

Measuring Constitutional Islamization: The Islamic Constitutions Index

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Abstract

The military coup in Egypt and the Taliban insurgency in Pakistan and Afghanistan have once again highlighted the high political stakes of incorporating Islam within a constitution. Many constitutions in the Muslim world include clauses that recognize the Islamic character of the state; yet, there is little scholarship empirically analyzing these clauses; indeed, while much has been written about the effects of incorporating a particular type of clause—the Islamic supremacy clause, to date, we know very little about the comparative constitutional universe of Islamic clauses: How prevalent is Constitutional Islamization? Which countries have the most or least Islamized Constitutions? Do secular countries in the Muslim world promise more human rights than Islamic countries? Does having

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more Islam in the constitution correlate with weaker political participation and gender equality?

This Article tries to fill this gap. Relying on an original dataset based on the coding of the constitutions of all Muslim majority countries globally, it introduces the Islamic Constitutions Index (ICI)—the first index to measure and rank constitutions according to their Islamicity. Using this index as a proxy for Constitutional Islamization, we investigate the universe of Islamic constitutions. Our analysis shows that roughly half of all Muslim majority countries in the world have Islamic features in their constitutions and geography and colonialism seem to have some influence on Islamicity. Further, in terms of Islamicity, Saudi Arabia, Iran and Pakistan lead the rankings of Constitutional Islamization while the Central Asian countries all have secular constitutions. Further, we show that while Muslim countries' constitutions generally promise a number of important human rights and none explicitly incorporate corporal punishments, constitutions that privilege secularism tend to, on average, promise more rights than constitutions that privilege Islam. Indeed, of the top 10 countries in the Muslim world measured in terms of *de jure* constitutional promise of rights, all but one—Maldives, are secular. We also find that Islamicity of the constitution seems to correlate negatively with democracy, gender equality and political stability. Although preliminary and not implying causation, our correlation analysis has considerable implications: not only can it provide some support to peace-making efforts with Islamic militant groups doubting the Islamic character of the states they are fighting, it implies that the Muslim world may in fact chart its own version of "Islamic constitutional democracy" that may be different from Western paradigm of democracy. Further, our work lays the foundation for a research agenda investigating of the relationship between political Islam and democracy. On a normative level, if the pursuit of Constitutional Islamization is indeed shown to be in tension with liberal democracy, constitutional designers must focus on design options such as the structure of constitutional courts that will engage in interpretation of these constitutions so as to reconcile potential tensions between these two popular

strands of the constitution-making.

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Introduction

On July 3rd, 2013, General Abdul Fatah al-Sisi, the chief of the Egyptian army, removed President Mohammed Morsi from power in a coup d'état. Morsi, elected in 2013, had been Egypt's first ever democratically elected president. The Chief Justice of the Supreme Constitutional Court of Egypt was installed as the interim president when Morsi was put under house arrest. Several members of the Muslim Brotherhood – the political party to which Morsi belonged – were arrested and some were killed. General al-Sisi also suspended the Egyptian Constitution, which was promulgated only a few months earlier. The acting president issued a constitutional decree to make amendments to the 2012 constitution.¹ A constitutional committee, composed of 50 members, would propose the amendments.² The Committee had hardly begun its work when foreign observers began to refocus most of their attention on speculating just *how* "Islamic" the amended constitution might be.³ And indeed, the Committee was soon gridlocked over the issue of Islam in the new constitution.⁴

Egypt's 1971 and 2012 Constitutions had contained clauses entrenching the principles of Islamic law as the primary source of legislation; and while some called the 2012 constitution, an "Islamic" constitution, others alleged that it leaned towards "conservative" Islam. Would the amended constitution be more or less "Islamic" than its predecessor? One commentator argued that "Egypt's constitutional declaration issued late on July 8 contains more

1. Shadia Nasralla, *Rows Over Egypt's Constitutional Decree Signal Hurdles Ahead*, REUTERS (July 9, 2013), <http://www.reuters.com/article/2013/07/09/us-egypt-protests-constitution-idUSBRE96815 R20130709>.

2. Nathan J. Brown, *Egypt's Daring Constitutional Gang of 50*, FOREIGN POLICY (Sept. 20, 2013), available at http://mideastafrica.foreignpolicy.com/posts/2013/09/20/egypts_daring_constitutional_gang_of_50.

3. Omar El Akkad, *Egypt's Draft Constitution Limits Role of Islam*, THE GLOBE AND MAIL (Aug. 30 2013), available at <http://www.theglobeandmail.com/news/world/egypts-draft-constitution-limits-role-of-islam/article14060190/>.

4. Gamal Essam El Din, *Fierce debates over preamble of Egypt's new constitution*, AHARAM ONLINE (Nov. 26, 2013), <http://english.ahram.org.eg/News/87562.aspx>.

concessions to radical Islam than the constitution drawn up by deposed President Hosni Mubarak.”⁵ As speculation intensified over the – what we call – “Islamicity” of Egypt’s constitution, one of the members of the constitutional committee was quick to dismiss any suggestion that the amended constitution of 2013 would be any less Islamic than the previous one, and claimed that the committee does not intend to “distort Egypt’s Islamic identity whatsoever,” adding, “What is being said in this regard is nothing more than unfounded speculation.”⁶

The question of Islamicity of constitutions that this paper tackles is of immense importance. In writing the new Egyptian Constitution, drafters confronted that routine, age-old question of constitutional design: what role will Islam be given in this newly drafted constitution in the Muslim world? How will law-making be affected by the adoption of Islam? Are constitutions in the Muslim world establishing theocracies or liberal democracies? How does the incorporation of Islam in a constitution affect the adoption of constitutional rights? These questions are not only of great importance in the Middle East today, but have remained an issue during constitution-making exercises in the Muslim world. Discussions about the future constitutional design of Syria have already begun. Jordan has amended its constitutions in ways designed to preserve its monarchy; Tunisia has just passed a new constitution, and Libya and Yemen are in the middle of constitution-making exercises. The question of Islam has remained of primary salience in each of these constitutional design situations. Even in Tunisia – one of the most secular countries in the Muslim world – one question stood out: the role of Islam in the constitution.

In 2014, the question of Islamicity of constitutions also gained particular prominence internationally when peace talks were being discussed between the governments of Pakistan and Afghanistan and the Taliban. In the case of Pakistan, the militant group even refused to accept peace talks under the framework of a constitution which, in

5. Richard Palmer, *Egypt’s New Constitution More Islamic Than the Last*, THE TRUMPET (July 13, 2013), available at <http://www.thetrumpet.com/article/10805.19.0.0/religion/islam/egypts-new-constitution-more-islamic-than-the-last>.

6. Safaa Azaab, *In Conversation with Kamal El-Helbawy*, ASHARQ AL AWSAT (Oct. 12, 2013), available at <http://www.aawsat.net/2013/10/article55318241>.

their view, was not Islamic.⁷ Hence, war and peace partly can sometimes hinge on how Islamic a country's constitution is.

This debate is not new: the status of Islam had similarly been a major issue for US foreign policy in the process of producing the Iraqi and Afghan constitutions.⁸ With regards to Iraq, Senator Richard Lugar went so far as to publicly state that the United States could not accept "a popularly elected theocracy," while one scholar dismissingly referred to the newly written constitutions of both countries—due to their incorporation of Islamic clauses—as impositions of "theocracy."⁹ As Voll notes, "implicit in these concerns is an assumption that an "Islamic" state, even if democratically established, would be transformed into an illiberal and undemocratic "theocracy."¹⁰ For these critics, the choice between the constitutional inclusion of Islam and democracy or rights was a zero-sum game: a constitution then, would have to make a choice between the two.

In contrast to Western fears, in much of the Muslim world, the idea of incorporating Islam in the/a constitutional-legal framework

7. Dawood Ahmed, *How "Islamic" is Pakistan's Constitution?*, ICONNECT BLOG (May 17, 2014), <http://www.iconnectblog.com/2014/05/how-islamic-is-pakistans-constitution/>.

8. LARRY DIAMOND, *SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ* 49 (2005) ("Any democratically elected Iraqi government is unlikely to be secular, and unlikely to be pro-Israel. And frankly, moderately unlikely to be pro-American") (quoting Noah Feldman's description of the Bush administration's involvement in the Iraqi constitution); Alexander Thier, *Big Tent, Small Tent: The Making of a Constitution in Afghanistan*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 535, 543–45 (Laurel E. Miller ed., 2006) (discussing UN and US involvement in the Afghani constitution making process); Nusrat Chodhury, Comment, *Constrained Spaces for Islamic Feminism: Women's Rights and the 2004 Constitution of Afghanistan*, 19 *YALE J.L. & FEMINISM* 155, 156 (2007) ("The recent drafting and ratification of the Constitution of the Islamic Republic of Afghanistan in 2003 and 2004 sparked contentious debates over the compatibility of democratic governance, Islam, and Islamic law.").

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

10. Voll, *supra* note 9, at 171.

still remains very popular.¹¹ This became evident after the Arab Spring. A recurrent slogan of protestors in the Arab Spring was “ash-shab yurid isqat an-nizam,” translated as “the people want to bring down the regime.” The protestors in the Arab Spring certainly wanted democracy and rights. However, while outside observers feared the rise of Constitutional Islam, the protestors did not want to trade democracy for religion; that is, did not desire secular government; which is often associated in the popular imagination in Muslim countries with repression, colonialism and an assault on Islam.¹² Rather they wanted Islam *and* democracy. That is, even though the Arab Spring movements were not by any means Islamist in nature; the protestors were clamoring for freedom and justice as “Muslims and not against religion,¹³ in general. While they wanted Islam; they also, overwhelmingly, desired democracy, rights and the rule of law.¹⁴ Accordingly, foreign governments that assumed that democratization would bring secular parties to power and encourage a separation of religion and state, were disappointed as it became apparent that instead, as democratization took hold in the Middle East, it would be Islamic parties that would rise to power. Some commentators even skeptically began to refer to the Arab Spring as the “Islamist Spring.”¹⁵ In contrast, rather than downplaying the

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

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

13. See generally *id.* at 15.

14. See Richard Wike, Pew Global Research Project: *The Tahrir Square Legacy: Egyptians Want Democracy, a Better Economy, and a Major Role for Islam* (Jan. 24, 2013) at <http://www.pewglobal.org/2013/01/24/the-tahrirsquare-legacy-egyptians-want-democracy-a-better-economy-and-a-major-role-for-islam/>.

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

Islamicity of their constitutions, leaders in the Muslim world seem to be boasting at *how* Islamic their constitution will be. Sudan's leader, Omar Al-Bashir has already promised his constituents a "100% Islamic" Constitution,¹⁶ the Syrian opposition wants a constitution based on Islam,¹⁷ Libyan leaders have suggested that the constitution will be "Islamic" and "half of the debates" in the Tunisian National Constituent Assembly have been about the status of Islam in Tunisia's constitution.¹⁸ Indeed, one of the promises of the Islamic parties is the full implementation of sharia in their respective societies. The constitution, as the most important legal document in the state, becomes the primary focal point of exercising this demand.

Thus, rather than greater democracy in the Muslim world, leading to the presumed marginalization of Islam or the advance of secularization, the reverse seems to be occurring. And this is not surprising: secularism has never been popular in many parts of the Muslim world. Indeed, *The Economist* states "most Muslims do not believe in the separation of religion and state, as America and France do, and have not lost their enthusiasm for religion, as many "Christian Democrats" in Europe have."¹⁹ Unsurprisingly then, one of the dominant promises of the Islamists elected to power after the Arab Spring was the implementation of sharia in their respective societies. As Professor Noah Feldman acknowledged in the case of Iraq, "as the constitutional process became increasingly participatory and democratic, the constitution itself became increasingly Islamic in orientation and detail" and "more democracy meant more Islam."²⁰ Indeed, as Professor Feldman writes elsewhere, "[w]here the country is majority Muslim, many citizens will often want Islam to have some

16. Yara Bayoumy, *Sudan Constitution To Be "100 Percent Islamic": Bashir*, REUTERS (July 8 2012), at <http://uk.reuters.com/article/2012/07/07/uk-sudan-constitution-idUKBRE8660IB20120707>.

17. Oren Dorell, *Syrian Rebels Said To Seek Islamic Democracy*, USA TODAY, Sept. 24, 2012, available at <http://usatoday30.usatoday.com/news/world/story/2012/09/24/syrian-rebels-said-to-seek-islamic-democracy/57826584/1>.

18. Robert Joyce, *Tunisia's Neglected Constitution*, CAIRO REVIEW OF GLOBAL AFFAIRS, (Oct. 14, 2013), available at <http://www.aucegypt.edu/GAPP/CairoReview/Pages/articleDetails.aspx?aid=439>.

19. *The Uprisings: Islam and the Arab Revolutions*, THE ECONOMIST (Mar. 31, 2011), available at <http://www.economist.com/node/18486005>.

20. See Noah Feldman & Roman Martinez, *Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 FORDHAM L. REV. 883, 884 (2006).

official role in state governance, beyond mere symbolism”²¹ and that the Islamic democrats believe that “a majority of Muslim citizens would choose government with an Islamic cast if they were free to do so.”²²

Why would bringing Islam and sharia into the constitution and political sphere be so popular in Muslim societies? Perhaps because many Muslims associate sharia, good governance and rights as indivisible and complementary. Muslims in many countries consider a lack of Islam responsible for much of the political corruption and lack of accountability that besieges many Muslim countries. Indeed, the sharia is widely considered by Muslims to be the solution to their problems—as the Muslim Brotherhood’s slogan goes, “Islam is the Solution.”²³ Thus, while the idea of Islam and Islamic law conjures up negative connotations in the West, for Muslims, according to Professor Feldman, it is Islam that continues to “invoke the core idea of law in terms that resonate deeply with the Islamic past.”²⁴ Polls routinely attest to the fact that vast majorities in Muslim societies desire to see Islam embedded in their constitutional and legislative framework.

In fact, for Muslims, sharia itself is analogized as a sort of constitution, holding rulers accountable for transgressions and corruption, to God’s law. In the public consultations during the constitutional drafting process in Egypt in 1971, Kristen Stilt writes that it was apparent that those who desired to see Islam and rights associated the two as linked.²⁵ We also know from polls that the majority of Muslims who desire that Islam be a source of legislation do so, because they associate many positive rights to Islam—and these rights overlap with modern day human rights norms. For example, a majority of those polled believe that incorporating Islam

21. *Id.* at 860.

22. *Id.* at 864.

23. Kristen Stilt, “Islam is the Solution”: *Constitutional Visions of The Egyptian Muslim Brotherhood*, 46 TEX. INT’L L.J. 73, 73-108 (2010).

24. See Noah Feldman, THE FALL AND RISE OF THE ISLAMIC STATE 2 (2008) (discussing increasing tendency for governments in majority-Muslim countries to declare themselves Islamic and apply Sharia).

25. See generally Kristen Stilt, *Constitutions in Authoritarian Regimes: The Egyptian Constitution of 1971*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 111 (Tom Ginsburg & Alberto Simpser eds., 2014) (tracing the history of Egypt’s constitution).

as a source of law would mean a provision of justice for women, constraining government, a reduction in corruption, the protection of minorities, human rights and a fair judicial system. Even in secular Turkey, less than a third of Muslims – who want Islamic law to be a source of legislation – perceive it to limit personal freedom; thus, it could very well be that the demands for rights and Islam are motivated by the same forces.²⁶ Secularism in the constitution, in contrast, has only limited appeal in most Muslim countries. Secularism is seen as unacceptable to many Muslims, even if some elites in the region desired it and saw it as necessary.²⁷ As one writer has commented, “Muslim thinkers [find] it very difficult to understand new ideas like secularism in isolation from Christian (Western colonial) supremacy.” Secularism is perceived as a means to rid the state of religion completely – to remove God from the public space – a goal which is “intolerable for many Muslims;” rather than being understood as an alternate style of government. And there is of course another reason for its low legitimacy: politics. Secular-styled governments ranging from Nasser in Egypt, to the Shah in Iran and Bourguiba in Tunisia happened to be very dictatorial regimes. Indeed, even in Turkey – the most secular of all Muslim majority countries – the charm of secularism has been waning in the face of popular politics.²⁸

With this in mind, and as the idea of an “Islamic constitution,” where state and religion are fused, gains even more popular traction and can sometimes make the difference between war and peace, it becomes immensely important to understand “Constitutional Islamization” from an empirical perspective. But, to date, there is little empirical or systematic scholarship on Constitutional

26. Rheault, *supra* note 11.

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

28. See BRIAN J. GRIM & ROGER FINKE, *THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY* 167 (2011) (discussing popular interest in bringing Islam to secular Turkish government); see also Nazih N. M. Ayubi, *The Political Revival of Islam: The Case of Egypt*, 12 INTL. J. MIDDLE E. STUD. 481, 487 (1980) (describing a general turning away from secularism in Middle East).

