2013

Designing Islamic Constitutions: Past Trends and Options for a Democratic Future

Clark B. Lombardi
University of Washington School of Law

Designing Islamic constitutions: Past trends and options for a democratic future

Clark B. Lombardi*

*In recent years, a growing number of countries have adopted constitutional provisions requiring that state law be consistent with Islamic law (*sharia*). Muslims today are deeply divided about what types of state action are consistent with* sharia. *The impact of a "*Sharia *guarantee clause" (SGC) depends largely on questions of constitutional design: who is given the power to interpret and apply the provision and what procedures do they follow? This article explores the trends that gave rise to SGCs and provides a history of their incorporation into national constitutions. It then surveys a number of the remarkably varied schemes that countries have developed to interpret and enforce their SGCs, and it considers the impact that different schemes have had on society. Finally, building on this background, the article considers what types of SGC enforcement scheme, if any, are consistent with democracy. As it notes, SGCs are often found in authoritarian or imperfectly democratic constitutions. Unsurprisingly, the designers of SGC enforcement schemes in non-democratic countries have generally tried to ensure that their SGC will be interpreted and applied in a way that permitted or even promoted non-democratic policies. Nevertheless, from the experience of non-democratic countries with SGCs we can draw some important lessons about the types of SGC enforcement scheme that would allow more democratic states to promote both democratic political participation and rights. Furthermore, recent debates have erupted in Western liberal democracies about how best to reconcile rights enforcement with democracy. These help to further clarify some issues that aspirational Islamic democracies will face as they try to develop SGC enforcement schemes for a democratic society, and they provide insights into the qualities that an institution must possess if it is to address these issues effectively. A number of Muslim countries are currently debating how best to square a constitutional commitment to respect Islam with parallel commitments to democracy and rights. Acknowledging that these countries will need to tailor their SGC enforcement schemes to very different local conditions, this article describes some basic design features that effective democratic SGC enforcement schemes are likely to share.*

* University of Washington School of Law. Email: lombardi@uw.edu.

I•CON (2013), Vol. 11 No. 3, 615–645 doi:10.1093/icon/mot038

1. Introduction

The past forty years have witnessed religious revival around the world,[1] and this revival has profoundly affected constitutions in the Muslim world.[2] Most importantly, it has led to the spread of "*Sharia* Guarantee Clauses" (SGCs). SGCs try to realize through the lens of modern constitutionalism the classical Islamic political principle that a ruler's laws should respect the fundamental principles of *sharia*. The SGC provides that, even if a law has been enacted according to constitutionally correct procedures, that law must be treated as void if it is inconsistent with *sharia*. In this article, I will refer to constitutions with SGCs as "Islamic constitutions."

In both the Muslim world and the West, there has been debate about whether Islamic constitutions can ever be truly democratic. Concerned that *sharia* principles are fundamentally inconsistent with democratic principles, some argue that constitutions containing SGCs will inevitably prevent a country from realizing democracy or from respecting liberal rights. Others insist that these fears are misguided. Both sides oversimplify the matter and overlook a crucial point. In almost every country in the Muslim world, people disagree about who can interpret *sharia* and about what *sharia* requires. As a result, incorporating an SGC does not, by itself, lead to particular outcomes. Whether an SGC permits or even promotes democracy and human rights depends upon its interpreters. Those who want to ensure that democracy flourishes in the Middle East should spend less time lamenting or celebrating the spread of these clauses. Instead, they should try to ensure that countries with SGCs create institutions that are likely to apply them democratically.

Section 2 of this article provides a brief history of SGCs and explores the significant challenges they pose to constitutional designers. Contemporary Muslims disagree deeply about what Islam requires and about what constraints an SGC places on the state. The impact of an SGC on state practice depends to a great extent on questions of institutional design: who has been given the authority to interpret Islam's constraints, and what procedures will they follow?

Section 3 demonstrates that the elites who design Islamic constitutions have been keenly aware that certain types of institution provide legitimacy in the eyes of different groups of Muslims and also that certain types of institution may constrain the state from pursuing particular policies. A series of case studies shows that constitutional designers have created enforcement schemes with two goals in mind. First, they have tried to ensure that key Muslim groups see the institution that interprets and applies the SGC as legitimate. Ideally, *all* important Islamic factions in the country will respect the SGC. However, in the less than democratic regimes that were all too common in the Muslim world, designers were often content merely to satisfy only a particular subset of Muslims

[1] *See generally, e.g.*, The Desecularization of the World (Peter Berger ed., 1999), and Gilles Kepel, The Revenge of God (1994).

[2] *See* Saïd Amir Arjomand, *Introduction*, *in* 1, 3 Constitutional Politics in the Middle East: With Special Reference to Turkey, Iraq, Iran and Afghanistan (Saïd Amir Arjomand ed., 2008). The second development is to push for a positive commitment to promote Islam. It is beyond the scope of this paper to engage with this phenomenon or the challenge it poses for constitutional design.

whose support the state needed to survive. Second, designers have tried to ensure that the institution will be disinclined to interpret Islam in a way that prevents the state from pursuing policies to which the designers are committed. In one country, a particular type of institution may prove well-suited to the designers' goals. In another country, designers may prefer different goals. In different countries, then, constitutional designers of Islamic constitutions have developed very different SGC enforcement schemes.

Section 4 briefly considers how democratization in the Muslim world may be changing the goals of designers, and what types of SGC enforcement schemes are likely to sustain a democratic and liberal Islamic society. Given the relative lack of democracy in the Muslim world until recently, any conclusions will have to be temporary. Drawing lessons both from the experience of Western democracies and from the case studies provided in Section 3, Section 4 hypothesizes that SGC enforcement schemes will continue to differ from country to country, but that within democracies, effective schemes may tend to share some common qualities. Among them will be structural provisions designed to ensure that the institutions entrusted with the final power to interpret and enforce the SGC are sensitive to both the opinions of apolitical experts widely respected by the public and the opinions of the elected political figures who represent the public.

2. *Sharia* Guarantee Clauses and the challenge of enforcing them

SGCs enshrine into the constitutions of Muslim countries a principle that state law should be consistent with *sharia*. This is a principle with a long pedigree in Islamic political thought.

2.1. The classical Sunni principle that state legislation must respect *sharia*

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 in 632, however, the Muslim community lost access to its divinely inspired lawgiver. In subsequent centuries, the Muslim community went through several centuries of debate about legal authority and a schism that would lead to the formation of Shiite Islam. From roughly the tenth to the twentieth century, however, Sunni Muslims agreed that interpretation of *sharia* was the preserve of professional scholar-jurists (*fuqaha*) who were trained and licenced in a guild-like system.[3] Shiites too came to trust scholars trained in their own guilds.[4] *Fuqaha* in both sects interpreted Islam using a complex process of logical reasoning that was informed by precedent, and, in a subtle way, utility.[5]

[3] *See generally*, JONATHAN BERKEY, THE TRANSMISSION OF KNOWLEDGE IN MEDIEVAL CAIRO (1992). *See also* WAEL HALLAQ, SHARĪ'A: THEORY, PRACTICE, TRANSFORMATIONS 135–140 (2009).

[4] *See, e.g.*, DEVIN STEWART, ISLAMIC LEGAL ORTHODOXY: TWELVE SHIITE RESPONSES TO THE SUNNI LEGAL SYSTEM 30 (1998).

[5] On the system, *see generally, e.g.*, BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW 38–87 (1998); WAEL HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES (1997); WAEL HALLAQ, AUTHORITY, CONTINUITY AND CHANGE IN ISLAMIC LAW (2001).

Scholars often disagreed about questions of God's law. It was accepted that when two scholars disagreed it was impossible to say with certainty who was correct, and Muslims were by default permitted to organize their lives and those of their community according to the teachings of whichever scholar they preferred.[6] Between the eleventh and the fourteenth centuries, however, important Sunni scholars argued that the ruler should have considerable discretion to impose by statute a uniform body of law for a state—even if that prevented some Muslims from following their preferred version of Islamic law.[7] According to their theory of *siyasa shar'iyya*, rulers could regulate the lives of Muslims by statute. To be legitimate, however, a statute had to satisfy two criteria. First, state law could never legitimately compel a citizen to violate any of the limited number of commands that were clearly stated in the scripture. Second, when regulating in the vast sphere that was not covered by clear scriptural rules, the state could not act in a way that harmed the welfare (*maslaha*) of the public—"welfare" referring to material benefits not implicitly disapproved by scriptures.[8]

To legitimate their rule in terms of *siyasa shar'iyya*, some pre-modern states institutionalized a process of consultation with the *fuqaha*. Methodologically, it is difficult to measure with confidence the legitimacy that these schemes provided. Modern scholars relying on histories written largely by the *fuqaha* may overestimate the degree to which the masses of people accepted unquestioningly an affirmation by the *fuqaha* that a law was consistent with Islam. With that caveat, rulers such as the Ottomans do seem to have legitimated themselves in part by cooperating with the *fuqaha*, and this affected the drafting of early constitutions.[9]

When the Ottomans drafted their first constitution, they included an SGC, which was understood to require a symbiotic relationship with the *fuqaha*.[10] A few other Muslim states in the nineteenth and early twentieth centuries also drafted constitutions obliging rulers to respect the traditional principle of *siyasa shar'iyya*.[11] Even as states were constitutionalizing the traditional principle of *siyasa shar'iyya*, however, some Muslims were beginning to question whether the *fuqaha* could be trusted to distinguish Islamic from non-Islamic laws.[12] Combined with the rise of new, formally

[6] *See* Weiss, *supra* note 5, at 116–121.

[7] *See* Frank Vogel, Siyasa, *pt. III (In the Sense of* Siyasa Shari'a), *in* 9 Encyclopedia of Islam 695 (2d ed. 1997); Clark Lombardi, State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari'a into Egyptian Constitutional Law 49–58 (2006); Erwin J. Rosenthal, Political Thought in Medieval Islam 43–61 (1958).

[8] *See generally* the sources cited *supra* note 7. On the concept of *maslaha*, *see generally*, Felicitas Opwiss, Maṣlaḥa and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to the 8th/14th Century (2010), Felicitas Opwiss, *Maslaha in Contemporary Islamic Legal Theory*, 12 Isl. L. & Soc. 182 (2005).

[9] Lombardi, *supra* note 7, at 54–58. *Compare generally*, Noah Feldman, The Fall and Rise of the Islamic State (2008). *See also* L. Carl Brown, Religion and State: the Muslim Approach to Politics 37 (2000) (noting that opposition from the *fuqaha* could adversely affect a ruler's legitimacy).

[10] Nathan Brown, Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government 15–34 (2002).

[11] *Id.*

[12] See discussion *infra* in Section 2.2.

secular ideologies among elites in Muslim regions, such as nationalism and communism, this development led states temporarily to shy from SGCs.

