

REPUGNANCY IN THE ARAB WORLD

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I. INTRODUCTION

“Repugnancy clauses”—those constitutional provisions that, in language that varies from nation to nation, require legislation to conform to some core conception of Islam—are all the rage these days.¹ This clause, a relatively recent addition to many modern constitutions, has emerged as a central focus of academic writing on Muslim state constitutions generally, and on Arab constitutions in particular.² Much of the attention it has received has been enlightening and erudite.³ Yet one aspect of the broader repugnancy discourse that deserves some attention is an important, often de facto, temporal limitation on the effect of the clause. There appears to be a rising trend that repugnancy in the Arab world should not apply to legislation *enacted prior to the date that the repugnancy clause was*

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1. Haider Ala Hamoudi, *The Death of Islamic Law*, 38 GA. J. INT’L & COMP. L. 293, 297 (2010) (describing attention given to repugnancy clauses). The term “repugnancy clause” appears to originally have referred to colonial era clauses imposed by the British that limited local customary law to the extent that it was deemed repugnant to principles of natural justice or public policy. T.W. BENNETT, *CUSTOMARY LAW IN SOUTH AFRICA* 67 (2004). Such clauses, which are almost the reverse of the Islamic repugnancy clauses (in that they subvert an indigenous law in favor of a Western transplant), remain in force in various African nations today, including South Africa. *Id.* at 68. In any event, the term was used in the Islamic constitutional context as early as 1973, where it appeared in the 1973 Constitution of Pakistan. PAKISTAN CONST. art. 227, § 1. (“All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.”).

2. Hamoudi, *supra* note 1, at 297.

3. *See generally, e.g.*, RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 103–61 (2010) (describing, *inter alia*, efforts of constitutional courts to interpret repugnancy clauses); Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Global Ordering*, 16 IND. J. GLOBAL LEGAL STUD. 85 (2009) (describing “theocratic constitutionalism” as it applies in Islamic states).

inserted into the Constitution. Irrespective of electoral results throughout the region heavily favoring parties that seek a more robust role for *shari'a* in public life, parties I will describe for the purposes of this Article as “Islamist,” this trend seem to be growing deeper roots.

The trend is particularly ironic because the canon is fundamentally incoherent, both from the perspective of constitutional structure as well as substantive policy. As to the former, surely a constitutional amendment of this sort must generally have retroactive effect. It would make little sense to amend a constitution to grant all citizens equal protection under the law and then for a court to suggest that existing slavery laws might be exempted because enacted before the amendment in question. Such a result would be one that courts would generally resist to the extent it was possible to do so, given how much violence is done to the amendment by the limitations. This would seem to be no less the case for a clause requiring legislative conformity with Islam.

Moreover, as a matter of policy, if there exists in any state a broad view that law should conform to Islam (a commonly stated Islamist position),⁴ and if that view is widespread (a fair conclusion given recent electoral results), then surely the advocates of that view should be as willing to apply it to past legislation as to future. Either the Islamicity of legislation is a cornerstone of the Muslim state or it is not. If it is, then the date of the legislation vis-à-vis the date of the repugnancy amendment is surely beside the point for the advocates of *shari'a* conformity. Indeed, the *fact* of the incoherence may well explain the reluctance to discuss it often, particularly openly.

Ironically, however, despite the incoherence, the limitations on repugnancy have spread. Given this, this Article addresses how and why these limitations grew so popular, and what it might portend for the future of Islamist parties in the Arab world. Part II discusses in detail the origins of the trend in the Arab world,⁵ including the well-

4. The importance of repugnancy clauses to Islamist groups should not be understated. Stilt describes the repugnancy provision of Egypt’s constitution as one that is particularly important to the Muslim Brotherhood, Egypt’s primary Islamist party. Kristen Stilt, “*Islam is the Solution*”: *Constitutional Visions of the Egyptian Muslim Brotherhood*, 46 TEX. INT’L L.J. 73, 88 (2010). Iraq’s Islamist parties feel no less strongly about the inclusion of repugnancy in their constitution. Haider Ala Hamoudi, *Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution*, 7 ST. THOM. L. REV. 692, 697–98 (2010) (describing proposals by Islamist groups that included the broadest possible formulation of repugnancy, complete with review undertaken by jurists in *shari'a* rather than state law judges).

5. Importantly, the notion of repugnancy existed in Pakistan as early as 1973, and

known Decision 20 of 1985 issued by the Supreme Constitutional Court of Egypt (SCC), which exempted existing legislation from Egypt's repugnancy clause in a decision that specifically upheld a provision of the Civil Code permitting the taking of money interest on a loan.⁶ This Part shows that, in issuing its decision, the SCC was constrained in what actions it could take. It could not retain legitimacy as an arbiter of Islam, at least among Islamist groups, if it deemed money interest to be permissible under the *shari'a*. At the same time, it could not very well strike down all legislation permitting money interest without engendering some sort of nearly complete economic catastrophe. Hence, drawing on legislative history to justify its result, the SCC embarked upon the path of incoherence.

Part III will demonstrate that far from having been repudiated, the primary Egyptian Islamist political party, the Muslim Brotherhood, has embraced not only the repugnancy clause in Egypt's constitution, *but also the SCC's jurisprudence*. Its earlier attempts to ensure greater Islamicity in law, which engendered much resistance in Egypt, did not object to the exclusively prospective effect of Egypt's repugnancy clause. The Part will further demonstrate that Iraq's Islamist constitutional drafters were not only aware of this Egyptian example, but sought to replicate it much more forthrightly in the Iraqi constitution. Finally, this Part will discuss the strong statements issued by Tunisia's Islamist party, the victorious Ennahda, that it will not seek to dismantle the state's existing legal framework.

