations; provide legal advice on constitutional matters to the President and National Assembly; make suggestions to the President and legislator on laws that, according to the constitution, would be needed; and report to the President any violations of the constitution. The Commission took one decision related to the 2010 parliamentary elections. Its future role and relations with the Supreme Court do however remain unclear.

B. Recent Constitutional Law Decisions by the Supreme Court

1. Appointment of the Members of the First Meshrano Jirga
When the first parliamentary election was underway in 2005, the non-existence of district councils was raised as problem. This was an important issue, as according to Art. 84 of the Constitution, one-third of the members of the Meshrano Jirga or House of Elders should come from districts. The Supreme Court was asked to consider the relevant subsection 2 of Art. 84. The Court held that as the district councils had not yet been created, two individuals from the provincial councils should be elected from within their councils and thereby become elected members of the Meshrano Jirga. The Court further argued that the members of the provincial councils were democratically legitimated as they were elected at the time of the parliamentary elections by the electorate in their regions. On the basis of this interpretation by the Supreme Court, the Meshrano Jirga came into being, which was then approved by the Wulesi Jirga.

49 Mahmoudi (n 32) 868.

50 Some authors, however, at the time of the enactment of the constitution expressed their hopes that the Supervisory Commission would turn into a permanent counterbalance to the Supreme Court which they feared would become a permanent stronghold of conservative clerics. Arjomand (n 2) 960.
2. Approval of Ministers under Art. 106

Another important case concerned the approval of ministers by the Wulesī Jirga on the basis of Art. 106 of the Constitution which provides that decisions can be validly adopted by each House of the Assembly if a majority of the members of the House is present and the decision is supported by a majority of the members present and voting, unless the constitution states otherwise. In the above case, twelve abstention votes were counted. Discounting the abstention votes, the ministers would have received the necessary votes to be appointed. The counting of the twelve abstentions would have produced the opposite result. Prolonged debates did not yield any clear conclusion and the chamber decided to ask the President to refer the case to the Supreme Court for a review under Art. 121 of the Constitution. The Supreme Court interpreted Art. 106 of the Constitution and decided that only “yes” and “no” votes could be counted. The decision was conveyed to the National Assembly through the Presidential Office and accepted. As a result of the Supreme Court’s interpretation of the constitution, the three ministers were confirmed.

Two conclusions can be drawn from this case: First, the National Assembly recognized the Supreme Court as a body competent to interpret the constitution, and the ambiguity in the meaning of Art. 121 was resolved for good; and second, a precedent was established in favor of disregarding abstentions when determining the result of a parliamentary vote. Had the above practice been followed by the National Assembly in other similar cases, the painful confusion and disagreement over other ambiguities could have been resolved in a constructive manner.

3. The Case of Foreign Minister Spanta

Art. 92 of the Constitution grants the Wulesī Jirga the power to summon ministers for questioning, and, if it considers the explanations given to be unsatisfactory, and the results of a confidence-vote are not satisfactory, the Wulesī Jirga shall consider the issue of a no-confidence vote. The no-confidence vote on a minister shall be explicit, direct, as well as based on convincing reasons. The vote shall be approved by the majority of all members of the Wulesī Jirga.

A recent case revolved around the questioning of Foreign Minister Spanta by the National Assembly, who was accused of not taking necessary measures to prevent the expulsion of Afghan refugees from Iran. The Wulesī Jirga took a no-confidence vote. After voting, two blank voting slips were discovered in the ballot box. The two blank slips caused a prolonged debate, as they were crucial for deciding the issue; the vote would have gone in favor of Spanta if the two blank voting slips had been discounted. The house decided to vote a second time, with the result that the balance finally tilted against the Foreign Minister.

The question of which reasons would be “convincing” in the sense of Art. 92 caused further dissent. A majority in the Wulesī Jirga ultimately held that the alleged political failure of the Minister of Foreign Affairs was convincing enough.

While the government accepted the result of the first round of voting, it did not accept the decision of the Wulesī Jirga to vote in a second round and therefore considered the second result unconstitutional. President Karzai referred the case to the Supreme Court to determine the constitutionality of the second vote of the Wulesī Jirga. The Supreme Court in its decision focused on the phrase “convincing reasons” in Art. 92 and ruled that the

51 The Court further held that presence of all Members of Parliament was not necessary for starting the proceedings; that for voting, presence of more than half, i.e., 125 members, was compulsory; and that decisions were taken by a simple majority.
actions taken by the Foreign Minister before the expulsion of the refugees from Iran did not constitute a convincing reason for his dismissal within the meaning of Art. 92 because Iran’s policy toward the Afghan refugees was widely beyond the Minister’s control. It therefore considered the vote of no-confidence as unconstitutional. As a result, the Foreign Minister remained in office.  

Although Arts. 92 and 93 regulate the no-confidence vote, they do not specify the consequences of that vote. Whether the censured minister may remain in office, must resign, or be terminated, is unclear. The following question on presidential powers arises: Is the no-confidence vote of the Wulesī Jirga to be considered a legislative act of the National Assembly? If so, the President would be exercising his veto power by referring the decision to the Supreme Court for further review. M. H. Kamali interprets Islamic constitutional theory to give the President the authority to preside over all three branches of government. However, given the situation of the nation at present, with the general lack of confidence in government officials, allegations of corruption, the volatile security situation, poverty, and unemployment, “finer legalities are somewhat subsidiary to the concerns of unity and effective governance in the country.” Kamali believes other options would have been more ideally suited to resolving the issue, making the confrontation between the executive and the Wulesī Jirga unnecessary and detrimental to stability and integrity of the government and constitution.  

V. CONCLUSIONS

The Afghan Constitution promulgated in 2004 is among the most progressive and modern in the Islamic world. Islamic law is recognized as a source of law alongside, but not in contradiction to, the constitutional provisions, statutes, and international conventions that constitute Afghan law. The constitution gives Islamic law and jurisprudence a status of supremacy over the other sources of law. However, the young state has recently been subject to considerable influence from Western nations interested in its development, and has, for example, recognized international conventions on human rights. Islamic law and secular law diverge on the rights of women and of followers of minority religions. The courts, when using Islamic jurisprudence to interpret the law, can take either a liberal or a fundamentalist perspective. Not all of their decisions are in compliance with the constitution. Practical implementation of constitutional principles is further hindered by the continuing reliance of many citizens in villages on local Jirgas, which practice tribal customary law, often to the detriment of rights that are protected under the Sharī’ah.

In practice, the interpretation of the constitution poses considerable difficulties. Apparent contradictions between Islamic and secular laws must be resolved, and the separation of powers between the government, the National Assembly, and the Supreme Court must be clarified. Unfortunately, the authority of the Supreme Court to make binding decisions on constitutional matters is disputed. Whether the Supreme Court may review government actions is not yet agreed upon. Precedent does not provide any consistent guideline. If the National Assembly and government cannot work together and settle their differences in this regard, the central government will not have the force to implement the

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53 Kamali (n 27) 8.
constitutional principles and the rule of law. The executive and legislative branches of government must put aside their current grievances and cooperate with one another in order to come to an agreement on the different perspectives on interpretation, and begin to work on constitutional amendments.

The current situation in Afghanistan shows how important an independent, impartial judiciary is for a just interpretation of the constitution, and how badly political inclinations and partisan approaches can impede the impartial judicial process. The establishment of a functioning system of constitutional adjudication is a crucial step toward improved security, stability, and civil rights in Afghanistan.
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Constitutionalism in an Islamic Republic

The Principles of the Afghan Constitution and the Conflicts between Them

RAMIN S. MOSCHTAGHI

I. INTRODUCTION

The Afghan Constitution of January 26, 2004 codifies the outcome of a sophisticated constitutional process following the downfall of the Taliban regime. The first step to reestablish a coherent constitutional order for the war-torn country was the “Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions” of December 5, 2001, also called the Bonn Agreement. This agreement reestablished the Constitution of 1964 and promulgated regulations for a transitional period inter alia by providing the framework for the constitutional process. A preliminary draft was prepared by a nine-member Constitutional Drafting Commission, which was reviewed in the second phase by a thirty-five-member Constitutional Review Commission. After public consultations in the summer of 2003 the Commission

\[ This \text{ article is based on the situation as of the beginning of 2010.} \]
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\[ Decree \text{ No. 103 published in the Official Gazette No. 818.} \]
\[ Agreement \text{ on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, also named Bonn Agreement after the location of its signature, Annex to UN Doc. S/2001/1154 of December 5, 2001.} \]
\[ See \text{ Art. II. 1) of the Agreement.} \]
\[ Kamali (n 4) 271. \]
submitted the draft to the Transitional Government in late September 2003. Following intensive debates, the Constitutional Lōya Jirga finally approved the draft with some amendments on January 4, 2004, and the Constitution was proclaimed on January 26, 2004.\(^9\)

Whereas most previous Afghan constitutions had been drafted in secret by governments that controlled the outcome and followed a specific agenda, the Constitution of 2004 was the first one where the substance of the constitution, even concerning the form of government, was subject to serious debate.\(^10\)

There have been intensive debates both within the Constitutional Review Commission and the Constitutional Lōya Jirga on the role of human rights in general and the equality of men and women in particular and on the references to Islam in the constitution.\(^11\) The final compromise differs from the constitutions of most other Islamic countries\(^12\) in the region and prior Afghan constitutions with regard to the importance it attributes to democracy, the rule of law, and human rights.\(^13\) On the other hand, the constitution also emphasizes the significance the Afghan people attribute to Islam inter alia by the very first article of the constitution, which establishes the principle of Islamic republicanism in Afghanistan. The introduction of this principle evokes memories of the constitutional system of the neighboring Islamic Republic of Iran (I.R. Iran) and of the latter’s human rights record\(^14\) and the efforts of Iranian officials to justify breaches of internationally recognized human rights standards by references to Islamic law.\(^15\)

The comparison with Iran suggests that, depending on the interpretation of Islamic law, there may be tensions between Islam and the other constitutional principles, in particular human rights and their protection. In order to analyze these tensions and the relationship between the different constitutional principles, the author will identify the different principles of the Afghan Constitution (section II) and analyze points of conflict between them. Subsequently, by analyzing a specific conflict between Islamic law and human rights concerning the treatment of apostates in Islam and the freedom of religion, the author will

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\(^1\) The Pashto term Lōya Jirga (Grand Assembly/Council) is defined in the Constitution of 2004 by Art. 110, referring to it as the highest manifestation of the will of the Afghan people, being composed out of the members of the National Assembly and the chairmen of the Provincial and District Councils. Traditionally a Lōya Jirga has been an assembly of delegates of the different Afghan tribes convening on a national level, to reach leading decisions for the country.

\(^2\) On the process in detail, see Rubin (n 4).

\(^3\) Rubin (n 4) 152; cf. also Kamali (n 4) 276ff.

\(^4\) Kamali (n 4) 282ff.; 298ff.

\(^5\) The term “Islamic country” in this chapter refers to a state in which Islam or one of its sects is established as religion of state.


\(^7\) Cf., for instance, the Iranian delegate Khosroushāhī before the Human Rights Committee, Summary Record of the 364th Meeting, UN Doc. CCPR/C/SR. 364 of 19. July 1982, 3 para. 4; cf. Āyatollāh Khomeini, quoted in Farhang Rajaee, Islamic Values and World View—Khomeini on Man, the State and International Politics (University Press of America, Lanham 1983) 81.
propose a practical approach how to solve conflicts between different Afghan constitutional principles and values (section III). Due to the necessary restrictions of an essay, only a survey of the different state principles will be provided. The only exception is Islamic republicanism, which will be discussed in more detail, as it has not been thoroughly researched yet.