2.2. Modern reformulations of *siyasa shar'iyya* and the temporary disappearance of SGCs

Social and political changes during the nineteenth century created doubts in the minds of many Sunni Muslims about core elements of medieval Islamic legal thought.[13] All over the Sunni Muslim world, cacophonous debates emerged about who had authority to interpret Islam, about the methods that those interpreters should employ and, by extension, about what Islamic states were permitted to do. In almost every country, multiple factions emerged, each divided into sub-factions.[14] Similar doubts and debates would appear later and in a somewhat different form in the Shiite world.[15]

In the contemporary Muslim world, "traditionalist" groups continue to believe that the state must legislate in accordance with the universal rules of Islam and with the public interest—each as understood by the *fuqaha*.[16] These traditionalists have been challenged by a variety of new Muslim groups, who assert that traditional methods of interpreting Islam's universal rules and the traditional methods of identifying the public interest are deeply flawed. "Scriptural literalists" (what some might call fundamentalists) opined that the universal rules should be found directly in scripture—and thus interpretation could be performed by people with deep knowledge of the scriptures but only limited training in the traditional exegetical methods used by the *fuqaha*. Lastly, a broad group I will here call "modernists" favored highly untraditional techniques for interpreting Islam's constraints on state discretion—many of which relied heavily on utilitarian reasoning.[17] Modernists themselves were divided into different, often mutually hostile sub-groups. These groups disagreed about what constituted a public good, and even those who shared common views about how to define the good might find themselves at odds about whether a certain law actually promoted good results. Some were liberal, some not.[18]

[13] For a brief outline of major contours of these debates, *see* Sami Zubaida, *Contemporary Trends in Muslim Legal Thought and Ideology*, *in* 6 THE NEW CAMBRIDGE HISTORY OF ISLAM: MUSLIMS AND MODERNITY: CULTURE AND SOCIETY SINCE 1800, at 270 (Robert W. Hefner ed., 2010).

[14] *See generally* Robert W. Heffner, *Introduction*, *in* SHAR'IA POLITICS: ISLAMIC LAW AND SOCIETY IN THE MODERN WORLD 1 (Robert W. Heffner ed., 2011) and the subsequent case studies. For detailed analysis of debates in Southeast Asia and Egypt, *see generally* R. MICHAEL FEENER, MUSLIM LEGAL THOUGHT IN MODERN INDONESIA (2007); LOMBARDI, *supra* note 7, at 78–118.

[15] *See* discussion of debates about SGCs in Iran in Section 3.4 *infra*; *cf.* Naser Ghobadzadeh, Religious Secularity, an Emerging Backlash to the Islamic State in Iran, *available at* http://sydney.edu.au/arts/government_international_relations/downloads/documents/spirited_voices/006_Naser_Ghobadzadeh_RELIGIOUS_SECULARITY_AN_EMERGING_BACKLASH_TO_THE_ISLAMIC_STATE_IN_IRAN.pdf.

[16] For a discussion of the logic of traditionalism, *see* MUHAMMAD QASIM ZAMAN, THE ULAMA IN CONTEMPORARY ISLAM: CUSTODIANS OF CHANGE 38–59 (2007).

[17] Some scholars prefer to save the term "modernist" for the group I call "liberal modernists."

[18] *See, e.g.*, the contrasting positions taken by modernists on polygamy or interest described in BARBARA FREYER STOWASSER, WOMEN IN THE QUR'AN, TRADITIONS AND INTERPRETATION 121–122 (1996); and Mohammad Fadel, *Riba, Efficiency, and Prudential Regulation: Preliminary Thoughts*, 25 WIS. INT'L L.J. 655 (2008).

As disagreement grew, states could no longer assume that traditional mechanisms of consultation with the *fuqaha* would imbue their law with legitimacy in the eyes of all citizens—or even a majority of them. It was unclear, however, that other mechanisms would have broader appeal. Some Muslim thinkers came to argue that it was quixotic and unnecessary formally to promise to its citizens that its laws would respect Islam.[19] In line with this pessimistic view, governments in the Muslim world increasingly abandoned any attempt constitutionally to guarantee that they would respect Islamic law. By the time of the First World War, almost no majority Muslim country had a constitution that explicitly required the state to act in accordance with scripture and state practice.[20]

2.3. The Islamic revival and the reappearance of SGCs in an age of contest about Islam

The disappearance of SGCs was only temporary. During the twentieth century, public interest in Islam continued to grow. Furthermore, the failures of many secularist states either to provide for their people or to guarantee their rights contributed to a reaction against secularism. Growing numbers of Islamists in numerous countries demanded that states recommit to the ideal of legislating in accordance with *sharia*—agreeing implicitly to postpone detailed discussions about what the *sharia* actually required.[21] In the last quarter of the twentieth century, states in the Sunni Muslim world began to bow to Islamist pressure and to incorporate SGCs into their constitutions.[22]

States that adopted SGCs in the second half of the twentieth century committed to an ideal whose implications were being vigorously contested.[23] In so doing, they found themselves facing a conundrum analogous to the dilemmas facing states that identify themselves as "liberal" and struggle to interpret and apply constitutional provisions guaranteeing individual rights. Writing about individual rights provisions in the US Constitution, Jeremy Waldron comments:

> The Bill of Rights does not settle the disagreements that exist in the society about individual and minority rights. It bears on them but it does not settle them. At most, the abstract terms of the Bill of Rights are popularly selected sites for disputes about these issues. The question . . . is who is to settle the issues that are fought out on those sites.[24]

[19] See Lombardi, *supra* note 7, at 69–72.

[20] *See* Brown, *supra* note 10, at 91–94.

[21] *See generally*, The Contemporary Islamic Revival: A Critical Survey and Bibliography (Yvonne Y. Haddad, John O. Voll & John L. Esposito eds., 1987); The Islamic Revival since 1988: A Critical Survey and Bibliography (Yvonne Y. Haddad, John O. Voll & John L. Esposito eds., 1997).

[22] The exact number of countries is hard to gauge. Some discussed in this article have adopted provisions that are obviously SGCs. Others have ambiguous clauses whose meaning must be decided by scholars and courts. *See, e.g.*, Clark B. Lombardi, *Constitutional Provisions Making Sharia "a" or "the" Chief Source of Legislation: Where Did They Come from? What Do they Mean? Do They Matter?*, 28 Am. U. Int'l L. Rev. 733 (2013). To date, no one has done an exhaustive survey of Muslim constitutions *as interpreted*.

[23] Heffner, *supra* note 14, at 2–3, 43–48.

[24] Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 Yale L.J. 1348, 1393 (2006).

Similarly, the decision to constitutionalize Islam has never settled the raging debates among modern Muslims about what God wants Muslims to do or about the constraints that Islamic law places on a state's discretion to legislate.

3. SGC enforcement schemes in the twentieth and twenty-first centuries

Whenever a majority Muslim state adopts an SGC, it must develop a process by which the SGC will be interpreted. It is hard to develop an institution that will be able to check laws for consistency with Islam in a way that all citizens, or even a majority of them, would accept as legitimate, and in non-democratic or imperfectly democratic countries, many have chosen not to even try. They have been content to develop schemes that satisfy some favored subset of the nation's Muslims. Designers have also always tried to ensure that, whatever institution is entrusted to enforce the SGC, it will not interfere with policies to which the designers are committed. Designers of authoritarian Islamic constitutions have thus been careful to vest the power of SGC enforcement in an institution disinclined to protect liberal rights. Designers of liberal Islamic constitutions have tried to vest the power in institutions that will protect them. Trying to appeal to different Islamic constituencies and interested in pursuing different policies, states have chosen to employ very different SGC enforcement schemes.

3.1. A basic typology of SGC enforcement schemes

SGC enforcement schemes can be divided into three types: ones that rely primarily on legal institutions to ensure that the state complies with its obligation to legislate in a manner that respects *sharia*; those that rely primarily on political institutions; and those that try to create what I will call a hybrid or "dialogic" method of SGC interpretation and enforcement.

Theorists of liberal constitutionalism have long differentiated between political constitutionalism and legal constitutionalism. States that embrace what I call "political constitutionalism" allow legislators to judge for themselves whether their laws respect all protected rights. In making their decisions, they are accountable solely to the public. In a democracy, they will be subject to public rebuke through the political process. In other systems (which are perhaps not properly described as "constitutionalist" at all), they will be subject only to a loss of legitimacy and, perhaps, rebellion. States that embrace "legal constitutionalism" empower tribunals staffed by politically insulated legal experts to make the final determination as to whether the political branches have acted in a way that the constitution prohibits. [25]

[25] On the different models, there is an enormous literature. *See, e.g.*, Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 Am. J. Comp. L. 707 (2001); Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights and Democracy Based Worries*, 38 Wake Forest L.R. 813, 813–815 (2003).

Political and legal constitutionalism are Weberian ideal types, and in practice, few liberal democracies operate in a *purely* political or legal constitutionalist mode.[26] England's Westminster model of parliamentary governance is often said to epitomize a system of political constitutionalism. Judges through their power of statutory interpretation, however, have always had room to frustrate the enforcement of laws that they feel violate protected rights and they have often been willing to do so. The United States is often held up as an example of a country that employs a system of legal constitutionalism. However, US political branches have various tools available to pressure courts either to forestall them from voiding laws or to prevent them from enforcing such a ruling. As a practical matter, then, liberal democracies are probably better described as systems that rely *primarily* on political or legal institutions to ensure that rights are respected.

Over the past few years, a growing number of countries have designed hybrid rights enforcement systems that formally combine in significant and similar ways important elements of both political and legal constitutional schemes. Some scholars, such as Stephen Gardbaum, have controversially asserted that these types of systems should be considered examples of a distinctive new "model" of rights enforcement.[27] Gardbaum describes this model as one in which a government (a) binds itself to recognize citizens' liberal rights through constitutional or legal enactment, (b) empowers a legal tribunal to review government action to review laws to ensure that it respects those rights, and (c) allows political branches to examine any judicial ruling that voids their laws as inconsistent with constitutional rights guarantees and, after deliberation, to override it by ordinary majority vote. If the political branches exercise their override power, the law is restored and courts will henceforth hold, it does not, in fact, violate rights.[28] Systems that fit into this putative new model can differ in significant details. They may use different types of documents to identify the protected rights. They may use slightly different types of judicial review, and they may require parliaments to follow different procedures when exercising their power to override. All systems share, however, a goal of "decoupl[ing] judicial review from judicial supremacy or finality."[29] Recognizing the force of the arguments that these may be less distinctive or less attractive than it

[26] *See* Rosalind Dixon, *Weak Form Judicial Review and American Exceptionalism*, 32 Oxford J. Legal Stud. 487 (2012); Mark Tushnet, *How Different are Waldron and Fallon's Core Cases for and against Judicial Review?*, 30 Oxford J. Legal Stud. 49 (2010).

[27] *See* Gardbaum, *New Commonwealth*, *supra* note 25; Stephen Gardbaum, *Reassessing the new Commonwealth Model of Constitutionalism*, 8 Int'l J. Const. L. 167, 170 (2010); Stephen Gardbaum, The New Commonwealth Model of Constitutionalism (2013). For debates about the distinctiveness and merits of systems that contain these qualities, *compare* Kent Roach, *Dialogic Judicial Review and its Critics*, 23 Sup. Ct. L. Rev. (2d ser.) (2004); Janet Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 Mod. L. Rev. 7 (2006) and Jeremy Waldron, *supra* note 24, at 1354 *with* Alison Young, Parliamentary Sovereignty and the Human Rights Act (2009); Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: The Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 Hastings Const. L.Q. 457 (2012); Rivka Weill, *On Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 Berkeley J. Int'l L. (2011); Dixon, *supra* note 26; Tushnet, *How Different?*, *supra* note 26.