Part IV will conclude with a series of explanations as to how this came about. It will first show that the very same concerns that animated the SCC in Egypt over 25 years ago would undoubtedly remain a central issue for any Islamist party focused on economic development, as every Islamist party claims to be. Secondly, it will

Pakistani courts have engaged in judicial review of legislation to ensure compliance with *shari'a* since 1980. For an excellent, detailed account of this, see Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Practice*, 44 VA. J. INT'L L. 759, 773-97 (2004). This review has even encompassed the validity of legislation permitting taking of interest on a loan. *Id.* at 783 n.86. Nevertheless, because of language differences, cultural differences, and the fact that Pakistan is a common law society while the Arab world generally operates under civil law, Pakistani influence on Arab law is quite marginal. As such, I do not include discussion of Pakistani example in the Article, other than to point out the perhaps obvious point that interpretive approaches to repugnancy different from those used in the Arab world may well prevail in other, important Muslim state jurisdictions.

6. A translation of the decision is available. Supreme Constitutional Court (Egypt) *Shari'a and Riba: Decision No. 20 of 1985*, 1 ARAB L.Q. 100 (1985) [hereinafter SCC Decision].

demonstrate that Islamists seek to use repugnancy to address their fears of further state secularization rather than to Islamize society. Finally, and perhaps most importantly, this Part will show that Islamist parties genuinely seek a greater public role for *shari'a*, but prefer to see its realization through the use of mechanisms other than the state, and using means other than state compulsion. While the Article focuses on three particular (and particularly influential) Arab states, the lessons to be drawn might reverberate more broadly throughout much of the Arab world.

II. THE COLLISION OF REPUGNANCIES AND ECONOMIC REALITIES

In 1980, Article 2 of the Egyptian Constitution was amended so that *shari'a* became *the* principal source of legislation rather than *a* principal source of legislation, as it had been prior to the amendment.⁷ On its surface, the enhanced role of judicial review as a result of this rather small change is not apparent. The amendment seems to require that the *sole* principal source material for any law would be *shari'a*, though presumably other material could be used as well, so long as its use was not so broad as to be deemed “principal.” Logistically, it is difficult to imagine a court examining a complex piece of legislation, trying to find a source for each and every provision in it, and then making a determination as to whether or not the legislation as a whole “principally” derives from *shari'a* or any other source. Moreover, not only is such an approach logistically difficult, it also would almost surely result in the invalidation of large amounts of vitally important legislation.⁸ The fact is that in drafting most modern law, from securities laws⁹ to bankruptcy laws,¹⁰ the vast compendia of norms

7. Stilt, *supra* note 4, at 80.

8. Interestingly, the SCC makes this point in an effort to justify its odd result in Decision 20. SCC Decision, *supra* note 6, at 106.

9. A thorough rendition of the Egyptian securities laws, which demonstrates the extent of the influence of European Union law upon them, appears in Ahmad A. Alshorbagy, *Orascom Telecom Versus France Telecom: A Case Study on Egyptian Takeover Law*, 20 INFO. AND COM. TECH. L. 157 (2011) (describing, in an excellent article, some of the problems that arose in Egypt with the transplantation of the European rules respecting corporate takeovers). By contrast, the *shari'a* did not develop the corporate form as a historical matter and therefore could not offer very much by way of example as concerns the drafting of modern securities laws. TIMUR KURAN, *THE LONG DIVERGENCE* 125 (2011) (describing the historic lack of a legal personhood in Islam and indicating that the problem does not lie in some notion of immutable Islamic doctrine). Quite plainly, therefore, the “principal source” of securities legislation is not *shari'a*, nor could it be.

10. Haider Ala Hamoudi, *The Surprising Irrelevance of Islamic Bankruptcy*, 19 AM. BANKR. INST. L. REV. 505, 509–10 (2012) (describing broadly transplanted bankruptcy laws in

and rules derived by jurists, mostly from the medieval era, that collectively comprise the *shari'a* have so little to offer that they cannot meaningfully be considered the “source” of the law. The true sources of these laws are European and American models transplanted into the Arab world. As a result, it is not a surprise that commentators have in various contexts dismissed the *shari'a* source provision in Muslim state constitutions as “chiefly symbolic”¹¹ and unlikely to meaningfully constrain legislative activity.¹² That the Drafting Committee’s Preparatory Report seemed to grant some deference to the legislature to determine precisely what the “principles” of the *shari'a* were only adds to the conclusion that the amendment was not primarily focused on the possibility of judicial review.¹³

On another level, however, at least in theory, the amendment might retain some force as constitutional constraint on legislation. Whatever “the principal source of legislation” might mean in terms of the influence that the *shari'a* might have on legislation (exceedingly slight as concerns the securities laws, and quite significant as concerns family law),¹⁴ surely it must mean that the legislation in question cannot be *repugnant* to the *shari'a*. Of course, the *shari'a* is not a legal code. It is a vast juristic compendia of rules derived from sacred text, spanning centuries across various schools of thought.¹⁵

Muslim states).

11. Noah Feldman & Roman Martinez, *Constitutional Politics And Text In The New Iraq: An Experiment In Islamic Democracy*, 75 *FORDHAM L. REV.* 883, 903 (2006) (describing effect of shari'a source provision in Iraq).