II. THE PRINCIPLES OF THE AFGHAN CONSTITUTION AND THEIR MUTUAL RELATIONSHIP

The Constitution of 1964 has served to a large extent as a point of reference and a model for the substantive provisions that have been incorporated into the Constitution of 2004. Most of the institutions that can be found in the Constitution of 1964 are also referred to in the Constitution of 2004. However, there are also substantive differences—a major difference is the monarchy remains abolished. However, the President of the Islamic Republic of Afghanistan combines the powers that were exercised by the King and by the Prime Minister under the Constitution of 1964. Another characteristic of the Constitution of 2004 is its unprecedented emphasis on the international obligations of Afghanistan concerning human rights, and also on the rule of law and democracy. The constitution also stresses the unitary character of the state and the importance of Islam for the state and society. Due to the importance attributed by the mothers and fathers of the constitution to these principles, which is visible already in the preamble and is furthermore proven by the repercussions they had on the constitutional order, these principles can be referred to as constitutional principles. Therefore, depending on the categorization of human rights, four or five constitutional principles can be identified. These are the principles of Islamic republicanism, democracy, rule of law, unitary state, and finally human rights and their protection.

This sequence should not be confused with a ranking of the different constitutional principles because, as will be demonstrated in the following, there is no hierarchy between them. The sequence is rather due to practical considerations, because conflicts mainly exist between Islamic republicanism and the other constitutional principles and therefore the analysis of these conflicts is facilitated by the sequence. Moreover, it has to be established in
the first place whether the constitution of an Islamic republic can be binding at all or whether the only binding law of an Islamic state can be the Shari’ah.21

A. Islamic Republicanism

Art. 1 of the Constitution provides:

Afghanistan is an Islamic republican, independent, unitary and indivisible state.22

This norm introduces the principle of Islamic republicanism. It is important to notice that according to Art. 149 para. 1 of the Afghan Constitution, the principle of Islamic republicanism is irrevocable by constitutional amendment.

The Islamic republic clause of Art. 1 of the Afghan Constitution was subject to intense debate within the Constitutional Review Commission.23 In regard to the central position attributed to the principle by its introduction in the very first article of the constitution and its immunity to constitutional amendment, it is astonishing that according to a prominent member of the Commission, “no one really focused on the juristic consequences of the proposed Islamic republic and what it might mean for the judiciary and the legal system.”24

In fact the text of the constitution provides no further detail as to the nature and composition of the “Islamic republican state.” Therefore Art.1 has been labeled as being “at once the most prominent yet altogether ambiguous feature of this constitution”25 and it has been claimed that the introduction of the principle was rather seen as a political gesture that would appeal to the public sentiment than having specific recursions on the state and its institutions.26 However, as will be demonstrated in the following, there are multiple repercussions of the principle of Islamic republicanism on the constitution and the legal order of Afghanistan. Additionally, it is of high importance to provide an interpretation of this principle and its repercussion on the legal system, which is in conformity with the overall architecture of the Afghan Constitution and thereby can provide arguments against efforts by political extremists to misuse the principle to block reforms of society and state in the name of fundamentalist interpretations of Islam and Islamic law.

Due to the ambiguity of Art. 1 of the Afghan Constitution, it seems advisable to adopt a comparative approach in order to elaborate on the content of the principle and hence to compare the constitutional doctrine of other Islamic republics in order to determine whether some aspects common to them are transferable to Afghan constitutional doctrine and thereby to achieve clarity on the content of the concept of Islamic republicanism and its possible consequences for the legal system. However, we have to be sensitive of the fact that the possibility for a transfer of ideas is very limited as neither the Iranian model nor the Pakistani one seems appropriate for the Afghan context. First, both systems reflect

21 For the meaning of the term Shari’ah, see below.
22 Emphasis added by the author. For this translation, see also Kamali (n 4) 281.
23 For details on these debates, see Kamali (n 4) 282ff.
24 Kamali (n 4) 282.
25 Kamali (n 4) 281.
26 Kamali (n 4) 282ff.
peculiarities of the respective societies, and second, it seems that during the debates on Art. 1 there was a consensus that neither of these models should be applied to Afghanistan.

Therefore, two prerequisites must be fulfilled before an individual aspect of the principle of Islamic republicanism might be introduced into the Afghan context by way of analogy. First, there has to be concurrence between the constitutional orders of the various Islamic republics under consideration on the issue, in order to prevent national peculiarities from distorting the interpretation and application of Afghan constitutional law. Second, only the general aspects of certain core elements of Islamic republicanism may be deemed applicable to the Afghan context, whereas the details must be regulated in accordance with the characteristics of Afghan constitutional law, in particular the other constitutional principles.

The first question associated with the principle of Islamic republicanism is whether the idea of a normative constitution enjoying superior binding force on all organs of state is compatible with the concept of Islamic republicanism at all. Notably, there might be the perception that a truly Islamic state cannot be ruled by man-made law but by the Shari’ah only. The Arabic term Shari’ah in a literal translation means “the way to the water hole.” In a religious context it refers to the way God has stipulated for men and which was heralded by his messenger, the Prophet Muḥammad. The Shari’ah is constituted by the Qur’ān and the Sunnah. The first is the holy book of Islamic faith, whereas the second term refers to traditions of the life of Muḥammad in his function as the messenger of God, i.e., to actions, sayings, implicit approvals, or omissions attributed to him. In his function as Prophet, Muḥammad is considered impeccable by Islamic doctrine. The Shari’ah regulates all aspects of religion and is regarded as the binding source of Islamic belief, including religious rituals and ethics. Although the Shari’ah does not only encompass issues of legal character, it is

27 In particular, the Iranian constitutional system with its basic principle of velāyat-e faqīh is firmly based in the Shi’ite doctrine of the Imāmat and hence seems hardly transferable to a society with a majority Sunni population. On the peculiarities of the Iranian Constitutional system, S. Tellenbach, Untersuchungen zur Verfassung der Islamischen Republik Iran vom 15. November 1979 (Schwarz, Berlin Freiburg 1985); A. Schirazi, The Constitution of Iran-Politics and the State in the Islamic Republic (I.B. Tauris & Co Ltd, London New York 1997); Moschtaghi (n 14).

28 Kamali (n 4) 283ff.

29 Besides Afghanistan there are at present the Islamic republics of Iran, Mauritania, and Pakistan. Although there are other Islamic states, for instance, Saudi Arabia, these are not Islamic republics, therefore their constitutional systems can provide little insight to the content of the principle of Islamic republicanism.


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perceived as the divine source of all principles of Islamic law and regarded as immune to changes. For instance, the legal system of Saudi Arabia is formally based on the perception that the Sharī‘ah constitutes the sole constitution.

1. The Normative Character of the Constitution

There are several arguments demonstrating that the concepts of a normative constitution and an Islamic republic are not mutually exclusive. First, many members of the traditional community of scholars of Islamic law (‘ulamā’) explicitly embrace the idea of a binding constitution as a necessity for the establishment of an Islamic state, since the Sharī‘ah stakes out the legal boundaries that the community of Muslims (ummah) ought to develop, but leaves a multitude of points to be decided from case to case, in accordance with the requirements of time and changing social circumstances.

In fact, in the time of the constitutional revolution in Iran during the first decade of the twentieth century, the notion of a normative constitution was a subject of controversy within the ‘ulamā’ but in the end a majority embraced the idea as principally compatible with Islam as long as certain prerequisites were being fulfilled. When the Islamic republic was installed in Iran in 1979 after the overthrow of the last Shāh of the Pahlavi Dynasty, one of the first things the revolutionary forces did was to start a constitutional process to elaborate a new constitution. This constitution is widely perceived to constitute the foundation of the legal system, delimiting the competencies and powers of all state organs.

The idea of a binding constitution was also the basic idea of the “Principles of an Islamic Constitution” worked out by prominent members of the ‘ulamā’ to be incorporated into the Constitution of Pakistan.

Since both the I.R. Iran, which has been established as a decisively Shi‘ite Islamic republic, and the I.R. Pakistan, with a majority Sunni population, have adopted binding constitutions, the idea of a binding constitution is acceptable both in Shi‘ite and Sunni

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35 For details, cf. A.H. Hairi, Shi‘ism and Constitutionalism in Iran (Brill, Leiden 1977); S.A. Arjomand, “Islam and Constitutionalism since the Nineteenth Century: the Significance and Peculiarities of Iran” in S.A. Arjomand (n 4) 35ff; S.A. Arjomand, “The Kingdom of Jurists: Constitutionalism and the Legal Order in Iran” in this volume.
37 For the Iranian constitutional process cf. for the Iranian constitutional process Tellenbach (n 27); Schirazi (n 27); Moschtaghi (n 14).
39 For the story of the project, cf. S.A.A. Maududi, Islamic Law and Constitution (Islamic Publishers, Lahore 1960) 26ff. (For the text of the Principles, see appendix I).
Islam. This concurrence constitutes strong evidence that the idea of a normative constitution can also be embraced by Afghan constitutional doctrine.

Additional arguments can be deduced from Art. 130 of the Afghan Constitution. The provision introduces the possibility of subsidiary application of Hanafi jurisprudence in law suits.\(^{41}\) However, the application of Hanafi jurisprudence is limited by the constitution.\(^{42}\) Thus, if a Hanafi ruling applicable to the case is incompatible with the constitution, it must either be discarded or has to be interpreted in a way compatible with the constitution. If only the Shari‘ah possessed normative force in Afghanistan, there would be no use in limiting the application of Hanafi fiqh by the constitution. Because the Arabic term fiqh or feqh in Dari/Farsi is translated by “to comprehend” or “to understand,”\(^{43}\) it refers to Islamic legal science.\(^{44}\) Due to the character of the Shari‘ah as God’s law and the codification of his will, its origin and validity cannot be questioned by Islamic legal science. Therefore feqh exclusively focuses on discovering the will of God as expressed in the Shari‘ah and to apply it to individual cases no matter whether they are real or of hypothetical character.\(^{45}\) The sole objective of feqh is to interpret the will of God for the assessment of human behavior.\(^{46}\) Feqh is therefore being described as the knowledge of the legal norms for individual cases derived from the sources of law.\(^{47}\) Since the Shari‘ah, according to Islamic doctrine has to be regarded as a comprehensive legal system, which is however in need of interpretation and concretization, the object of feqh is to assess and regulate all aspects of life on the basis of the Shari‘ah.\(^{48}\) Both terms are correlating insofar as the Shari‘ah is depending on feqh to facilitate an assessment of concrete, external human actions.\(^{49}\) Since there is no possibility of feqh beyond the Shari‘ah it would make sense to restrict its application if only the Shari‘ah would enjoy binding form because feqh is per se in conformity with Shari‘ah.

Finally, the binding character of the constitution is also confirmed by Art. 121. According to this article the Supreme Court of Afghanistan upon request of the government or a lower court can review the compliance of laws, legislative decrees, international treaties, and international conventions and their interpretations with the constitution. If the

\(^{41}\) Cf. Kamali (n 4) 290.