[28] Gardbaum, *Reassessing*, *supra* note 27, at 169–170.

[29] *Id.* at 170.

might at first glance appear, I agree with Gardbaum that it is useful to highlight them as a distinctive middle point on a spectrum from legal to political enforcement. I will refer to them in this paper as "hybrid" or "dialogic" systems.[30]

Like institutional schemes to enforce rights, institutional schemes to enforce SGCs can be divided into ones that rely primarily on political institutions to interpret and force SGCs, ones that rely primarily on expert legal institutions and, finally, dialogic hybrids that subject laws to judicial review but also allow legislatures, under carefully controlled circumstances, to override judicial decisions voiding laws on the ground that the laws are inconsistent with constitutional rights guarantees. It would be impossible here to describe all the SGC enforcement schemes that countries have adopted over the past 50 years. The following pages provide, however, a sample of schemes and a hypothesis as to why elites in different nations thought that a particular scheme would provide them with Islamic legitimacy (for at least some important set of Muslim citizens) while leaving them free to satisfy all of their constitutional commitments and most cherished policies.

3.2. "Primarily political" systems for SGC enforcement

Many states with SGCs have allowed political institutions to judge their own compliance with Islam.

a) Afghanistan: 1923–1967 (and arguably until 2004)

Since entering the modern era, Sunni Islam has been central to Afghan national identity. Afghanistan's nineteenth and early twentieth-century monarchs, trying to legitimize their rule in Islamic terms, embraced the principle of *siyasa shar'iyya*.[31] Afghanistan's first constitution in 1923 did not have an SGC. It was short-lived. Amanullah Khan, a Westernized, modernizing monarch, enacted the 1923 constitution. Although it made Islam the religion of the state, it did not explicitly require the state to legislate in accordance with *sharia* principles.[32] Conservative political factions, already suspicious of the king, instigated a series of revolts that portrayed the King as un-Islamic.[33] Within a decade, Amanullah had been overthrown and his constitution replaced with one committing the kingdom to the principle of *siyasa shar'iyya*.[34] While courts were not granted any power of judicial review, the experience of Amanullah lingered in the minds of Afghan rulers, and they were for a long time careful not to contravene Islamic principles as understood by Afghanistan's powerful conservative factions.

[30] They have also been described as systems of "weak form judicial review," "dialogic" review or, with regard to a subset, "new Commonwealth model of constitutionalism." *Compare, for example*, Tushnet, *New Forms*, *supra* note 25, *with* Roach, *supra* note 28 and Gardbaum, *New Commonwealth*, *supra* note 25.

[31] *See generally*, M. Hassan Kakar, *Constitutional History of Afghanistan*, ENCYCLOPEDIA IRANICA (Dec. 15, 1992; updated Oct. 28, 2011), *available at* http://www.iranicaonline.org/articles/constitutional-history-of-afghanistan.

[32] AFGHANISTAN CONST. (1923) art. 2. On Amanullah, *see* THOMAS BARFIELD, AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY 174–195 (2010).

[33] *See* BARFIELD, *supra* note 32, at 183–95.

[34] *See* AFGHANISTAN CONST. (1931) arts. 5, 6, 7, and 10.

Afghanistan's 1964 Constitution prohibited the legislature from passing legislation "repugnant to the basic principles of the sacred religion of Islam."[35] A 1967 law technically gave courts the power to refuse to enforce laws that were contrary to the Constitution, but researchers have uncovered no case of courts ever exercising this power.[36] Subsequent constitutions, including communist constitutions of the 1980s and constitutions enacted by Islamic governments in the 1990s, also included SGCs that were, as far as we can tell, never actually enforced by judicial review.[37] Nonetheless, Afghan governments were generally sensitive to powerful factions' understanding of Islam. Those that weren't (including the communist regimes) suffered loss of legitimacy and sometimes rebellion. Only in 2004, after invasion and occupation by Western troops, did Afghanistan enact a constitution with an SGC that was not only formally enforceable through judicial review, but was also given to an institution that was actually expected to perform such review.

b) Pakistan: 1956–1977

Pakistan was created in 1947, carved out of British India and designated as a homeland for the Muslims of the sub-continent. After independence, its elites struggled to draft a constitution for the new state. Two years after independence, the Constituent Assembly produced the so-called "Objectives Resolution," which identified key principles that were to inform the Constitution.[38] Among its principles was that Muslims would be able to structure their lives according to Islamic law. Many interpreted this to mean that Pakistan's constitutions would have to include an SGC.[39] These principles would later be incorporated into the preamble of Pakistan's successive constitutions.

Members of the Constituent Assembly debated whether the SGC should be enforced through a form of Islamic review. As Pakistanis were deeply and often violently divided among traditionalist, conservative modernist, and liberal modernist factions,[40] it was hard to imagine any tribunal whose authority was likely to be accepted by a broad cross section of them. Ultimately, the Constituent Assembly decided to let political institutions judge for themselves whether their law respected Islam. Article 25 of Pakistan's 1956 Constitution required the state to enforce only laws consistent with *sharia*,[41] but Article 23 explicitly declared that courts had no right to interpret or enforce this provision.[42] Although the 1956 Constitution was short-lived, it created a pattern. For over

[35] AFGHANISTAN CONST. (1964) art. 64.

[36] J. Alexander Thier, *Reestablishing the Judicial System in Afghanistan*, Stan. U. 19 CDDRL Working Papers (Sept. 1, 2004), at 8.

[37] *See, e.g.*, AFGHANISTAN CONST. (1987) art. 2; AFGHANISTAN CONST. (1990) art. 2.

[38] OBJECTIVES RESOLUTION (1949) (Pak.). Incorporated as a substantive part of the 1973 Constitution of Pakistan by the Revival of Constitution of 1973 Order, 1985 (P.O. No. 14 of 1985). *See* PAKISTAN CONST. (1973), *as amended* Feb. 28, 2012, art. 2A and Annex.

[39] *Compare* Arjomand, *supra* note 2, at 3, arguing that the more significant development was the invocation of God as the ultimate sovereign in the state.

[40] *See* LEONARD BINDER, RELIGION AND POLITICS IN PAKISTAN 259–292 (1961).

[41] PAKISTAN CONST. (1956) art. 25.

[42] *See* PAKISTAN CONST. (1956) art. 23 ("The State shall be guided in the formulation of its policies by the provisions of this Part, but such provisions shall not be enforceable in any court").

twenty years, most of Pakistan's constitutions required the state to legislate in accordance with Islamic law but denied courts the right to enforce that requirement.[43] The era of pure political enforcement of Pakistan's SGC ended in 1977.

For thirty years after independence in 1947, Pakistan failed to establish a robust democracy. Although a vast number of Pakistanis favored traditionalist or conservative modernist visions of Islam, the state never took their concerns into account when legislating. The military and economic elites that alternated as rulers of Pakistan were almost uniformly committed to a liberal modernist vision of Islam—legislating entirely in accordance with their own vision of Islam and enacting many laws that conservatives felt were inconsistent with Islam.[44] Disgruntled traditionalists and conservatives represented a potential source of support for anyone who wished to establish a new regime. Against this backdrop in 1977, a new military dictator overthrew a civilian government. He believed Pakistan was dangerously divided and thought conservative Islam could provide a unifying vision. A convinced authoritarian, he also believed that, if he could provide conservatives with something that they recognized as an Islamic state, they would not demand a return to civilian rule—indeed they would try to prevent it, because it was likely to bring back to power the ousted modernist elites.[45] General Zia replaced some family law and criminal statutes that traditionalists and conservative modernists had considered un-Islamic. As these groups had come to distrust political institutions, they also wanted guarantees that the government would continue to legislate in accord with Islam as they understood it. Zia thus agreed to subject the government to an institution that would perform Islamic review. As we will discuss below, he struggled to establish an institution whose decisions would be respected and, at the same time, would allow him wide discretion to pursue his preferred policies.

c) Sudan: 1988–2005

Africa too has seen a country enshrine into its constitution a non-justiciable SGC. Since the 1960s, Sudanese Islamists had pushed for the country to adopt an Islamic constitution. Non-Muslim minorities fiercely resisted. After talking power in a military coup, Sudan's dictator oversaw the drafting of the 1973 Constitution, which made only vague gestures towards Islam.[46] By the time of the 1983 revolt, however, it was clear that the government's lack of democratic legitimacy was threatening the regime. In an attempt to replace this with Islamic legitimacy, the government began a process of highly public Islamization. The gambit failed, in part because the Islamists whose

[43] *See* MARTIN LAU, THE ROLE OF ISLAM IN THE LEGAL SYSTEM OF PAKISTAN 7–8 (2006); *cf. generally*, Clark B. Lombardi, *Can Islamizing a Legal System Ever Help Promote Liberal Democracy?: A View from Pakistan*, 7 U. ST. THOMAS L.J. 649 (2011).

[44] For tensions between traditionalist Islamists in Pakistan and modernists who dominated military governments prior to 1977 (and the regular judiciary thereafter), *see generally* Muhammad Qasim Zaman, *Religious Discourse and the Public Sphere in Contemporary Pakistan*, REVUE DES MONDES MUSULMANS ET DE LA MÉDITERRANÉE 55 (2008).

[45] *See* LAWRENCE ZIRING, PAKISTAN AT THE CROSSCURRENT OF HISTORY 163–182 (2003).

[46] SUDAN CONST. (1973) art. 16.

support the regime was trying to court did not believe that Islamization was being carried out in good faith.[47] When the government was overthrown, a democratic government began a process of reaching out to Sudan's non-Muslims and scaling back the Islamization process. In 1989, a new military leader conspired with Islamists to take power. The executive then cynically and instrumentally doubled down on the previous military regime's attempt to legitimize its Islamic authority in the eyes of its core Islamist supporters.[48] It created an even more draconian regime of self-styled Islamic laws than the previous regime. In 1998, the new regime also adopted a constitution containing an SGC.

By most accounts, however, it was simply using Islam to legitimize its authoritarian rule, and the regime had no intention of implementing it in a way that would restrict the discretion of the president any more than was absolutely necessary to survive.[49] The simplest way to achieve this was to leave interpretation and enforcement of the SGC in the hands of the president and his captive legislature. Article 65 thus declared:

> Islamic law and the consensus of the nation, by referendum, Constitution and custom shall be the sources of legislation; and no legislation in contravention with these fundamentals shall be made; *however, the legislation shall be guided by the nation's public opinion, the learned opinion of scholars and thinkers, and then by the decision of those in charge of public affairs.* (Emphasis added).[50]

Aware that it needed Islamist support to survive, Sudan's government generally pursued policies that satisfied their most important concerns. Conservative Islamists were, in turn, highly supportive of the regime, even in the face of domestic opposition and fierce international condemnation of its policies. In 2005, however, when it seemed necessary to end a long insurgency by non-Muslims in the South, the regime enacted a new interim constitution which did not contain an SGC.[51] As the largely non-Muslim South has recently become independent, it is unclear whether the constitution will be amended again and, if so, what the role of Islam will be.[52]

d) Iraq: 2011–present

From the 1980s to 2004, Iraq was governed by an authoritarian regime whose constitution did not contain an SGC. In 2004, a US-led coalition overthrew this regime, and the US and its Iraqi allies quickly set out to establish what they hoped would be a model regime for the Arab Middle East—one that was both Islamically legitimate and

[47] Ibrahim A. Karawan, *Monarchs, Mullas, and Marshals: Islamic Regimes?*, 524 Annals Am. Acad. Pol. & Soc. Sci. 103, 114–115 (1992).