Islamization.²⁹ In particular, there is no account as to why we observe variation throughout the Islamic world regarding whether or not the constitution is Islamized or which constitutions are most Islamized. This gap exists despite the fact that the “Muslim world’s desire for enacting these clauses shows no sign of abating.”³⁰

This is not to say that there is no scholarship. Certainly, in the area of comparative constitutional law, scholars have recently described how courts have moderated this potential tension, specifically focusing on the ‘benign’ judicial interpretation of Islamic supremacy clauses. Nathan Brown and Clark Lombardi, citing the example of Egypt, suggest that constitutions that incorporate Islam may not in fact threaten human rights since a progressive judiciary can interpret laws in a progressively compatible way.³¹ Similarly, Ran Hirschl has written extensively about the means by which judges across the Muslim world have mitigated the potential illiberal effects of incorporating religion within constitutions—or “constitutional theocracy.”³² On the other hand, Intisar Rabb has critiqued some of

29. *But see* Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari’a Threaten Human Rights? How Egypt’s Constitution Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT’L L. REV. 379 (2006); NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 107–10, 161–93 (2001) (tracing historiography of idea that the origin of Western constitutionalism lies in Christianity and the history of the role of shari’a in Middle Eastern governance); FELDMAN, FALL AND RISE, *supra* note 24, at 103–40 (exploring the emergence of modern Islamism and its constitutional proposals); *see generally* Clark Lombardi, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, 28 AM. U. INT’L L. REV. 733, (description of sharia clauses as a source of legislation); Jan Michiel Otto, *Sharia and Law in a Bird’s-Eye View: Reform, Moderation and Ambiguity*, in DELICATE DEBATES ON ISLAM 74 (Jan Michiel Otto and Hannah Mason eds., 2011) (examining the changing role of sharia over time in 12 Muslim countries); Dawood I. Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions*, 54 VA. J. INT’L L. (forthcoming 2014).

30. Lombardi and Brown, *supra* note 29, at 381 (discussing growing popularity of constitutional Islamization).

31. *Id.*

32. *Id.* (using Egypt as a case study to examine the difficulties courts face in interpreting Constitutional Islamization and the effects on human rights and the economy); Clark B. Lombardi, *Designing Islamic constitutions: Past Trends and Options for a Democratic Future*, 11 INT’L J. CONST. L. 615, 627 (2013) (Iraqi Supreme Court finds clauses nonjusticiable); *see generally* RAN HIRSCHL, CONSTITUTIONAL THEOCRACY

these positions. Yet, even as the concept of an “Islamic” constitution is brandied about with increasing frequency today by policy makers, commentators and scholars alike—no one has to date surveyed the constitutional landscape to exhaustively identify the prevalence of Islamic features in constitutions, nor asked just *how* Islamic are the constitutions of Muslim countries are, or which Muslim country has the most Islamic constitution? That is, we find that there is no empirical analysis of Islamicity in constitutions, despite the immense political importance of the question.

This Article fills the gap: relying on a unique dataset based on the coding of in force national constitutions of countries that are members of the Organisation of Islamic Co-operation (OIC), it surveys the global landscape of constitutions of Muslim countries: from Uzbekistan to Saudi Arabia, from Iran to Somalia—and charts out the universe of “Constitutional Islamization.” In doing so, it develops a novel index—the Islamic Constitutions Index (ICI) that measures and ranks the constitutions of all Muslim majority countries according to “Islamicity.”³³ In doing so, it seeks to measure not only how well countries’ constitutions live up to the popular ideal of being an Islamic Constitution but also tests the popular assumption that the constitutional incorporation of Islamic law is necessarily antithetical to human rights and democracy. Questions this Article tackles include, just *how* Islamic are the constitutions of Muslim majority countries today? What types of Islamic clauses exist? How do constitutions incorporate Islam? What types of constitutional clauses relating to Islam are most popular in the Muslim world? What regions have the most Islamic constitutions and what variables predict the adoption of Islamic features in a constitution? It also answers the puzzle: Which is the most and least Islamic constitution in the Muslim world?

(2010) (arguing that encompassing religion in constitutionalism, i.e., “constitutional theocracy,” has allowed opponents of theocracy to maintain order through religious rhetoric without an actual theocracy).

33. We acknowledge that developing and using indicators and rankings to understand and conceptualize complex socio-legal phenomena is a risky exercise and therefore significant caution should be exercised when relying on such tools conclusively for policy making. See generally Tom Ginsburg, *Pitfalls of Measuring the Rule of Law* 3 HAGUE J. RULE OF L. 269 (2011).

Accordingly, the goal of this Article is to illuminate the world of “Constitutional Islamization” for academics and policymakers alike empirically, so as to resolve a major tension during constitution-making in the Muslim world and lay the foundations for an ambitious empirical research agenda that further illustrates the relationship between Islam and democracy globally. Further, we hope that providing empirical evidence on the Islamicity of constitutions will assist fragile democracies during peace-making efforts with groups such as the Afghan and Pakistani Taliban that have as their central goal, the establishment of an Islamic Constitution.

This Article proceeds in five parts. Part I provides a brief history of the relationship between constitutionalism and Islam in the Muslim world. Part II elaborates on Islamic law or Sharia and the core theoretical framework of “Islamic Constitutionalism.” Part III sets out the conceptual framework of our analysis by introducing *the* model Islamic constitution—a hitherto under-researched, comprehensive “model” Islamic constitution developed by Al-Azhar University in Egypt; an institution widely considered one of the most authoritative source of Islamic rules and jurisprudence in the Sunni Muslim world. It is this model against which we assess global constitutionalism for its Islamicity. Part IV introduces our empirical methodology and elaborates our findings about the universe of Islamic Constitutions. It captures the universe of Islamic clauses found in constitutions and ranks Muslim country constitutions in terms of their Islamicity—that is, the most and least Islamic constitutions in the world. It also identifies regional patterns regarding Islamicity in constitutions and charts the trajectory of Islam in the world’s constitutions temporally. Part V concludes the Article.

I. The Origins of “Islamic Constitutions”

A. *Liberal Leanings and Moral Standings—Islamic Constitutionalism*

In the past century, religion seems to have witnessed a marked resurgence in law and government.³⁴ This revival has been witnessed

34. See generally RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2008); see generally PETER BERGER, *THE DESECULARIZATION OF THE WORLD* (1999); see generally GILLES KEPEL, *THE REVENGE*

across the globe, in regions spreading “from central and southeast Asia to north and sub-Saharan Africa and the Middle East.”³⁵ In the case of Muslim countries, beginning with the 1970s, widespread calls for the implementation of Islamic law were observed.³⁶ In terms of constitutional design, while a number of constitutions globally contain a state religion clause, constitutions in Muslim-majority countries privileged religion even more robustly.³⁷ Many Muslim countries, including Saudi Arabia, Kuwait, Bahrain, Yemen, and the United Arab Emirates, have adopted constitutions that entrenched Islam or Islamic law (Sharia) as *a* source, *a* primary source or *the* primary source for legislation. Since 1980, the Egyptian Constitution has provided that “principles of Islamic law are the principal source of legislation.”³⁸ Similarly, the Iraqi Constitution states that “Islam . . . is a fundamental source of legislation.”³⁹ Some of these constitutions went a step further and provided for so-called “repugnancy clauses.” In Pakistan, Afghanistan, Egypt, Iran, and Iraq, for example, it is constitutionally forbidden to enact legislation that is antithetical to Islam. The Constitution of Pakistan requires that “no law shall be enacted which is repugnant to Islam.”⁴⁰ The Afghan Constitution similarly demands that “no law can be contrary to the beliefs and provisions of the sacred religion of Islam.”⁴¹ Some Muslim countries require that the head of state or government must be Muslim, while others simply make references to their Islamic identity in their preamble.

OF GOD (1994).

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

36. SAMI ZUBAIDA, *LAW AND POWER IN THE ISLAMIC WORLD*, 1 (2003) (explaining the Islamic revival in the 1970s calling for application of shari’a in a system of government); see SAID AMIR ARJOMAND, *Introduction* in CONSTITUTIONAL POLITICS IN THE MIDDLE EAST: WITH SPECIAL REFERENCE TO TURKEY, IRAQ, IRAN AND AFGHANISTAN, at 3 (Said Amir Arjomand ed., 2008).

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

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

39. IRAQ CONSTITUTION Oct. 15, 2005, Art. 2.

40. THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN 1973 Art. 227.

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

So where and how did this demand for Islam arise in constitution writing in the Muslim world? The story goes like this: during the 19th century, autocratic rulers in parts of the Muslim world faced fiscal stress and political tensions. Once the supremely powerful Muslim polities faced almost certain decline, reformers within the system saw within a written constitution a partial means to arrest this decline. Emulation of Western political ideas and norms was considered necessary if the Empire was to reform itself. Accordingly, armed with a desire to ensure fiscal and political accountability and for rejuvenating a once powerful Muslim polity, while not giving up Islamic heritage, reformers in the Muslim world began experimenting with the “technology” of European written constitutionalism.

However, prior to written constitutionalism, it was sometimes Islamic law which had historically existed as a kind of natural, higher law “constitution” that constrained and limited temporal authority in some parts of the Muslim world.⁴² The doctrine of *siyasa sharia* had an “enormous impact on the political philosophy of the Ottoman state.”⁴³ According to the doctrine, to ensure laws were considered legitimate, “the ruler would have to consult with classical Islamic jurists and . . . ensure that . . . edicts must not require Muslims to perform acts that these jurists deemed forbidden and [did] not cause general harm to society by impeding the goals that Islamic jurists accepted as goals of the law.”⁴⁴ Accordingly, governments in some parts of the Muslim world had the power to make and apply laws; as long as they did not violate Sharia and were in the public interest.⁴⁵ In light of the existence of such constraints upon government, scholars of Islam explicitly recognized the congruence between Sharia and natural law;⁴⁶ some even argued that Sharia had certain features that might make it more constitutionalist than a positive,

42. See FELDMAN, FALL AND RISE, *supra* note 24, at 2 (discussing increasing tendency for governments in majority-Muslim countries to declare themselves Islamic and apply Sharia).

43. Lombardi and Brown, *supra* note 30, at 404–05.

44. *Id.*

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

46. See BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD, *supra* note 29, at 108 (discussing the debate about the analogy between Islamic shari’a and either constitutional law or natural law).

man-made, constitutional order.⁴⁷

While early Western scholarship traced the roots of constitutionalism to natural law doctrines in Christianity and Judaism, surprisingly “Islam, despite its strong legal orientation, provoked no [similar] interest.”⁴⁸ This is despite the fact, as Professors Esposito and Voll note, that the Islamic heritage contains a number of fundamental concepts that can support constitutionalism in the Islamic world—consensus, consultation, limits on arbitrary governmental power, limited sovereignty of the ruler, social contract and separation of powers.⁴⁹ Nevertheless, some Western scholars perceived that Islam, as a non-Western religion, could not have espoused values compatible with those of the Enlightenment.⁵⁰ In contrast, in recognition of the constitutionalist functions that sharia envisaged, some Muslim countries enacted positive *legislation only for certain issues*: rather, law and the limits of temporal authority in government were for certain issues organically derived from the various schools of Sharia.⁵¹

Yet, once it was decided that modernity required constitutional democracy along the European model, Islam’s previous role in governance had to be realigned and reconfigured to fit the emergence of the “modern” nation-state. Islamic tools of governance were thus

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

48. See *id.* at 108.

49. JOHN L. ESPOSITO & JOHN O. VOLL, ISLAM AND DEMOCRACY 51 (1996) (discussing aspects of Islamic heritage that support democratization like consensus, consultation, constitutional opposition, and limits on arbitrary government); see also Mohammad Hashim Kamali, *Constitutionalism in Islamic Countries: A Contemporary Perspective of Islamic Law*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES, *supra* note 27, at 20 (Islamic heritage compatible with constitutionalism like rule of law, consultation, separation of powers, and limited government); but see ELIE KEDOURIE, DEMOCRACY AND ARAB POLITICAL CULTURE 5 (1992) (The idea of representation, elections, popular suffrage, political institutions being regulated by laws laid down by a parliamentary assembly, laws being guarded and upheld by an independent judiciary, and ideas of the secularity of state are all profoundly alien to the Muslim political tradition).

50. See RAMADAN, *supra* note 12, at 13 (Western governments support Arab dictatorships rather than Islamist political movements).

51. See PAUL MARSHALL, RADICAL ISLAM’S RULES: THE WORLDWIDE SPREAD OF EXTREME SHARI’A LAW 12 (2005) (discussing the lack of legislation in many Islamic jurisdictions in favor of shari’a).

“modernized” and reframed as constitution makers in the Muslim world blended Islamic rhetoric into written constitutions—or engaged in what we refer to today as—“Constitutional Islamization.” Confronted with a pervasive European orientalism that viewed the Ottoman Empire as the embodiment of despotism,⁵² reformers and conservatives alike began integrating religious modes of governance into a modern form. Beginning with Tunisia in 1861, states in the Islamic world adopted the *form* of Western constitutions.⁵³ Yet, they also sought to render political authority accountable to Islamic law in an attempt to develop a constitutionalist system that would be Islamic.⁵⁴ That is, they attempted to write constitutions that were Islamic, rendering authority accountable to the Sharia.⁵⁵ Constitutionalist ideas were accordingly fashioned in Islamic rhetoric, to ensure not only that Islam was not being side-lined, but also that constitutional reforms would be considered more acceptable and legitimate. Unsurprisingly, Islam provided a familiar, indigenous anchor for rooting potentially alien change within the framework of society’s own cultural identity. Since that period about a century and a half ago, the Islamic world has continually wrestled with a rather nuanced relationship between the norms of religion and the core ideas of modern constitutionalism. As Schacht argues, even today, law “remains an important, if not the most important, element in the struggle which is being fought in Islam between traditionalism and modernism under the impact of Western Ideas.”⁵⁶

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

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

54. See BROWN, *supra* note 29, at 20 (examining treatise on government by leading Tunisian politician of the constitutional period Khayr al-Din al-Tunisi, who wrote about the importance of restraining state power and ruler accountability); Cf. Fourth Draft of Constitution of Tunisia (2013) (on file with author) (example of constitution without any provision on Islamic law).

55. BROWN, *supra* note 29, at 52.

56. JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 1 (1964).

B. A Tale of Four Monarchies: Tunisia, Ottoman Empire, Egypt and Iran

In Tunisia, where the Muslim world's first modern constitution was written, Islam's role in the constitution-making process is particularly instructive. The insertion of Islamic rhetoric to formulate the constitution was seen as a strategic tool employed by reformers to ease the insertion of reforms perceived as "Western" into the political milieu; particularly to legitimate these "alien" reforms in the eyes of the religious elites and conservatives that would resist such efforts. Ideas about constitutionalism entered the political scene just as Western, European, colonial dominance—in material and fiscal terms especially—was being cemented within the region. The British and French had growing privileges within the province of Tunis. In fact, their nationals and even sometimes religious minorities would be subject to their "consular jurisdiction"—that is, a separate legal and justice system that existed outside the authority of the Tunisian authorities even as they geographically resided in Tunisia. This "legal exceptionalism" created significant resentment within the Muslim population in Tunisia. Thus, emphasizing a difference or contrast between Muslim political thought and "European" thought helped Europeans as well as Tunisians to make sense of the friction and unequal and asymmetrical political relations between them. A narrative of "We are Islamic" gained steady ground. Accordingly, the Tunisian Constitution of 1861—also known as the *Qanun Ul Dawla*—opened with reference to God and to Sharia which guarantees security.⁵⁷ The King had to give an oath in the name of God to the Grand Council—an advisory body and *shari'a* court. Members of the Grand Council—the parliamentary advisory body—were also referred to in Islamic terminology, as *ahl al-hall wa-l-aqd*, literally the people who loose and bind and the population were referred to as *na'ayana*—or our flock.⁵⁸

It is telling that the first constitution in the Muslim world—of Tunisia—was drafted under the combined pressures of the British and French Consuls. This is not surprising since, the region had become a pawn and site of—as with other Muslim countries such as Iran and Afghanistan—diplomatic tussle between European powers.

57. See ZEGHAL, *supra* note 53.

58. See BROWN, *supra* note 29, at 16.

In Tunisia, France and Great Britain competed for economic and political clout in Tunisia by seeking economic concessions, as was the case in Iran, between the British and Russians. The two countries also had competing political aims; the French wanted Tunisia to be isolated from the Ottomans, while the British wanted to reinforce the relationship between the *bey* of Tunisia and the Ottomans. For the French, the constitution was a means to limit the perceived absolute authority of the monarchical government—absolutism was to be converted into a constitutional monarchy.⁵⁹ However, alongside the French, there was also a cadre of Muslim reformers—Khayr Al Din most notable amongst them—desperate to see political accountability and the progression of their nation. He wrote that the ruler needed to be restrained and that “it was necessary to check him either in the form of a heavenly shari’a or a policy based on reason . . . it is incumbent upon the ulema [scholars] and the notables of the umma [Muslim community] to resist evil.”⁶⁰ These reformers disliked the absolute power of the *bey* and desired a better legal and administrative system. According to another reformer, Ibn Diyaf, the absolute power of the monarch had been very damaging for Tunisia; and while sharia was one tool to control against a monarch’s absolute power—it alone was not sufficient.