\(^{42}\) Art. 130 of the Afghan Constitution: “While processing cases, the courts apply the provisions of this Constitution and other laws. When there is no provision in the Constitution or other laws regarding the ruling on an issue, the courts’ decisions shall be in accordance with the Hanafi jurisprudence and within the limits of this Constitution [emphasis added by the author] in a way to serve justice in the best possible manner.”

\(^{43}\) In detail Nagel (n 31) 6ff.; cf. Abdal-Haqq (n 31) 6.


\(^{45}\) Coulson (n 44) 75ff.; cf. Abdal-Haqq (n 31) 5; Nagel (n 30) 6ff.; M. Asad (n 35) 11ff.; cf. F Broschk, Gottes Gesetz zwischen Elfenbeinturm und Außenpolitik—Schiitisches Völkerrecht in der Islamischen Republik Iran (EB-Verlag, Hamburg-Schenefeld 2008) 18.

\(^{46}\) Nagel (n 31) 9.

\(^{47}\) Löschner (n 31) 27; cf. Baradie (n 31) 43.

\(^{48}\) Abdal-Haqq (n 31) 5.

\(^{49}\) Baradie (n 31) 44. A decisive difference is that whereas the rules and principles of the Shari‘ah are perceived as being impeccable, eternal and resistant to changes, the results and regulations reached by feqh can be modified due to the passing of time and change of circumstances. Abdal-Haqq (n 31) 5; cf. G. M. Badr, “A Survey of Islamic International Law” in Janis and Evans (eds) (n 33) 95ff.
constitution would not be binding, a review of the constitutionality of legislation would hardly make sense. Because in that case the only relevant question would be whether a law complies with the Shari‘ah or not.

However, the fact that the Afghan Constitution has a normative character and is not identical with the Shari‘ah does not mean that the constitution and the legal system of Afghanistan are indifferent to Islam or the Shari‘ah. In the following the consequences of the introduction of Islamic republicanism for the constitutional system shall be analyzed in detail.

2. The Consequences of the Introduction of Islamic Republicanism for the Constitutional System

According to the perception of the author there are six major prerequisites for the constitutional order of a state embracing Islamic republicanism as a constitutional principle. First, the constitution and all acts of legislation have to be compatible with the Shari‘ah. Second, the compatibility of legislation with the Shari‘ah has to be enforced via judicial review or similar review of all legislative acts. Third, Islam or one of its schools of law has to be established as the religion of state. Fourth, the Islamic state is obliged to adhere to the principle of equality of its citizens and refrain from any discrimination between them. Fifth, it has to aspire to social justice for all of its citizens, and finally the state is obliged to improve the education of the people and to protect the family. Additionally, there are minor repercussions on the constitutional principle, like the introduction of certain official symbols associated with Islam, and institutions like judicial independence, which are repercussions of other state principles but which are also supported by the principle of Islamic republicanism. However, since these are either of minor importance or mainly based on other constitutional principles, they will be mentioned in passing only.

2.1 Compatibility of the Constitution and Legislation with Shari‘ah

During the constitutional revolution in Iran the (Shi‘ite) ‘ulamā’ demanded that the constitution, in order to be endorsed by them, had to be compatible with the Shari‘ah and that there should be guarantees ensuring that all legislation based on the constitution must be compatible with the Shari‘ah. Shi‘ite and Sunni followers of political Islam agree that a state possessing an un-Islamic constitution or un-Islamic laws could not rightfully claim to live up to the concept of an Islamic republic. Hence, first the constitution of an Islamic republic itself may not be un-Islamic, and second it has to be guaranteed that all legislation based on the constitution is in conformity with Islam.

With regard to the compatibility of the Afghan Constitution itself with Islam, it can be assumed that this requirement is met. Not only is the Afghan Constitution firmly based on Afghan constitutional tradition, which is in turn deeply rooted in Islam and Islamic legal tradition, but also it has been influenced by Islamic legal principles. This is because the constitution was drafted by a team of jurists and scholars of Islamic law, who were appointed by the Taliban regime.


51. On this point, as a prerequisite for any Islamic state, see H. Enayat, Modern Islamic Political Thought (I.B. Tauris, London New York 2004) 85, 99; Asad (n 35) 1ff.; cf. also Hairi (n 36) 194.

doctrines, but there were also several members of the ‘ulamā’ participating in both the Constitutional Review Commission and the Constitutional Lōya Jirga. It is unlikely that they would have consented to an un-Islamic constitution.

Regarding the guarantee of the compatibility of legislation with the Shari‘ah the Afghan Constitution states in Art. 3:

In Afghanistan, there shall be no law repugnant to the beliefs and ordinances (mo‘takedāt va aḥkām) of the sacred religion of Islam.

Similar guarantees can be found both in the Iranian (Art. 4) and in the Pakistani Constitution (Art. 227 para. 1). However, while there is concurrence in the perception of the proponents of political Islam, no matter whether of Sunni or Shi‘ite background, that legislation has to comply with the Shari‘ah, there is disagreement whether also feqh is binding for the legislator. This disagreement becomes evident by a comparison of the constitutional order of other states whose constitutional systems embrace Islamic republicanism, in particular of Iran and Pakistan. The Constitution of the Islamic Republic of Pakistan promulgates in Art. 227 para. 1:

All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur‘ān and Sunnah, [... ] and no law shall be enacted which is repugnant to such Injunctions.

The Qur‘ān and the Sunnah of the Prophet together compose the Shari‘ah. Hence, Art. 227 para. 1 demands compatibility of legislation only with the Shari‘ah and not with the feqh of a particular madhhab.

In contrast, Art. 4 of the Iranian Constitution requires the conformity of legislation with both Shari‘ah and feqh of a particular school of Islamic law, i.e., the Shi‘ite Ja‘farī madhhab. Both the Pakistani and the Iranian regulations are consistent with their

53 M.H. Kamali, Law in Afghanistan (Brill, Leiden 1985) 19ff.
54 Cf. Kamali (n 4) 283.
55 See for the same translation also Kamali (n 3) 286.
56 On this point as a prerequisite for any Islamic state, see Enayat (n 51) 85, 99; cf. Maududi (n 39) 45ff.; Asad (n 35) 87ff.; Khomeini (n 52) 40ff.; Seyyid Qutb, Milestones (Islamic Book Service, New Delhi 2006) 9; cf. also the preamble of the Mauritanian Constitution of 16 July 1991, English text in A.P. Blaustein (ed), Constitutions of the Countries of the World (n 37) Vol. XII.
57 Asad (n 35) 11ff.
58 Similar to shari‘ah, madhhab literally means “way.” It is applied to the different schools of Islamic law. While there have been at least nineteen schools of Islamic law during the first centuries of Islam, their number has dwindled significantly in the course of centuries and today only five major schools remain. For details on the different schools of law cf. Abdal-Haqq (n 31) 24ff. On the Sunni side these are the Hanafī, Mālikī, Shaf‘ī, and Hanbali schools of law, and on the Shi‘ite side the Ja‘farī school of law. Further Shi‘ite schools of law which, however, have less followers are the Ismā‘īlī and the Zaydi school. The different schools vary both in their doctrines and in practical aspects of religious rites and daily life. Abdal-Haqq (n 31) 24; J. Schacht, An Introduction to Islamic Law (Clarendon Press, Oxford 1982) 28ff. Every Muslim belongs to a certain madhhab, the rules of which are binding on him both in ritual and legal matters like inheritance or marriage, for instance. Buchta (n 32) 32.
59 Art. 4 “All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations have to be based on Islamic criteria.” This is understood as covering not only Shari‘ah
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regional constitutional systems insofar as the Pakistani Constitution generally introduces Islam as the religion of the state without giving preference to a particular madhhab, and in Iran the official religion is Islam in the interpretation of the Ja’fari school of law.

From this difference between the two constitutions we may conclude that the concept of Islamic republicanism in its general understanding does not necessarily require consistency of legislation with the whole body of Islamic law, including the feqh of a particular school of Islamic law. Hence, the principle of Islamic republicanism as introduced by Art. 1 of the Afghan Constitution does not offer any guidance regarding the content of the repugnancy clause of Art. 3.

Art. 3 of the Afghan Constitution is basically no novelty to Afghan constitutional doctrine as all prior constitutions of Afghanistan, with the exception of the communist constitution of 1980, contained a repugnancy clause promulgating that statutory legislation may not contravene basic principles of Islam.

However, neither the present constitution nor its predecessors elaborate on the precise scope of these provisions, therefore leaving the question unanswered as to what exactly constitutes the criteria of repugnancy. The formulation applied in Art. 3 is relatively vague and open to broad interpretations. Hence, Art. 3 might arguably be a reference not only to the Shari’ah stricto sensu but also to the regulations of feqh. In fact, Kamali fears the provision might just have this effect, since Art. 3 of the present Constitution seems to be phrased more widely than the respective provision of the Constitution of 1964. However, his perception is slightly unclear as he himself states that the term abkām (pl. of īhukm), has a legal connotation and refers to the Shari’ah. Moreover, since it is very common in Dari/Farsi to use a pair of words conveying a single meaning, the term “beliefs” (mo’taqedāt) combined with “ordinances” (abkām) does not necessarily provide an additional meaning to abkām.

While there are no compelling reasons for a broad interpretation of Art. 3 of the Afghan Constitution, there are nevertheless several aspects that suggest that in spite of its seemingly broader formulation, Art. 3 refers to the Shari’ah only and even only to those parts of the Shari’ah that are uncontested among all the different Muslim schools of law. The most decisive argument is that, in contrast to former constitutions, the Constitution of 2004 does not establish a superiority of one school of Islamic law. Proof of that is provided by Art. 2 of the Afghan Constitution, which refers to Islam in general and does not mention

but also fiqh of the Shi’ite Ja’fari school of Islamic law. Mahmoudi (n 44) 871; Moschtaghi (n 14) Teil: 2, B.) 1.2.2.


61 Art. 12 of the Iranian Constitution: “The official religion of Iran is Islam and the Twelver Ja’fari school (madhhab), and this principle will remain eternally immutable.”

62 Also Asad (n 35) 11ff.

63 Kamali (n 4) 286; Kamali (n 53) 27ff.

64 Kamali (n 4) 286.

65 Kamali (n 4) 286. Art. 64 of the Constitution of 1964 promulgated: “There shall be no law repugnant to the basic principles of the sacred religion of Islam and the other values embodied in this Constitution.” [Emphasis added by the author].

66 Kamali (n 4) 286, on the similarities between both terms, see also Rohe (n 30) 9.

67 Concerning prior Afghan constitutions, see Kamali (n 53) 27ff.
a particular madhhab. The Hanafi madhhab as the school of law of the majority of the Afghan people is not mentioned in the Afghan Constitution apart from Art. 130, which only has a subsidiary meaning. In light of the fact that the constitution refrains from privileging a certain school of Islamic law by establishing it as the religion of state like the Iranian Constitution regarding the Ja'fari madhhab, it hardly seems acceptable to privilege a certain school of Islamic law by rendering its feqh a limitation of legislation.