[48] Ghazi Suleiman & Curtis Francis Doebbler, *Human Rights in Sudan in the Wake of the New Constitution* (Fall 1998), *available at* http://www.wcl.american.edu/hrbrief/fall98/ghazi.html.

[49] *See* Olaf Köndgen, *Sharia and National Law in the Sudan*, *in* Sharia Incorporated 222 (J.M. Otto ed., 2010).

[50] Sudan Const. (1998) art. 65 (English trans. *at* http://www.mpil.de/shared/data/pdf/the_constitution_of_the_republic_of_the_sudan_1998.pdf).

[51] Sudan Interim Const. (2005) art. 5; Köndigen, *supra* note 49, at 202–203.

[52] Olaf Köndgen, *Sudan*, *in* Oxford Encyclopaedia of Islam and Law (Jonathan Brown et al. eds., forthcoming 2014) (draft on file with author).

liberal.[53] From the start, they assumed that courts would have some power of judicial review, although they disagreed on the structure of the courts that would exercise this power.[54] Ultimately, the Federal Supreme Court was entrusted with the power of concrete judicial review to ensure compliance with both the SGC and the rights guarantee.[55]

The courts themselves, however, came to doubt their ability effectively to exercise Islamic review. In a 2010 case, the Supreme Court resolved on the merits a case challenging a law as unconstitutional because it was inconsistent with Islamic law.[56] Shortly thereafter, however, the justices became concerned that the government or members of the public might doubt its competence to issue opinions on questions of Islam. The concerns arose because Iraq is majority Shiite, and most Shiites believe that the interpretation of Islamic law requires specialized training that most Iraqi judges lack.[57] Although the Constitution allows the legislature to appoint religious specialists to the court,[58] the legislature never did so.[59] It is not clear whether Sunnis would trust these judges to properly interpret Islam. At best, however, the Court felt its opinions could satisfy only a minority of Iraqis and, at worst, would satisfy none. Any rulings on Islam were likely to invite controversy and criticism that would be harmful to a court trying to reestablish its prestige and authority after years of subjugation under a dictator. In two 2011 cases, the Supreme Court ruled that as a prudential matter, many questions of Islamic review must be treated as non-justiciable.[60] As Haider Ala Hamoudi has explained, the justices felt questions about a law's compliance with Islam must ultimately lie with the legislature, which has access to testimony from both Shiite *fuqaha* and from Sunni experts, can negotiate a compromise in a fashion that a court is ill-suited to do and, ultimately, has the democratic legitimacy to impose that compromise.[61] There is no indication that the court felt itself ill-suited to enforce the rights guarantees in the constitution.

3.3. Primarily "legal" mechanisms for enforcing constitutional Islamization

In some countries, constitutional designers have concluded that political mechanisms are ill-suited to enforce SGC clauses. There can be two reasons for this. Some feared

[53] *See generally*, Ashley Deeks & Matthew Burton, *Iraq's Constitution: A Drafting History*, 40 Cornell Int'l L.J. 1 (2007).

[54] *See id.* at 45–53.

[55] Dustur Jumhuriat al-Iraq [The Constitution of the Republic of Iraq] (2005), arts 2 and 91.

[56] al-Mahkama al-'itihadya al-'ulya [Federal Supreme Court], decision No. 60 of Dec. 21, 2010, *available at* http://www.iraqja.iq/view.738/. For excellent discussion of this case, *see* Haider Ala Hamoudi, *Religion and Law in Iraq: A Noteworthy Federal Supreme Court Opinion*, Jurist—Forum (Feb. 10, 2011), *available at* http://jurist.org/forum/2011/02/religion-and-law-in-iraq-a-noteworthy-federal-supreme-court-opinion.php.

[57] Chibli Mallat, The Renewal of Islamic Law: Muhammad Baqer As-Ṣadr, Najaf and the Shi'a International 38 (1993); Intisar Rabb, *We the Jurists: Islamic Constitutionalism in Iraq*, 10 U. Pa. J. Const. L. 527, 550–555 (2008).

[58] Article 90, Iraq Const.

[59] Hamoudi, *supra* note 56.

[60] al-Mahkama al-'itihadya al-'ulya [Federal Supreme Court], decision No. 59 of Nov. 21, 2011, *available at* http://www.iraqja.iq/viewd.886/; al-Mahkama al-'itihadya al-'ulya [Federal Supreme Court], decision No. 61 of Jan. 31, 2011 (2012), *available at* http://www.iraqja.iq/viewd.933/.

[61] *See* Haider Ala Hamoudi, *Judicial Review of Islamic Law Under Iraq's Constitution*, Jurist—Forum (Apr. 26, 2012), *available at* http://jurist.org/forum/2012/04/haider-hamoudi-iraq-islam.php.

that their country's political institutions would be unable to identify and implement an interpretation of Islam's constraints on the state that is satisfactory to all the Muslims whose support the state needs. Others have worried that political institutions will favor an interpretation of Islam that is inconsistent with their own priorities.

a) Afghanistan: 2004–present

In 2001, an American-led military force conquered Afghanistan. As it would later do in Iraq, the international community worked with local Afghan elites to draft a new constitution that would respect both Islam and liberal rights and would vest Afghanistan's regular courts with the power to enforce both the SGC and the rights guarantees.[62] The final authority would be the Supreme Court, which was obliged, at least to some extent, to follow the interpretive guidance of a special judicial committee.[63]

The reliance on enforcing constitutional provisions through judicial review appears to reflect an assumption on the part of the international community and its Afghan allies that, as a general rule, constitutional best practices require that courts be empowered to exercise judicial review.[64] It surely also reflects concerns about the history of strong popular support in Afghanistan for illiberal traditionalist interpretations of Islam and weak support for liberal rights. Representative political institutions were likely to feel considerable political pressure to maintain an illiberal regime of laws. A politically insulated judiciary would be more willing and more able to measure laws against a liberal interpretation of Islam and protect liberal rights.

It remains to be seen whether Afghanistan's judges will actually be able and willing to enforce a liberal understanding of the state's twin obligations. In 2004, most Afghan judges had received significant specialized *sharia* training, and the populace recognized them as competent to interpret Islamic law.[65] If they preferred a liberal vision, they would probably have been able to "sell" it to the public. It was not clear, however, that all of these traditionally trained judges *were* committed to the liberal goals as Afghanistan's constitutional designers had hoped. The courts have to date exercised judicial review in few cases and none have involved either the SGC or the constitution's rights guarantees.[66] In some other cases, the courts have interpreted Islam in an illiberal fashion and have argued that applying illiberal rules does not

[62] AFGHANISTAN CONST. (2004) arts. 3, 22–59.

[63] Thier, *supra* note 36, at 9; J. Alexander Thier & John Dempsey, *Resolving the Crisis over Constitutional Interpretation in Afghanistan*, USIP Peace Brief (March 2009), *available at* http://www.usip.org/publications/resolving-crisis-over-constitutional-interpretation-afghanistan.

[64] For an example of these views, *see generally* Ramin Moschtagi, *Organization and Jurisdiction of the Newly Established Afghan Courts—The Compliance of the Formal System of Justice with the Bonn Agreement*, *in* 10 MAX PLANCK Y.B. U.N. L. 531 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2006).

[65] *See* Marvin G. Weinbaum, *Legal Eites in Afghan Society*, 12 INT'L J. MIDDLE EAST STUD. 39, 47–47, 51 (1980). *Compare* Moschtagi, *supra* note 64, at 547–548. Personal discussions with Afghan law and *sharia* professors suggest that the situation described by Weinbaum and Moschtagi remains true, but that the government is appointing more people with "legal" rather than "*sharia*" training to the courts.

[66] Personal discussion with faculty in the law and *sharia* departments of Afghan universities. For an example of the types of case they have revolved, *see* Thier & Dempsey, *supra* note 63, at 3.

violate the constitution's rights guarantees.[67] The Afghan government has recently been appointing a number of new judges who have considerable training in Afghan statutory law, constitutional law, international law and human rights theory.[68] If this training is acquired to the exclusion of traditional Islamic training, this new policy may create a more liberal jurisprudence at the expense of the judiciary's Islamic credibility.

b) Egypt: 1980–present

Egypt over the past 35 years has enforced its SGC through judicial review by Egypt's constitutional court—the same court that reviews laws for compliance with other constitutional provisions. Some history is necessary to understand how this court came to be vested with the power of Islamic review, and why it has been permitted to keep it.

In the 1970's, Egypt's secular, nationalist authoritarian government suffered a crisis of legitimacy. Seeking support among liberal members of the opposition, the government in 1971 drafted a new constitution. This guaranteed a variety of liberal rights and established a new Supreme Constitutional Court (SCC) with the power of constitutional review.[69] The regime also enacted enabling legislation giving the Court considerable independence and, more surprising still, allowed liberals to be appointed to this powerful court. By the 1980s, these liberals had begun to issue liberal opinions that brought them into conflict with the authoritarian executive.[70]

As the SCC was trying to liberalize Egypt, Egypt was also going through a period of Islamic revival. Conservative Islamists, whose interpretation of Islam was partly but not entirely liberal were also coming into conflict with the executive. Trying to appease Muslim groups, the Egyptian government in 1980 amended Article 2 of the Constitution to say "the principles of the Islamic sharia are the chief source of legislation."[71] Although this new article was not without its ambiguities, most understood it to be an SGC.[72] The government probably assumed that it would be treated as non-justiciable.[73] However, the SCC was no longer fully under its control, and in a 1985 decision, the SCC held that it was *partly* justiciable. The court held it had no jurisdiction to hear Article 2 challenges to laws that had already been in force at the time

[67] *See, e.g.*, State v. Parwiz Kambaksh, unpublished opinion of Kabul Appeals Court (Oct. 21, 2008) (*overruling* Decision 63 of the Balkh Trial Court (Apr. 3, 2007)); *cf.* Advisory Opinion from the Sup. Ct. of Afghanistan (July 4, 2010) (unpublished opinion on the subject of women running away from the marital home).

[68] Private discussions with faculty in the law and *sharia* departments of Afghan universities.

[69] NATHAN J. BROWN, THE RULE OF LAW IN THE ARAB WORLD 93–96 (1997).