12. Baudoin Dupret, *A Return to the Shari'a: Egyptian Judges and the Return to Islam*, in *THE SHARI'A IN THE CONSTITUTIONS OF AFGHANISTAN, IRAN AND EGYPT—IMPLICATIONS FOR PRIVATE LAW* 165 (Nadjma Yassari ed. 2005) (indicating that “[s]tatute law, then, does not seem overly disturbed by references made to Islam and its normative provisions, as long as these references are not made in order to challenge its validity and/or to require its subordination to an order external to it.”).

13. CLARK LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI'A INTO EGYPTIAN CONSTITUTIONAL LAW* 160 (2006).

14. Lama Abu Odeh, *The Politics of (Mis)Recognition: Islamic Law Pedagogy in American Academia*, 52 *AM. J. COMP. L.* 789, 800 (2004) (indicating that the law of the family is the one area of law where traditional Islamic law rules continue to hold).

15. Haider Ala Hamoudi, *The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law*, 56 *AM. J. COMP. L.* 423, 434–35 (2004). I am (intelligently and thoughtfully) criticized for often defining this vast and contradictory body of norms and rules developed by medieval jurists as *shari'a*, rather than *fiqh*. See, e.g., Patrick S. O'Donnell, *Divine Law (Shari'ah) and Jurisprudence (Fiqh) in Islam*, *Ratio Juris: Law, Politics, Philosophy*, *RATIO JURIS BLOG* (June 26, 2009, 10:58 AM), <http://ratiojuris.blogspot.com/2009/06/divine-law-shariah-jurisprudence-fiqh.html>. It is true that the latter term is often used to describe the substantive rules derived by such jurists. See

These rules, as developed by individual jurists, are not always consistent with one another.¹⁶ Thus, some thought would have to be given as to what “repugnancy” to *shari’a* might mean. Still, at least in theory, to the extent that a “core” of the *shari’a* could be found, by letter or by spirit, the legislation could not be in stark violation of it.¹⁷ At the very least, for example, repugnancy would prevent the enactment of a law that provided for the enforcement of contracts that related to conduct that jurists and scholars operating within the Islamic legal tradition had deemed to be deeply sinful (for example, contracts for the sale of alcohol). Similarly, repugnancy would seem to render unconstitutional a law that forbade conduct that was almost unanimously deemed to be religiously mandated (for example, a prohibition against maintaining the fast in Ramadan).¹⁸ If nothing else, surely laws of this sort could hardly be considered to be consistent with a requirement that *shari’a* be the principal source of legislation. There would thus be, in the end, *some* role for judicial review in a revised Article 2, even if only at the margins.

All of this was largely speculation until May of 1985, when the

FRANK E. VOGEL & SAMUEL L. HAYES III, *ISLAMIC LAW AND FINANCE: RELIGION, RISK AND RETURN* 23–24 (1998) (distinguishing between *shari’a* as the immutable Divine Law and *fiqh* as human efforts to capture that law through scholarly interpretation); Asifa Quraishi, *What if Shari’a Weren’t the Enemy, Rethinking International Women’s Rights Advocacy on Islamic Law*, 22 *COLUM. J. GENDER & L.* 173, 203 (2011) (noting a similar distinction). Yet at the same time my own realist predispositions lead me to the conclusion that if *shari’a* is meant to refer to nothing beyond a perfect and immutable Divine Law separate and apart from any human effort to understand that law, then almost as a matter of epistemological necessity it means precisely nothing that can be known and is of no value to lawyers. This is to say nothing of the manner in which *shari’a* is used in the Egyptian Supreme Constitutional Court, the context here, where it absolutely includes references to some legal content. See, e.g., LOMBARDI, *supra* note 13, at 180 (quoting Case no. 7/1993/Supreme Constitutional Court (Egypt)). Hence I find my definition, while contestable, more appropriate under the circumstances.

16. Hamoudi, *supra* note 15, at 435.

17. I have been deeply critical of efforts to find a letter or spirit in *shari’a* given the vast and conflicting corpus of rules that comprise it. *Id.* at 437–38. Accordingly, I have always found repugnancy to be inconsistently applied in fact and hardly a matter to be taken particularly seriously as genuine Islamic constraint on legislative activity. Hamoudi, *supra* note 1, at 328–33 (describing inconsistencies and failures of repugnancy); Hamoudi, *supra* note 4, at 710–11 (suggesting that repugnancy review in Iraq is largely “ornamental”, a function of identity politics rather than a genuine commitment to ensure that law conforms to *shari’a*). It is important to note that these considerations are beyond the scope of this Article, which focuses exclusively on one important aspect of repugnancy as it is developing in the Arab tradition, and that is to immunize existing legislation from any form of judicial review on the basis of repugnancy.

18. See Stilt, *supra* note 4, at 96 (offering the examples of intoxicants and the fast at Ramadan as examples of unchanging and universally accepted rules).

Supreme Constitutional Court issued its famed Decision 20. As it happened, the medical school at the most venerable seat of Sunni Islamic learning, the Al-Azhar University, bought surgical instruments from the late Fouad Goudah for the price of approximately 592 Egyptian Guineas (or \$100) and failed to pay him back.¹⁹ He received judgment for this amount, and in addition, 4% interest on the debt from the date he was forced to pursue legal action for the Azhar's delinquency, as permitted under Article 226 of the Egyptian Civil Code.²⁰ The Azhar's response was to pursue a claim before the Supreme Constitutional Court of Egypt, claiming that the Civil Code's permitting of interest was a clear violation of the *shari'a*, and as such, provisions of the Civil Code which permitted interest did not use *shari'a* as their principal source of legislation.²¹