Moreover, the necessary qualifications of the bodies responsible for the review of the compatibility of legislation with the constitution and hence also with Art. 3 of the Afghan Constitution argue for a narrow interpretation of the repugnancy clause referring to the Shari‘ah only. Art. 121 of the Afghan Constitution gives the Supreme Court the exclusive competence to review the compatibility of laws and legislative decrees with the constitution on the request of the government or a court. This competence includes the review of the compatibility of legislation with Art. 3. In regard to the professional qualifications of the members of the Supreme Court, Art. 118 stipulates that they shall have a higher education in law or in Islamic jurisprudence, and shall have sufficient expertise and experience in the judicial system of Afghanistan. Thus, candidates are not necessarily required to have an education in Islamic law at all. However, since Afghan law is deeply rooted in Islamic law, a judge without any knowledge of Islamic law and also of the Hanafi school of law as the madhhab of the majority of the Afghan people would hardly qualify as having sufficient expertise in the judicial system of Afghanistan. This provision therefore guarantees that judges have at least a certain basic knowledge in this regard. Nevertheless, if the Supreme Court were to decide on the conformity of legislation not only with the Shari‘ah but also with feqh there should be a provision requiring that candidates have detailed knowledge or experience in the feqh of the Hanafi madhhab or any other Islamic school of law.

By contrast, in the Islamic Republic of Iran the so-called “Guardian Council” (shūrā-ye negahbān) is responsible for the review of legislation (cf. Arts. 72 and 96 Iranian Constitution). Half of the members of the council are fuqahā’ trained in Ja‘fari law and the determination of the compatibility of legislation with Islamic principles rests with the majority vote of the fuqahā’ only. The fuqahā’s of the Council have to be experts (mojtahed) in the doctrine and jurisprudence of the predominant Shi‘ite Ja‘fari School and are therefore competent to give rulings on difficult questions concerning the details of Ja‘fari feqh.

The fact that the constitutional system of Afghanistan lacks similar requirements for the members of the Supreme Court and that there is therefore no guaranty that the Court has the professional competence to decide on difficult and detailed questions concerning

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68 Art. 2 of the Afghan Constitution: “The religion of the state of the Islamic Republic of Afghanistan is the sacred religion of Islam.”

69 In this regard there is a difference to Art. 2 of the Afghan Constitution of 1964, which introduced the Hanafi school as official state religion.

70 Cf. Art. 12 of the Iranian Constitution.

71 Art. 121 of the Afghan Constitution: “The review in accordance with the law of the compliance of laws, legislative decrees, international treaties, and international conventions and their interpretation with the Constitution based on an appeal by the government or a court is the competence of the Supreme Court.”


73 The six other members of the Council are worldly legal scholars (Art. 91 Iranian Constitution).

74 On the members of the Guardian Council in detail Moschtaghi (n 14).
the compliance of legislation with the details of the *feqh* of a particular school, shows that a broad interpretation of Art. 3 of the Afghan Constitution encompassing the *feqh* of a particular school of law is hardly sustainable.

**B. ENFORCEMENT OF ARTICLE 3 OF THE AFGHAN CONSTITUTION BY JUDICIAL REVIEW**

In order to render the constitutional guarantee of the compatibility of all legislation with Shari’ah effective, most Islamic republics have established a special procedure for the review of legislation.\(^75\) Such a review can be achieved either by a preventive and general review of every bill prior to entering into force, or by an *ex post* review of questionable laws. The Iranian and the Pakistani Constitutions each follow a differing approach in this regard.

In the I.R. Iran, the Guardian Council is established to examine the compatibility of all legislation passed by parliament with *Ja’fari* law (Art. 94 Iranian Constitution),\(^76\) whereas the Pakistani Constitution introduces the so-called “Shariat Court,” which has the duty to review the compatibility of laws with Shari’ah on appeal of certain bodies of the state or on the court’s own motion (cf. Arts. 203C and 203D).

The Afghan Constitution provides for facilities both for preventive and *ex post* review of legislation. While the President of the Republic has a veto right on legislation,\(^77\) which may be used if he or she perceives a law to be repugnant to Art. 3 of the Afghan Constitution,\(^78\) the Supreme Court may review the constitutionality of laws and thereby also their adherence to Art. 3 once they have entered into force.\(^79\) Although Art. 121 states that the Supreme Court will decide on the question of the compatibility of legislation with the constitution in accordance with the law, there are no provisions in the constitution or in any other law regulating the respective procedure and the effect of the decisions of the Court in these cases. Hence, the consequences of a negative decision of the Supreme Court stating that a law does not comply with the constitutional requirements are not regulated explicitly. The Supreme Court seems to perceive its decisions based on Art. 121 as advisory opinions without any binding effect.\(^80\) However, Art. 162 of the Afghan Constitution leaves no doubt that upon entry into force of the constitution, laws contrary to its provisions are automatically invalid. Therefore, it has to be assumed that the Supreme Court may declare void any laws and legislative decrees that are in violation of the constitution, including Art. 3.\(^81\)

It should be remarked that via Arts. 3 and 121 the independence of the judiciary in general and of the Supreme Court in particular becomes also a consequence of the concept of Islamic republicanism.\(^82\) Because the decision of the Supreme Court as to whether a law

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\(^{75}\) For such a review as a basic requirement of an Islamic democratic state cf. M. Hofman in Donohue and Esposito (eds) (n 50) 298.

\(^{76}\) On the Guardian Council, its composition and competences in detail please refer to Tellenbach (n 27) 217; Moschtaghi (n 14); M. Hāshemī, *Hoquq-e asāsi-ye jomhuri-ye eslāmi-ye irān* (Shahīd Beheshtī, Tehran 2003 (1383)) Vol. 2, 221.

\(^{77}\) It has to be mentioned, however, that this veto right can be overridden by a majority of two-thirds of the members of the *Wilesī Jirga* (Art. 94 of the Afghan Constitution).

\(^{78}\) Cf. Kamali (n 4) 286.

\(^{79}\) The Independent Commission for the Supervision of the Implementation of the Constitution will probably also have certain competences. However, since the respective law has been stopped due to unconstitutionality, it remains to be seen how the competences of the Commission will be framed in the future.

\(^{80}\) Cf. Advisory Opinion of the Supreme Court dated June 02, 2006, annexed to letter no. 1513 of the Supreme Court dated 12/03/1386 (June 02, 2006) to the State Minister for Parliamentary Affairs.

\(^{81}\) Cf. Grote (n 17) 912.

\(^{82}\) Cf. also F. Osman in Donohue and Esposito (eds) (n 50) 295.
is in compliance with Art. 3 or not is based on the merits of the case only and not on political considerations, it must be guaranteed that neither the executive nor the legislative powers, each of whom might have political agendas, may influence the outcome of the judicial review.83

C. ISLAM AS STATE RELIGION

Another aspect shared by all Islamic republics is the establishment of Islam, or one of its schools of law, as the religion of state. In Iran, Art. 12 of the Constitution introduces Islam in the interpretation of Shi‘ite Ja‘fari law as the official religion of state. In Pakistan, Art. 2 of the Constitution stipulates that Islam shall be the state religion of Pakistan and in Mauritania this is provided for by Art. 5 of the Constitution. The respective Afghan regulation is Art. 2 of the Afghan Constitution, which establishes Islam as the religion of the Afghan state.84 In contrast to prior constitutions a particular Islamic school of law (madhhab) is not mentioned.85

The formal proclamation of a state religion is in no way peculiar to the Islamic context. There are also western European states which have state religions, such as the Church of England and the Evangelical-Lutheran religion as the state religion of Norway.86 The establishment of a state religion is not per se in conflict with the freedom of religion.87 The Human Rights Committee of the United Nations,88 the European Commission on Human Rights,89 and the various Special Rapporteurs on Religious Intolerance90 agree that for the protection of religious freedom, it is basically irrelevant which framework each state chooses for the organization of the relationship between religion and state. However, the privileged

83 In this regard it is interesting to note that during the late 1960s many conservative deputies argued in parliamentary debates against reform bills by claiming they were repugnant to Islam although there were mostly minor divergences at most. Kamali (n 4) 287.
84 The text of the provision (n 68); On the drafting history of Art. 2 of the Afghan Constitution, see Kamali (n 4) 284ff.
85 Concerning prior Afghan constitutions, see Kamali (n 53) 27ff.
88 General Comment No. 22 of July 30, 1993, para. 9ff.
89 European Commission of Human Rights, Darby v Sweden, Series A, Vol. 187, para. 45; although Afghanistan is no party to the European Convention of Human Rights, the case law of the European Court of Human Rights and the European Commission of Human Rights provide excellent examples for the concretisation of the freedom of religion and belief in detail. Therefore the basic principles developed for very heterodox relationship between state and religion in Europe can as examples also be of high relevance in the international context. Frowein, “Religionsfreiheit” (n 87) 77.
90 UN Doc E/Cn.4/1996/95 Add 2, para. 8; UN Doc. A/51/542/Add 2, para. 8; UN Doc. A/51/542/Add 1, para. 19, UN Doc. E/CN.4/1996/95/Add 1, para. 81.
status of the state religion must not cause a discriminatory treatment of the individual followers of other beliefs nor an infringement of their freedom of religion. 91

D. PRINCIPLE OF EQUALITY

Speaking of human rights, another aspect of the Afghan Constitution that is at least partly inspired by Islamic thought is the principle of equality as promulgated in Arts. 6 and 22. Art. 6 provides:

The state is obliged to create a prosperous and progressive society based on [...] equality between all peoples and tribes [...]. 92

Furthermore Art. 22 para. 1 promulgates:

Every kind of discrimination or privilege between the citizens of Afghanistan is prohibited.

Even though the principle of equality before the law is both a prominent aspect of the rule of law 93 and an internationally recognized human right, this principle is also deeply rooted in Islamic law. 94 In fact the principle of equality and equality before the law at least in so far as it refers to Muslims is a central pillar of Islamic belief. 95 Following Islamic principles, the right to equality is an inherent right of every Muslim. 96 This command is part of the Shari'ah as several verses of the Qur'an emphasize the equality of human beings concerning race and ethnicity and prohibit discrimination between them based on these criteria. 97 It is also reported that the Prophet Muhammad strongly spoke for the equality of all Muslims in his farewell pilgrimage when he said that there is no difference between an Arab and a non-Arab, between white and black. 98

91 General Comment (n 88); cf. Frowein, “Religionsfreiheit” (n 87) 79.
92 Emphasis added by the author.
93 Cf. III D. Rule of Law.
96 Syed (n 94) 104; Shamsi (n 94) 189; 156.
97 For instance, Verse 49:13 reads: “Ye mankind! We created you from one male and one female and made you in nations and tribes so that you might know one another: of a truth the most noble of you in Allah’s sight is the most pious.” M. Henning, Der Koran (Diederichs, Stuttgart 2005) 499; cf. Syed (n 94) 104; Hassan (n 94) 119ff.; Moreover, verse 30:22 declares: “And of His signs are the creation of the heavens and the earth and the diversity of your tongues and colours. In all that there are signs for those who are endowed with knowledge.”
The egalitarian threads of the new religion were already visible in the composition of the early Islamic community, which comprised slaves and former slaves of non-Arab origin in responsible positions.\textsuperscript{99} Muslim authors like to point out that it was the aim of the Prophet Muḥammad to build a society based on the principles of equality and social justice.\textsuperscript{100} Therefore, every discrimination between Muslims based on race,\textsuperscript{101} language, or ethnicity is considered un-Islamic\textsuperscript{102} and a state discriminating between its Muslim citizens on the basis of ethnicity would hardly be Islamic at all.\textsuperscript{103} Therefore, it can be assumed that the establishment of the principle of equality, and equality before the law, at least as far as Muslim citizens are concerned, can be deduced not only from the principle of the rule of law and human rights, but also from the concept of an Islamic republic.