[70] On the Court, *see generally*, TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS AND ECONOMIC DEVELOPMENT IN EGYPT (2007); and *see* Clark B. Lombardi, *The Supreme Constitutional Court of Egypt: Managing Constitutional Conflict in an Authoritarian, Aspirationally "Islamic" State*, 3 J. COMP. L. 234, 246–249 (2008).

[71] CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, Mar. 26, 2007, art. 2.

[72] *See* Lombardi, *Constitutional Provisions*, *supra* note 22, at 755–758.

[73] LOMBARDI, *supra* note 7, at 159–164.

Article 2 was enacted, but *did* have jurisdiction to hear challenges to any laws enacted thereafter—including any laws amending existing laws.[74]

The Court's 1985 ruling appears to have been animated partly by a desire to ensure that the government's new commitments to Islam were not interpreted to preclude the type of liberalization that the judges were trying to promote through their rulings.[75] Indeed, the justices seem to have wanted to convince Egyptians that Islamization actually *required* the sort of democratization and liberalization that they were advocating. That judges could try this reflects the fact that neo-traditionalism is not nearly as strong in Egypt as it is among Iraqi Shiites (or Afghans). Egypt's most powerful Islamists, the Muslim Brotherhood, always resisted the claim that only traditionally trained scholars can be trusted to interpret Islamic law.[76] Indeed, many of the Brothers' leaders had no traditional training, and some had been judges.[77] Many Islamists were thus willing to accept, in theory, that judges with national legal training might have sufficient training to interpret *sharia*. It was not clear, however, that they would accept this particular set of judges' highly liberal interpretations of law as legitimate. Over time, they appear slowly to have accepted this.

Starting in the late 1980s and increasingly in the 1990s, the judiciary issued a number of highly publicized Article 2 opinions that resolved Islamist challenges to laws. Sometimes upholding conservative Islamists' challenges to laws and sometimes rejecting them, the Court used a method that was heavily indebted to liberal modernism, but that also made some gestures towards more conservative methods of interpretation.[78] Substantively, it indicated that Islam must be interpreted to be consistent with liberal values. In cases where conservative Islamist views were consistent with liberalism, including property rights, it upheld Islamist challenges. In cases where conservative views were inconsistent, such as women's rights, it rejected them.[79] While Islamists remained deeply ambivalent about the Court's substantive conclusions, they were grateful to the Court for insisting that the government was bound to respect Islamic law and, indeed, for striking down some laws that violated Islamic law.[80] Furthermore, they appreciated that the Court was respectful of Islamists and engaged publicly with their arguments. The government at this time had closed electoral politics and the media to Islamists. Court cases and the public discussion that surrounded them became one of the few public forums in which Islamists could debate publicly with each other and with the government about what

[74] Rector of the Azhar U. v. President of the Republic, Case No. 20, 1985, Sup. Const. Ct. (Egypt), Eng. trans. *in* 1 ARAB L.Q. 100, 104 (Saba Habachy trans., 1986). For further analysis, *see* LOMBARDI, *supra* note 7, at 164–173.

[75] Lombardi, *Supreme Constitutional Court*, *supra* note 70, at 246–249.

[76] *See* LOMBARDI, *supra* note 7, at 258–261.

[77] *Id.*

[78] *See generally*, LOMBARDI, *supra* note 7, at 201–258, and the analysis of the multiple arguments made in the cases that are analyzed there.

[79] *Id.*

[80] *See generally*, Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Sharia Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379 (2006).

Islam required.[81] Seeing the Court as a valuable place to engage each other and the state, Islamists kept appearing before it and obeyed its orders. Although they criticized rulings, these Islamists as a rule did not claim that the Court was incompetent or had acted in bad faith.

All indications are that the SCC over time came gradually to be seen by many liberals and Islamists as legitimate mediators of Egyptian debates about Islam and liberal rights.[82] In 2007, some conservative members of the Brotherhood called for the SCC to be stripped of its jurisdiction over cases involving Islamic review and called for Islamic review to be carried out by a special tribunal of scholars.[83] Apparently frustrated by some liberal decisions, these Brothers wanted to vest the power of Islamic review in a more conservative institution. Strikingly, this was criticized not only by liberals, but by some important members of the Brotherhood itself.[84]

Events after the fall of Mubarak suggest even more strongly that a broad cross-section of Muslims came to see the Court as a valuable institution that mediated between rival visions of Islam and rights. During the tumultuous period from 2011–2012, the Muslim Brotherhood won elections that allowed it to take control of Egypt's political branches and supervise the appointment of a constituent assembly to draft a new constitution that was supposed to contain both an SGC and rights guarantees. During this period, there were many tensions between the Brothers who controlled the parliament and the courts. Some Brothers proposed changing Egyptian law to allow the legislature to override SCC rulings. This led to a further series of conflicts between the Court and the Brotherhood.[85] While many Egyptians may have felt that the Court was abusing some of its power, many, including many supporters of the Brotherhood, felt also that the courts had established themselves as valuable mediators of Egypt's divisive debates about Islam, democracy and rights. Indeed, they were more likely to be successful at resolving these disputes going forward than elected representatives. As the Constituent Assembly began to draft a constitution, polls showed that 81 percent of Egyptians said that Egypt needed a fair judiciary—far more than thought it was very important to have fair elections.[86]

Not surprisingly, perhaps, the 2012 Constitution does not contain a provision allowing for parliamentary override of SCC decisions, even in Article 2 cases. Instead, to

[81] The Court was at that time developing a growing power to protect Islamists civil and political rights. *See generally*, Tamir Moustafa, *The Islamist Trend in Egyptian Law*, 3 Politics and Religion 610 (2010).

[82] *See* Lombardi, *supra* note 7, at 258–261.

[83] *See* Nathan J. Brown & Amr Hamzawy, *The Draft Party Platform of the Egyptian Muslim Brotherhood: Foray Into Political Integration or Retreat Into Old Positions?*, 89 Carnegie Papers: Middle East Series 1 (2008).

[84] *Id.*

[85] *See Egypt Reels from Judicial Coup*, The Guardian (June 15, 2012), *available at* http://www.guardian.co.uk/world/middle-east-live/2012/jun/15/egypt-reels-judicial-coup-live; Nathan J. Brown, *Judicial Turbulence Ahead in Egypt, Fasten Your Seat Belts*, Carnegie Endowment for Peace, Online Commentary (June 6, 2012), *available at* http://carnegieendowment.org/2012/06/06/judicial-turbulence-ahead-in-egypt-fasten-your-seat-belts/b689.

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

mollify Islamic conservatives, it includes new constitutional provisions that instruct the SCC to take more account of conservative interpretations of Islam when it interprets Islam.[87] In other words, the Court can keep its liberal jurisprudence only insofar as it can convincingly make an argument for it in terms that traditionalists and conservative modernists will accept. Put differently, as it mediates, it must take account of the fact that in Egypt, the Islamic "center" has shifted to the right.

c) Pakistan: 1977–present

When, in 1977, General Zia al-Haq ousted a civilian government dominated by these elites, he sought to build support for his new regime among disaffected traditionalist and conservative modernist groups. He revised many existing statutes to reflect conservative, illiberal understandings of Islam—particularly in the area of family law and criminal law.[88] He also denied the distrusted political branches their traditional right to decide for themselves whether their laws conformed to Islamic principles. However, Zia seems not to have been personally sympathetic to all the views of traditionalists and conservatives, and he clearly wanted to maintain at least some laws that conservatives view with suspicion.[89] His challenge was thus to create an institution that could perform review in a way that would satisfy conservatives, while still leaving in place his preferred laws.

Zia first gave the power of Islamic review to special benches within the regular courts but soon came to think that the courts were an unsatisfactory choice.[90] Pakistan's regular courts tended to favor liberal modernists' interpretations of Islam, and the conservatives would not trust them to be fair interlocutors on questions of Islam. Worse, past judges had publicly speculated that the power of Islamic review could be used to constrain the political branches.[91] Thus, in 1980, Zia transferred the power of Islamic review to a new tribunal, the Federal *Shariat* Court (or FSC) which was supposed to be better able to mediate between liberal and conservative ideas and ensure that Pakistan's laws were broadly seen as consistent with Islamic law—while leaving Zia's favorite laws untouched.[92]

It was not easy to do this. The composition of the FSC's judges was altered several times to increase its credibility among different Islamic factions. As finally composed, it included a majority of regular judges supplemented by Islamic scholars.[93] To ensure

[87] On these provisions, *see* Clark B. Lombardi & Nathan J. Brown, *Islam in Egypt's Constitution*, Foreign Policy (Dec. 13, 2012), *available at* http://mideast.foreignpolicy.com/posts/2012/12/13/islam_in_egypts_new_constitution.

[88] *Compare* the introduction and contributions in Islamic Reassertion in Pakistan: The Application of Islamic laws in a Modern State (Anita Weiss ed., 1986) *with* Charles Kennedy, *Islamization and Legal Reform in Pakistan, 1979–1989*, 63 Pacific Affairs 62 (1990).

[89] *See generally*, Kennedy, *Islamization*, *supra* note 89.

[90] *See* Lau, *supra* note 43, at 122–126.

[91] *See* Asma Jilani v. Punjab, (1972) 24 PLD (SC) 139, 140–142 (Pak.); Zia-ur Rahman v. State (1972) 24 PLD. (Lahore) 382, 382–383 (Pak.) (*overruled by* State v. Zia-ur-Rahman (1973) 25 PLD. (S. Ct.) 49 (Pak.)). For a discussion of these cases, *see* Lau, *supra* note 43, at 13–20.

[92] Pakistan Const. art. 203(a)–(j). *See also* Lau, *supra* note 43, at 127–130.

[93] Pakistan Const. art. 203(a)–(j). Charles H. Kennedy, *Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan*, 41 Int'l & Comp. L.Q. 769, 772–773 (1992).

that this court did not threaten any laws in which Zia had a vested interest, the new court was given only limited jurisdiction. The FSC could not hear Islamic challenges to the constitution, family laws and, for a period, laws governing the economy.[94] Giving Zia a final safety net, FSC judges were, until constitutional reforms in 2010, appointed by the President and had far fewer guarantees of independence than the regular courts, and the President actually demonstrated a willingness to interfere with the court in several cases.[95]

With its hybrid staffing, limited jurisdiction and lack of independence, this tribunal was ill-equipped to gain the trust of multiple factions and to build support for a broadly shared understanding of Islam. Nevertheless, Pakistanis may have come to see it as better than the alternatives. In the years since its creation, Pakistan's political institutions were entirely dysfunctional, with Pakistan lurching back and forth between dictatorship and ineffective rule by Pakistan's traditional elites. In this environment, Pakistanis increasingly turned to the courts to deal with a large number of issues the political institutions are incapable of resolving. In this environment, the FSC has had more staying power than one might initially have expected. After a civilian government replaced Zia, that new government was in turn supplanted by a new military regime led by Perwez Musharraf. The Musharraf regime was itself removed by a popular movement to restore democracy. Successive regimes always left the FSC in place and, in the past few years, a civilian government strengthened its independence by changing the appointment and removal processes for judges.[96]

d) Iran: 1979–1988

While Iran's Islamic governments have favored legal methods of enforcing the SGC, they have shied from granting the power of judicial review to judges in the regular courts. Like Pakistan, however, Iran has struggled to come up with an alternative forum whose interpretation is respected by a broad cross section of Iranians.