The difficulty in which the SCC found itself had very little to do with *shari'a* doctrine in fact. While there is an unmistakable condemnation in very strident terms of a practice known as *riba* in Islam's core revelatory texts, there was ample resource to determine that *riba* did not encompass money interest on a loan. For example, the SCC could have maintained that under the prevailing Sunni school of thought which historically prevailed in Egypt, the Hanafī, the prohibition as against the trading of items for delay and with gain (a common form of *riba* as per foundational text) did not apply to money, but only items measurable by weight or volume.²² Hence it was forbidden to trade 10 pounds of gold for 15 pounds in the future, but a trade of \$10 for \$15 in the future (i.e. money interest) was not intended to be covered.²³ The SCC could have instead cited authority from a second school that permitted trades of copper coins for more coins in the future because that school, the Maliki, excluded from the forbidden trades metals that were not precious.²⁴ Or the SCC could have attempted a more modernist approach in the fashion developed

19. SCC Decision, *supra* note 6, at 102.

20. *Id.*

21. *Id.*

22. Hamoudi, *supra* note 15, at 448.

23. Shi'i jurists use this distinction to permit the trading of currencies with gain, so long as it is a different currency. Thus, a trade of \$10 for \$15 to be paid later is prohibited, but a trade of \$10 for £15 to be paid later is acceptable. 2 ALI SISTANI, MINHAJ AL-SALIHEEN §234.

24. The Maliki jurist Ibn Rushd, commonly known as Averroes, criticizes his own school's position on this basis. See 3 IBN RUSHD, BIDAYAT AL-MUJTAHID 1568–71 (“and thus we see that the legal cause is narrow . . . because it does not extend beyond gold and silver”).

by the drafter of the Egyptian Civil Code, Abdul Razzaq al Sanhuri, who does justify Article 226 as being consistent with *shari'a*.²⁵ Any of these approaches was, from a purely doctrinal standpoint, *plausible*.

The problem was that none of them were, in the context of the times, deemed particularly *legitimate*, particularly in Islamist eyes. By 1985, despite earlier modernist efforts to the contrary, a broad Islamist position had developed which held that there was “complete unanimity among all schools of thought in Islam that the term *riba* stands for interest in all its types and forms.”²⁶ Efforts to justify the taking of money interest were in turn characterized as being “apologetic about Islam”²⁷ or “defeatist.”²⁸ Thus, any decision to legitimize the taking of interest as consistent with Islam would have led to a considerable loss of legitimacy on the part of the SCC among Islamist groups, and the SCC might well have been dismissed by such groups as being little more than an instrument of the executive rather than a truly separate and independent branch of government. At the same time, it hardly needs to be said that money interest is a vital part of virtually any modern, successful economy and to declare it unlawful would have catastrophic economic consequences. The SCC thus found itself squarely between the Scylla of a disastrous loss of legitimacy and the Charybdis of economic ruin.

The SCC rescued itself from this dilemma through creative and clever incoherence. It accepted the principle that money interest was a form of *riba*, and that as such, it was stridently condemned in Islam, making any law deeming it permissible plainly repugnant to *shari'a*.²⁹ Yet at the same time, relying on legislative history to reach its bizarre conclusion, the SCC also indicated that the judiciary only retained the power to strike down legislation enacted *after the 1980 amendment*,

25. ‘ABD AL-RAZZAQ AHMAD SANHURI, 3 MASADIR AL-HAQQ FI AL-FIQH AL-ISLAMI: DIRASA MUQARANAH BI-AL-FIQH AL-GHARBI [THE SOURCES OF TRUTH IN ISLAMIC JURISPRUDENCE: A COMPARATIVE STUDY WITH WESTERN JURISPRUDENCE] 241–43 (1967) (arguing that permitting interest in the Egyptian Civil Code is consistent with Islam because the prohibition against money interest was only a “prohibition of means,” which could be said aside in times of need, rather than a “prohibition of ends,” which would be absolutely forbidden).

26. Mohammad Uzair, *Impact of Interest Free Banking*, 1 J. ISLAMIC BANKING & FIN. 39, 40 (1984).

27. *Id.*

28. MUHAMMAD NEJATULLAH SIDDIQI, BANKING WITHOUT INTEREST 7 (1983).

29. SCC Decision, *supra* note 6, at 102 (indicating that the Qur’anic practice of *riba* was equivalent to interest and therefore “unanimously condemned by divine rule”).

to the extent that such legislation violated *shari'a*.³⁰ To quote the SCC more fully:

[T]he obligation imposed on the [legislature] to follow the principles of the *shari'a* and to consider them as the source of legislation is aimed only at the legislative enactments which are issued after the date of the imposition of the said obligation, and does not cover former legislative enactments. . . . [O]nly such new legislative enactments fall within the prohibition to the effect that they should not be contrary to the principles of Islamic law. [I]t follows the above that only the legal enactments issued after the coming into effect of the obligation to conform to Islamic law are affected, so that, should any such legal enactments be in conflict with the principles of Islamic law, such legal enactments alone would fall in the domain of constitutional illegality. . . . [L]egal enactments which antedated the amendment are not affected by the obligation to conform because they were in existence before that limitation became due for implementation. [C]onsequently, such prior enactments are immune from the application of the limitation because of its anterior date, which is the determining factor on which proper constitutional control is based.³¹

There is little reason to explore at length the faulty logic and strained reasoning of the SCC. The more important point was that it succeeded. Through this combination of creative incoherence and political necessity, a conception of repugnancy was born in Egypt from an amendment that on its face does not deal directly with voiding law in conflict with *shari'a*. While an interesting story on its own, even more remarkable is the continued appeal of this type of approach to repugnancy. This is the subject of the next two sections.