However, it has to be emphasized that the equality of Muslims must not be interpreted as an endorsement of discrimination between Muslims and non-Muslims based on their religion. Rather, Art. 22 of the Afghan Constitution expands the principle of equality to the non-Muslim citizens of Afghanistan. Therefore, with regard to the equality of the Afghan citizens, the principle of Islamic republicanism should be seen as an additional pillar of, rather than an obstacle to, full equality of Muslim and non-Muslim citizens, since viewing it as an obstacle to full equality would not be in conformity with Art. 22, the rule of law, and the internationally recognized human rights that are part of the Afghan domestic order according to Arts. 6 and 7.

E. OBULATION OF THE STATE TO ASPIRE TO SOCIAL JUSTICE

The obligation of the Islamic state to realize social justice has been a major feature since the days of the Prophet Muḥammad.\textsuperscript{104} In fact, the introduction of the special tax devised for the poor (zakāt) as one of the pillars of Islamic belief furnishes proof of this obligation. The brotherhood which has to be established between all Muslims and which obliges the rich to share with the poor enjoys paramount importance in Islam.\textsuperscript{105} In this context, reference can be made in particular to verse 51:19 of the Qur’ān stating:

And in their possessions was a share for the beggar and the coy poor (the poor who does not ask the others).\textsuperscript{106}


\textsuperscript{100} Baloch (n 94) 228.

\textsuperscript{101} The criteria of “race” is highly problematic as it lacks any scientific basis. At the most in can be understood as referring to the color of the skin of a person. G. Dahm, J. Delbrück, and R. Wolfrum, \textit{Völkerrecht} (De Gruyter, Berlin 2002) Vol. I/2, 280; in detail on the problematic term “race,” T. Makkonen, \textit{Identity, Difference and Otherness} (University of Helsinki Faculty of Law, Helsinki 2000) 20ff.

\textsuperscript{102} Enayat (n 51) 127; Hassan (n 94) 119ff.; Ali (n 94) 10, 153; Syed (n 94) 104; Shamsi (n 94) 189.

\textsuperscript{103} A.A. Maududi in Donohue and Esposito (eds) (n 50) 269; M.S. Al-Awa in Donohue and Esposito (eds) (n 50), 284.

\textsuperscript{104} Baloch (n 94) 208.

\textsuperscript{105} Tellenbach (n 27) 186; cf. Maududi in Donohue and Esposito (eds) (n 50) 266.

\textsuperscript{106} Henning (n 97) 504.
The Prophet Muḥammad has also emphasized in several sayings and actions (ḥadīth) attributed to him the obligation of the Islamic ruler to provide for social justice.\footnote{Asad (n 35) 87.}

This obligation is also reflected in the “Principles of an Islamic Constitution,” which place emphasis on social justice and security for every citizen.\footnote{Maududi (n 39) 337ff. 338; Tellenbach (n 27) 186.} Comparable provisions can moreover be found in the constitutions of the various Islamic republics. For instance, several articles of the Iranian Constitution oblige the state inter alia to direct all resources to strive for the planning of a just economic system in accordance with Islamic criteria in order to create welfare and to eliminate poverty.\footnote{Cf. Arts. 3 No. 12, 43 No. 1 of the Iranian Constitution.} Art. 38 of the Pakistani Constitution introduces the responsibility of the state to ensure the social rights of its subjects, notably to secure the social well-being of the people, prevent the concentration of wealth, and provide work, social security, and the basic necessities of life to all of its citizens. The responsibility of the state to protect and promote social rights is also emphasized in the preamble of the Constitution of Mauritania. Correspondingly, the Afghan Constitution establishes in Art. 6 the obligation of the state

\[\ldots\] to create a prosperous and progressive society based on social justice[\ldots]\footnote{Emphasis added by the author.}

Therefore, an Islamic state has to aspire to provide social justice and social security of its citizens.\footnote{Cf. Asad (n 35) 88; K.H. Göbel, Moderne Schüttische Politik und Staatsidee (Leske und Budrich, Hamburg 1984) 47, 110; cf Maududi in Donohue and Esposito (eds) (n 50) 266.} Hence, it can be concluded that the responsibility of the state for the social welfare of every one of its citizens is a prerequisite of the principle of Islamic republicanism.\footnote{A.U. Jan in Donohue and Esposito (eds) (n 50) 320.}

F. OBLIGATION OF THE STATE TO IMPROVE EDUCATION AND TO PROTECT THE FAMILY

Another point of great importance to Islam is education. There are several ḥadīth attributed to the Prophet Muḥammad in which he emphasized the importance of knowledge and of education.\footnote{Tellenbach (n 27) 187; for instance, he has been quoted as saying: “if anybody goes on his way in search of knowledge, God will thereby make easy for him the way to Paradise” and “[t]he search for knowledge is a sacred duty imposed on every Muslim man and woman.” Quoted in Asad (n 35) 86ff.} Hence, a state that owes its justification to Islam must make education accessible to all and compulsory for every child, male or female.\footnote{Asad (n 35) 87.} As becomes evident in some ḥadīth attributed to the Prophet, the exclusion of women from education has no basis in Islam or Islamic law.\footnote{Cf. Asad (n 35) 87.} Therefore, a state which follows the principle of Islamic republicanism is obliged to provide for the education of its male and female population. It has even been argued that a state that refers to Islam for its legitimation is obliged to provide for free education for all of its citizens and to introduce compulsory and general education for every child.\footnote{Asad (n 35) 87.}
Indeed, the obligation of the state to improve the education of all of its citizens, men and women, is a common feature of the constitutions of all Islamic republics. In Afghanistan, Arts. 43–45 of the Afghan Constitution establish the right to education for every Afghan and oblige the state to provide free education up to the university level and to reduce illiteracy. According to Art. 44, the Afghan State is explicitly obliged to devise programs to improve the education of women. Summing up, the introduction of educational rights is not only a human rights issue, but also a consequence of the introduction of the concept of Islamic republicanism.

Another common feature of all Islamic republics is the constitutional obligation to protect the family as the core unit of society. The relation of this obligation to Islam becomes particularly apparent in Art. 10 of the Iranian Constitution, which declares that the family is the “fundamental unit of Islamic society.” The importance of the family is also emphasized by Art. 16 of the Constitution of Mauritania. In Afghanistan, this obligation is introduced by Art. 54 of the Constitution, according to which the family is the fundamental unit of the society and the state is obliged to protect and support it.

Since the obligation to protect the family is a common feature of states embracing the concept of Islamic republicanism, it can be concluded that the obligation to protect the family also derives from Islamic principles and therefore is a consequence of the concept of an Islamic republic.

3. Republicanism

The exact meaning of the “republican” aspect of the principle of Islamic republicanism is questionable. In a rather formal understanding, the term republic only offers a distinction from the former principle of monarchy. According to this understanding republicanism only requires a system with a non-hereditary head of state who, unlike a king or an emir, is elected by the people rather than being heir to a monarchic position. This prerequisite is fulfilled in Afghanistan as Art. 60 of the Constitution introduces the President of the Republic as head of the Afghan state.

However, republicanism can also be understood in a more substantive way, as referring to a political system in which the sovereignty of the people is expressed by the popular election of the head of state rather than one in which the leader of the nation is chosen on the

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117 Cf. Art. 37 of the Pakistani Constitution; cf. Art. 30 of the Iranian Constitution. In fact it is a great achievement of the I.R. Iran that since its establishment the literacy of the population has been increased tremendously. Especially women benefit from these achievements, which can be seen by the fact that today more than half of the students at the bachelor level are females. Between 1998 and 2004 on average 57 percent of the places at university have been given to women, which had the result that in 2006 the percentage of female students reached 53 percent, in comparison to 28 percent in the year 1978 prior to the revolution. S. Paivandi, Discrimination and Intolerance in Iran’s Textbooks (Freedom House, Washington New York Budapest 2008) 10, http://www.freedomhouse.org/uploads/press_release/IranTextbookAnalysis_FINAL.pdf, accessed April 5, 2009.

118 Emphasis added by the author.

119 Furthermore references to Islam in national symbols might be based on the principle of Islamic republicanism. However, since first, most of the symbols mentioned in the constitution had already been used during the monarchy and second, the Islamic signs used in the national symbols of the different Islamic republics vary decisively, one has to reach the conclusion that the state has wide discretion in this regard. Cf. also Kamali (n 53) 31ff.

120 Cf. for the meaning of republicanism in the Iranian constitution Hāshemi (n 32) 82ff.

121 Lewis (n 95) 1, 5.
basis of his descent or other special attributes. The President of Afghanistan, according to Art. 61 para. 1, is elected by the people in free, general, secret, and direct elections and Art. 4 of the Afghan Constitution introduces the sovereignty of the people.\textsuperscript{122} Hence, there is strong evidence that republicanism according to the Afghan Constitution includes reference to the sovereignty of the people. However, the latter idea, also referred to as the principle of democracy, conflicts with the view of the proponents of political Islam that only God is truly sovereign, and thus with the Islamic aspect of Islamic republicanism.

**B. The Principle of Democracy**

Democracy literally means “rule of the people,” originating from the Greek word for people \textit{demos}.\textsuperscript{123} This principle is established by Art. 4 para. 1\textsuperscript{124} and 2 of the Afghan Constitution reading:

\begin{enumerate}
\item National sovereignty in Afghanistan belongs to the nation that exercises it directly or through its representatives.
\item The nation of Afghanistan consists of all individuals who are holding Afghan citizenship.
\end{enumerate}

It should be stressed that there is no universal understanding of the principle of democracy and hence also no binding definition in international law.\textsuperscript{125} The difficulties in reaching a universal definition for democracy are due to the very different value concepts within the international community.\textsuperscript{126} For instance, some states like Saudi Arabia explicitly reject democracy as a form of government for themselves.\textsuperscript{127} But also, between the states embracing democracy as a principle of government the constitutional orders vary greatly in the degree of direct or indirect participation of the people they introduce.\textsuperscript{128} Para. 8 of the

\textsuperscript{122} See in detail under III. B. The Principle of Democracy.

\textsuperscript{123} Cf., for instance, C. Degenhart, \textit{Staatsrecht I} (C.F. Müller Verlag, Heidelberg 2000) 4.

\textsuperscript{124} Art. 4 para. 1 of the Afghan Constitution is formulated very similar to the respective article of the French Constitution of October 4, 1958 (\textit{Journal Officiel} of October 5, 1958, 91Sff. amended by the \textit{Loi constitutionnelle no. 2005-204} of March 1, 2005, promulgated in the \textit{Journal Officiel} of March 2, 2005, 3696ff.). Art. 3 of the French Constitution provides that: “National sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum.” This is probably due to the observation that Art. 4 para. 1 of the Afghan Constitution is very similar to Art. 1 of the Constitution of 1964 and French advisors played an important role in the constitutional process during the early sixties. Grote (n 17) 897; R. Magnus, “The Constitution of 1964—A Decade of Political Experimentation” in L. Duprée (ed), \textit{Afghanistan in the 1970s} (Praeger, New York 1974) 56; R. Bachardoust, \textit{Afghanistan—Droit constitutionnel, histoire, régimes politiques et relations diplomatiques depuis 1747} (L’Harmattan, Paris 2003) 81ff.