The *qanun*—or law—not derived from the sharia, could be a valuable medium to set such limits. Ibn Diyaf accordingly developed the notion of a “government bounded by law.” He argued that government in Muslim societies had become absolutist and corrupt. This was partly because religious scholars—who historically served as a check on the ruler—were no longer fulfilling their task of using temporal law to limit arbitrariness. Even the French Consul agreed with this; writing to his superior, he described the Tunisian government as capricious and arbitrary; Muslim in name, but not following the Islamic principles of good governance.⁶¹ To this end, the Europeans and Muslim reformers had a common agenda in constitutionalism—to the extent that it limited authority, improved governance and provided rights to Tunisians. Over time, this Western-Islamic dichotomy, assisted by power asymmetries between

59. See ZEGHAL, *supra* note 53, at 19.

60. See BROWN, *supra* note 29, at 16.

61. See ZEGHAL, *supra* note 53, at 43.

the East and West, between colonial people and colonial powers, cemented into a deeper narrative of European—and today Western values—verses Islamic values.⁶² In fact, the European Press played on this apparent dichotomy between European, “liberal” values, and Islam. In the popular European imagination, the constitution was “proof that Islam could accept the values of the Enlightenment. The influential French *Journal des Debats* saw the constitution as the sign of “good progress” and a model for other Muslim countries. A constitution made the state “civilized” and its Prince “as liberal as he is enlightened.”⁶³

We see a similar pattern developing in the Ottoman Empire in the mid-19th-century. From 1826 to 1877, the Ottoman government desperately tried to modernize to revitalize its once mighty but now declining empire; that had stopped expanding after failing to defeat European forces at Vienna. Amongst other problems, the economy was in decline and tensions were also mounting between different ethnicities. Pressure was also mounting with regards to Europe’s expanding and competing capitalism. European countries were seeking new markets and zones of influence and required reforms necessary for such capitalist expansion, such as commercial laws. An emerging system of foreign privileges, immunity, and interventions was on the rise. Additionally, to finance modernization, the government had borrowed heavily and this led to further fiscal problems and foreign domination.⁶⁴ During this crisis, a group of reformers sought to restore the legacy of their nation and believed that the adoption of “Western” style governance—including a constitution—with Islamic characteristics would provide the most appropriate tools for improving the future of a chaotic, declining empire and in turn, constraining the power of the Sultan.⁶⁵ Indeed, as “crisis followed crisis the liberals became convinced that the safety, if not the very existence of the Empire lay in a radical reshaping of its government structure. Above all they perceived a need to end the absolute rule of the sultan and to substitute a constitutional form of government.”⁶⁶

62. *Id.*

63. *Id.*

64. See BROWN, *supra* note 29, at 21.

65. *Id.* at 25.

66. *Id.*

Thus a series of reforms preceding the constitution were promulgated in 1839, labeled *Tanzimat*; literally meaning *reorganization* – the goal of which was to reform the Ottoman Empire under the guidance of Westernization and protect it against nationalist movements and foreign powers. Tanzimat was based on the adoption of European political modernity within Ottoman institutions and bureaucracy. The establishment of a military was the Tanzimat's first priority. The second priority was the establishment of the empire's administrative apparatus, which was the main focus of Ottoman reformers from 1839 onwards. 1839 was also the year the first Tanzimat edict, *Hatt-i-Sharif of the Gulhane*, was issued. Amongst other changes, the reforms attempted to integrate non-Muslims and non-Turks by enhancing their civil liberties and granting them legal equality. Laws were promulgated regulating, "Ottoman affiliation" (meaning citizenship) in 1869 and the reorganization of the judiciary: which was divided between Islamic, communitarian, and secular courts. Additional laws were issued to organize matters of trade, official transactions, registration of land, municipalities and their powers.

The constitution was perhaps *the* major tool of reform. A "committee was appointed which consisted of military officials, religious scholars and government officials. A group of senior officials, military leaders and ulema were appointed to draft the constitution. The draft they finally submitted to the Sultan most closely resembled the Belgian constitution of 1831; others noted parallels with the Prussian constitution."⁶⁷ The constitution introduced some measures to check absolute rule; the sultan could not unilaterally enact laws or amend the constitution. In addition, it created a legislative body, guaranteed personal liberty, and assured religious freedoms. Free education became a right and equality before the law—irrespective of religion, caste or creed—was guaranteed. The courts were granted independence, according to article 87. A free press was also provided for and a weak bicameral parliament was instituted, whereby there would be an elected house as well as an appointed senate. Ministers were principally responsible to the Sultan, but parliament could try them for criminal offenses, with the Sultan's permission. Despite its novel nature—

67. *Id.* at 21.

being the second constitution in the Muslim world—again, Islamic idiom was a recurring feature in the constitution. Article 4 appointed “His Majesty the Sultan, under the title of “Supreme Caliph,” [as] the protector of the Muslim religion. Article 11 proclaimed Islam at the state religion. Article 7 tasks the Sultan with carrying out the provisions of the Islamic law. Affairs touching the sharia were also exclusively the prerogative of sharia tribunals. It was quite apparent that part of the reason for using Islam in the constitution was that drafters wished to legitimate positive, man-made legislation—a feature of modern political systems—alongside divine sharia.⁶⁸ In fact, when the constitution was resurrected in 1908—after its earlier abandonment only two years after promulgation—the constitution now required the Sultan to swear an oath to sharia alongside the nation, constitution and homeland.

In Egypt, like Tunisia and the Ottoman Empire, we see a somewhat identical set of circumstances. The country was bankrupt and heavily afflicted by European dominance—politically and financially;⁶⁹ the extent of this was such that French and British ministers had been inducted into the Egyptian cabinet. As political and military resentment built up, the Khedive (ruler), keen to counter European influence, encouraged the writing of a constitution. Like Tunisia and the Ottoman Empire, a group of reformers—from the political elite mainly—saw a constitution as a way to make government more accountable and responsible and so the 1882 Constitution was promulgated.

The fourth country in the Muslim world to write a formal constitution during that period was Iran. It is also, historically, the first constitution to contain the most robust constitutional entrenchment of Islam. The constitution was written in circumstances similar to Egypt, Tunisia and the Ottoman Empire. During the course of the 19th century Iran had become economically and militarily weaker; much to the resentment of its citizens. Reliance on cash crops, increasing export of raw materials and the growing rate of unemployment had contributed to this economic situation and also raised questions of modernization in parallel with debates about

68. *Id.* at 24.

69. *Id.* at 26–27.

how to curb the impact of European commerce on Iran's economy.⁷⁰ Janet Afary cites these transformations as being the Constitutional Revolution.⁷¹ Externally too, Iran, had become significantly dependent on European powers – namely Britain and Russia. Rather than resist foreign domination, the monarchs of the Qajar dynasty had quite visibly succumbed to British and Russian pressure and by the late nineteenth century, Iran was essentially “a prisoner of imperial interests.”⁷²

As more and more resentment built-up, an uprising that came to be known later as the “Constitutional Revolution” erupted. The central demand, of this varied group of protestors in the Constitutional Revolution, was for the rule of law and establishment of representative government. Since 1860⁷³ there had been a recurring demand amongst many Iranians for a House of Justice – *adalatkhana* that would dispense justice in contrast to the arbitrary justice delivered by the Qajars.⁷⁴ After months of incessant agitation by a cross-section of Iranian society: clergy, traders, peasants and merchants; the Iranian monarch, Muzaffar al-Din Shah signed a proclamation for constitutional government in August 1906. This declaration marked Iran's transition from an absolutist monarchy to a parliamentary government.

Yet, it had become clear that not only was the constitution of 1906 causing much consternation amongst various elements of Iranian society, it was also textually incomplete. While it recognized the

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

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

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

73. See MARTIN, *supra* note 137, at 76 (discussing 1860 reorganization of the Ministry of Justice and ulama request for *adalatkhana*, or courts of justice).

74. See Afary, *supra* note 70, at 57 (examining the public cry for majles that were “national” not “Islamic”).

people as the source of political power, contained numerous rights and set-up a division of powers⁷⁵—there was no bill of rights, nor were the limits to the authority of the executive, legislative, and judicial branches of government clearly defined. Thus work immediately started on a supplementary constitution, which would solidify the gains of the constitutional revolution and fill gaps in the earlier constitution. In 1907, a supplementary constitution was written, which contained an extensive bill of rights. Property, life domicile, privacy regarding letters and telegrams, and the right to trial were to be respected. Unlike its predecessor, the 1906 constitution, Islam was entrenched deeply in the 1907 constitution; it included a strong Islamic supremacy clause. The Majlis delegates had agreed that a committee of leading clerics would review and rewrite articles of the constitution that were in conflict with Islamic law.⁷⁶ Article 2 of the 1907 supplementary constitution thus called for the establishment of a Council of Clerics—an Islamic review mechanism. The constitution also stated a repugnancy clause, that laws ratified by the Majlis could not be at variance with the Sharia. Article 2 of the constitution declared that “laws passed by [the National Assembly] must never to all ages be contrary to the sacred precepts of Islam and the laws laid down by the Prophet.” This was the first repugnancy clause in the constitutional history of Muslim countries and it thus bears credit for introducing the very language of repugnancy that would migrate transnationally into future constitutions. The clause was certainly an innovation, not just amongst the handful of relatively independent Muslim majority states that actually had a written constitution at the time—Tunisia, Egypt, Ottoman Empire,

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

76. See Afary, *supra* note 70 at 89 (arguing that the concept of “freedom” was generally ignored in the 1907 constitution. This is not surprising “since many members of the ‘ulama continued to oppose the notion of freedom, and the word soon adopted a highly pejorative connotation.” Freedom, including the right to be different and to act differently from other people, was equated with non-religiosity, immorality, lack of chastity, and licentious behavior. With regard to gender, words such as freedom and liberation had come to have a doubly negative connotation. For example, a “free woman” meant a vulgar, immoral, and sexually promiscuous one.”); *Id.* at 220.

but also amongst other constitutions of the world.

Framing today's demand for Islamic constitutionalism within this historical predicament seems like a natural continuation; it is certainly not surprising that the idea of an "Islamic" politico-constitutional order remains popular. Since the time of these early constitutional experiments in the Muslim world, the issue of Islam in constitutions has tended to remain a central issue of constitutional design, both for the Muslim world and for Western observers. As soon as Muslim countries started to gain independence post-colonialism during the 20th century, they were keen not only to write constitutions signaling their sovereignty, independence and provide a framework of governance, but also to incorporate Islam into these constitutions. Inevitably, Constitutional Islamization spread as several countries blended Islam and constitutionalism. In 1947 during constitution-making debates raged in Pakistan about where sovereignty lay and how Islam would be the foundation of the constitution. Similarly in Syria, at around the same time, there were similar debates about incorporating Islam. Thus, in many Muslim-majority countries, constitutionalism has increasingly been aligned with—and seen to reference Islam and Islamic law. Accordingly, most constitutions in Muslim-majority countries contain certain notions of Islam and sharia ranging from the more strict versions of Iran and Pakistan, to the more lenient in Algeria, Bangladesh and Malaysia. Even today, for governments in the Muslim world, the adoption of Islamic law in the legal system and subsequent application is not only an indicator of religiosity of a Muslim country, but also allows for a veneer of legitimacy of rule, for both democrats and dictators alike. To be sure, while sharia is not *all* that defines constitutional aspirations in Muslim countries, nor is it true that Islam is the source of all political legitimacy for Muslims, it is certainly an extremely important feature of any constitutional order for many Muslims.

II. Sharia and Islamic Constitutionalism

While the last section provides us with a historical, on the ground perspective, of the Muslim world's engagement and experimentation with constitutionalism, the theoretical and doctrinal foundation of "Islamic constitutionalism" or what Islamic theology says about

constitutionalism is far older. And, to fully understand Islamic Constitutionalism, it is important to introduce Islam and importantly, Islamic law or, Sharia, which forms the basis of the Islamic legal system. This section engages in such an elaboration.

A. *Islamic Law*

Islam, the faith of over 1.5 billion Muslims today, dates back to the seventh century. It was founded by Prophet Muhammad, who Muslims consider to be the final messenger; continuing the tradition of earlier monotheistic faiths of Judaism Christianity. In Arabic, Sharia means the clear, well-trodden "path to water." In Islamic terminology, however, it is used to refer to matters of religion that God has legislated for Muslims. The principal source of Sharia is the Quran, which is the holy scripture of the Islamic faith and is understood to be the word of God as revealed to Prophet Muhammad. A secondary source for sharia is the Sunnah, which literally means "practice" and in relation to Islamic law means the practices, sayings and deeds of Prophet Muhammad. The records of Sunnah are contained in intricate detail in compilations known as hadith.⁷⁷ Within Islamic law, scholars use the hadith to resolve legal questions that the Quran does not answer definitively. An important difference is that while the Quran is divine and immutable, the hadith fall into a variety of categories and corresponding levels of authority.

While it is true that while the importance of the Quran as a source of Islamic law is accepted by almost all Muslims, many of the sources of fundamental practice have derived from hadith. For example, the Quran does not mention the number of times or method a Muslim has to pray (salah), whereas the hadith expands on this. Similarly, the Quran does not provide the rate of alms tax (zakah) that a Muslim has to pay, whereas the hadith specifies this. Also, whilst the two texts provide some legal rules, they are in no sense a fixed declaration of the law. On the basis of these two texts together then, scholars have

77. Hadith is a term that denotes a statement or action of the Prophet Muhammad. Hadith are the second-most important source of Islamic law. There is some dispute as to which hadith are authentic and therefore should be followed, there are collections of hadith which are considered to be authentic by many sects. e.g., the Sahih Muslim and Sahih Bukhari are considered wholly authentic by most Sunni Muslims. See generally MUHAMMAD ZUBAYR SIDDIQI, THE HADITH FOR BEGINNERS: AN INTRODUCTION TO MAJOR HADITH WORKS AND THEIR COMPIERS (2006).

formulated the actual legal rules (shariah). In other words, the law could be said to be a product of human interpretation based on the word of God and the deeds of Prophet Muhammad. This process of developing and extracting the law is called Ijtihad.

It should be mentioned at the outset that as with any historical revelation, neither the Quran nor the hadith could be said to cover every future eventuality for the purposes of law-making. While “during the life of the Prophet Muhammad, the Muslim community was guided by rules laid down by the Prophet, after the death of the Prophet, a void existed with regards to legal matters. Sunni Muslims agreed upon that [the] interpretation of sharia was the preserve of professional scholar-jurists (fuqaha) who were trained and licensed in a guild-like system. Shiites too came to trust scholars trained in their own guilds.”⁷⁸ Fuqaha in both sects accordingly interpreted Islamic law after the death of the Prophet as and when necessary.⁷⁹ Thus, in practice, many matters concerning war, spirituality (ibaadat), or civil matters (muaamalat)—which were not explicitly dealt with by the Quran or hadith, the Fuqaha developed further methods to ensure the continuity of legal reasoning that would be appropriate for contemporary political and social circumstances. The two methods that were adopted for this purpose were reasoning by analogical deduction (Qiyas) and consensus/agreement between scholars (Ijma). A simple example of Qiyas from today, would be reasoning whether betting in casinos is forbidden (haram) in Islamic law—even though, casinos are not mentioned in either the hadith or the Quran. The basis for ruling it as haram would be a combination of the Quran and analogy. The Quran forbids both wine and games of chance, gambling, in the same verse. Since gambling through chance creates a danger of economic loss, by analogy the same rationale should apply to casino gaming and therefore it must be banned.

The other method, Ijma, is essentially a majority consensus of Islamic scholars. The hadith of Prophet Muhammad stating “my

78. See, e.g., DEVIN STEWART, ISLAMIC LEGAL ORTHODOXY: TWELVER SHIITE RESPONSES TO THE SUNNI LEGAL SYSTEM 30 (1998).

79. See generally, BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW 38–87 (1998); WAEEL HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES (1997); WAEEL HALLAQ, AUTHORITY CONTINUITY AND CHANGE IN ISLAMIC LAW (2001).

community will never agree upon an error”⁸⁰ is cited in support of Ijma. Whilst there are different views on whether Qiyas or Ijma are superior to the other and there is often overlap, many Sunni scholars view Ijma as a third source of law and Qiyas as the fourth. Shia⁸¹ scholars, in contrast to Sunni scholars, tend to rely more on ‘Aql’ (intellect) i.e., independent reasoning more than Qiyas and Ijma. Shia schools of thought also follow a different set of hadith, giving more emphasis to the hadiths narrated by Prophet Muhammad’s daughter, Fatima and son-in-law Ali, who are part of the Ahl-ul-Bayat (the family of Prophet Muhammad). Within the Shia and Sunni scholars there are further sects and schools of law. Within Sunni (orthodox) jurisprudence there are many schools of law (Madhabs), named after the four early scholar-juridical authorities, Abu Hanifa, Malik, Shafii and Ibn Hanbal. Whilst the rules within these schools are not necessarily mutually exclusive, there is still great tolerance between the schools when there is some disagreement as to specific details. In fact, historically, scholars often disagreed about questions of God’s law. It was accepted that when two scholars disagreed and it was impossible to say with certainty that was correct, Muslims could opt to follow either scholar.⁸²

This legal system—comprising Sharia and law—occupies a primary place in Muslim thought. Indeed, some Muslims agree on the comprehensiveness of Islamic law/sharia with regards to all kinds of matters. In fact, sharia and “religion” are often understood as synonymous for many Muslims. Islam is not simply religious guidance for private life, but also a holistic tool of ascertaining what the good society should look like. As such, it provides governing principles about the conduct of public life, constitutionalism and international relations. And, as stated above, the majority of Muslims naturally identify Islamic law as a means to impose limits on arbitrary governments and promote rights and a just political order based on the rule of law. Mortimer states that “Islam, we are told, is not mere

80. Matti Steinberg, *My Community Will Never Agree Upon an Error*, available at https://politicalscience.stanford.edu/sites/default/files/attachments/steinberg_matti.pdf.