III. ISLAMISTS AND REPUGNANCY

A. *The Egyptian Muslim Brotherhood*

Egypt's premier Islamist party, the Muslim Brotherhood has supported the SCC's approach to repugnancy, thereby demonstrating the SCC's success in developing legitimacy for its approach. Founded in 1928 by Hasan Al-Banna, the Brotherhood had long advocated a greater role for *shari'a* in Egyptian political and legal life,

30. *Id.* at 104.

31. *Id.* (emphasis added).

and had suffered through decades of political repression for it.³² The amendment of Article 2 was in many ways designed to mollify the Brotherhood.³³

Yet rather than argue that the SCC had, in Decision 20 of 1985, unjustifiably stripped the courts of their necessary powers of review with respect to the Islamicity of legislation, the Brotherhood seems to have embraced not only Article 2 as amended, *but also the SCC's jurisprudence with respect to the Article*.³⁴ Indeed, the Brotherhood uses the SCC to demonstrate that its own views on how to recognize Islam in the state fit well within Egypt's constitutional structure as it already existed.³⁵ In its own draft political platform issued in 2007, the Brotherhood described Article 2 as being precisely the type of "moderate" Islam it advocated, rejecting theocratic rule and explicitly endorsing the Article "according to what the SCC has determined in interpreting the Article."³⁶ The Brotherhood similarly prepared an electoral program in November of 2010 in anticipation of the People's Assembly elections held that year. That program described a number of constitutional articles requiring amendment, but Article 2 was not one, even though it would have been easy to demand a change that would subject existing legislation to judicial review on the grounds of Islamicity.³⁷

32. Stilt, *supra* note 4, at 76–78. As Stilt correctly indicates, the level of repression to which the Muslim Brotherhood was subjected did wax and wane over Egypt's history, but the group was never fully tolerated.

33. LOMBARDI, *supra* note 13, at 130.

34. Nathan J. Brown and Amr Hamzawy, *The Draft Party Platform of the Egyptian Muslim Brotherhood: Foray Into Political Integration or Retreat Into Old Positions?*, in CARNEGIE PAPERS (MIDDLE EAST SERIES No. 89) 3 (2008), available at http://carnegieendowment.org/files/cp89_muslim_brothers_final.pdf.

35. *Id.*

36. THE MUSLIM BROTHERHOOD, DRAFT PLATFORM OF THE POLITICAL PARTY 6 (2007) (on file with author) [hereinafter PLATFORM]. The Draft Political Platform was once widely available online, but has been taken down by the Brotherhood itself, perhaps because of controversies surrounding it.

37. See THE MUSLIM BROTHERHOOD, ELECTORAL PROGRAM FOR THE 2010 PEOPLE'S ASSEMBLY ELECTIONS 11 (2010), available at <http://egyptelections.carnegieendowment.org/wp-content/uploads/2010/11/brotherhood-platform.pdf>. The Brotherhood has been more intent on amending Article 5 of the constitution, which prohibits political parties that are defined on religious bases. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, as amended, March 26, 2007. The party was able to run in the 2011 elections that were organized after Hosni Mubarak's fall, but only after it renamed itself the "Freedom and Justice Party" and purported to be a civil party rather than one religiously based. Carnegie Endowment for Int'l Peace, *Guide to Egypt's Transition, Al-Hurriya wa al-'Adala (Freedom and Justice Party)*, <http://egyptelections.carnegieendowment.org/2011/09/22/al-hurriyya-wa-al->

That the Brotherhood does not seem to seek a broader mandate for the SCC so as to extend to existing legislation also seems demonstrated from those proposals it does publicize that generate controversy. Hence, for example, the Brotherhood's draft political platform in 2007 argued for the creation of a council composed of religious scholars.³⁸ These scholars would advise the legislature, and significantly, the legislature would be free to ignore the council's directives *as to any matters that did not impinge upon a ruling within Islam that was absolutely certain*.³⁹ The clear implication is that as to such certain rulings, among them the taking of interest according to the SCC as earlier described, the legislature would be bound by the council's decision.⁴⁰

Significantly, however, this evidently would only encompass efforts to enact *future* legislation, rather than to void older legislation, as the council advises the legislature and the executive, with no mention made of the judiciary.⁴¹ The council would thus act in precisely the same manner as the SCC has interpreted its own jurisdictional mandate as concerns Article 2—to address future legislation, that is, albeit at the law's inception rather than when subsequently challenged. This seems to reflect a significant dissatisfaction with legislative and executive activities as they relate to Islam and the state, but comparatively less as concerns the SCC and its jurisprudence. Indeed, the SCC is never criticized in the Draft Platform at all.⁴² One would have thought that if the Brotherhood was dissatisfied with the limited scope of the SCC's jurisdiction over the Islamicity of legislation, as outlined in SCC Decision 20 of 1985, it would have expressed it.⁴³ This is particularly so in the context of a

[%E2%80%98adala-freedom-and-justice-party](#) (last visited Nov. 12, 2012).