\textsuperscript{125} K. Ipsen, \textit{Völkerrecht}, (Beck Verlag, München 2004) 430.

\textsuperscript{126} Ipsen (n 125).


\textsuperscript{128} For instance, the Constitution of the United States of America establishes a rather representative form of democracy demonstrated by the regulation that the president of the United States is not elected directly by the people but rather by an assembly of electors elected by popular vote. On the other side, the Swiss democracy has a rather direct character because a large part of legislation has to be approved by referenda.
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non-binding Vienna Declaration and Programme of Action of the 1993 World Conference on Human Rights\textsuperscript{129} describes democracy in the following way:

Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.

As can be derived from this formulation, a common characteristic of all systems based on the sovereignty of the people is that only the people itself can contribute the justification for the rule of human beings over other human beings. Consequently, every exercise of state power must be attributable to the people and must originate in the people as the original bearer of sovereignty.

In a democratic system state power can thus only legitimately be exercised either directly by the people, for example in a referendum, or indirectly via their representatives, e.g., by a president or by deputies elected by general vote. The Afghan Constitution in Art. 4 para.1 provides for both direct and indirect exercise of state power. However, the constitution has widely embraced the concept of a representative democracy. The direct execution of sovereignty is generally limited to the election of the representatives of the people, i.e., in particular the delegates of the Lower House (\textit{Wulesī Jirga}), the President of the Republic and the delegates to the different councils on local and provincial level. The possibility enshrined in Art. 65 to call for a referendum is rather an exception.

As already mentioned, the concept of the sovereignty of the people is in conflict with the general understanding of sovereignty in an Islamic state, as perceived by the proponents of political Islam, since according to most of them sovereignty only belongs to God\textsuperscript{130}, a perception diametrically opposed to the sovereignty of the people.\textsuperscript{131} In consequence to the absolute sovereignty of God the main reason for the establishment of an Islamic state is to enforce his will, i.e., the Shari'ah.\textsuperscript{132}

In the constitutions of the I.R. Iran and Pakistan the conflict between these two concepts of sovereignty has already become visible in the text of the constitution. Both constitutions provide that sovereignty belongs to God only. Nevertheless, the republican character of the state is maintained through express recognition that on earth this sovereignty is wielded by the people acting as his representatives.\textsuperscript{133} Hence, the Iranian Constitution states:

\begin{quote}
Absolute sovereignty over the world and man belongs to God, [. . .]. The people are to exercise this divine right in the manner specified in the following articles.\textsuperscript{134}
\end{quote}


\textsuperscript{130}Rohe (n 30) 244; G. Krämer, \textit{Gottes Staat als Republik} (Nemos Verlags Gesellschaft, Baden-Baden 1999) 88ff.; Maududi (n 39) 75ff.; Maududi in Donohue and Esposito (eds) (n 50) 263ff.; cf. Khomeini (n 52).

\textsuperscript{131}Cf. Maududi, “No one should be allowed to pass orders or make commands \textit{in his own right} and no one ought to accept the obligation to carry out such commands and obey such orders. None is entitled to make laws on his own authority and none is obliged to abide by them. This right rests in Allah alone.” in Donohue and Esposito (eds) (n 50) 263.

\textsuperscript{132}Khomeini (n 52) 40ff.

\textsuperscript{133}Cf. for this theory also Maududi in Donohue and Esposito (eds) (n 50) 264ff.

\textsuperscript{134}Art. 56 of the Iranian Constitution, on the Iranian Constitution, see (n 37).
The Pakistani Constitution provides:

Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust;[...].  

Although Afghanistan legislation, according to Art. 3 of the Constitution, is also limited by the Shari’ah, in contrast to the constitutions of the two neighboring Islamic republics, the Afghan Constitution in Art. 4 para. 1 unequivocally declares its adherence to the principle of the sovereignty of the people and refrains from introducing the idea of a mere representation of God by the people.

This unambiguous embrace of the principle of the sovereignty of the people, however, does not entail incompatibility with the idea of Islamic republicanism. First, due to Art. 3, all legislation has to respect the Shari’ah, and second, even though the proponents of political Islam agree in the perception that sovereignty in an Islamic state can only belong to God, they do not hold a monopoly on the interpretation of Islam. There are other scholars of Islamic law who strongly disagree with them.

The fact that the Afghan Constitution unequivocally embraces the sovereignty of the people and, aside from Art. 3, refuses to make concessions to the proponents of political Islam in this regard, shows that Islamic republicanism as introduced by the Afghan Constitution fully endorses the sovereignty of the people. Hence, the importance of Art. 4 of the Afghan Constitution can hardly be overestimated. Not only has it decided the question of the original bearer of sovereignty unequivocally, but it also gives evidence that the Afghan legal system undertakes to reconcile Islam with democracy rather than endorse fundamentalist interpretations of Islam and Islamic law. Finally, since the sovereignty of the people can be regarded as part of the republican aspect of the specific design Islamic republicanism has found in the Afghan Constitution, Art. 149 para. 1, which renders Islamic republicanism immune to constitutional amendments, is applicable also to the concept of the sovereignty of the people.

As a consequence of the distinct acceptance of the sovereignty of the people by the Afghan Constitution, the democratic legitimation of the state organ responsible for reviewing the conformity of legislation with the “beliefs and ordinances (mo’taqedāt va aḥkām) of the sacred religion of Islam” is much higher than that of its Iranian counterparts. Notably, in Afghanistan the members of the Supreme Court according to Art. 117 para. 1 of the Afghan Constitution are appointed by the President of the Republic with the approval of the

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135 Preamble of the Pakistani Constitution, on the Pakistani Constitution, see (n 5961).
136 Cf. Rohe (n 30) 247ff.; Hofman in Donohue and Esposito (eds) (n 50) 297ff. 299; cf. also A. Soroush in Donohue and Esposito (eds) (n 50) 311ff.; Krämer (n 130) 90ff.
137 In the I.R. Iran the question of who is to legitimate the execution of state power is still subject to heated debate. While the proponents of a more republican interpretation of sovereignty during the argument accompanying the electoral fraud of the June 2009 presidential elections referred to the will of the people to criticize the actions of the government (cf. the Friday prayer of Ayatollah ‘Ali Akbar Hashemi Rafsanjāni on July 17, 2009), their opponents argued that the government is not legitimated by the people but by God (cf. Ayatollah Mohammad Yazdi, according to the news agency ISNA, http://www.spiegel.de/politik/ausland/0,1518,636987,00.html, accessed July 25, 2009).
138 Art. 117 para. 1: “The Supreme Court is composed of nine members who are appointed by the President of the Republic with the approval of the
Lower House. Both the delegates of the Lower House and the President are legitimized by direct and general vote.\textsuperscript{139}

By contrast, in the I.R. Iran the democratic legitimacy of the six foqahā'\textsuperscript{140} of the Guardian Council responsible for the review of the legislation with Islamic Ja'fārī law is rather remote. They are appointed by the Leader (rahbar) without involvement of any other branch of state power. The Leader according to Art. 107 of the Iranian Constitution\textsuperscript{141} is chosen by the Assembly of Experts (majles-e khebregān). He is appointed for lifetime and may only be removed from office if he is no longer able to fulfill his functions or has lost his special skills.\textsuperscript{143} Moreover, only foqahā' with special qualification are eligible for the Assembly of Experts and only after they have been accepted by the Guardian Council, which has a notorious reputation for excluding the bulk of candidates.\textsuperscript{143}

C. Principle of a Unitary State

Like the principle of Islamic republicanism, the principle of unitary state is established by Art. 1 of the Afghan Constitution.\textsuperscript{144} The main intention of the principle is to refuse the idea of a federal state. It is a characteristic of a unitary system that there are no original competencies in the hand of the regional or provincial authorities. Instead, central state organs, regularly situated in the capital, head the whole administration of the country. In a unitary system the central authorities are the source of any authority the provincial administration may wield, since they delegate competencies to the provincial authorities.

It is noteworthy that during the constitutional process the question of whether the Afghan Constitution should embrace federalism or not was very controversial, and in particular, representatives of ethnic minorities argued for its adoption.\textsuperscript{145} In the end, the proponents of a strong central state prevailed. However, as a compromise the Afghan Constitution promotes administrative decentralization\textsuperscript{146} and, most importantly for the ethnic minorities of Afghanistan, the constitution for the first time acknowledges the ethnic and linguistic plurality of the country.\textsuperscript{147} This is unproblematic in regard to the principle of Islamic

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139 Please refer to Art. 83 of the Afghan Constitution concerning the election of the delegates of the Lower House and Art. 61 regarding the election of the President of the Republic.

140 The faqīh (pl. foqahā’) is an expert of feqh. J. Schacht, An Introduction to Islamic Law (Clarendon Press, Oxford 1982) 1 there (n 1).

141 Art. 107 para. 1 Iranian Constitution: “[. . .] the task of appointing the Leader shall be vested with the experts (khebregān) elected by the people [. . .].”

142 Cf. Art. 111 para. 1 Iranian Constitution.

143 For details on the Assembly and the problematic criteria for eligibility to the Assembly and to the office of the Leader please refer to Moschtaghi (n 14).

144 For the text of Art. 1 of the Afghan Constitution, see III. A. Islamic Republicanism.

145 Rubin (n 4) 153.

146 Art. 137 of the Afghan Constitution: “The government, in preserving the principles of centralism, shall transfer necessary powers, in accordance with the law, to local administrations in order to accelerate and improve economic, social as well as cultural matters, and foster people’s participation in developing national life.”

147 Rubin (n 4) 159ff.; cf. Art. 4 para. 3 of the Afghan Constitution: “The nation of Afghanistan is comprised of the following ethnic groups: Pashtūn, Tājīk, Hazāra, Uzbek, Turkmān, Baluch, Pashai, Nūristānī, Aymaq, Arab, Qirghız, Qızılbaş, Gujur, Brahwhi and others.” Art. 16 (1) From among the languages of Pashto,
republicanism, because Islamic law is not opposed to recognizing ethnic and lingual diversity and establishing language rights for members of ethnic minorities.\textsuperscript{148}

With regard to the principle of democracy, it is positive that the constitution provides for popular participation in regional and local government through the establishment of elected councils at all levels of the provincial administration.\textsuperscript{149}

Although Art. 1 also mentions the independence and the indivisibility of Afghanistan, these are not constitutional principles. Independence describes a political concept rather than a constitutional principle, and the term “indivisibility” originates from French constitutional law.\textsuperscript{150} In French constitutional law doctrine it refers to the precept that the state and its territories must not be partitioned, neither by foreign conquest, secession, nor any other alienation or fragmentation.\textsuperscript{151} The fact that the architects of the constitution deemed it necessary to emphasize the independence and indivisibility of the state can be attributed to the tragic history of foreign intervention in Afghanistan.