81. Shia and Sunni are the two major sects within Islam. Within these sects are many sub-sects. The majority of Muslims are Sunni. The Shia supported Ali as the rightful successor to Prophet Muhammad.

82. See Weiss, *supra* note 79 at 116–121.

religion: it is a way of life, a model of society, a culture, a civilization.”⁸³

B. Islam on Constitutions

Within this system, Sharia unsurprisingly is the most important source of guidance and therefore unsurprisingly occupies primary significance with regards to matters of governance and constitutional design. Sharia is expected to contain “elements of an *Islamic constitution* as well as of a *constitutionalism* to be defined in reference to it.”⁸⁴ Al-Turabi (1987, p. 25) argues that *shari’a* does contain within it a detailed constitution. Similarly, Maududi, an eminent scholar of Islam from the subcontinent, argued that without sharia, Muslim society could not essentially be Islamic. He argued that “if an Islamic society consciously resolves not to accept the Sharia, and decides to enact its own constitution and laws or borrow them from any other source in disregard of the Sharia, such a society breaks its contract with God and forfeits its right to be called ‘Islamic.’”⁸⁵ This is, at a fundamental level, the theoretical conception of Islamic Constitutionalism.

Historically, although contested, the basis of Islamic constitutionalism can be traced back almost fourteen centuries earlier to the experience of the first Muslim constitution, established by the prophet Muhammad in Medina. In 622, the Prophet and his followers migrated from Mecca, where religious intolerance and persecution had become unbearable for the Muslim minority; 622 has become known as the year of migration or the “hijrah.” The year 622 also set in motion two important Islamic events: the Islamic calendar commenced and the first Islamic Constitution—the Constitution of Medina—was promulgated.⁸⁶ It is “perhaps the earliest surviving text of Islam that is accepted as authentic.”⁸⁷ In form and substance, the document reads more like a peace pact or Charter between

83. MORTIMER EDWARD, FAITH AND POWER: THE POLITICS OF ISLAM 16 (1982).

84. Raja Bahlul, *Is Constitutionalism Compatible With Islam?*, THE RULE OF LAW: HISTORY THEORY AND CRITICISM 515,520 (P. Costa & D. Zolo eds., 2007).

85. ABUL A'LA MAUDUDI, ISLAMIC LAW AND ITS INTRODUCTION (1955).

86. Ali Khan, *The Constitution of Medina*, available at http://works.bepress.com/cgi/viewcontent.cgi?article=1011&context=abu_kashif (last visited Aug. 11, 2014).

87. Paul Lawrence Rose, *Muhammad, The Jews and the Constitution of Medina: Retrieving the historical Kernel*, 86 DER ISLAM, 1-29 (2011).

different ethnic and religious groups—rather than a modern day constitution that constitutes government or sets limits on it. This is not surprising since the primary goal of the document was to end bitter inter-tribal fighting between the two tribes of Aws and Khazraj within Medina.⁸⁸ One commentator has suggested the principal objective of the document was to establish political unity that would be based on territory rather than, as was common in Arab society, on tribes and kinship. Another writer comments that the Constitution of Medina demonstrates that “the first Islamic state was founded not in the shadow of swords, as is commonly believed in some circles, but in the security of a social contract.”⁸⁹ The Constitution established rights and obligations among the Ansar (Helpers) of Medina, the Muhajirun (Emigres) who left Mecca with the Prophet, and the Jewish tribes of Medina as they embarked upon a new journey of co-existence and cooperation in the nascent Muslim polity founded in Medina.⁹⁰ Articles 1-23, of the constitution of Medina, addressed mutual relations among Muslims. Articles 24-47 set out rules to regulate inter-communal affairs between Muslims and non-Muslims, the latter being identified as believers. It contained 63 articles and a number of rights and responsibilities for those residing in Medina. Based on its structure, it is likely that it was written as a series of agreements rather than as one document. Part I included within its ambit, Muslim, Jews and Christians and envisaged the establishment of one pluralistic nation—or Ummah—formed by “believers and non-believers” alike. It recognized diverse communities, which is evident from the fact that it did not treat any group “as one monolithic population; instead it recognized their diverse ethnic, cultural, or linguistic characteristics, just as it acknowledges similar diversity within the Muslim population.”

The constitution provided that the migrants from Mecca and the tribes from Medina were to “pay the bloodwit within their number and shall redeem their prisoners with the kindness and justice common.”⁹¹ It provided that no one was to “leave anyone destitute

88. See Khan, *supra* note 86.

89. *Id.* at 1.

90. Anvar Emon, *Comment: Reflections on the "Constitution of Medina."* An Essay on Methodology and Ideology in Islamic Legal History, 1 UCLA J. ISLAMIC & NEAR E. L. 103 (2002).

91. Muhammad Tahir-ul-Qadri, *The Constitution of Medina*, art. 3–11,

among them by not paying his redemption money or bloodwit in kindness.”⁹² Also “the God-fearing believers shall be against the rebellious or him who seeks to spread injustice, or sin or animosity, or corruption between believers; the hand of every man shall be against him even if he be a son of one of them.”⁹³ Article 47 explicitly stated that this Constitution “will not protect the unjust and the sinner.” Certain agreements were also crystallized by the Constitution. Article 19, for example, provided that “the believers must avenge the blood of one another shed in the way of God” and Article 24 stated that “The Jews shall contribute to the cost of war so long as they are fighting alongside the believers” and Article 44 declared that “contracting parties are bound to help one another against any attack on [Medina]Yathrib.” A model of freedom of religion and non-interference in religious matters was also envisaged in Article 25, which clarified that “the Jews have their religion and the Muslims have theirs.”

From the perspective of Islamic Constitutionalism, the Constitution of Medina essentially framed the conceptual model for future political leadership, or Caliphate, in the Islamic state.⁹⁴ Some Islamic scholars assert that the constitution of Medina is the first constitution in the history of humanity. Hamidullah wrote that it was the “earliest written constitution, promulgated by a sovereign for his own [state] conduct, both in internal and foreign affairs.”⁹⁵ This picture is probably not completely accurate as earlier constitutions had been developed in Greece and Rome. Nevertheless, it can certainly be considered as the root of Islamic Constitutionalism in that it reflected the three cardinal principles (discussed later) of the Islamic political system as theorized by Al-Mawdudi. Mawdudi, who is widely considered as the pioneer of the idea of the “Islamic state”

available at http://www.constitutionofmadina.com/wp-content/uploads/2012/02/Constitution-of-Madina_Articles.pdf.

92. *Id.* at art. 12.

93. *Id.* at art. 13.

94. R. B. Serjeant, *The Sunnah Jāmi'ah, pacts with the Yathrib Jews, and the Tahrīm of Yathrib: Analysis and Translation of the Documents Comprised in the So-Called 'Constitution of Medina'*. 41 BULLETIN OF THE SCHOOL OF ORIENTAL AND AFRICAN STUDIES, 1, 41. (1978).

95. MUHAMMAD. HAMIDULLAH, *THE FIRST WRITTEN CONSTITUTION IN THE WORLD* (KAZI PUBLICATION, INC. 1986).

and constitution that has flourished in past decades,⁹⁶ coined and popularized the term “Islamic State” in his book, *The Islamic Law and Constitution*, published in 1941 and subsequent writings. According to his view, the Islamic state would follow Sharia, which would comprehensively cover “family relationships, social and economic affairs, administration, rights and duties of citizens, judicial system, laws of war and peace and international relations. In short it embraces all the various departments of life . . . The Sharia is a complete scheme of life and an all-embracing social order where nothing is superfluous and nothing lacking.”⁹⁷ He stated that the Islamic State must be an “Islamic Democracy”⁹⁸ and there would be three cardinal principles underlying its operation: *tawhid* (unity of God), *risala* (prophethood) and *khilafa* (caliphate or succession of the prophet Muhammad).

Tawhid proposes that since God is the Creator, sovereignty is vested only in the Divine and not the people. Maududi wrote that the sovereignty of God and the sovereignty of the people are mutually exclusive.⁹⁹ According to him, Islamic Democracy was the antithesis of secular Western democracy, since the latter transferred sovereignty to the people. Naturally then, Islamic constitutionalism differs significantly from western concept of constitutionalism in that it entrusts sovereignty to God and not “we the people” as is perceived to be the case in Western democracies. Scholars have noted that this principle negates the concept of the legal and political independence of human beings. In this system, Muslims have to obey God, the Prophet, and those who have authority (*ulu al-amr*) amongst them to the degree that their decisions and policies are in accordance with God’s commands in *Qur’an* and the Prophet’s tradition in *hadith* – or as we described earlier, shari’a. To reconcile this dichotomy between Islamic and Western notions of constitutionalism, Rashid Al-Ghannouchi, a promising Islamic intellectual, who also co-founded the Ennhada party in Tunisia provides a reconciliatory explanation for “sovereignty of Allah” that harmonizes with western concepts of

96. SEYYED VALI REZA NASR, *MAWDUDI AND THE MAKING OF ISLAMIC REVIVALISM* (1997).

97. Mawdudi, *Islamic Law* at 57 (quoted in Adams at 113).

98. Abu al-A’la al-Mawdudi, *Political Theory of Islam*, in *ISLAM: ITS MEANING AND MESSAGE* 159–61 (Khurshid Ahmad ed., 1976).

99. *Id.*

constitutionalism. He argues that since “there is no clergy in Islam, and Allah cannot be perceived directly, nor does He dwell in a human being or an institution which can speak for Him. [Thus,] what the slogan “sovereignty belongs to God” means is rule of law and government by the people.”¹⁰⁰

A second principle of Islamic constitutionalism is *Risala*. This literally means “scriptures revealed from God through Prophets” or Prophethood. The conceptual underpinning here is that Prophets brings laws to their communities so as to guide them towards the straight path of God. In the Islamic context of course, as discussed earlier, such laws and rules are referred to as shari’a. As stated earlier in this article, *shari’a* is based on two essential sources: the *Quran* and the *sunna*. The *Quran*, the holy book of Islam, which contains God’s word revealed to the prophet Muhammad over a period of 23 years, and the *sunna*—the practices and sayings of Muhammad contained in the *hadith*—became the source of Islamic ethics and norms for Muslim behavior. Since sovereignty is vested in God, while the ruler must consult the existing legislature, its function “is really that of law-finding, not of law-making.”¹⁰¹ Another scholar has argued that, “the Islamic constitution has only two important organs: the executive and the judiciary. The third organ i.e., the legislature, is a less important feature for the reason that almost all legislation has already been pre-ordained by God and only remains to be implemented or executed by the head of the state who, in consultation with the body of advisors or otherwise, can make subordinate legislation by the way of ordinances.”¹⁰² Professor Abdullah An-Na’im, a prominent scholar, disagrees with this view. He argues that human reasoning has always played a fundamental role in “discovering” and “determining” the will of God.

And certainly, Muslim jurists have for centuries specialized in Islamic jurisprudence (*fiqh*) and developed legal principles and methodologies to interpret sharia. Therefore, many legal concepts of Islam changed according to the time and place and the prevailing

100. Raja Bahlul, *Islamic Perspectives on Constitutionalism*, (2005) available at <http://www.juragentium.org/topics/islam/law/en/bahlul.htm>.

101. Mawdudi, *supra* note 97, at 77.

102. JAVID IQBAL, THE CONCEPT OF STATE IN ISLAM: A REASSESSMENT 13 (Iqbal Academy Pakistan 2000).

circumstances, providing Islam with a sense of indeterminacy and dynamism to suit different societies. An-Naim argues that, in contrast to this historical reality of legal flux and change, the dominant view of Islamic constitutionalism which assumes that since Muslims accept the ultimate sovereignty of God, they must also accept the decisions of men who speak for God, is conceptually lacking.¹⁰³ In contrast to those who advocate for "Islamic Constitutionalism," he strongly believes that reformation within Muslim societies is only possible if there is a secular state, and calls for the separation of "historical *shari'a*" (which is often perceived as divine revelation) from the essential principles of Islam, as revealed by the early tenure of Mohammed in Mecca.¹⁰⁴ In his view, this historical *shari'a* is man-made and also likely violates the rights of non-Muslims and women and is incompatible with concepts of the nation-state, international law, and human rights.

Caliphate, or *khilafa*, is the third feature of Islamic Constitutionalism. Caliphate is the idea of an Islamic state led by an executive known as a caliph (meaning literally a successor, i.e., a successor to Islamic prophet Muhammad). After Prophet Muhammad's death, his closest aides, revered figures in Islam thought, were elected to the position of Caliphate. After their death, successive rulers from various Muslim dynasties claimed to be Caliph of Islam—until the official abolishment of the post when Turkey secularized under Kemal Ataturk. Today, while the concept of caliphate is often used to describe Muslim empires of the past; theoretically, it is a state, which encompasses the political unity of the entire Muslim community globally, and ruled by a single caliph. The conceptual basis of *khilafa* is based on the belief that since Muslims are to be governed in accord with Islamic law, a leader is necessary to implement this. However, since according to scholars of Islamic Constitutionalism, God has already laid down the law, the head of Islamic state (usually referred to as *Khalifa* or *Imam*) is only an executive authority and has no inherent power to legislate.¹⁰⁵ An-

103. ABDULLAH AN-NAI'M, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES HUMAN RIGHTS AND INTERNATIONAL LAW, 81 (Syracuse University Press 1990).

104. ABDULLAH AN-NAI'M, ISLA AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A (2008).

105. KEMAL FARUKI, THE EVOLUTION OF ISLAMIC CONSTITUTIONAL THEORY AND PRACTICE FROM 610 TO 1926 (1971) (pointing out that caliph was either chosen by a

Na'im points out that this concept of *khilafa* is not necessarily compatible with constitutionalism. There is no way of assessing the continued political legitimacy of the executive once the initial appointment and confirmation were made. Contrary to impeachment procedures in modern constitutions, there were also no means to remove the executive by withdrawing legitimacy. Thus under this conventional model of Islamic Constitutionalism, the nature and scope of powers of the executive are by no means limited. This design problem did not exist at the beginning of Islam since the Prophet was deemed to be chosen by God to lead the Islamic state, so centralizing executive, judicial, and legislative powers in his person was not problematic. However, after his demise and with the passage of time, this paradox has made it difficult to restructure or set political limits on the powers of the caliph that would parallel the limits within democracy.

III. Designing the Islamic Constitution

A. *The Promise of Constitutional Islamization*

Islam *and* – not Islam *or* – democracy tends to be the rallying call of Muslim majorities in Muslim countries from Tunisia to Egypt and Algeria to Pakistan. In a political landscape beset by authoritarianism, they have promised both: constitutionalism and Islam. Indeed, the rise of political Islam in the 1970s—or the phenomenon commonly referred to as “Islamic fundamentalism”—was in itself partly a reaction to the secularizing reforms of oppressive Middle Eastern regimes.¹⁰⁶ In societies where avenues for political expression were forcibly blocked, movements based on Islamic political philosophy represented the only opening left for protest. As Fouad Ajami points out, “Islamist” movements have had significant resonance in the Arab world *precisely* because, in contrast to authoritarian, secular regimes, they were “democratic” and

small group of Muslims or selected by the preceding caliph and was then confirmed by the general Muslim public through a mass pledge of allegiance (*bay'a*)).

106. ZUBAIDA, *supra* note 36, at 5 (arguing that political Islam is a reaction to secularizing reforms by “Europe and Christianity”); Fareed Zakaria, *Islam, Democracy and Constitutional Liberalism*, 119 POL. SCI. Q. 1, 11–12 (2004) (describing how Arab world associates failure of their governments with failure of secularism and the West and how fundamentalism gave Arabs a language for dissent and opposition).

representative; that is, “[they] invited men to participate . . . [in] contrast to a political culture that reduces citizens to spectators and asks them to leave things to their rulers. At a time when the future is uncertain, it connects them to a tradition that reduces bewilderment.”¹⁰⁷ As popular democracy laid its seed after the Arab Spring, and Islamic parties came to power, in each country, they promised a place for religion (namely Islam) in statecraft and most importantly—the new constitution. Islamic-oriented parties in the Arab Spring have promised—directly or indirectly—an Islamic Constitution. Yet, what is an Islamic constitution and how can we measure whether a constitution lives up to the claim of being Islamic?

B. The Al-Azhar Islamic Constitution

As our analysis will show, there are myriad ways in which Islam can be given a place in the constitutional order—some more central than others. Islam can become a source of legislation or laws repugnant to Islam can be declared void. It may require that the head of state be a Muslim or the preamble may simply make a reference to Islamic values. Even rights can be made normatively subject to Islamic principles.

Not only is the debate about Islamic Constitutionalism and democracy ongoing, but Muslim countries, since 1861 in Tunisia, are still grappling with integrating and blending constitutionalism and Islam. An Islamic Constitution means different things to different people—and this is even truer in the popular imagination. Yet, there are countless opinions about what makes a society “Islamic.” While we know that all members of the OIC—an inter-governmental organization which encapsulates the universe of Muslim majority countries worldwide¹⁰⁸—have formal, written constitutions, in this Article, we are particularly interested in how one defines an Islamic

107. FOUAD AJAMI, *THE ARAB PREDICAMENT: ARAB POLITICAL THOUGHT AND PRACTICE SINCE 1967* 134 (1982).

108. Under the OIC Charter, Article 3(2), the criteria for membership are that a country has a “Muslim majority” and that the Council of foreign ministers approves the new member by consensus. The membership of countries with a Muslim minority (e.g., Benin, Cameroon, Gabon, Guyana and Uganda) is therefore not in accordance with the provisions on membership of the OIC Charter. Nevertheless, all OIC members are included in our sample for consistency.

constitution.¹⁰⁹ This is most crucial since the prerequisite for achieving the goal of this article—comparing the Muslim world’s constitutions for their Islamicity, ranking them and assessing their status on rights and democracy—is only possible if we have a paradigm against which we can compare it to. And, for the purposes of this analysis, there is one paradigmatic example: a model Islamic constitution that the esteemed Al-Azhar University in Egypt has drafted for governments in the Muslim world to emulate.