38. Brown & Hamzawy, *supra* note 34, at 4.

39. PLATFORM, *supra* note 36, at 12. See also Stilt, *supra* note 5, at 102.

40. Brown & Hamzawy, *supra* note 34, at 4.

41. PLATFORM, *supra* note 36, at 12.

42. Stilt, *supra* note 4, at 97.

43. Stilt suggests that the Brotherhood may have indirectly expressed such dissatisfaction with the temporal limitation established by Article Two when it indicated that Article Two merely reaffirmed a pre-existing legal order. *Id.* at 97–98. I did not so understand these rather abstruse ruminations in the Draft Political Platform. I understood the Brotherhood merely to be advancing a sort of natural law theory that the validity of the *shari'a* as a form of law supersedes any positive law enacted by the state, including the Constitution. That is to say, the *shari'a* does not need Article 2 for its validation, as this would suggest that God's Law was somehow not binding upon the state unless affirmed by the foundational law of the state. That would not to my mind necessarily empower the state's judiciary to invalidate existing legislation in conflict with Article 2. It might only obligate the legislature rather than the

draft document that went so far as to propose a council of religious scholars who could advise and even bind the legislature.⁴⁴ If this was the position of the party in 2007, it is even more so now. The party platform of the Freedom and Justice Party, the surrogate of the Brotherhood for the purposes of the 2011 People's Assembly elections,⁴⁵ is devoid of any mention of a council of scholars and lacks a great deal of specifics on the role of *shari'a* in public affairs.⁴⁶

Admittedly, and importantly, the Brotherhood has never openly endorsed the specific SCC principle that existing legislation is immune from review for compatibility with Islam. To do so might risk the loss of some support among a more ardent conservative base of support who would demand that some effort be made to Islamize existing laws. Yet at the same time, the Brotherhood has not challenged the SCC's determinations or suggested an alternative path, at least not in any clear fashion, even as it has endorsed the SCC's work generally. This is quite telling of its inclinations.

B. Iraq

It is one thing for an unusual set of circumstances in Egypt to have led to a broadly acceptable result on the meaning and scope of repugnancy. It is quite another to find that same conception of repugnancy transplanted to other Arab states. One brief look at the Iraq constitution demonstrates that the ideas that have permeated Egypt have now transplanted themselves into Iraq. Specifically, the Iraqi constitutional text appears to reflect the SCC's jurisprudence to a large extent.

First, the Iraqi Constitution embraces the idea of repugnancy unambiguously. Hence, it indicates that "it is not permissible to enact any law that contradicts the settled rulings of Islam."⁴⁷ In Egypt, as

judiciary to revise existing legislation to bring it in conformity with *shari'a* over time, a point the SCC itself makes in Decision 20. SCC Decision, *supra* note 6, at 106.

44. Stilt points to two areas where the Brotherhood seems to seek expansion of Article 2 review. These are the effort to permit any individual with an interest to pursue a claim before the SCC for an Article 2 violation, and an effort to subject not merely laws, but also executive orders and regulations, to review for compliance with *shari'a*. Stilt, *supra* note 4, at 98–101.

45. See PLATFORM, *supra* note 36.

46. As a demonstration of the extent to which Islamist parties are aware of global trends of hyper-connectivity and seek to take advantage of them, the party platform of the Freedom and Justice Party is most readily found on a Facebook page. See Party Platform, FREEDOM AND JUSTICE PARTY, http://www.facebook.com/FJParty.Official?sk=app_7146470109 (last visited Nov. 12, 2012) [hereinafter FREEDOM AND JUSTICE PARTY].

47. Article 2, Doustour Jounhouriat al-Iraq [The Constitution of the Republic of Iraq] of

the previous section makes clear, the constitution merely made reference to *shari'a* as “the principal source” of legislation, and the notion of repugnancy was developed by the SCC. Iraq’s constitutional provision incorporates that judicial construction directly into the text.

This is not mere happenstance. In my own conversations with them, the Iraqi constitutional drafters were aware during their negotiations that Egypt had been operating under a principle of repugnancy for nearly two decades.⁴⁸ They were also aware that repugnancy provisions had appeared in the constitution of Afghanistan,⁴⁹ and as a result, Islamists within Iraq of both the Shi’i and Sunni variety wanted to ensure that a similar provision appeared in the Iraqi constitution. Secular and nationalist forces resisted this because they wanted to minimize the role of Islam and *shari'a* in the nation state to the extent possible.⁵⁰ Various factions proposed different formulations, and this opened several lines of debate that are well beyond the purposes of this Article to explore in detail.⁵¹

Yet one notable feature of the compromise text that ultimately emerged is the extent to which it appears to *endorse* the SCC’s incoherence concerning the immunizing of all legislation enacted prior to the Constitution’s enactment. The provision plainly prohibits

2005 (translation mine). The reference to “Islam” in place of *shari'a* was demanded by more secular groups, though its precise import remains a matter of some question. See Hamoudi, *supra* note 4, at 699 (describing controversies surrounding use of “Islam” rather than “*shari'a*”).

48. I spent nearly a year in Iraq working with a committee delegated by Iraq’s legislature to develop a set of critical amendments to the Iraq constitution. These meetings were held in the offices of the Chair of the Constitutional Review Committee, Sheikh Humam Hamoudi (in full disclosure, my paternal uncle). The consultation was part of a larger project organized and run by the University of Utah S.J. Quinney College of Law entitled: “Global Justice Project Iraq.” The project was funded by the U.S. Embassy’s Constitutional and Legislative Affairs Office and operated in Baghdad from the fall of 2008 through March of 2010.

Significantly, in connection therewith, I was given access to the plethora of negotiation materials that were compiled during the drafting of the Constitution, and because many of the same actors served on the original committee drafting the Constitution and the committee tasked with amending it, I had extensive access to those individuals as well. Many of the reflections contained herein are the product of those conversations and that documentary review.