D. Rule of Law

The concept of the rule of law escapes any attempt at an exhaustive definition.\textsuperscript{152} Basically there are two main perceptions, a legal, positivistic one,\textsuperscript{153} sharing in varying degrees a formalistic understanding of the concept,\textsuperscript{154} and a substantive approach including, also in varying degrees, aspects of morality, and natural law.\textsuperscript{155} Between these extreme views there are numerous particular conceptions seeing the rule of law as emphasizing and advancing

\begin{itemize}
\item \textsuperscript{148} Cf. the two verses 49:13 and 30:22 of the Qur'ān in particular the latter one reading: “And of His signs are […] the diversity of your tongues and colours.” Reaching the same conclusion Baloch (n 94) 229; in detail also Moschtaghi (n 14).
\item \textsuperscript{149} In order to foster the participation of the people on a regional and communal level Arts. 138, 140, and 141 of the Afghan Constitution introduce provincial and district councils and municipalities. The members of these councils and the mayors of the municipalities are elected in free, general, secret, and direct elections.
\item \textsuperscript{150} Cf. Art. 1 of the French Constitution of 1958.
\item \textsuperscript{151} Gérard Cornu, Vocabulaire juridique (PUF, Paris 2005) 475.
\item \textsuperscript{154} Demonstrated drastically in the phrase “A non-democratic legal system, based on the denial of human rights […] may, in principle, conform to the requirements of the rule of law better than any of the legal system of the more enlightened western democracies,” Raz (n 153) 78.
\item \textsuperscript{155} Fletcher (n 152) 11; M.J. Radin, “Reconsidering the Rule of Law” (1989) 69 B.U.L. REV. 781ff.
\end{itemize}
different goals. However, it would go much beyond the scope of this article to give an in-depth analysis of the discussion and it is moreover questionable whether any one of these individual perceptions would catch the content of the rule of law specific to Afghan constitutional doctrine. Hence, this article, rather than trying to explain the principle, exhaustively focuses on a core meaning of the concept common to most legal orders embracing the principle.

A famous statement that is regularly cited as an example for the classical conception of the rule of law is part of the Constitution of Massachusetts, requiring “[. . .] a government of laws and not of men.” Read in context, this clause was a clear expression of the doctrine of the separation of powers. While the separation of powers is still regarded as part of the rule of law, the modern understanding of the overall concept is much broader. The modern usage is widely traced back to A.V. Dicey, who explained:

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint

and

[. . .] we mean in the second place, when we speak about the rule of law [. . .] not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

Hence, in addition to the establishment of the separation of power, a state adhering to the principle of the rule of law must guarantee that its executive is bound by law and therefore each intrusion on the rights of the citizens has to be based on law. Moreover, there has to be equality before the law with everyone, including the government, being subject to the same law. This definition can be enriched with the definitions and guidelines that the International Commission of Jurists has worked out to concretize the implications of

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158 Constitution of Massachusetts 1780 pt. I Art, XXX: “In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.”
162 See also Venkatachaliah (n 159) 323.
the rule of law,

namely that the judiciary has to be an independent organ of the state,

that a judicial review of the acts of the executive which directly and injuriously affect the rights of the individual has to be guaranteed,

and that in cases of legislation delegated to the executive or other agencies a judicial review by an institution independent of the executive has to be guaranteed ensuring that the extent, purpose, and procedure appropriate to delegate legislation has been observed.

The existence of the rule of law as a principle of the Afghan Constitution can be derived from several regulations of the constitution. First of all, there is the preamble of the constitution, which declares: “We the people of Afghanistan: [. . .] 8. for the creation of a civil society [. . .] based on the rule of law, social justice, the protection of human rights, and dignity, and ensuring the fundamental rights and freedoms of the people, [. . .] have adopted this constitution [. . .].”

Although the preamble itself does not share the legally binding character of the constitution, since it is a compilation of motives rather than concrete rights or obligations, it nevertheless offers guidance for the interpretation of the text of the constitution. Moreover, the individual prerequisites mentioned above which are generally associated with the rule of law are established by the Afghan Constitution.

First, the Afghan Constitution establishes the separation of the different state powers and promulgates judicial independence, which are both prerequisites for the rule of law.

The separation of powers is already visible in the structure of the Afghan Constitution, which distributes state powers to different organs and allocates special competencies to each of them. Art. 116 of the Afghan Constitution introduces the judiciary explicitly as an independent pillar of the state with a three-level system of courts and the Supreme Court on its peak. Art. 122 ensures that legal cases are handled by the judiciary only. In fact, the organizational separation of powers regarding the Afghan judiciary is very strict. Instead of a special department of the administration like the Ministry of Justice, the

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163 International Commission of Jurists (n 159) 1ff.
165 International Commission of Jurists (n 159) 12; Denninger (n 164) 49.
166 International Commission of Jurists (n 159) 12ff.
167 Emphasis added by the author.
168 International Commission of Jurists (n 158) 30ff.; also Summers (n 163) 1694; Denninger (n 17763) 48; Venkatachaliah (n 159) 322; Moschtaghi (n 72) 580; due the restricted length of the chapter the various implications of judicial independence and its implementation into the Afghan legal system cannot be discussed in detail here. For details to the basically satisfying legal situation in this regard and the still existing problems please refer to Moschtaghi (n 72).
169 On the separation of powers in the Afghan Constitution in detail, see Grote (n 17).
171 Art. 122 of the Afghan Constitution: “No law, under any circumstance, can transfer a case from the jurisdiction of the judicial branch, as it has been determined in this chapter [i.e., in Arts. 116—135 of the Afghan Constitution], to another organ.”
Supreme Court heads the judiciary and its administration.\textsuperscript{172} The other two branches of state power are also organized separately.\textsuperscript{173}

The Constitution, moreover, introduces certain checks and balances between the state powers. For instance, the judiciary is not free in adjudicating cases but is strictly bound by both the constitution and the Afghan laws. This is unequivocally stated in the first sentence of Art. 130.\textsuperscript{174} A law (\textit{qānūn}) is defined by Art. 94 as a “draft which both Houses of the National Assembly have approved and the President has endorsed, unless this Constitution states otherwise.” Only when there is no provision in the constitution or other laws regarding the ruling on an issue and only then, the courts may devise solutions on their own since they are obliged according to Art. 13 LOJC to deliver a decision.\textsuperscript{175}

The legislature, on the other hand, is bound only by the constitution. The responsibility to guarantee this limitation lies with the Supreme Court, which is competent according to Art. 121 of the Afghan Constitution to review the compliance of laws with the constitution upon the request of the government or lower courts.\textsuperscript{176}

Regarding the executive branch, the accountability of the ministers to the \textit{Wulesī Jirga} in Art. 77 para. 2 can be named as an example of check and balances.\textsuperscript{177}

Moreover, as an essential aspect of the rule of law, the constitution stipulates a catalogue of fundamental rights (Arts. 22–42) according to which any curtailments of these rights must be based on law, or else they are invalid. Such regulations enable a judicial review of administrative acts to determine whether the prerequisites for a legally valid limitation of individual rights have been met or not, which is another aspect of the rule of law.\textsuperscript{178}

The Afghan Constitution also provides that the executive is bound by law, since its Art. 50 obliges all administrative officials to execute their offices in accordance with the law.\textsuperscript{179} Art. 77 clarifies that also the ministers, as the heads of their administrative units, are subject

\textsuperscript{172} Cf. Art. 116ff. of the Afghan Constitution. The Supreme Court is inter alia responsible also for the employment and dismissal of judges and the management of the budget of the judiciary.

\textsuperscript{173} The executive is headed by the President of the Republic (Art. 71 of the Afghan Constitution), while both the houses of the National Assembly elect one of their members as the president of the respective house to manage the administrative affairs (Art. 87 of the Afghan Constitution). An administrative committee constituted of members of the respective house supports each of the Presidents of the two houses in this task.

\textsuperscript{174} Art. 130 of the Afghan Constitution: “In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws.”

\textsuperscript{175} Such a gap in the law can only be assumed after all efforts toward an interpretation of the law have been undertaken without finding a ruling on the case in question. If these efforts have been undertaken without result a judge may apply a ruling in accordance with the \textit{Hanafi} jurisprudence, which as an additional criterion has to be within the limits of the constitution and has to be applied in a way to serve justice in the best possible manner.

\textsuperscript{176} On the deficits of Art. 121 of the Afghan Constitution, see Grote (n 17) 910ff.; Moschtaghi (n 170) 509ff., 518ff.

\textsuperscript{177} In this regard the advisory opinion concerning the vote of censure of the Lower House on the Minister of Foreign Affairs is highly problematic since such an interpretation of the constitution would affect the parliamentary control of the executive decisively. See Moschtaghi (n 170).


\textsuperscript{179} For greater detail please refer to Moschtaghi (n 16).
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to the law. Finally Art. 76 points out that in case the government devises executive regulations, these may not be contradictory to the body or spirit of the law.

Furthermore, the Afghan Constitution also implements equality before the law with everyone, including the government, being subject to the law. Art. 22 of the Constitution states that every citizen of Afghanistan, no matter whether male or female, bears the same rights and duties. Any discrimination or the bestowal of privileges is prohibited. Art. 14 LOJC states that the proceedings and verdicts of courts will be based on the principle of equality before the law. Read together with the provisions about the impeachment of state officials (Art. 69 of the Constitution in regard to the President of the Republic, Art. 78 in regard to the ministers, Art. 127 for the Chief Justice and the members of the Supreme Court) these provisions implement equality before the law into the legal system of Afghanistan and clarify that everyone, including the President of the Republic, is subjected to the same law. 180

Hence, the preamble identifies the creation of a society based on the rule of law as a primary objective of the Afghan Constitution, and the constitution explicitly provides for mechanisms and institutions necessary for the implementation of the rule of law. Thus, the rule of law including the separation of powers can be derived from the constitution as one of its principles.

As mentioned in the beginning of this section, there is a substantive approach regarding the content of the rule of law including in varying decrees, aspects of morality and natural law and thereby also human rights and their protection. 181 Hence, depending on the perception of the rule of law one might subsume human rights and their protection under the principle of the rule of law. However, due to the importance of human rights protection in a post-conflict scenario such as the Afghan scenario, and the prominence attributed to human rights in the Afghan Constitution, they shall be treated as an additional constitutional principle. However, this should not be seen as a predicament in the sense that the rule of law according to Afghan constitutional doctrine lacks this material component, as it is possible for certain aspects of constitutional law to be based on two comprehensive constitutional principles.

E. Human Rights and Their Enforcement

In its preamble, the Afghan Constitution expresses its commitment to the creation of a society free of oppression, atrocity, discrimination, and violence and based on the rule of law, social justice, the protection of human rights, and dignity, and ensuring the fundamental rights and freedoms of the people. 182 Most important for a legal system based on the protection of human rights and dignity, Arts. 22–42 promulgate a much more detailed

180 A still-existing problem in this regard is the accountability for past human rights abuses and atrocities committed during the Soviet occupation and the ensuing civil war, which remains a task yet to be shouldered. To end the culture of impunity will be a political decision and will be a necessary and urgent task in order to realize the principle of equality before the law fully. In this respect, amnesty laws granting general amnesty are highly problematic.

181 See (n 155).

182 “We the people of Afghanistan: [. . .] 8. for the creation of a civil society free of oppression, atrocity, discrimination, and violence and based on the rule of law, social justice, the protection of human rights, and dignity, and ensuring the fundamental rights and freedoms of the people [. . .] have adopted this constitution [. . .].”
catalogue of basic rights and freedoms than any of the preceding constitutions. The prominence of this catalogue of basic rights and freedoms is emphasized by Art. 149 para. 2 of the Afghan Constitution, rendering it immune to any negative amendments insofar as they may only be amended in order to increase their effectiveness. The importance of human rights as a pillar of the Afghan constitutional order and their protection as one of the main functions of the Afghan state is underlined by Art. 6, which obliges the Afghan state to create a prosperous and progressive society based on social justice and the protection of human dignity and human rights. Additionally, Art. 7 promulgates that the state shall abide by the UN Charter, the international conventions to which Afghanistan is a party, and the Universal Declaration of Human Rights.