Iranians are primarily Shiite, and Shiite legal and political theory has historically evolved separately from Sunni theory. In the modern era Shiites have generally maintained a traditionalist outlook. The vast majority has continued to recognize the *fuqaha* as having unique insights into the *sharia*. Nevertheless, Shiite discourse has slowly incorporated over the past 50 years some concepts long associated with Sunni Islamists. Most importantly, some Iranian Shiites have in recent decades echoed Sunni thinkers' concern with public welfare (*maslaha*) and some have also echoed Sunni doubts about whether the *fuqaha* are always well qualified to judge the utility of a law.[97]

[94] Kennedy, *Repugnancy*, *supra* note 93, at 772–773.

[95] *See* examples in Lau, *supra* note 43, at 148, 166; Zaman, *supra* note 16, at 65–69.

[96] *See* 18th Amendment Bill (Apr. 19, 2010) (Pak.), *available at* http://www.cfr.org/pakistan/18th-amendment-bill-pakistan/p21953 and the law of the new Judicial Commission of Pakistan, inserted into the Constitution as Article 175(A) Appointment of Judges, *available at* http://www.supremecourt.gov.pk/web/page.asp?id=432.

[97] See discussion *infra* in this Section.

After the 1979 Islamic revolution, Iran's new "Islamic" constitution established a novel type of government.[98] There was an elected parliament, a popularly elected President, and a judiciary that supervised legality but had no power of constitutional review. Alongside these institutions was placed another figure called a "Supreme Leader." This was a member of the *fuqaha* elected by other members of the *fuqaha* for an indefinite term. An SGC required that all government legislation and regulations be based on Islamic principles.[99] This SGC was initially to be enforced through expert review by a special body of *fuqaha*. A new institution called the Guardians Council was given sole authority to conduct abstract constitutional review of laws.[100] One half of its members were lawyers nominated by the judiciary subject to confirmation by an elected parliament. The other members were clerics appointed by the Supreme Leader. Only clerics voted on whether the law violated the constitutional Islamization provision.[101]

In the 1980s, progressives dominated the Iranian parliament, while the Guardians Council continued to represent the views of a conservative clerical faction. The Guardians Council thus repeatedly struck down as un-Islamic parliamentary legislation supported both by society at large and by some progressive clerics. The conflict threatened both the Islamic legitimacy of the state and its ability to realize important policy objectives.[102] In response to the crisis, the Supreme Leader adopted a position long associated with Sunni modernists.[103] God's supreme command was that Muslims act in the public's interest, and if reasoned analysis shows that the law provides significant benefit (*maslaha*) to society, society must conclude that God does, in fact, want the law to be applied. Traditionally trained clerics, such as those on the Guardians Council, were not always well suited to judge the utility of laws, and they were liable occasionally to overturn laws that should be upheld on grounds of their benefit. In keeping with this position, the Supreme Leader created an appellate body that could under certain circumstances override decisions of the Guardians Council on questions of Islamic review. In 1989, the Constitution was amended to include this new

[98] *See generally* Saïd Amir Arjomand, *Authority in Shi'ism and Constitutional Developments in the Islamic Republic of Iran*, *in* The Twelver Shia in Modern Times: Religious Culture and Political Identity (W. Ende & R. Brunner eds., 2001); Saïd Amir Arjomand, *Islam and Constitutionalism since the 19th Century: The Significance and Peculiarities of Iran*, in Constitutional Politics in the Middle East, *supra* note 2, at 33; H.E. Chehabi, *Religion and Politics in Iran: How Theocratic is the Islamic Republic*, 120 Daedalus 69 (1991); Mehran Tamadonfar, *Islam, Law and Political Control in Contemporary Iran*, 40 J. Sci. Study Rel. 205 (2001); Bahman Bakhtiari, *Shari'a Politics and the Transformation of Law*, in *Shari'a* Politics, *supra* note 14, at 121; Hootan Shambayati, *The Guardian of the Regime, the Turkish Constitutional Court in Comparative Perspective*, *in* Constitutional Politics in the Middle East, *supra* note 2, at 117–120. My understanding has been greatly informed by conversations with Mirjam Künkler and by her unpublished work.

[99] Qanuni Assassi Jumhurii Islamai Iran [The Constitution of the Islamic Republic of Iran] as amended to July 28, 1989), art. 4 (hereinafter Iran Const.). For discussions of the Iranian Constitution and the Guardians Council, see the sources cited *supra* note 98.

[100] 1980 Iran Const., arts. 91–98. For a critical review of its performance, *see* Arjomand, *Islam and Constitutionalism*, *supra* note 98, at 51–56.

[101] All members vote on whether it violates other provisions of the constitution. *See id.*

[102] *See generally*, Chehabi, *supra* note 98. Tamadonfar, *supra* note 98; Bakhtiari, *supra* note 98.

[103] My thanks to Mirjam Künkler for pointing out the apparent borrowing.

institution.[104] Henceforth, if the Guardians Council overturned a legislative act as contrary to Islam, the legislature could vote by supermajority to challenge the Guardians Council's interpretation of Islam. The law would then be reviewed by a third body composed of both clerics and lay people all appointed entirely by the Supreme Leader to determine whether the law in question was necessary to promote *maslaha*.[105] Based on its decision, this body, called the Council for the Discernment of *Maslaha*, could declare the law consistent with Islam and have it enacted or could write an amended version that, it believed, was consistent with the purpose of the rejected law and *did* comply with *sharia*. It is not easy to characterize this new scheme. Arguably, it creates a second tier of expert Islamic review. As I will argue below, however, it is expert review of a peculiar type, and it could also be considered an appellate form of political review carried out by bureaucrats under the control of Iran's effective authoritarian executive—the Supreme Leader.[106]

3.4. Hybrid or "dialogic" mechanisms for enforcing SGCs

Within the Muslim world, a few countries over the past sixty years have flirted with SGC enforcement schemes that combine elements of Islamic review with elements of political control—systems that move in the direction of the formally hybridized systems that Gardbaum considers a distinct new model of constitutionalism.

a) Two roads not taken: Pakistan 1952–1953 and Egypt 2012

Two countries have flirted with schemes that include some mechanism of review by a politically insulated group of experts and a mechanism by which the legislature could override a judicial decision declaring a law to violate the constitution. For example, when Pakistan's Constituent Assembly was drafting its first constitution in the early 1950s, it proposed that:

> a Board consisting of 5 scholars well versed in Islamic law be created by the Head of the State. When a bill was passed by the federal legislature, it would then be sent to the Head of State together with any objections raised by the members of the legislature on the grounds that the bill was either wholly or partially repugnant to the Islamic guidelines; the Head of State would consult the Board and if it unanimously held that it is against the Islamic guidelines, [the Head of State] would send it back to the legislature for reconsideration. The legislature could then only pass the Bill in a joint meeting of the two houses and with a majority of the Muslim members/voters.[107]

This proposal to hybridize legal and political constitutionalism proved unappealing both to secularists and lay Islamists (who did not want to give *fuqaha* any privileged role in the process in the process of judicial review) and to traditionalists (who refused on principle to approve a scheme in which the *fuqaha*, the sole legitimate authorities

[104] *See* discussion *infra*, and Chehabi, *supra* note 98, at 80–81; Bakhtiari, *supra* note 98, at 120–126.

[105] Iran Const. arts. 110, 112. The text is cryptic. For a fuller discussion of how the Council was eventually formed and its powers, *see* Tamadonfar, *supra* note 98, at 214–215; Bakhtiari, *supra* note 98, at 126–127.

[106] Tamadonfar, *supra* note 98, at 214–215; personal communication with Marjam Künkler.

[107] Mohammad Amin, Islamization of Laws in Pakistan 38–39 (1989).

on questions of Islamic law, could be overridden).[108] Failing to satisfy anyone, it was dropped, and Pakistan adopted first the political and then legal mechanisms described above.[109]

More recently, Egypt's parliament briefly considered adopting a procedure by which the legislature could override Supreme Constitutional Court decisions striking down a law as unconstitutional. This occurred during a tumultuous period in 2011 when there was tension between an Islamist dominated legislature and the SCC. In response, the SCC dissolved the legislature.[110] When a new Constituent Assembly dominated by the Muslim Brotherhood drafted a new constitution in 2012, it chose not to include any provision permitting general legislative override of SCC decisions. As noted above, however, it instructed the Court to use more traditional reasoning in its opinions and allowing al-Azhar to opine on questions about how best to interpret Islamic law.[111]

b) Iran: 1988–present: Was creating the Maslaha Council a step toward hybrid review?

As noted already, Iran currently employs a unique system of Islamic review. A popularly elected legislature is supposed to consider Islam when it enacts a law. All laws are subject to expert review by expert Islamic scholars on the Guardians Council. If the legislature believes that the Guardians have voided a law wrongly, the parliamentarians can refer the law to the *Maslaha* Council—a body of figures with large and diverse training who are appointed by an unelected quasi-executive. The Guardians Council determines whether the law is so beneficial to society that it must be considered Islamic even if it seems inconsistent with the formal strictures of Islamic law. As noted already, this scheme could be seen as a scheme of legal SGC control with two layers of expert Islamic review. It could also be seen as a scheme by which an elected legislature can appeal a decision by judges to a bureaucratic institution under the control of an authoritarian executive. With changes to the process by which the *Maslaha* Council is appointed, such as by giving the elected legislature control over appointments, the Iranian model could in theory morph into something resembling a dialogic model of Islamic review analogous in some ways to hybrid dialogic forms of rights review of the sort that Gardbaum studies.

4. Designing SGC enforcement mechanisms for democratizing and liberalizing the Muslim world

Section 3 provides a few takeaway lessons. First, the Muslim world has increasingly felt compelled to adopt SGCs, but has not settled on a single "best" model for enforcing them. Second, the lack of agreement arises because no single model will serve the needs

[108] *See* Binder, *supra* note 40, at 181–182 (discussing the different views of the *fuqaha* and politicians on the question of who should have the power of review).

[109] Kennedy, *Repugnancy*, *supra* note 93, at 770–771.

[110] *Egypt Reels from Judicial Coup*, *supra* note 85.

[111] *See* discussion *supra* at notes 82–87 and accompanying text.

of all different types of regime. Third, diversity has been promoted, until recently, by a lack of democracy. Undemocratic Islamic regimes do not need to ensure that their SGC is interpreted in a way that satisfies a majority of Muslim citizens. It is sufficient for them to identify an interpretation of Islam that satisfies only some favored subset of the citizenry and to impose it through non-democratic means. Furthermore, undemocratic regimes may promote any number of policies, unconstrained by a shared need to respect liberal rights.

Democratization in the Muslim world appears to be leading to convergence in many countries both on questions of *who* should be satisfied and on questions of *what* the SGC must permit. Democratizing Muslim countries are all diverse, and they tend to agree that a broad cross section of their diverse Muslim population needs to be satisfied—ideally, a majority. Although democratizing countries may disagree about the precise constraints that liberal rights place on a state, they agree on the general principle that rights matter. Even if it is quixotic to ask what type of SGC enforcement scheme is *generally* best for Muslim countries, it may be possible to ask whether certain types of SGC enforcement scheme might tend to be more effective in *democratizing* Muslim countries.