49. THE CONSTITUTION OF AFGHANISTAN, Jan. 26, 2004, ch. 1, art. 3.

50. Hamoudi, *supra* note 4, at 698.

51. For an extensive discussion of this provision, see *id.* at 697–700. See also Ashley S. Deeks & Matthew D. Burton, *Iraq’s Constitution: A Drafting History*, 40 CORNELL INT’L L.J. 1, 7–14 (2007) (offering an excellent and detailed explanation respecting the debates surrounding Article 2).

the “enactment” of laws that violate Islam’s “settled rulings.” It does not invalidate legislation already in existence. Indeed, Article 130 indicates that existing legislation remains in force until repealed or amended.⁵² This appears to be an effective endorsement of the SCC’s approach—validating prior legislation, and subjecting future legislation to review for Islamicity. At least one important Iraqi legal expert has taken this position.⁵³

Iraqi Islamists generally deny such a reading is possible. They point first to the incoherence of the result, though that did not appear to be a problem for the SCC in Egypt, operating on far shakier textual ground than is available in Iraq. A leading drafter of Iraq’s original constitution indicates that Article 13, Section 2 forecloses such an argument, because it indicates that any law that conflicts with the constitution is void.⁵⁴ This argument might work as for existing legislation that conflicts with a separate article of the Constitution notwithstanding the indication in Article 130 that existing legislation is deemed valid.⁵⁵ Hence, an existing law that denied gender equality would be deemed void under Article 13, Section 2 as in conflict with the principle that all Iraqis are equal before the law irrespective of gender as set forth in Article 14, even if Article 130 validated existing legislation more generally. Yet an existing law that violates Islam’s “settled rulings” does not on its own conflict with the Constitution, given that the Constitution only prohibits future enactment of such laws. At the very least, there is ambiguity and confusion as to the status of existing legislation.

Nevertheless, when faced with the opportunity to amend Article 2 to make absolutely clear that existing law in conflict with *shari’a* would be deemed void (perhaps using language very similar to that contained in Article 13, Section 2), the Shi’a Islamists demurred. They did not quite endorse the possibility of a more limited approach, but rather repeated the implausibility of the interpretation, expressed their confidence that the courts in Iraq would not replicate those of

52. Article 130, *Doustour Joumhouriat al-Iraq* of 2005.

53. The individual in question is Judge Ghazi Al-Janabi, who served as head of the Shura Council, effectively Iraq’s *Conseil d’Etat*, and thereby one of Iraq’s premier legal drafting experts.

54. Article 13, Section 2, *Doustour Joumhouriat al-Iraq* of 2005. This is the established position of Dr. Hasan Al-Yasiri, a preeminent Iraqi legal scholar, who worked closely with Sh. Humam Hamoudi throughout the drafting of the constitution and the amendment negotiation process.

55. Article 130, *Doustour Joumhouriat al-Iraq* of 2005.

Egypt, and indicated concern over the controversy that would surround any attempt to strengthen Article 2 because of secular opposition. These arguments hardly seem convincing, and are internally inconsistent. After all, to the extent it is obvious that existing legislation is not immunized, an amended and clarified Article 2 should do little to raise secular objection. Moreover, secular objection did not prevent Islamist groups from including successfully in a final amendment proposal a revision to very controversial provisions regarding the Islamizing of family and inheritance laws.⁵⁶ It seemed plain that the Islamist forces were content to leave the text in a manner that appeared to endorse the SCC's scheme in Egypt, yet they could not bring themselves to say as much. Far from being dismissed as a poorly reasoned anomaly, the SCC's approach appears to have crossed borders.

The Iraqi Federal Supreme Court seems to endorse this result of immunizing state legislation, albeit not necessarily by applying the same explicit temporal limitation that the SCC adopted in Egypt. For example, in Decision 61 of 2011, a litigant sought to challenge a law that permitted the government office responsible for administering the Islamic charitable trust, known as a *waqf*, 10% of the value of the *waqf* as an administrative fee. The litigant maintained that such a rule plainly violates Shi'i rules respecting *waqfs*, and as such, violates Article 2 of the Constitution. The Court upheld the law, reasoning as follows:

The Federal Supreme Court finds the appeal occasioned by the Appellant's attorney to require detailed and specialized study of the opinions of all the Islamic schools in the development of legislation of the administration of the *waqfs*, their areas of concern and their religious institutions . . . such that there is a single text for all Iraqis based on their Islamic leanings.⁵⁷

The Court went on to make clear that until such a law was enacted, determining the areas on which the various juristic rulings agreed and reconciling as between inconsistent rulings, the offending

56. Constitutional Review Commission of the Iraqi Council of Representatives, Proposed Amendments to the Constitution of Iraq, art. 58 (on file with author). The amendments privileged religious and sect based rules of organization of family and inheritance law over other possibilities available in the original text. See Article 41, Doustour Joumhouriat al-Iraq. It is important to note that the proposed amendments were never enacted.

57. Decision 61 of 2011, Iraq Federal Supreme Court.

provision would stand as it was. The Court reached a similar conclusion with respect to a provision in Iraq's Personal Status Code that denied a party the right to issue a divorce through an agent.⁵⁸

In both of these cases, the Federal Supreme Court did not foreclose the possibility that the challenged provisions were indeed repugnant to Islam. It did, however, immunize the provisions from judicial review for Islamicity. The Court did this, it stated, because the provisions were part of existing, complex legislation which only the legislature could sensibly amend to conform to Islam. The reasoning is not identical to that of the SCC, and makes no explicit mention of the temporal limitations that Article 2 of the Constitution imply. Yet it reaches precisely the same result and has precisely the same effect—existing provisions of Iraqi law escaped repugnancy review and were left for the legislature to amend, if it saw fit.