Whereas human rights, the rule of law, and democracy share points of contact but no imminent conflicts, and might be realized in a central state as well as in a federal system of government, depending on the interpretation of Islamic law, the relationship between Islamic republicanism and human rights is not without tension. A troubling reminder of the incompatibility of some interpretations of Islamic law and human rights is the human rights record of the I.R. Iran mentioned in the introduction, and the fact that the Iranian government regularly tries to justify its deficits in this regard by references to Islamic law.

However, we have seen that the Afghan Constitution sponsors an understanding of Islamic republicanism and its relation to the other constitutional principles, which is much different from the Iranian model. First, as already mentioned, the Afghan Constitution does not endorse radical interpretations of Islamic law, which is demonstrated by the introduction of the sovereignty of the people, which displays the rejection of ideas of proponents of political Islam. Second, Islamic republicanism is “embedded” in the Afghan constitutional order in a way that it does not posses superiority but rather shares the same importance as the other constitutional principles. Especially regarding basic rights and their protection this is demonstrated by the fact that according to Art. 149 para. 1 and 2 of the Afghan Constitution both the principle of Islamic republicanism and the catalogue of basic rights are immune to derogations by constitutional amendment.

Due to the principal equality of the constitutional principles in cases of conflict, a balance has to be struck between the principles involved and the balance achieved in
an individual case has to fulfill the prerequisite that neither of the principles involved is privileged and realized on the maximum nor discharged completely. Instead, in every case a considerate balance between them has to be achieved, realizing both as far and as fully as possible. In other words, the equality of the involved principles and values of the constitution necessitates that both conflicting values have to be limited in order to be realized in an optimal way. These limitations have to be proportional and may not reach further as necessary to achieve the concordance of both. This approach to reconcile principally equal constitutional principles in case of conflict is inspired by the so-called doctrine of practical concordance (praktische Konkordanz), which is applied in German constitutional doctrine to solve individual cases in which basic rights or other constitutional values conflict with each other.\footnote{\textnormal{Cf.\ inter\ alia\ K. Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland (C.F. Müller Verlag, Heidelberg 1999) 28; German Federal Constitutional Court, BVerfGE 93, 1ff.; German Federal Constitutional Court 28, 243 (260ff.); German Federal Constitutional Court 41, 29 (50); German Federal Constitutional Court 52, 223 (247, 251).}}

In order to give hints on the practical application of this method and to demonstrate possible solutions of conflicts, in the following the punishment of apostasy in Islam shall be analyzed in an abstract way.\footnote{\textnormal{Cf.\ for\ an\ in-depth\ analysis\ of\ an\ actual\ case\ of\ apostasy\ in\ front\ of\ Afghan\ courts\ M. Knust\ Rassekh \Afshar, “The\ case\ of\ an\ Afghan\ apostate”\ (2006) 10 Max Planck yearbook of United Nations law 591ff. whose convincing argumentation inspired the approach proposed in the following to a substantive extent.}}

\section*{III. A PRACTICAL APPROACH TO SOLVE CONFLICTS BETWEEN HUMAN RIGHTS AND ISLAMIC REPUBLICANISM WITHIN THE FRAMEWORK OF THE AFGHAN CONSTITUTION}

Would it be compatible with the Afghan Constitution to punish someone for changing his religion and leaving Islam and the community of Muslims (ummah)? From an Islamic law perspective the case is rather simple. Although the Qurʾān does not mention any worldly punishment for apostasy, and in spite of the perception of individual foqahāʾ, the prevailing reading within all schools of Islamic law interprets a certain Sunnah of the Prophet Muhammad that an apostate to Islam has forfeited his life and has to be punished accordingly.\footnote{\textnormal{Knust (n 190) 598; cf.\ T. Kamel, “The\ Principle\ of\ Legality\ and\ its\ Application\ in\ Islamic\ Criminal\ Justice”\ in\ M.C. Bassiouni (ed), The Islamic criminal justice system (Oceana Publishers, London 1982) 149ff. 153.}}

In contrast, from the perspective of the Afghan Constitution, any punishment in this case would be unconstitutional because according to Art. 27 para. 1\footnote{\textnormal{Art. 27 para. 1: “No act is considered a crime, unless determined by a law adopted prior to the date the offence is committed.”}} in criminal cases the principle of legality (nulla poena sine lege) applies and there is no statutory law punishing apostasy. Although there are voices claiming Islamic law in its whole has to be considered “law” in Afghanistan without any formal act of legislation,\footnote{\textnormal{For\ an\ overview\ of\ the\ argument, see\ Knust (n 190) 600ff.}} this perception is hardly sustainable because Art. 94 unequivocally defines law as, “[. . . ] a resolution passed by both Houses of Parliament and promulgated by the President [. . . ]”.\footnote{\textnormal{Cf.\ for\ the\ relevance\ of\ Art.\ 94\ of\ the\ Afghan\ Constitution\ as\ a\ definition\ of\ “law”\ Kamali (n 4) 290.}}

It is questionable, however, if a respective bill punishing apostasy from Islam could be constitutional at all. In the perception of the author, a correct balancing of the principles
involved has to reach the conclusion that such a norm would be unconstitutional. On the one side of the conflict there is the religious freedom of the “perpetrator.” Although Art. 2 of the Afghan Constitution only protects the religious freedom of non-Muslims and therefore is not applicable to cases of apostasy, Art. 7 para. 1 has to be taken into account. According to this provision:

the state abides by the UN charter, international treaties, international conventions that Afghanistan has joined, and the Universal Declaration of Human Rights.

The Universal Declaration of Human Rights in Art. 18 states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief [...].

Although declarations by the General Assembly according to Arts. 10 et seq. of the Charter of the United Nations are non-binding in character, the binding character of the declaration for Afghanistan follows out of Art. 7 of the Afghan Constitution. The freedom of religion is furthermore protected by Art. 18 of the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by Afghanistan without any reservation, and Art. 14 of the Convention on the Rights of the Child (CRC). According to the well-established principle of the continuity of states, the identity of a state is not affected by changes to its constitutional system, no matter if changes have been of a revolutionary character. Hence, Afghanistan is bound by both treaties. Although, unlike the

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196 Charter of the United Nations of June 26, 1945, entered into force October 24, 1945, 1 UNTS XVI.
Universal Declaration, neither the ICCPR nor the CRC explicitly mentions the right to change one’s religion, it is generally perceived that this right is included in Art. 18 ICCPR and Art. 14 CRC.\(^\text{201}\) In regard to the ICCPR, this can be derived from Art. 18 para. 2 according to which:

No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

The threat of execution in case of apostasy would clearly constitute coercion and therefore would significantly impair the freedom of religion.\(^\text{202}\) Hence, a provision establishing the death sentence for cases of apostasy would be incompatible with the freedom of religion. Although this aspect of the freedom of religion is not expressly part of the catalogue of basic rights promulgated by the Afghan constitution, it is nevertheless of constitutional rank as can be seen in the strong emphasis the Afghan Constitution puts on human rights and its international obligations relating thereto.\(^\text{203}\)

This provides a strong argument for the unconstitutionality of a bill punishing apostasy. However, it has to be established whether it would be compatible with the principle of Islamic republicanism not to punish apostasy. In order to answer this question several issues have to be taken into account. First, the necessity to punish apostasy is not part of Shari‘ah but only of \textit{feqh} since this rule is derived out of the \textit{interpretation} of a Sunnah of the Prophet.\(^\text{204}\) As has been examined above Art. 3 of the Afghan Constitution requires conformity of legislation with the Shari‘ah only and not with \textit{feqh}.\(^\text{205}\) Moreover, the fact that there is dispute within the ‘ulama’ on the question whether apostasy without any qualifying circumstances necessitates criminal sanctions, allows the conclusion that the introduction of a respective bill is not a necessary prerequisite for an Islamic state. This perception is furthermore supported by the authority of some members of the ‘ulama’ rejecting a punishment for apostasy if the action in question is not qualified by additional criteria, i.e., the intention to inflict harm to the ummah, i.e., the community of Muslims.\(^\text{206}\) For instance one of the dissenting scholars is Grand Ayatollah (Ayatollah-e ‘ozmā) hosein ‘Ali Montazeri, who is one of the most revered sources of emulation (marja’-e taqli) within Shi‘ite Ja‘fari Islam, which means every believer of this madhhab is allowed to follow his rulings without transgressing Islamic law even if Montazeri should err. The fact that Montazeri belongs to the Ja‘fari school of law, the largest Shi‘ite school of law, does not impair the religious authority of his views, given that about 19 percent of the Afghan population belong to the Shi‘ite

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\(^{202}\) Cf. also Knust (n 190) 601.

\(^{203}\) Cf. Arts. 6, 7 and the preamble of the Afghan Constitution.

\(^{204}\) See above and also Knust (n 190) 595, 598.

\(^{205}\) See III. a. Compatibility of the Constitution and Legislation with Shari‘ah.

\(^{206}\) Knust (n 190) 598.

\(^{207}\) On the Shi‘ite ‘ulama’ and its hierarchy in detail Momen (n 32) 184ff.
branch of Islam and the Afghan Constitution does not establish a certain school of Islamic law as religion of state.

Therefore, while an Islamic state could refrain from punishing apostasy without being considered un-Islamic, as previously established, the introduction of a respective penal norm would constitute a grave infringement of freedom of religion. Therefore, it would be unconstitutional for the Lower House to pass a respective bill.

IV. CONCLUSION

Although Art. 1 establishes the principle of Islamic republicanism, this is one pillar of the Constitution among others. The other pillars include democracy, the rule of law, the principle of a unitary state, and last but not least human rights and their enforcement. Although Islamic republicanism enjoys immense importance as a constitutional principle, it has to be balanced with other principles or constitutional values in case of conflict. The balancing of conflicting principles and rights can only be accomplished in compliance with the spirit of the Afghan Constitution, which requires that none of them should be ignored, and that all are interpreted in a way which renders them compatible with each other and gives maximal effect to each of them. The need for balancing is implicit in the constitutional text itself: although according to Art. 3 of the Afghan Constitution no Afghan law may be repugnant to the Shari’ah, Art. 4 unequivocally embraces the principle of the sovereignty of the people and thereby rejects the notion of the proponents of political Islam that in an Islamic state sovereignty belongs to God alone.

Hence, the present constitutional order of Afghanistan is clearly not the order Sayyid Qutb, Āyatollāh Khomeinī, and other fundamentalist preachers of political Islam had in mind. Rather, as stated in the preamble of the constitution, it is the attempt of a religious society whose majority is deeply committed to Islam to establish a legal order in which the rule of law, democracy, and human rights can be realized without ignoring the Islamic identity of the vast majority of the population. Due to its well-balanced character, the Afghan Constitution provides a good starting point and framework for the development of a society realizing these different aims. In response to past atrocities, the Afghan Constitution avoids extremism, no matter whether of religious or anti-religious character. It is incumbent on the Afghan society in general, and its jurists in particular, to implement the promise of the constitution into reality and thereby let Afghanistan, like its constitution, become an example to the Islamic world.
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