4.1. The recent trend towards democratization in the Muslim world

Recently, the Muslim world has gone through a period of democratization. Ran Hirschl noted, even before the events of the Arab Spring, that a number of Muslim countries have recently drafted constitutions that require the state to respect both Islam and the principles of liberal democracy.[112] The political and social upheavals of the Arab Spring are ongoing and the final outcome is uncertain in some countries. Nevertheless, the Arab Spring—and recent pushes for democratization outside the Muslim world—all seem to confirm Hirschl's intuition that Muslim polities are demanding a more participatory form of politics. Resurgent Muslim citizenries seem to have an appetite for what Nathan Brown and Bruce Rutherford have called Islamic constitutionalism[113] and I prefer to call here Islamic democracy. In an Islamic democracy, constitutions require state actions to respect democracy, sharia and at least some liberal rights. Institutions are created to harmonize these competing demands and constrain states to respect them.

Democratization leads to some convergence between countries both about whose interpretation of Islam the state must satisfy and as to the substantive policies that the SGC must permit. First, in Islamic democracies, SGC enforcement schemes must generate and impose interpretations of Islam that are recognized as plausible by broad cross sections of a country's inevitably diverse Muslim citizenry. While the exact constellation of Muslims varies from country to country, most countries have some combination of liberal modernists, conservative modernists and traditionalists. For the SGC to be effective, Muslims from different groups must accept that the state's official interpretation of Islam is reasonable. Furthermore, among those whose interpretation

[112] Ran Hirschl, Constitutional Theocracy 13 (2011).

[113] Brown, *supra* note 10, at 161–193; Bruce K. Rutherford, Egypt After Mubarak: Liberalism, Islam and Democracy in the Arab World 77–130 (2008).

is rejected, the method of choosing one interpretation over another must be seen as democratically legitimate. Finally, the interpretation must allow the state to respect its constitutional obligation to respect rights—in practical terms, if constitutional rights guarantees are officially interpreted to preclude certain types of law, then the SGC must not be officially interpreted to require those types of law. In thinking about how to satisfy these shared imperatives, constitutional designers can draw insights from two places: recent debates in liberal democracies about how one can best design institutions to enforce rights; and the experiences of Muslim countries discussed in Section 3.

4.2. Western debates about the institutions best suited to interpret and enforce contested rights principles

Islamic democracies face a challenge similar to that of liberal democracies. Each must balance a commitment to respect majority views with a commitment to respect contested moral values. Islamic democracies might thus benefit from studying debates in the West about what types of institution are best suited to negotiate these twin commitments.

In the post war period, the West seemed for some time to be coalescing behind the view that democracies should enforce rights through judicial review. As a practical matter, many democracies that had not previously allowed for judicial review, began to embrace it.[114] Notwithstanding the apparent tension between judicial review and majoritarian democracy, this appeared to be supported by the people, and judicial decisions striking down laws enacted by majoritarian political institutions seemed generally to be obeyed. Democratic theorists who favored judicial review concluded that people recognized, correctly, that democratic political institutions are inherently less able than courts to generate outcomes that were clearly reasonable, fair and legitimate.[115] Few countries with judicial review have abandoned it. Democratizing countries continue regularly to adopt systems that include some mechanisms of judicial review and many theorists continue to champion the practice. Nevertheless, consensus has broken down that judicial review is always superior to political review. Debate has emerged on an issue that some had thought closed.[116]

At the extremes, theorists like Jeremy Waldron argue that courts are actually inferior to legislatures in making difficult decisions about the scope of moral rights.[117] If robust democracies had to choose between a system of legislative supremacy or judicial review, they should opt for the former. To such thinkers, disagreement about

[114] *See* Tushnet, *New Forms*, *supra* note 25, at 813–815; Gardbaum, *New Commonwealth*, *supra* note 25, at 707–709.

[115] *See* Mathias Kumm, *Institutionalizing Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*, 1 Eur. J. Legal Stud. 1, 21 (2007).

[116] *Compare generally, e.g.*, Waldron, *supra* note 24; Richard H Fallon, *The Core of an Uneasy Case for Judicial Review*, 121 Harv. L. Rev.1693, 1733 (2008); Tushnet, *New Forms*, *supra* note 25, at 813; Kumm, *Institutionalizing*, *supra* note 116; Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights* (2002), 22 Oxford J. Legal Stud. 275; Tushnet, *How Different?*, *supra* note 26.

[117] *See, e.g.*, Waldron, *supra* note 24, at 1379–1386.

whether a law violates a rights guarantee does *not* always arise because the public is uninformed or unable to think through the moral issues at stake. Rather, in many cases, there is simply no one correct answer. In such cases, in a robust democracy, political institutions are generally better suited than legal institutions to reach a fair answer, and the only ones that can impose a solution that a loser could reasonably accept as democratically legitimate.[118]

More subtly, some theorists have suggested that arguments about the relative merits of purely legal and purely political modes of rights enforcement are largely theoretical and that under real world conditions, the best type of system is a hybrid. Theorists generally agree, in fact, that the superiority of one approach over another usually depends upon certain conditions being met—conditions that are rarely entirely satisfied in real democracies. Thus, those who favor political enforcement of rights in a democracy generally concede that political institutions are superior to courts only when they are truly representative and informed about all views. However, in many countries, supposedly representative institutions do not fully satisfy these conditions.[119] Conversely, champions of judicial review admit it is only democratically appropriate if courts are staffed by people with unusual expertise and political insulation and have gravitas to which the public is willing to defer. These conditions are not always met.

Empirically, many successful liberal democracies seem implicitly to recognize that in practice neither political nor legal institutions are well placed by themselves to determine how to enforce rights in a democratically legitimate way by themselves. Thus, few successful liberal democracies seem to place their trust *entirely* on political institutions or *entirely* on legal ones. Successful political enforcement schemes tend to embed mechanisms—sometimes formal and sometimes informal—which allow legal institutions who have concerns about the impact of a law on rights to interfere with the operation of that law. The converse is also true. A number of countries that are considered to employ judicial review, create mechanisms by which political institutions influence the staffing, jurisdiction, or powers of constitutional courts, and thus create incentive for courts to pay attention to their strongly held beliefs. Most notably, a number of former commonwealth countries have recently developed systems that formalize a discursive process through which political and legal institutions both weigh in on the question of whether a law violates rights—with the legislature getting the final word. As noted above, these systems, which I earlier called "hybrid dialogic," differ in details.[120] Nevertheless, each tries to promote dialogue between courts and the legislature by establishing a system of judicial review subject to a potential parliamentary override by simple majority vote. Theorists such as Stephen Gardbaum have applauded these systems, suggesting that they combine the best aspects of political and legal rights enforcement schemes.[121] Tushnet and Dixon, on the other hand, have questioned whether these systems are particularly distinctive. They suggest that in

[118] *See e.g., id.* at 1382–1395.

[119] Waldron, *supra* note 24, at 1359–1369.

[120] See discussion *supra* Section 2.1.

[121] *See e.g.*, Gardbaum, *New Commonwealth*, *supra* note 27.

some systems, informal means are well designed to promote dialogue between legislatures and courts on questions of rights and they do in much the same way as in Gardbaum's preferred systems.[122]

It is beyond the scope of this article to explore the nuances of this debate. Given what we have described, though, the debate seems to contain lessons for the designers of SGC enforcement schemes in aspiring Islamic democracies. Constitutions often provide that the state will respect moral principles -- such as rights principles or, in some Muslim countries, religious principles. People will inevitably disagree about how to interpret these principles. Many Western theorists believe that, at least in practice, neither political nor legal institutions can, by themselves interpret and enforce such contested moral principles in a democratically legitimate way. Recent experience suggests political rights enforcement schemes are more effective when legislatures have incentive to be sensitive to judges' views about a law's compliance with rights guarantees and vice versa. Sensitivity can be promoted either through informal mechanisms or can be institutionalized explicitly through the construction of a hybrid dialogic scheme. Which system works best is likely to depend upon the way in which the legislative or judicial branches are structured and on national political culture. This suggests that SGC enforcement schemes for Islamic democracies will similarly tend to be more successful if they give political institutions and courts a role in the process by which rights guarantees are interpreted and enforced and give them incentives each to consider respectfully the other's views. The case studies in Section 3 appear to provide some support for this hypothesis.

4.3. Lessons from Muslim experiences with SGC enforcement

Most of the countries discussed in Section 3 were authoritarian or imperfectly democratic. Nevertheless, the designers of SGC enforcement schemes in some tried to design SGC enforcement schemes that would interpret their SGC in a manner that has broad appeal among a diverse Muslim citizenry and is understood to be consistent with the constitution's rights guarantees. The experience of such countries provides us with some insight into how governments can successfully develop SGC enforcement schemes for an Islamic democracy.

The case studies do not tell us everything we would like to know. For one, they provide little insight as to whether democratic countries that rely primarily on political institutions to enforce SGCs will be able to ensure compliance with Islam in a manner that is democratically legitimate. Of the countries that used a primarily political process, none has been sufficiently democratic for a long enough time to enable any firm conclusions about the ability of democratic systems to ensure state compliance with sharia in a democratically legitimate way. Some countries might in the future provide us with the type of data needed. Until then, it would be premature to draw any conclusions about what types of primarily political scheme, if any, might be able to develop a democratically legitimate interpretation of Islam that allowed the state to meet its constitutional obligations to protect liberal rights.

[122] *See generally, e.g.*, Tushnet, *New Forms*, *supra* note 25; and Dixon, *supra* note 26.

The case studies of countries with primarily *legal* SGC enforcement schemes are a bit more informative. They suggest such schemes have been most effective when courts are widely considered expert by all the major Islamic factions in society and when they are incentivized, to consider seriously and engage respectfully with all of them. To begin, the experience of countries that have enforced SGCs through Islamic review suggest unsurprisingly that unelected institutions performing Islamic review are likely to issue democratically legitimate opinions only if they are staffed with judges whom a majority of citizens consider credible interlocutors on questions of Islamic law. Courts may *not* need to be staffed with figures whose views are accepted as indubitably authoritative by all factions in society—something that would be exceptionally hard in any case to achieve. They *do* need to be staffed by figures with sufficient expertise and access to information that they can serve as informed mediators of competing Islamic interpretations, can identify interpretations that will be widely accepted as plausible, and can provide meaningful explanations for why they prefer one of these interpretations over another. Intuiting this, the Pakistani government in the 1980s tinkered with the staffing of its Federal Shariat Court in an attempt to ensure that it included judges with a range of different training. Iraq's constitution permits the Supreme Court to include alongside secular trained judges, traditionally trained Islamic scholars of a sort that Iraq's Shiites deem uniquely authoritative on questions of Islamic law. And when the legislature failed to appoint such *fuqaha*, the Supreme Court so feared that its opinions would be dismissed by a majority of Iraqis that it declared SGC cases non-justiciable. When Egypt's SCC asserted the power of Islamic review, it was confident that its judges would be recognized by most Egyptians, including most Islamists, as having sufficient qualifications at least to engage seriously with a range of competing interpretations of Islam.