The context of the creation of the constitution is this: in October 1977, the Islamic Research Academy (IRA) at Al-Azhar University hosted a major meeting in Cairo. A decision was taken there to draft a model Islamic constitution that could be used as a framework by any country that wished to model itself on the basis of Islamic constitutionalism and sharia. All parties agreed that the content of the Islamic Constitution drafted must not only be complaint of Sharia, but it should especially be cognizant of differing Islamic schools of jurisprudence. Soon thereafter, on Jan. 5, 1978, Grand Sheikh of Al-Azhar issued a decree, whereby a High Committee of experts were formed for the purpose of drafting this Islamic constitution. A year later, the final version of this constitution was published in the Autumn of 1978 in Al-Azhar’s official magazine (Schulze, 1995).¹¹⁰ However, “this Islamic constitution was forgotten” for a time.¹¹¹

109. The exception is Saudi Arabia, which does not have a formal, written constitution. In its case, the holy Quran is the highest law; however, we treat the three 1992 Royal Decrees establishing the basic system of government, provinces and the consultative majlis (assembly)—the Basic Law—as the constitution.

110. Reinhard Schulze, *Citizens of Islam. The Institutionalization of Muslim Legal Debate.*, in *LAW AND THE ISLAMIC WORLD PAST AND PRESENT* 167-185 (Christopher Toll & Jakob Skovgaard-Petersen eds., 1995) (narrating what has happened after the Islamic constitution was introduced, “the [IRA]-proposal was not discussed openly. The [IRA]-session of 1979 could not be held, as most participants from the *duwal ar-rafd*, i.e., from those states, which rejected the Egyptian Israeli peace treaty of 1978, were not allowed to travel to Cairo. Again, divergent political views prevented the jurists from defining a legal conception of the Muslim nation (*Umma*). The main problem, of course, was to what extent an Islamic constitution should be the legal framework of the *Umma*; mostly it was postulated that an Islamic constitution should be the model of nation-state constitutions. It should prescribe an Islamic form of government and jurisdiction without questioning the sovereignty of the nation-states”).

111. Hamdi Dabash, *Al-Azhar and Salafi Scholars Prepare Islamic Constitution*, EGYPT INDEPENDENT, (July 7, 2011), available at <http://www.egyptindependent.com/>

Al-Azhar University, based in Cairo, is widely considered to be one of the most authoritative institutional bodies on Islam globally. It is often considered the chief center of Arabic literature and Islamic learning in the world. Founded over 1,100 years ago by the Fatimid dynasty as a madrasa, or center of Islamic learning, it is one of the oldest and most respected Sunni religious institutions in the world. Another author states that Al-Azhar is the most famous “old” Islamic institution. The head cleric of Al-Azhar, the Grand Imam of Al-Azhar, also known as Grand Sheikh of Al-Azhar is considered by some Muslims to be the highest authority in Sunni Islamic thought and Islamic jurisprudence.¹¹² And despite its subordination to the Egyptian state in recent decades, it is still called by some as “the greatest learning center for Muslims.” The madrasa was initially one of the relics of the Isma’ili Shi’a Fatimid dynasty era of Egypt, descended from Fatimah, daughter of Muhammad and Ali son-in-law and cousin of Prophet Muhammad. By bringing together the study of a number of different subjects in the same place it was one of the first universities in the world—and the only one to survive as a modern university. In 1961, Al-Azhar was officially established as a “modern” university under the government of Egypt’s second President Gamal Abdel Nasser when a wide range of secular faculties were added for the first time. Before then, the Encyclopedia of Islam classifies the Al-Azhar as a madrasa, center of higher learning and, since the 19th century, a religious university, but not as a university in the secular academic sense, referring to its modern transition process as a change “from madrasa to university.” Even outside the Muslim world, Al-Azhar is known as the voice of moderate Islam.¹¹³

Returning to the Al-Azhar Islamic Constitution, a constitution coming from an esteemed institution like Al-Azhar would naturally be of some importance in the Muslim World. And so it was; after being neglected for more than three decades, the Al-Azhar constitution showed up at Cairo’s Tahrir Square during the 2011

news/al-azhar-and-salafi-scholars-prepare-islamic-constitution.

112. CLINTON BENNETT, MUSLIMS AND MODERNITY: AN INTRODUCTION TO THE ISSUES AND DEBATES 220 (2005).

113. *Al-Azhar Issues Bill of Rights for New Egypt*, OnIslam (Jan. 11, 2012) available at <http://www.onislam.net/english/news/global/455352-azhar-issues-bill-of-rights-for-new-egypt.html>.

uprising.¹¹⁴ A scanned copy of the constitution, along with an English translation, was published on the July 13, 2011 in Tahrir Documents: a website dedicated to archive, translate and electronically publish activist papers from Cairo's Tahrir Square.¹¹⁵ Later, an Egyptian newspaper, announced that Salafis (adherents of one of the most puritanical strains of Islam), along with former Grand Mufti of Egypt, Nasr Farid Wasel, and a group of renowned Islamic scholars, had already started preparing a draft constitution for Egypt based on sharia. Their coalition was called "Islamic Legitimate Body of Rights and Reformation" (ILBRR) and essentially aimed to advance the country towards an Islamic model of governance.¹¹⁶ More importantly, Mohamed Yousry, ILBRR's secretary general and a Salafi scholar, pointed out that the main model to frame the new constitution was the Al-Azhar Constitution.¹¹⁷ Apparently, all the Islamic movements in Egypt agreed upon this constitution as the paradigmatic Islamic Constitution. One commentator even suggested the Al-Azhar constitution could pacify disputes between the various stakeholders as to what was Islamic or not.¹¹⁸

C. Analyzing "the" Islamic Constitution

The constitution itself consists of a preamble and nine sections, encompassing 93 clauses in 9 sections. It sets out, *inter alia*, principles related to how the economy will operate; it states that the judiciary will be independent; provides for rights including the right to work, freedom of opinion, religion and thought, freedom to join trade

114. This is not to say that the Al-Azhar Constitution was the sole or overarching model of constitutional text during discussions of constitution-making in Egypt post-Arab Spring. Yet, it was an important and legitimate benchmark. Indeed, while the Muslim Brotherhood in Egypt didn't de facto hold to this constitution, Khairat el-shatter, an important figure in the Muslim Brotherhood was one of the leaders of ILBRR and accordingly, it was always politically relevant. Further, during that period, there were also discussions (in Arabic) by Islamic scholars during recent uprisings that acknowledged the relevance of the Al-Azhar constitution to constitution-making in Egypt. See <https://www.youtube.com/watch?v=UJA I5HX h7dE>; see also https://www.youtube.com/watch?v=osXbrHz_psE.

115. See generally, Moamen Gouda, *Islamic Constitutionalism and Rule of Law: A Constitutional Economics Perspective*, 24 CONST. POL. ECO. 57 (2013).

116. *Id.*

117. See, Dabash, *supra* note 111.

118. See, Gouda, *supra* note 115.

unions and freedom of press. It provides for a presidency and the means to appoint the president (Imam). Interestingly, in Article 81, it also provides for the establishment of a "Supreme Constitutional Court . . . having the jurisdiction to decide upon the conformity of laws and regulations to the rulings of Islamic shari'a and the provisions of this Constitution." It also deals with other matters such as constitutional amendments, holding the president accountable, equality before the law and other administrative matters governing, for example, where the capital city would be and issues concerning the national flag. It also makes the president accountable to the judiciary. Yet, its most apparent feature is the frequent referencing to Islamic clauses.

Article 1 opens with a statement expressing the unity of the Muslim political community globally. Article 1b reads: "Islamic shari'a is the source of all legislation." Article 65 states that "Judges are subject only to the Islamic shari'a in their judgments." Article 61 also provides that "the judiciary shall rule justly in accordance with the rule of Islamic shari'a." Further, Article 12 provides that "the state is required to teach Muslims the fundamentals of religion, including: religious obligations, the Prophet's biography, and biography of the Caliphs. This study should be comprehensive throughout all years of education." Article 18 provides that "the economy will be based upon the principles of Islamic shari'a, which guarantees human dignity and social justice." Accordingly usury is forbidden in Article 23. Even many of the rights are subject to shari'a, for example, freedom of religion and thought, the freedom to work, the freedom to express opinion directly or indirectly, the freedom to establish trade union associations and participate in them, personal freedom, and the freedom of movement and congregation "are all basic and natural rights that are protected within the framework of the Islamic shari'a," according to Article 29. In terms of the head of state, Article 47 makes it clear that "candidates for the presidency must be: Muslim, male, past the age of majority, of sound mind, pious, and knowledgeable about the rules of Islamic shari'a." Very importantly, Article 83 provides "The state shall have a Shura council which, amongst other important tasks, reviews whether "Legislation [is] not inconsistent with rulings of Islamic shari'a."

Quite clearly, the Al-Azhar constitution is not short of Islamic credentials – Islamic clauses are scattered on almost every page of the

constitution and it is clear that Islam and Islamic law is privileged quite categorically as an overarching principle of the constitutional and legal order. At the same time, the constitution is sparse on other important details, which is not surprising given its short length. For example, it does not specify procedures for the impeachment of the Imam, what the status of international law is. Nor does it say who is eligible to become a member of parliament (presumably this is the shura council, although even this is not clear), how ministers will be appointed, whether there would be parliamentary or election commissions, how the armed forces and police will be set-up and regulated, the procedure for enacting legislation, or the method of appointing judges on the Supreme Constitutional Court and so forth.

Perhaps much of this has been deliberately left out by design because the intention of the framers was to simply provide a template “Islamic” constitution that could be molded by each state according to its particular circumstances. Alternatively, perhaps there was some recognition that going into specific details would be problematic, not only because Islamic doctrine may not have had much to say about a particular issue (e.g., the method of how judges will be appointed or the procedure by which the Imam can be impeached) but also because a greater level of detail was beyond the capabilities of the drafters or that greater detail may endanger more divisiveness and harm the completion of the overall project without adding much to the Islamic character of the constitution.¹¹⁹ Nevertheless, whatever the reason for drafting a less detailed constitution, for our intents and purposes of assessing and comparing Muslim countries’ constitutions for their “Islamicity,” the most important parts of the constitution are those that specifically reference and deal with Islam, and the constitution certainly provides us with a template for doing so.

IV. Measuring Islamic Constitutions

A. Method

This section introduces an empirical analysis of Constitutional Islamization and to what degree. To comparatively and conclusively

119. Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 91 J. CONST. L. 636 (2011).

answer this question, we need to first know the defining characteristics of Islamization in constitutions.¹²⁰ The Al-Azhar Constitution serves as the template for this exercise. We read, identified and then extracted every “Islamic” clause from that constitution—that is, every clause that make some reference to Islam or had some religious underpinning.¹²¹ Consequently, we identified 30 “Islamic clauses” capturing the universe of all Islamic clauses found in the Al-Azhar and constructed a survey instrument codifying the clauses¹²² (table 1 presents a list of the 30 questions/clauses that we found to represent the universe of Constitutional Islamization and the corresponding articles in Al-Azhar constitution). These were clauses that had an explicit focus of injecting the constitution with an Islamic feature. Our next step was to use these Islamic clauses as a basis for comparison among the constitution of Islamic countries. In order to define our sampling pool of Islamic countries and in the interests of capturing every country that was Muslim majority or at

120. Our analysis is primarily text based; that is, we look at the design and text of the “big-C” Constitution—the written document, rather than the broader constitutional order in the country in terms of defining “constitution”. In doing so, our work follows a tradition of text-based analysis in the constitutional design literature. *E.g., see*, Tom Ginsburg, Daniel Lansberg-Rodriguez & Mila Versteeg, *When to Overthrow Your Government: The Right to Resist in the World’s Constitutions*, 60 UCLA L. REV. 1184 (2013); David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863 (2013); Zachary Elkins Et AL., *The Endurance of National Constitutions* 82 (2009).

121. This is not to say that clauses not included as “Islamic” in our methodology cannot be justified as “Islamic doctrine”. For example, Article 16 states that “public sovereignty is based on the interest of the citizens, in particular protecting religion, mind, soul, property, and honor” and Article 33 prohibits torture. Certainly, support for principles underlying these clauses can be found in Islamic teachings about human rights and governance; however, the focus of this study is on identifying and conceptualizing explicit constitutional privileging of Islam in constitutions for the purposes of concrete measurement and so we exclude clauses that could only indirectly be justified as originating from Islamic theology.

122. We found that while the Al-Azhar constitution captured an overwhelming number of the Islamic clauses found today, there were some important ones that were contained in the constitutions of several Muslim countries, yet were lacking in the Al-Azhar constitution; for example, the Al-Azhar constitution did not contain clauses declaring Islam as a state religion. The references had to be explicitly “Islamic” to be counted in our survey instrument; this ensured rigour. That is, references to God or religion in general did not classify as Islamic within our instrument. So for example, the Indonesian Constitution references God, but since it is not a specifically Islamic reference, we do not count this as an Islamic clause.

least contained a sizeable Muslim population (such as Cameroon and Benin), we focused on constitutions from countries that are members of the Organisation of Islamic Co-operation (OIC). The OIC, founded in 1970, is the second largest inter-governmental organization after the United Nations and has membership of “57 states spread over four continents.” It includes virtually every Muslim majority country as a member and is “the collective voice of the Muslim world and ensuring to safeguard and protect the interests of the Muslim world in the spirit of promoting international peace and harmony among various people of the world.”¹²³

To collect the constitutions of these countries for coding, we drew on constitutional texts from *Constitute*, an effort by Google and the Comparative Constitutions Project to catalogue the formal contents of the written and in-force constitutions in the World. We read and analyzed the current constitution of each of the 56 OIC members (we excluded Palestine from the analysis since it is not yet recognized as a state internationally). For the countries located in the Middle East, we even read the Arabic language versions so as to ensure that all nuances regarding Islamicity were captured. Using the 30 Islamic clauses as a benchmark, the OIC-member constitutions were then coded by two separate coders, rechecked by the other coder and eventually comprised our unique dataset of Islamic Constitutions. The appendix contains the methodology that was used to build our Islamic Constitutionalism Index.¹²⁴

Table 1: The Main Islamic Articles in Al-Azhar Constitution and their Corresponding Articles

Question	Corresponding articles in Al-Azhar Constitution
A. General Characteristics	

123. Organisation of Islamic Co-operation website, available at <http://www.oic-oci.org/oicv2/home/?lan=en>.

124. To be clear, the index is a snapshot of constitutions in force as of 2014 and does not trace the incidence or occurrence of Islamicity in constitutions historically. Further, we make no claims about the relationship between the *de facto* level of Islamicity in a constitution and *de jure* Islamicity of that state in practice.

Q1. [STATREL]- Does the constitution state that Islam is the state religion?	Article 1b
Q2. [PREAMBLE]- Does the Preamble reference Islamic idiom?	Preamble
Q3. [UNITY]- Is there reference to the unity of OR association with the Muslim world or any mention of Ummah (Islamic political community)?	Article 1-3
Q4. [JIHAD]- Is there a reference to jihad or defense of the faith?	Article 56
Q5. [CALENDAR]- Does the constitution reference an Islamic calendar and/or holidays?	Article 15
Q6. [HDMUSLIM]- Does the head of state or government have to be Muslim?	Article 47
Q7. [CTZMUSLIM]- Should all citizens be Muslims?	No mention of non-Muslims in Al-Azhar constitution
Q8. [JDMUSLIM]- Is it stated that judges of the highest court need to be Muslim?	Articles 61 & 65
Q9. [OATH]- Does it mention Islamic idiom in the presidential and/or ministerial or parliamentary Oath?	Article 48
Q10. [MORAL]- Are Islamic morals given some constitutional foundation?	Article 7
Q11. [AMENDMENT]- Are the provisions related to Islam unamendable?	Preamble, Article 1b
Q12. [ADVISORY]- Does the constitution mention a religious council that is advisory?	Article 83
Q13. [AUTHORITY]- Does the source of authority or power stem from any religious notions?	Articles 55 & 56 & 57
Q14. [ACCOUNTABILITY]- Is government accountable to or to rule in accordance with the laws and limits of Islam?	Article 7
B. Rights	

Q15. [RIGHTS1]- Does the constitution make the enjoyment of any rights or freedoms subject to sharia requirements?	Article 29
Q16. [WOMEN]- Is there a clause stating that women should serve their husband or that serving the family is their priority?	Article 8
C. Executive	
Q17. [DUTY]- Does the head or state/government have some religious duties/symbolism?	Article 47
Q18. [HDKNOWLEDGE]- Does the head of state or government need to possess Islamic knowledge?	Article 47
Q19. [PLEDGE]- Is the head of state/government appointed through pledge of allegiance (<i>bai'ah</i>)?	Article 48
D. Legislation	
Q20. [SOURCE]- Is Islam identified as a source of legislation?	Article 1b
Q21. [SUPREMACY] - What is its degree of supremacy of Islam? Code the intensity (Asked only if SOURCE is answered 1)	Article 1b
Q22. [REPUGNANCE]- Does the constitution state that no laws can be repugnant to Islam?	Articles 83 & 92
E. Judiciary	
Q23. [JUDICIARY]- Is there an explicit provision requiring the judiciary to apply Sharia or refuse to apply laws that contradict it?	Article 81
Q24. [JDKNOWLEDGE]- Is it stated that judges of the highest court need to have Islamic knowledge?	Article 65
Q25. [COMPLIANCE]- Does the constitution mention a religious council or judicial court that has the power to review legislation (ex ante or ex post) to declare sharia compliance?	Article 83
F. Economy	

Q26. [ECONOMY] - Does it provide that the economy/trade or banking will be in accordance with Islam?	Article 23
Q27. [INTEREST]- Does the constitution ban interest rate (riba)? (Asked only if ECONOMY is answered 1)	Article 23
Q28. [ALMS]- Does it make provision for the state to recognize or organize alms/ charity/ Zakat/Waqf?	Article 26
G. Other Issues	
Q29. [CRIME]- Does the constitution make any explicit provision that Islamic criminal penalties (amputations, stoning) will be implemented?	Articles 56 & 59 & 69 & 71 & 72 & 79
Q30. [EDUCATION]- Does the constitution make provision for the state to provide Islamic (or religious) education?	Articles 10 & 11

B. Empirical Findings on Islamic Clauses

Analysis of the data shows that Constitutional Islamization is a common feature in the constitutions of Muslim majority countries. A small number of Muslim majority countries describe themselves as secular—most notably the Central Asian countries and Turkey but also Mali—and, as expected, we do not find Islamic clauses in the constitutions of countries that are not Muslim majority (i.e., do not contain a population of greater than 50% Muslims). Some, such as that of Uzbekistan and Sierra Leone are completely silent on the treatment of religion in the state—that is, they do not declare Islam or secularism as a constitutional principle. Conversely, over half (27), or almost 60%, of the 45 Muslim majority countries in the world express some relationship to Islam in their constitution;¹²⁵ that is, they have

125. Pew lists 49 Muslim majority countries, Pew Religious and Public Life Project (Jan. 27, 2011) *available at* <http://features.pewforum.org/muslim-population/>. We have not included in our sample four countries—Kosovo, Mayotte, Palestine and Western Sahara; hence our sample of Muslim majority countries is 45 and not 49. Kosovo is not a U.N. member or non-member state. None of these four states are recognized. In any case, the constitution of Kosovo does not contain any Islamic clause. The provisional constitutions of Palestine and Western Sahara do

undergone some degree of Constitutional Islamization. This is an important finding: Islam plays a major part in most Muslim countries' constitutions. Nevertheless, there is tremendous variation in the degree and mode to which these constitutions are Islamized.

One popular clause is the state religion clause that declares Islam to be the state religion—a staggering 23 of the 25 constitutions in the world that refer to Islam contain these clauses. Clauses that state that Islam will be a source of law are also popular; 18 constitutions have such a clause. 6 constitutions contain repugnancy clauses (sometimes in addition to a source of law clause e.g. in the case of Iraq), which state that no laws can be passed that contradict Islam. In Iran the constitution states that judges should refrain from executing laws that violate Islam; similarly in Saudi Arabia, “the judges bow to no authority other than that of Islamic Shari’ah,” Article 46. Other popular clauses are those that require that the head of state or government be Muslim (15 constitutions contain such a requirement). A number of constitutions provide for Islamic language in the oath; while the constitution of Pakistan even requires members of parliament to be those “who do not violate Islamic injunctions.” Some, including that of Iran and Yemen, provide that the head of government (in addition to head of state) should be Muslim. Some constitutions—that of Pakistan, Mauritania, Morocco, Egypt and Algeria—provide for an advisory religious body. While in Iran, however, the body is not simply advisory but has significant powers; including that of reviewing legislation to assess whether laws violate Islamic principles. The Pakistani Constitution also provides for a Federal Shariah Court that can “examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet” in Article 203 C.

In terms of rights, while the Afghan and Bahraini constitutions limit some constitutional rights as to what is permitted under Islam. In Iran, Saudi Arabia and Maldives, all rights are subject to Islam. Some constitutions include recognition of Islamic holidays; while others make provisions related to Islam unamendable. Interestingly,

contain some. Mayotte does not have an independent constitution. Hence, even if we included these countries the results would even out.

in terms of analogizing Islam and Sharia as a “natural law” limit on earthly authority of rulers, as was perceived to be the case in pre-modern times, only the Saudi Constitution explicitly provides that the king “shall undertake to rule according to the rulings of Islam” in Article 25. In Maldives, however, the President can be removed if he is in “direct violation of a tenet of Islam” – Article 100. There are more clauses that we found, for example, related to jihad, the provision of charity and the provision of religion education – but these were rare. Another rare, yet powerful and interesting, clause we found was in Maldives – under 9(d) of that country’s constitution, one cannot be a citizen unless he or she is a Muslim. For an extensive and universal examination of which constitutions include any of the 30 Islamicity clauses we capture, please see Table A in the appendix.

C. Islamic Constitutions Index – Ranking Islamic Constitutions

The survey of clauses provides us with a comprehensive empirical assessment of the world of Islamic Constitutions. They allow us to see which clauses are most popular – for example, state religion, and head of state being Muslim and source of law clauses. Yet without further comparative analysis, surveying Islamicity does not in itself provide answers to more interesting questions; which is the most Islamic constitution in the world and which is the least? Is it true that Iran’s constitution is the most Islamic, is it true that Pakistan or Afghanistan are constitutional theocracies or that Turkey is secular? Accordingly, using our unique dataset, we created something novel: the Islamic Constitutions Index (ICI) that ranks all the OIC members’ constitutions for their Islamicity. Our index measures Islamic constitutionalism. It distinguishes between OIC members that have Islamic constitutions and those that do not.

Each country’s score on the index is simply the total number of Islamic clauses in its constitution. The score of each of the investigated Islamic feature is one. An exception would be the Islamic feature related to the degree of supremacy of Islam in the constitution. For this specific article, we developed a special scoring methodology. If the supremacy article refers to Islam/Islamic law/Sharia, 2 points are added. 1 point is scored if the article refers to “principles” of Islam/Islamic law/Sharia. The reason behind this is that a direct reference to Islam or Sharia would be valued more than a reference to “principles,” which might refer to general principles in

Islam like justice, equality, and modesty. In addition, an extra point is added if the supremacy article states that Islam (or its principles) is “a” source of law or if there is no other law governing a matter then Islamic law can come in. 2 points are added if religion (Islam in our case) is “a” primary or basic or foundational source of law. Finally, 3 points if the supremacy article states that Islam (or its principles) is “the” source (or the only source).

The reason behind this scoring theme is that we perceive “supremacy” clauses that state that laws must comply with Islam or that privilege Islam as an important source of legislation are most powerful in terms of Islamicity, more so than any other clause—even state religion clauses.¹²⁶ This is because these supremacy clauses may allow courts to undertake an “Islamic judicial review,” as Professor Feldman labels it, the purpose of which will be “not merely to ensure [legislation’s] compliance with the constitution but rather, to *guarantee* that it does not violate Islamic laws or values” and thus be fully consistent with it.¹²⁷ That is, both types of clauses, imply the supremacy—or at the very least—create a privileged space for Islam and Islamic law within the normative constitutional-legal order.¹²⁸ That is, while formulating a supremacy clause in the form of a repugnancy clause would arguably imply a more robust ability to challenge legislation on the basis of violation of a “superior” normative order grounded in Islam, the source of law clause, depending on the degree to which it entrenches Islam, as “a” or “the” source, could also potentially serve this function.¹²⁹ Indeed, as Professors Brown and Sherif opine, even simply privileging Islam as “a” source of law—the weakest formulation of a supremacy clauses—in the constitution means that it becomes possible for many to argue that Islam authoritatively forms the “fundamental legal

126. See Ahmed and Ginsburg, *supra* note 29.

127. See FELDMAN, *FALL AND RISE*, *supra* note 24, at 2 (discussing increasing tendency for governments in majority-Muslim countries to declare themselves Islamic and apply Sharia).

128. See Nathan J. Brown & Abel Omar Sherif, *Inscribing the Islamic Shari’a in Arab Constitutional Law*, in *ISLAMIC LAW AND THE CHALLENGES OF MODERNITY* 55, 63 (Yvonne Yazbeck Haddad & Barbara Freyer Stowasser eds., 2004) (citing examples of Arab constitutional texts which cite Sharia as a source of law, and the effect of these provisions).

129. *Id.*

framework.”¹³⁰ For more details on our scoring methodology, see methodology section in the appendix.

Using our resulted scores, we then rank all countries according to their Islamicity. The more a constitution promises with respect to Islam, the more Islamic it is and the higher it's score and accordingly, it's ranking. Thus, a score of zero indicates that the country in question has not undergone any degree of Constitutional Islamization while scores above zero illustrate Islamization—the higher the number, the greater the Islamic credentials of that country's constitution. Table 2 demonstrates the ranking of the constitutions of OIC countries according to the degree of Islamicity.

Table 2: Ranking Islamic Constitutions Index

Rank	Countries	Sum
1	Iran 1979 (rev. 1989)	26
2	Saudi Arabia 1992 (rev. 2005)	23
3	Maldives 2008	17
4	Pakistan 1973 (reinst. 2002, rev. 2012)	16
5	Somalia 2012	14
6	Afghanistan 2004	13
7	Yemen 1991 (rev. 2001)	13
8	Bahrain 2002	11
9	Iraq 2005	11
10	Algeria 1963 (rev. 2008)	9
11	Mauritania 1991 (rev. 2012)	9
12	Sudan 2005	9
13	Egypt (2013)	8
14	Libya 2011	8
15	Oman 1996 (rev. 2011)	8
16	Qatar 2003	8
17	Kuwait 1962 (reinst. 1992)	7
18	Morocco 2011	7
19	United Arab Emirates 1971 (rev. 2004)	7

130.*Id.*

20	Comoros 2001 (rev. 2009)	6
21	Brunei 1959 (rev. 1984)	5
22	Malaysia 1957 (rev. 1996)	5
23	Syria 2012	5
24	Tunisia 2014 (Draft Translation)	5
25	Jordan 1952 (rev. 2011)	4
26	Bangladesh 1972 (reinst. 1986, rev. 2011)*	2
27	Djibouti 1992 (rev. 2010)	1
28	Albania 1998 (rev. 2008)	0
29	Azerbaijan 1995 (rev. 2009)*	0
30	Benin 1990*	0
31	Burkina Faso 1991 (rev. 2012)*	0
32	Cameroon 1972 (rev. 2008)*	0
33	Chad 1996 (rev. 2005)*	0
34	Cote D'Ivoire 2000*	0
35	Gabon 1991 (rev. 1997)*	0
36	Gambia 1996 (rev. 2004)*	0
37	Guinea 2010*	0
38	Guinea-Bissau 1984 (rev. 1991)*	0
39	Guyana 1980 (rev. 1995)*	0
40	Indonesia 1945 (reinst. 1959, rev. 2002)	0
41	Kazakhstan 1995 (rev. 1998)*	0
42	Kyrgyz Republic 2010*	0
43	Lebanon 1926 (rev. 2004)	0
44	Mali 1992*	0
45	Mozambique 2004 (rev. 2007)*	0
46	Niger 2010*	0
47	Nigeria 1999*	0
48	Senegal 2001 (rev. 2009)*	0
49	Sierra Leone 1991 (reinst. 1996, rev. 2008)	0
50	Surinam 1987 (rev. 1992)	0
51	Tajikistan 1994 (rev. 2003)*	0
52	Togo 1992 (rev. 2007)*	0
53	Turkey 1982 (rev. 2002)*	0
54	Turkmenistan 2008*	0
55	Uganda 1995 (rev. 2005)*	0
56	Uzbekistan 1992*	0

The rankings illuminate the world of Constitutional Islamization

for us. In some senses, they confirm popular assumptions, Saudi Arabia and Iran are top of the rankings; however some may be surprised to find Somalia and Maldives—not associated in the popular imagination with official Islam—are not lagging far behind these countries. The results for Turkey and the Central Asian countries are not surprising; these countries have expressed deep commitments to secularism in their constitution and some regimes in these countries have often suppressed the free exercise of Islam.¹³¹

What the index does that is most useful is that it allows us to distinguish between various degrees and layers of Constitutional Islamization. That is, it illustrates that “Constitutional Islamization” is not a monolithic phenomenon; its occurrence varies immensely. Some countries have much more Islamic Constitutions than others and some Islamic clauses matter much more than others in terms of their potential effects in the country’s normative constitutional order. So, although the Saudi Constitution makes many references to Islam, it is really the Iranian Constitution which is much more “Islamic” in substance. Our analysis and index thus adds much more nuance and sophistication to our understanding of the world of Islamic constitutions. Most importantly, it allows us to test various questions that provide novel insights into the question of Islam, democracy and rights; questions that remain untested empirically to date.

D. Bivariate Correlations

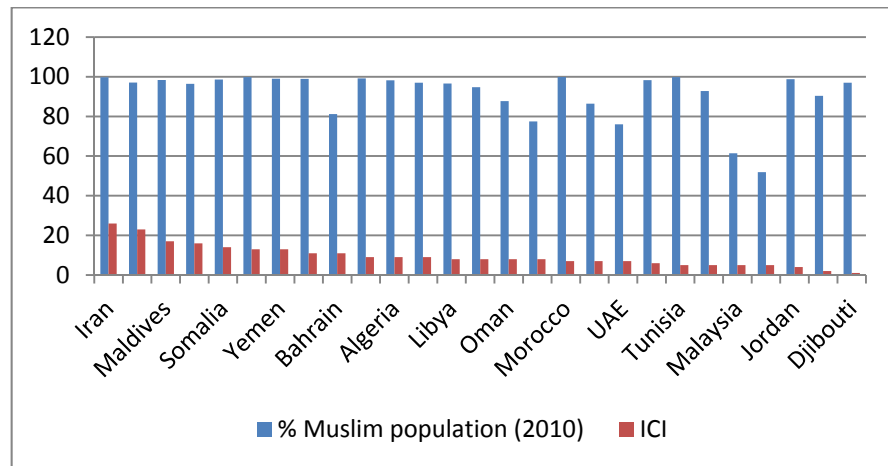
1. Population, Geography and Colonialism

The index above illustrates that countries that do not have a Muslim majority see no Constitutional Islamization in their constitutions. On the other hand, 60% of countries with a Muslim majority see some Constitutional Islamization. Yet, there are also countries with large Muslim majorities that have no degree of Constitutional Islamization in their constitution. Indeed 18 Muslim majority countries including Azerbaijan, Mali and the Kyrgyz Republic, either explicitly demarcate state and religion in their constitution, or make no mention of Islam. Countries which have the

131.“**” denotes all Muslim majority countries that have explicitly declared secularism as a constitutional principle. Bangladesh is quite interesting; it adopts secularism as a constitutional principle but also makes Islam the state religion.

most Islamic Constitutions—including Iran, Saudi Arabia, Pakistan, Maldives also have a population that is religiously homogenous to a very high degree; that is, over 90% Muslim. That means while countries where Muslims are not a majority will almost certainly not see Islamic clauses, conversely and perhaps unsurprisingly, in general, the higher the percentage of Muslims in the country's population, the more likely it appears that a country will have Islam in its constitution. That is, the number of Muslims, while not necessarily co-related directly with the level of Islamicity in a constitution, nevertheless increases the probability of Constitutional Islamization. Interestingly, we also find that the Central Asian countries in which poll results, in contrast to the majority of Muslim states, show that there is a low demand for Sharia to be the official law of the land, there is zero Constitutional Islamization.¹³² On the other hand, in the Middle East and North Africa, where polls show a high demand for Islamic law to be applied, there are also relatively high degrees of Constitutional Islamization. This illustrates that democratic demand perhaps does partly influence the degree of adoption of Islamic clauses in the constitution. See below for a side-by-side comparison Islamicity vs. Muslim population; we have excluded countries that have zero Islamicity in their constitution.

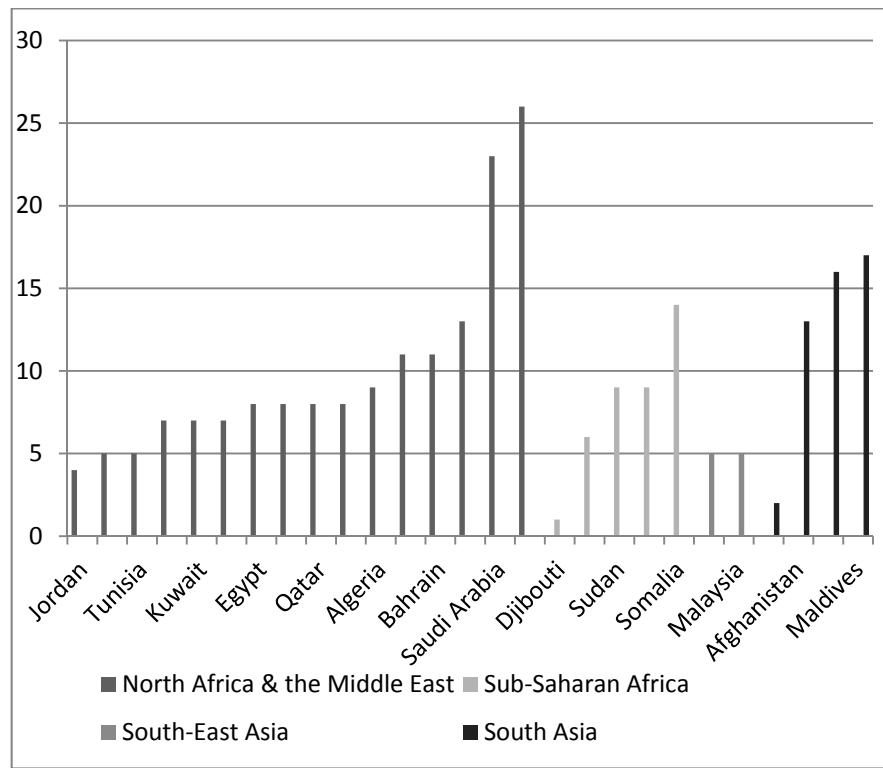
132. Pew Research Center's Religion & Public Life Project, *Beliefs About Sharia*, (Apr. 30 2013) available at <http://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-beliefs-about-sharia/>.