Credentials by themselves are not enough. Iran's Guardians Council failed to leverage its credentials into widely accepted opinions. Conversely, Egypt's SCC, whose jurists had less august credentials, seems successfully to have developed and enforced an interpretation of Islam that, if not loved, was broadly accepted and consistent with the state's constitutional rights guarantees. In short, it developed the type of interpretation that Islamic democracies require. One reason seems to be that its judges engaged sensitively with the full range of competing opinions in their society about Islamic law. Notwithstanding their personal preference for liberal modernist interpretation of Islam, the Supreme Constitutional Court during the Mubarak era made a point to engage respectfully with conservative Islamists. Its opinions employed a method that traditionalists and conservatives recognized and respected as legitimate. Furthermore, although the Court used this method in the service of a liberal vision of the state, the justices carefully couched their opinions in language that suggested their interpretation depended on the judges' assumptions about the effect that certain policies would have in society and also that these assumptions might over time change. Thus, the Court did not preclude the possibility that it would in the future move towards a more conservative Islamist position.

Because of its solicitous attitude, the SCC's liberal opinions came to be treated as reasonable and binding even by Islamists who preferred more conservative opinions.

It also explains why, since the fall of Mubarak in 2011, popularly elected, Islamist-dominated political institutions have drafted a new constitution and so far have left the power of Islamic review in the hands of the Court and, more strikingly, left much of its liberal staffing in place.[123] Tellingly, the new constitution obliges the presumably liberal modernist judges in their opinions to engage more than it did in the past with texts that traditionalists and conservative modernists think authoritative.[124] In practical terms, Egypt's new scheme seems to confirm that Egyptians ultimately want Islamic review to be a process by which a court mediates between their contesting visions of Islam and rights—albeit in a way that should reflect the fact that Egypt has moved to the right. So long as it does this, Egyptians will likely see the SGC enforcement schemes as democratically legitimate.

This leads to a third point. A court performing Islamic review is always in the process of establishing its legitimacy. Whatever amount of credibility a group of judges has at the outset, they can add to their legitimacy over time through a dynamic public process of reasoning that forces them to demonstrate the reasonability of their opinions.

4.5. Designing successful SGC enforcement schemes for Islamic democracies: Initial hypotheses

Looking at debates about how best to enforce rights in a liberal democracy and looking also at the experience of Muslim countries that have tried to enforce SGCs in keeping with a broadly acceptable, generally liberal interpretation of Islam, we might cautiously make some suggestions for countries which intend to enforce their SGC through Islamic review. One must proceed with caution. Given the limited evidence at hand, and particularly given the limited number of successful cases of SGCs being enforced in a way that is liberal and democratically legitimate, we can only tentatively identify some general characteristics that effective schemes are likely to share. Further case studies will be required to confirm any hypotheses on this score or to generate a more detailed set of suggestions. With those caveats, the designers of governments in Islamic democracies might wish to consider the following suggestions.

To begin, institutions that perform Islamic review in Islamic democracies should be staffed with people who have at least the minimum qualifications necessary to be recognized by all important Islamic factions as, at the very least, reasonably competent and fundamentally fair mediators of competing views. In different countries, there will be different constellations of Muslims who need to be satisfied. Appointments must thus be highly sensitive to local religious dynamics.

Second, states should recognize that in all likelihood no panel of judges will be able to issue opinions with unquestionable authority among all different groups. They should thus create procedures to ensure that judges are informed about the full range of Islamic views in their country and incentivized to engage respectfully with the

[123] Constitution of the Arab Republic of Egypt, Dec. 26, 2012, art. 275.

[124] *See* notes 85–90 *supra* and accompanying text.

views that they ultimately reject. States could take any number of steps to do this. Some are as simple as encouraging amicus briefs. Courts could also hire research staff with expertise in all the major strains of Islamic thought in the country. Courts should be required to publish and distribute widely their opinions in cases of Islamic review. Dissenting opinions should be permitted—at least insofar as this creates pressure on judges in the majority to engage respectfully with views that they do not personally hold. Public discussion about court opinions should be encouraged so that courts have a chance to see how their reasoning is being received. Freedom of speech on this subject needs to be strongly protected.

Third, countries should try to ensure that the courts have incentive to engage with the views of the public. In some cases, the incentive occurs naturally. Personally committed to a liberal vision of the state, the justices on Egypt's SCC felt pressure to cultivate the good will of traditionalists and conservative modernists who had popular support and could help keep the executive at bay. The justices thus calibrated their decisions to avoid crossing red-lines for either the executive or Islamists, and they made a point to justify their decisions in terms that had maximum appeal. Today the SCC continues to have incentive to reach out to traditionalists and conservatives because those groups control the elected branches of government. In some aspiring Islamic democracies, circumstances may not naturally create incentives for courts to "sell" their Islamic opinions. In such countries, designers should take steps to ensure that the courts performing Islamic review retain enough independence to be trusted, but at the same time are forced to be sensitive to majority intuitions about Islam and are encouraged to try and integrate them as far as reasonably possible into their interpretation. There are several ways that this could be done. The most dramatic would be to institute a system of hybrid dialogic Islamic review—something that has been flirted with but never fully adopted in any Muslim country. For this to be attractive, however, a country must be genuinely confident in the quality of their democratic system. In particular, they must be satisfied that any political institutions with the power to override judicial decisions are genuinely representative of the populace. In some countries, then, carefully cabined, informal mechanisms of pressure may be more attractive than formal override.

Finally, in setting up SGC enforcement schemes, Islamic democracies will be obliged to do more than simply ensure that their law is consistent with an interpretation of Islam that is widely accepted as legitimate within their societies. Islamic democracies by definition always have a constitutional obligation to respect at least some liberal rights. Different countries may understand rights differently—some, indeed, may adopt very thin understandings of rights. Once the country develops a democratically legitimate interpretation of rights, the institution interpreting the SGC must read Islam to be consistent with that understanding. In other words, if rights guarantees require the state to act one way, the SGC cannot be interpreted to prohibit the state from doing so. To ensure that this happens, Islamic democracies must ensure that the institutions interpreting and enforcing rights guarantees and those enforcing the SGC are all deeply familiar with each other's work and also are able to predict how the coordinate institutions are likely to interpret and enforce the constitution going forward.

The simplest path to ensure coherent interpretation of the constitution's rights guarantees and SGC would probably be simply to vest the same institution with the power to enforce both rights guarantees and the SGC. The public may, however, be unwilling to accept the opinions of rights experts on questions of Islam or vice versa. If so, rights guarantees must interpreted by one institution and the SGC by another. Still, a mechanism such as cross-staffing can enable the two institutions to inform each other. Alternatively, the institution performing rights review could be required to consult with the institution performing Islamic review and vice versa. The institution performing one type of review might even be required to seat ad hoc on every panel one member of the institution performing the other type of review. In countries that do not generally permit legislative override of judicial decisions, it might make sense to permit override in cases of incompatible interpretations of rights guarantees and Islamic guarantees.

5. Conclusion

During the pre-modern era, many Muslims embraced a principle that state law is legitimate only if it is consistent with Islamic legal principles. In the modern era, this principle has been constitutionalized in a growing number of countries through the mechanism of a *Sharia* Guarantee Clause, which requires all state law to conform to Islamic principles. Contemporary Muslims disagree deeply, however, about what constraints these clauses place upon a state. Whatever consensus existed in the pre-modern era about Islamic legal authority has collapsed. Muslims in every country today are contesting basic questions of Islamic law—questions of Islamic authority, questions of interpretive method, and questions about what types of law a state can legitimately enact without violating the fundamental principles of *sharia*. Not surprisingly, countries with SGCs have struggled to determine what institution should be entrusted with the power to develop an official interpretation for the state and impose it.

By choosing one institution over another, a state can greatly affect its legitimacy in the eyes of particular Islamic factions. Since different institutions are prone to interpret Islam in different ways, a state can also shape the amount of discretion that it has to pursue certain policies. Over the past one hundred years, states with SGCs have employed a wide variety of enforcement schemes. Many less-than-democratic regimes have not even bothered to try and develop an SGC with broad appeal. They have simply decided to ensure that it satisfies some favored sub-set of Muslims and allows the government to pursue policies to which they are committed. A recent turn towards democratization is making that type of policy unsustainable. Countries that are constitutionally committed both to Islamic rule and to democratic rule will need to develop institutions that can identify an interpretation of Islam that will be accepted as reasonable by a broad cross section of the citizens in a country and must impose it through mechanisms that these citizens accept as democratically legitimate. The interpretations they develop will have to be consistent as well with any rights guarantees in the constitution.

In developing democratic SGC enforcement schemes, rulers can draw insight from debates in liberal democracies around the world about how states can most democratically enforce rights guarantees. They can learn as well from the experience of those Muslim states that have tried to develop SGC enforcement schemes that will generate and impose broadly legitimate interpretations of Islam. Taken together, these two sources do not suggest any one model that will be correct for democratic Islamic countries. Yet they do suggest some general principles that designers should bear in mind as they develop systems for their country.

When enforcing a society's formal commitment to rights, politically insulated expert institutions and representative political institutions should each be given *some* role—even if it is informal. One can imagine many different schemes that would create a proper balance. A scheme appropriate in one country might not be appropriate in another. But states should keep in mind the broader principle that legislators need to be humble about the tendency of political systems to under or over-enforce constitutional provisions requiring respect for contested moral principles such as rights principles or Islamic principles. Judges should be humble in the face of informed and thoughtful public dissent against their interpretation of contested moral guarantees. They should also study how liberal democracies have integrated principles of legal and political balance formally into their rights enforcement schemes and explore too how some Muslim countries have integrated such a system into their SGC enforcement schemes. They will be better prepared to meet the challenge of simultaneous Islamization and democratization.

Political institutions will probably be best able to ensure that their laws are publicly accepted as consistent with an SGC if they are aware of, and heed, the views of apolitical experts. Systems that enforce SGCs only through political mechanisms should try to ensure that this takes place. Conversely, systems that enforce SGCs through Islamic review will likely be a more democratically legitimate way if the experts are selected and incentivized with an eye to ensuring that they can and will engage the full range of competing Islamic views in their society and that they can and will justify their own conclusions in language that is as convincing as possible to as large a cross section of Muslims as possible. Democratic countries that enforce SGCs through Islamic review should thus encourage and facilitate this process. There are numerous ways to do this, including abandoning strong judicial review and establishing hybrid, dialogic methods of review.

Whatever scheme a country adopts, it will have to keep monitoring the performance of that system in order to ensure that it actually conforms state law to an interpretation of Islam that is both democratically legitimate and consistent with the nation's liberal constitutional commitments. Countries should be encouraged to tweak their systems whenever necessary to improve its performance. The complexity of the challenge facing the designers of SGC enforcement schemes for Islamic democracies is breathtaking, as are the stakes for which they are playing. The whole world has a stake in their success. If stable liberal democracies are to emerge in the Muslim world, it will be because these designers have succeeded.