Figure 1. Levels of Islamicity vs Muslim Population %

Taking geography into consideration, there seems to be significant differences of Islamicity according to various geographic regions. The Central Asian countries and European Muslim majority states (Albania) have zero Constitutional Islamization. In South-East Asia, Malaysia's constitution is Islamized to some degree, so is that of Brunei, but Indonesia's is not (although Indonesia's constitution does make references to "God"). In South Asia, the constitution of every Muslim country—Bangladesh, Pakistan, Maldives and Afghanistan—is Islamized. In the Middle East and North Africa, the constitution of every Muslim country, with the exception of Lebanon, is Islamized. Africa presents some mixed results: some Muslim countries—e.g., Sierra Leone—are silent on the issue of Islam in the constitution. Others such as Mali and Senegal expressly declare a commitment to secularism while states including Somalia and Djibouti have undergone Constitutional Islamization. Further, the constitutions of Muslim countries in South Asia and the Middle East & North Africa not only have a very high probability of being Islamized but they also register the highest levels of Islamicity. It can be seen that some countries have much more Islamic constitutions than others based on where they are located. Perhaps this is due to a number of factors including colonial history, distance from the epicenter of Islam—Mecca/Medina in Saudi Arabia, the means by which Islam spread, who the agents of religious spread were (i.e.,

military vs traders) and so forth. See a geographical illustration of Constitutional Islamization below and notice the absence of Central Asian and many African countries that have a Muslim majority.

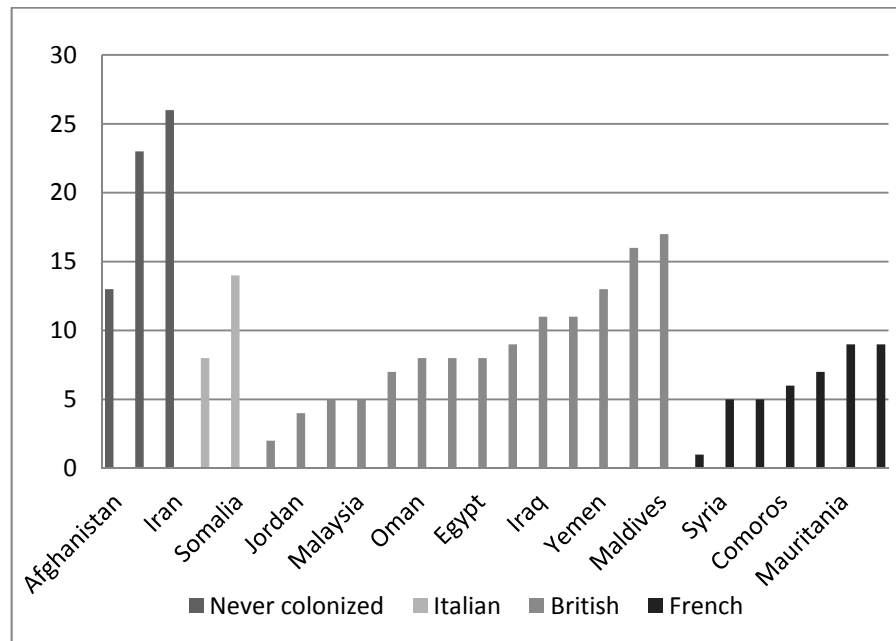
Figure 2. Levels of Islamicity vs Region of the World



Another interesting observation is the relation between colonialism and Constitutional Islamization. The two states that have the most Islamic constitutions were never colonized. In general though, countries that were colonized by the British see relatively higher levels of Islamization than countries that were colonized by other colonial powers—particularly the French. Indeed, no country in the French colonial tradition has adopted the repugnancy clause that makes all laws repugnant to Islam void. It can be argued that colonial structures have enduring legacies on legal systems, long after

the colonial power has packed up and moved home.¹³³

Figure 3. Constitutional Islamization and Colonization



2. Islamicity and Human Rights

We now come to a question that has often been asked in the popular imagination; what about Constitutional Islam and human rights? Is the constitutionalization of Islam incompatible with the provision of constitutional rights? Western constitutionalist thought has generally tended to view the Islamic world as the “antithesis of constitutional government.”¹³⁴ Scholars including Samuel Huntington claimed that not only is “Islam” a violent religion, but that “Islamic civilization” was destined to “clash” with “Western civilization” in the name of authoritarian politics.¹³⁵ This narrative

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

134. See BROWN, *supra* note 29, at 107 (discussing the perceived incompatibility of Islamic world and constitutionalism by Western scholars such as Montesquieu).

135. Samuel Huntington, *The Clash of Civilizations*, 72 FOREIGN AFF. 22, 22-49 (1993) (explaining hypothesis that civilizations based on concrete cultural differences

has penetrated not only academic but also policy thinking in the United States and Europe. The House of Lords in the United Kingdom recently stated that Sharia was “wholly incompatible” with human rights legislation.¹³⁶ A number of U.S. states have also attempted to enact laws that forbid state courts from considering Islamic law when deciding cases.¹³⁷ Similarly, during the drafting of the Iraqi Constitution, there was much discomfort within Washington about the possible inclusion of Islamic law in the Iraqi Constitution.¹³⁸ As Voll notes, “implicit in these concerns is an assumption that an “Islamic” state, even if democratically established, would be transformed into an illiberal and undemocratic “theocracy.”¹³⁹

Using data of the Comparative Constitutions Project, we investigate the relation between Islamicity of a constitution and the number of constitutional rights below (Table 3).

Table 3. Islamicity of Constitution in Muslim Majority Countries

will at the center of global political clashes); SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE MODERN WORLD ORDER* 14 (1996) (predicting that civilizations based on concrete cultural differences will at the center of global political clashes).

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

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

138. L. PAUL BREMER III, *MY YEAR IN IRAQ* 224 (2006) (discussing Iraqi constitutional process and role of Grand Ayatollah Sistani).

139. John O. Voll, *Islam and Democracy: Is Modernization a Barrier*, 1 *RELIGION COMPASS* 170, 171 (2007).

and Rights

Countries	ICI	Rights
Iran 1979 (rev. 1989)	26	44
Saudi Arabia 1992 (rev. 2005)	23	13
Maldives 2008	17	72
Pakistan 1973 (reinst. 2002, rev. 2012)	16	43
Somalia 2012	14	N/A
Afghanistan 2004	13	36
Yemen 1991 (rev. 2001)	13	32
Bahrain 2002	11	43
Iraq 2005	11	51
Algeria 1963 (rev. 2008)	9	36
Mauritania 1991 (rev. 2012)	9	30
Sudan 2005	9	48
Egypt (2013)	8	N/A
Libya 2011	8	35
Oman 1996 (rev. 2011)	8	39
Qatar 2003	8	32
Kuwait 1962 (reinst. 1992)	7	N/A
Morocco 2011	7	51
United Arab Emirates 1971 (rev. 2004)	7	30
Comoros 2001 (rev. 2009)	6	23
Brunei 1959 (rev. 1984)	5	2
Malaysia 1957 (rev. 1996)	5	30
Syria 2012	5	41
Tunisia 2014 (Draft Translation)	5	N/A
Jordan 1952 (rev. 2011)	4	28
Bangladesh 1972 (reinst. 1986, rev. 2011)*	2	47
Djibouti 1992 (rev. 2010)	1	25
Albania 1998 (rev. 2008)	0	75
Azerbaijan 1995 (rev. 2009)*	0	70
Benin 1990*	0	42
Burkina Faso 1991 (rev. 2012)	0	52

Cameroon 1972 (rev. 2008)*	0	32
Chad 1996 (rev. 2005)	0	44
Cote D'Ivoire 2000*	0	35
Gabon 1991 (rev. 1997)*	0	33
Gambia 1996 (rev. 2004)	0	61
Guinea 2010	0	43
Guinea-Bissau 1984 (rev. 1991)*	0	46
Guyana 1980 (rev. 1995)*	0	55
Indonesia 1945 (reinst. 1959, rev. 2002)	0	31
Kazakhstan 1995 (rev. 1998)	0	56
Kyrgyz Republic 2010	0	68
Lebanon 1926 (rev. 2004)	0	13
Mali 1992	0	42
Mozambique 2004 (rev. 2007)*	0	63
Niger 2010	0	46
Nigeria 1999*	0	55
Senegal 2001 (rev. 2009)	0	31
Sierra Leone 1991 (reinst. 1996, rev. 2008)	0	55
Surinam 1987 (rev. 1992)	0	46
Tajikistan 1994 (rev. 2003)	0	64
Togo 1992 (rev. 2007)*	0	48
Turkey 1982 (rev. 2002)	0	66
Turkmenistan 2008	0	54
Uganda 1995 (rev. 2005)*	0	69
Uzbekistan 1992	0	53

In general, there seems to be no direct co-relation between the number of rights in a constitution and its *degree* of Islamicity;¹⁴⁰ in fact,

140. We acknowledge that focusing on *de jure* number of rights promised in a constitution rather than assessing *de facto* rights within a particular country may not reflect the reality of human rights within a state. Yet, we believe the constitutional text (and its promise of rights and limits on government) is a foundational tool through which citizens and civil society can mobilize to realize human rights .

it seems that constitution with high degree of Islamicity have more number of rights than *less* Islamic constitutions. For example, Maldives has a very Islamic constitution, yet it also has the second highest number of rights (out of 45 Muslims countries) and more than many Muslim countries that have less Islamic constitutions. Nevertheless, constitutions of Muslim majority countries that have zero levels of Islamicity seem to, on average, contain a higher number of rights than constitutions of Muslim countries that have *some* level of Islamicity.

To demonstrate, below we include a ranking of Muslim countries based on the number of rights in their constitution, a * next to a country denotes an explicit commitment to secularism in the constitution.

Table 4. Muslim Countries Ranked by Number of Rights

Rank	Countries	Rights	ICI
1	Somalia 2012	N/A	14
2	Egypt (2013)	N/A	8
3	Kuwait 1962 (reinst. 1992)	N/A	7
4	Tunisia 2014 (Draft Translation)	N/A	5
5	Albania 1998 (rev. 2008)	75	0
6	Maldives 2008	72	17
7	Azerbaijan 1995 (rev. 2009)*	70	0
8	Uganda 1995 (rev. 2005)*	69	0
9	Kyrgyz Republic 2010	68	0
10	Turkey 1982 (rev. 2002)	66	0
11	Tajikistan 1994 (rev. 2003)	64	0
12	Mozambique 2004 (rev. 2007)*	63	0
13	Gambia 1996 (rev. 2004)	61	0
14	Kazakhstan 1995 (rev. 1998)	56	0
15	Guyana 1980 (rev. 1995)*	55	0
16	Nigeria 1999*	55	0
17	Sierra Leone 1991 (reinst. 1996, rev. 2008)	55	0
18	Turkmenistan 2008	54	0

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19	Uzbekistan 1992	53	0
20	Burkina Faso 1991 (rev. 2012)	52	0
21	Iraq 2005	51	11
22	Morocco 2011	51	7
23	Sudan 2005	48	9
24	Togo 1992 (rev. 2007)*	48	0
25	Bangladesh 1972 (reinst. 1986, rev. 2011)*	47	2
26	Guinea-Bissau 1984 (rev. 1991)*	46	0
27	Niger 2010	46	0
28	Surinam 1987 (rev. 1992)	46	0
29	Iran 1979 (rev. 1989)	44	26
30	Chad 1996 (rev. 2005)	44	0
31	Pakistan 1973 (reinst. 2002, rev. 2012)	43	16
32	Bahrain 2002	43	11
33	Guinea 2010	43	0
34	Benin 1990*	42	0
35	Mali 1992	42	0
36	Syria 2012	41	5
37	Oman 1996 (rev. 2011)	39	8
38	Afghanistan 2004	36	13
39	Algeria 1963 (rev. 2008)	36	9
40	Libya 2011	35	8
41	Cote D'Ivoire 2000*	35	0
42	Gabon 1991 (rev. 1997)*	33	0
43	Yemen 1991 (rev. 2001)	32	13
44	Qatar 2003	32	8
45	Cameroon 1972 (rev. 2008)*	32	0
46	Indonesia 1945 (reinst. 1959, rev. 2002)	31	0
47	Senegal 2001 (rev. 2009)	31	0
48	Mauritania 1991 (rev. 2012)	30	9
49	United Arab Emirates 1971 (rev. 2004)	30	7
50	Malaysia 1957 (rev. 1996)	30	5
51	Jordan 1952 (rev. 2011)	28	4

52	Djibouti 1992 (rev. 2010)	25	1
53	Comoros 2001 (rev. 2009)	23	6
54	Saudi Arabia 1992 (rev. 2005)	13	23
55	Lebanon 1926 (rev. 2004)	13	0
56	Brunei 1959 (rev. 1984)	2	5

Note in the above table that the out of the bottom 10 Muslim majority countries, in terms of the number of rights, only 2 (Lebanon and Senegal) are non-Islamic. In contrast, in the top 10 countries in terms of the number of rights, only one (Maldives) has an Islamic Constitution. This is a very significant finding: while the *level* of Islamicity in a constitution does not necessarily correlate with a reduction in the number of rights in a constitution, Islamicity may make a difference. Muslim countries that have zero levels of Islamicity or have expressed a commitment to secularism guarantee, in absolute terms, have a larger number of constitutional rights than Muslim countries that have Islamized constitutions. Of course, there are outliers: Lebanon registers zero Islamicity in its constitution, yet has the second lowest count of rights (after Brunei). Similarly, Maldives has a very Islamic constitution but also promises many rights. Yet, these are outliers. On average, secular Muslim majority states promise more rights in their constitution than states with Islamic constitutions. Notice in tables 3 and 4 that the overwhelming majority of states promising the highest number of rights in the Muslim world are all secular.

This, of course, does not necessarily mean the Islamicity caused less number of rights or that it is tension with rights. Indeed, work by one of the authors demonstrates that sometimes the adoption of Islamic supremacy clauses assists and legitimates the passage of rights in a constitution.¹⁴¹ Certainly, there are many more factors that would dictate the adoption of rights; for example, rights have become more ubiquitous in constitutions adopted recently – that is, time is a factor.

However, this preliminary analysis implies that in countries with Islamic constitution – since Islamic constitutions may be associated with a lower number of rights in a constitution – constitutional advisors should focus more attention on the basic political structures

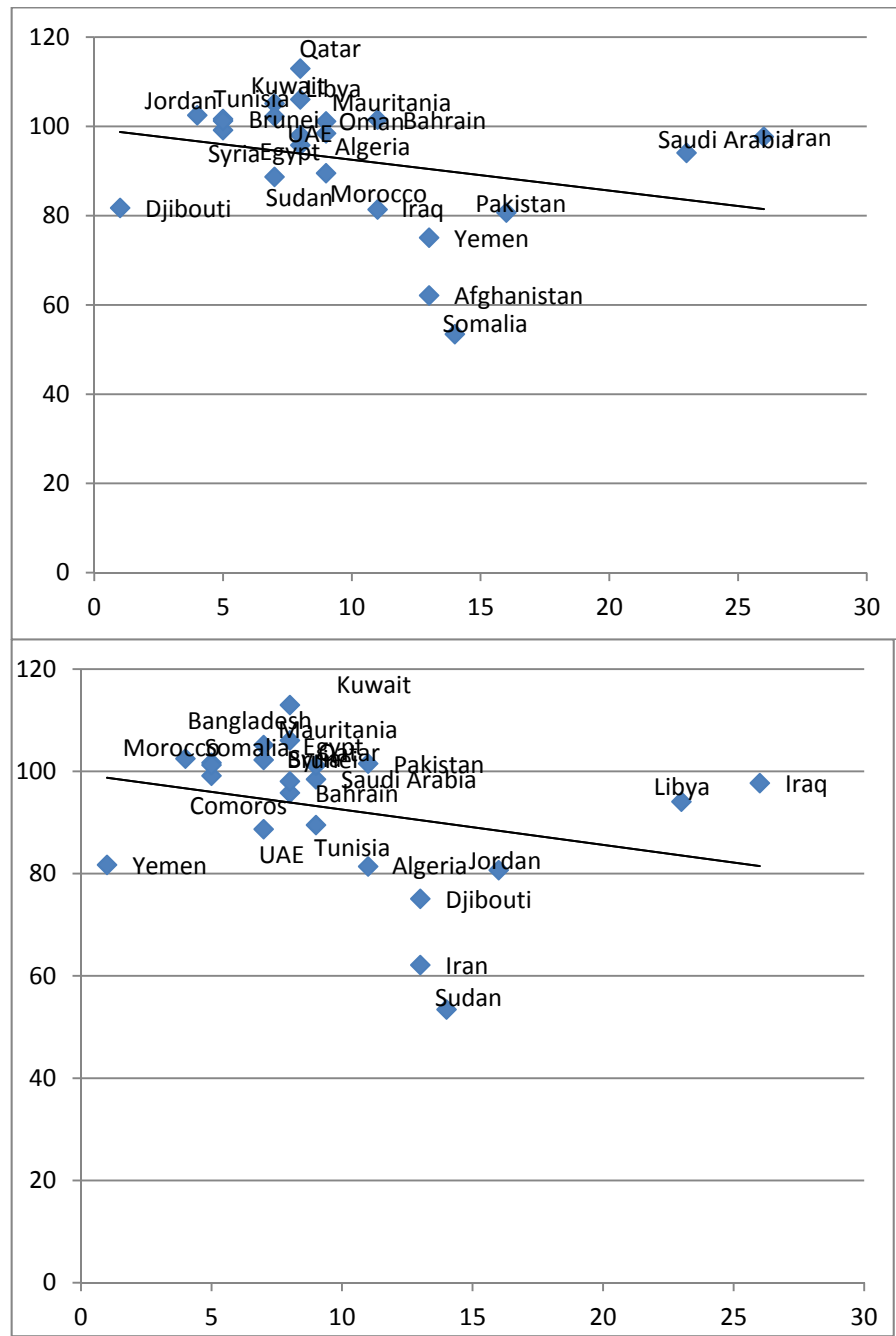
141. See generally Ahmed & Ginsburg, *supra* note 29.

of the constitution, including the design of constitutional courts and other bodies that will engage in interpretation. The project of balancing rights and Islam cannot but be resolved in each country through its own political and judicial processes, and it is these, which should be the main focus in constitutional design. These will include analysis of design options concerning the mechanisms of judicial appointment, the role of jurists and religious scholars in legal decision-making, standing rules to challenge laws, qualifications of judges and so forth. We intend to tackle this question in future work.

3. *Islamicity and Gender Equality, Democracy and Political Stability*

Questions are often also raised about Constitutional Islamization impacting women's rights, democracy. Using a simple bivariate correlation, we investigated whether this was true by comparing the Islamic Constitutions Index to the World Bank's Gender parity index for gross enrolment ratio.¹⁴² We found a considerable negative correlation between Islamicity and gender equality (Figure 4).

142. Primary & Secondary combined is the ratio of female gross enrolment ratio for primary and secondary to male gross enrolment ratio for primary and secondary. It is calculated by dividing the female value for the indicator by the male value. A GPI equal to 1 indicates parity between females and males. In general, a value less than 1 indicates disparity in favor of males and a value greater than 1 indicates disparity in favor of females.

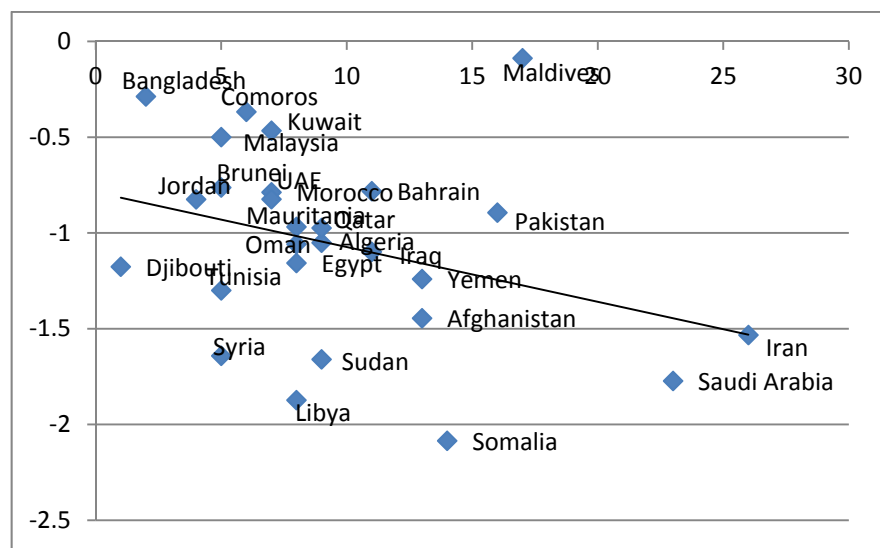
Figure 4. Gender Equality v Islamicity

R= -0.27. Source: World Bank WDI, 2013.

We then investigated whether countries that have more Islamic constitution are less democratic. For this we used Islamicity and “Voice and Accountability.” This latter measure includes a number of indicators measuring various aspects of the political process, civil liberties and political rights. Such indicators measure the extent to which citizens of a country are able to participate in the selection of governments. This category also includes indicators measuring the independence of the media, which serves an important role in monitoring those in authority and holding them accountable for their actions.

We found a considerable negative co-relation between Islamicity of constitutions and voice and accountability (Figure 5).

Figure 5. Islamicity and Voice and Accountability¹⁴³

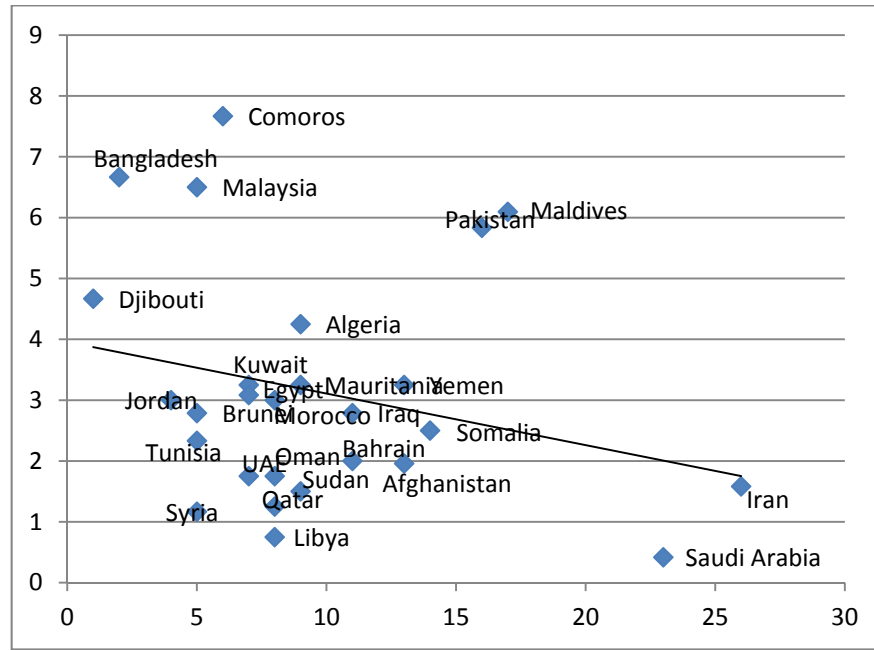


R= -0.33. Source: Worldwide Governance Indicators (WGI), 2013.

143. “Voice and Accountability” includes a number of indicators measuring various aspects of the political process, civil liberties and political rights. These indicators measure the extent to which citizens of a country are able to participate in the selection of governments. This category also includes indicators measuring the independence of the media, which serves an important role in monitoring those in authority and holding them accountable for their actions. The indicator scores lie between -2.5 and 2.5, with higher scores corresponding to favorable outcomes (World Bank, 2013).

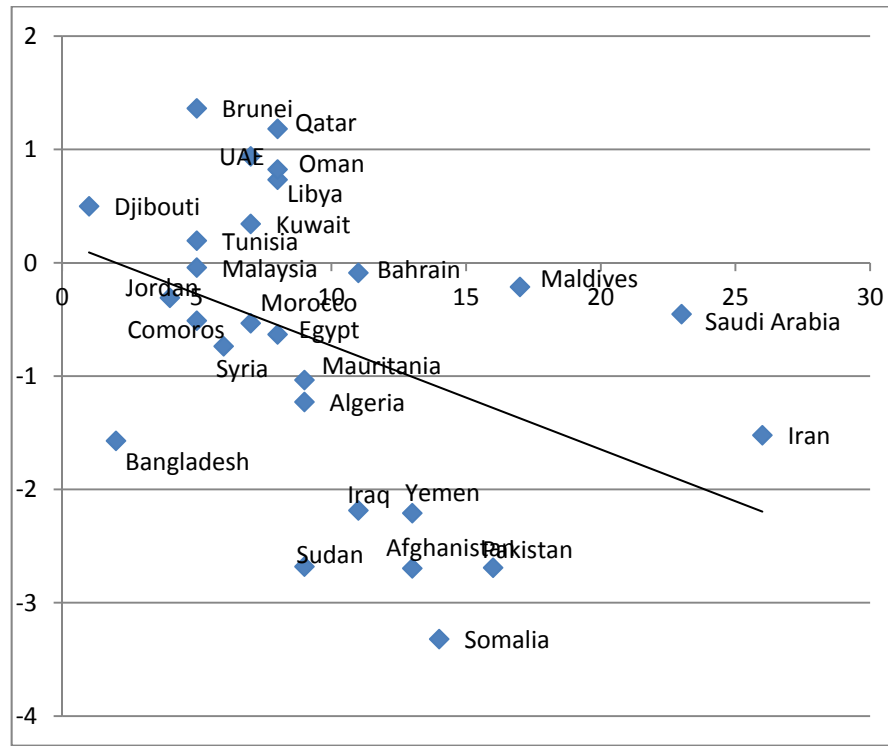
For democracy, we also compared Islamicity of constitutions against a measure of democracy from Freedom House. Again, we see a weak, but negative co-relation (Figure 6).

Figure 6. Islamicity and Democracy



R= -0.26. Source: Worldwide Governance Indicators (WGI), 2013.

Finally, we asked, do higher degrees of Constitutional Islamization correlate with politically unstable countries? "Political Stability" combines several indicators, which measure perceptions of the likelihood that the government in power will be destabilized or overthrown by possibly unconstitutional and/or violent means, including domestic violence and terrorism. The answer was yes: there is a strong co-relation between degree of Islamicity and political instability.

*Figure 7. Islamicity and Political Stability*¹⁴⁴

R = -0.40. Source: Worldwide Governance Indicators (WGI), 2013.

V. Conclusion

Western scholars and policymakers have long debated the inclusion and effects of incorporating Islam during constitution-making. Similarly, some Muslim majorities, Islamists and militants have long demanded the Islamization of constitutional life. While popular perceptions about Constitutional Islamization have persisted on both sides, despite its rich potential, to date, there has been little empirical measurement and investigation of the universe of Constitutional Islamization. This Article attempted to fill this gap. It

144. "Political Stability" combines several indicators that measure perceptions of the likelihood that the government in power will be destabilized or overthrown by possibly unconstitutional and/or violent means, including domestic violence and terrorism. The indicator scores lie between -2.5 and 2.5, with higher scores corresponding to favorable outcomes (World Bank, 2013). Accordingly, Afghanistan, Pakistan, Somalia, and Sudan are considered outliers.

explained the historical origins of Constitutional Islamization and elaborated on the theory of Islamic Constitutionalism. In doing so, its primary and novel contribution has been to undertake an empirical analysis of Constitutional Islamization, or the constitutional incorporation of Islamic clauses globally. Accordingly, it introduced the world's first ranking of constitutions based on Islamicity—the "Islamic Constitutions Index." Using the index, we assessed whether more Islamic constitutions have fewer rights, are associated with less democracy, gender equality and political stability and the answer, based on our preliminary and textual analysis seems to be yes. Although certainly not suggesting causation, this correlation needs to be further investigated. Does the inclusion of Islamic clauses cause these features or are there some other factors at work? While even complex causal questions can be investigated empirically, our work lays the foundations for investigating the relationship between Islam and democracy in more detail empirically while recognizing that qualitative analysis is necessary to deconstruct this relationship. Yet, our findings do imply that while Islam and constitutional democracy are certainly compatible—or at least that the Muslim world will chart its own indigenous version of democracy that may not be similar to Western models, since the constitution will ultimately be interpreted in each national context differently—constitutional advisors should focus much more attention on the basic political structures of the constitution, including the design of constitutional courts and other bodies that will engage in interpretation of these complex "Islamic Constitutions."

VI. Appendix

Methodology

A. General Characteristics

Q1. [STATEREL]- Does the constitution state that Islam is the state religion?

Yes (1 point)

No (0 point)

Q2. [PREAMBLE]- Does the Preamble reference Islamic idiom?

Yes (1 point)

No (0 point)

Q3. [UNITY]- Is there reference to the unity of OR association with the Muslim world or any mention of Ummah (Islamic political community)?

Yes (1 point)

No (0 point)

Q4. [JIHAD]- Is there a reference to jihad or defense of the faith?

Yes (1 point)

No (0 point)

Q5. [CALENDAR]- Does the constitution reference an Islamic calendar and/or holidays?

Yes (1 point)

No (0 point)

Q6. [HDMUSLIM]- Does the head of state or government have to be Muslim?

Yes (1 point)

No (0 point)

Q7. [CTZMUSLIM]- Should all citizens be Muslims?

Yes (1 point)

No (0 point)

Q8. [JDMUSLIM]- Is it stated that judges of the highest court need to be Muslim?

Yes (1 point)

No (0 point)

Q9. [OATH]- Does it mention Islamic idiom in the presidential and/or ministerial or parliamentary Oath?

Yes (1 point)

No (0 point)

Q10. [MORAL]- Are Islamic morals given some constitutional foundation?

Yes (1 point)

No (0 point)

Q11. [AMENDMENT]- Are the provisions related to Islam unamendable?

Yes (1 point)

No (0 point)

Q12. [ADVISORY]- Does the constitution mention a religious council that is advisory?

Yes (1 point)

No (0 point)

Q13. [AUTHORITY]- Does the source of authority or power stem from any religious notions?

Yes (1 point)

No (0 point)

Q14. [ACCOUNTABILITY]- Is government accountable to or to rule in accordance with the laws and limits of Islam?

Yes (1 point)

No (0 point)

B. Rights

Q15. [RIGHTS1]- Does the constitution make the enjoyment of any rights or freedoms subject to sharia requirements?

Yes (1 point)

No (0 point)

Q16. [WOMEN]- Is there a clause stating that women should serve their husband or that serving the family is their priority?

Yes (1 point)

No (0 point)

C. Executive

Q17. [DUTY]- Does the head or state/government have some religious duties/symbolism?

Yes (1 point)

No (0 point)

Q18. [HDKNOWLEDGE]- Does the head of state or government need to possess Islamic knowledge?

Yes (1 point)

No (0 point)

Q19. [PLEDGE]- Is the head of state/government appointed through pledge of allegiance (*bai'ah*)?

Yes (1 point)

No (0 point)

D. Legislation

Q20. [SOURCE]- Is Islam identified as a source of legislation?

Yes (1 point)

Otherwise (0 point)

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Q21. [SUPREMACY] - What is its degree of supremacy of Islam? Code the intensity (Asked only if SOURCE is answered 1)

[open-ended response]

Instructions:

Regarding Islam:

- Islam/Islamic law/Sharia=2 points

- "Principles" of Islam/Islamic law/Sharia= 1 points

Regarding Law:

- "A" source of law or if there is no other law governing a matter then Islamic law can come in=1 points

- "A" primary or basic or foundational source of law=2 points

- "THE" source (or the only source). (In case it is implying that Islamic law is the only source)=3 points

Examples:

- "Islamic law is the source of all legislation" Score:2+3=5

- "The principles of Islam is the source of all legislation" Score: 1+3=4

- "The principles of Islam are the major/primary source of all legislation" Score: 1+2=3

- "Islamic Sharia is a major source of legislation" Score: 2+2=4

Q22. [REPUGNANCE]- Does the constitution state that no laws can be repugnant to Islam?

Yes (1 point)

No (0 point)

E. Judiciary

Q23. [JUDICIARY]- Is there an explicit provision requiring the judiciary to apply Sharia or refuse to apply laws that contradict it?

Yes (1 point)

No (0 point)

Q24. [JDKNOWLEDGE]- Is it stated that judges of the highest court need to have Islamic knowledge?

Yes (1 point)

No (0 point)

Q25. [COMPLIANCE]- Does the constitution mention a religious council or judicial court that has the power to review legislation (ex ante or ex post) to declare sharia compliance?

Yes (1 point)

No (0 point)

F. Economy

Q26. [ECONOMY] - Does it provide that the economy/trade or banking will be in accordance with Islam?

Yes (1 point)

No (0 point)

Q27. [INTEREST]- Does the constitution ban interest rate (riba)? (Asked only if ECONOMY is answered 1)

Yes (1 point)

No (0 point)

Q28. [ALMS]- Does it make provision for the state to recognize or organize alms/ charity/ Zakat/Waqf?

Yes (1 point)

No (0 point)

G. Other Issues

Q29. [CRIME]- Does the constitution make any explicit provision that Islamic criminal penalties (amputations, stoning) will be implemented?

Yes (1 point)

No (0 point)

Q30. [EDUCATION]- Does the constitution make provision for the state to provide Islamic (or religious) education?

Yes (1 point)

No (0 point)

[illegible]