C. Tunisia

The final state in the Arab world worth discussing, because of the massive change it has undergone in the past few years, is Tunisia.⁵⁹ Over the past several decades, Tunisia has operated as a highly secularized dictatorship, with a 1974 constitutional amendment that declared the late President Habib Bourguiba "President for Life."⁶⁰ Its constitutional process remains in its infancy,⁶¹ and Tunisia's primary Islamist party, Ennahda, is vague as to its own ambitions concerning the role of Islam.⁶² As a result, very little can be said as to

58. Decision 59 of 2011, Iraq Federal Supreme Court.

59. Only one other Arab state, Libya, has undergone a total regime transformation recently. Unfortunately, it is hardly useful to discuss Arab constitutionalism with respect to it. The state's institutions have been so weak and ineffective as a historical matter that state building has to date proven daunting, and the government seems to exert little control, with power being exercised instead by roving and largely lawless militias. See Anthony Shadid, *Libya Struggles To Curb Militias as Chaos Grows*, N.Y. TIMES, Feb. 9, 2012, at A1.

60. Ann M. Eisenberg, *Law On The Books Vs. Law In Action: Under-Enforcement Of Morocco's Reformed 2004 Family Law, The Moudawana*, 44 CORNELL INT'L L.J. 693, 701 n.52 (2011).

61. National elections were held in Tunisia late in 2011, in which the Islamist Ennahda managed to win with a plurality of seats to the constituent assembly. David D. Kirkpatrick, *Tunisia: Islamist Party Wins Vote*, N.Y. TIMES, Oct. 28, 2011, at A13. The assembly has a year to write the constitution and schedule new elections. Jonathan Manthorpe, *Islamists Poised to Guide Tunisia's Voyage to Democracy*, SUN (Vancouver), Oct. 25, 2011, at B5.

62. See David D. Kirkpatrick, *Islamists Head Toward Victory in Tunisia Vote*, N.Y. TIMES, Oct. 25, 2011, at A1 (describing Ennahda and its candidates as focusing on economic issues and security rather than moral concerns). Even the website of Ennahda reflects the vagueness of its own constitutional vision. Nothing comparable to the Brotherhood's electoral program, much less the Brotherhood draft Platform, can be found on it. See generally

whether or not existing law will be subjected to some sort of repugnancy test in Tunisia at all.⁶³ Yet from all indications, and to the extent repugnancy is even relevant, Tunisia appears very much to be sharing this rising Arab trend.

Ennahda objects to the stigmatizing of Islam that it claims took place historically in Tunisia. For example, President Bourguiba went so far as to refer to the Islamic headscarf, the touchstone of pious Islamic observance among women in the contemporary era, as an “odious rag.”⁶⁴ It also broadly embraces religious themes in its rallies and encourages public displays of religion.⁶⁵ However, Ennahda has said repeatedly and forcefully that it is not interested in Islamizing Tunisia’s existing law, even the highly controversial (though Islamically derived) family laws, which are among the most progressive in the region,⁶⁶ or the rules on alcohol,⁶⁷ the consumption of which is often presented by commentators as an example of a *shari’a* prohibition on which there is virtually universal agreement.⁶⁸ The only way that this could possibly be consistent with a repugnancy clause would be if that clause did not relate to existing legislation.

Thus, Ennahda has expressed distaste with a past that sought to marginalize a public role for Islam and subjected individuals to discrimination for public expressions of religious piety.⁶⁹ Logically, in addition to demanding greater freedom for religious expression (a goal that can be achieved independent of repugnancy, or indeed any direct mention of Islam at all), Ennahda might then seek to prevent legal secularization measures from being enacted, and to ensure that legislation that is enacted does not violate some core notion of what

ENNAHDA, <http://www.nahdha.info/arabe/index.php>.

63. Ennahda has recently indicated that it will seek no explicit mention of *shari’a* in the Constitution and that it would be satisfied with wording that indicated that Tunisia was an Islamic state. *Tunisia’s Islamist Ennahda Edges Away From Sharia*, BBC NEWS (Mar. 26, 2012), <http://www.bbc.co.uk/news/world-africa-17517113>.

64. Adrien K. Wing & Hisham Kassem, *The Future Of Palestinian Women’s Rights: Lessons From A Half-Century Of Tunisian Progress*, 64 WASH. & LEE L. REV. 1551, 1557 (2007).

65. Kirkpatrick, *supra* note 62, at A1.

66. *Id.*; Scott Sayre, *Tunisia is Uneasy over Party of Islamists*, N.Y. TIMES, May 16, 2011, at A9.

67. Sayre, *supra* note 66, at A9.

68. Stilt, *supra* note 4, at 96.

69. An excellent account of this type of discrimination is offered in Monica Marks, Op.-Ed., *Can Islamism and Feminism Mix?*, N.Y. TIMES (Oct. 27, 2011), http://www.nytimes.com/2011/10/27/opinion/can-islamism-and-feminism-mix.html?_r=1&ref=zineelabidinebenali#.

Islam is. Its repeated, stated commitment not to seek to Islamize the state, but only grant to Islam space that it had been denied, is thus perfectly consistent with an approach to repugnancy that mimics that of Egypt and Iraq. As with those two states, it is not interested in a constitutional structure or institution that will displace any existing legislation. To the extent that it is interested in some sort of Islamic control at all, therefore, it will resemble those of Egypt and Iraq, and apply exclusively prospectively.

IV. THE INCOHERENT PREFERENCES OF ISLAMIST PARTIES

Why would Islamist parties ultimately *prefer* a state of affairs that effectively immunizes all sorts of existing, secularized, and transplanted legislation from any sort of review for its Islamicity? Why would such parties not instead offer some sort of coherent theory setting forth what legislation must look like in order to comply with *shari'a*, and then demand that a body such as the judiciary apply it to *all* legislation, existing or prospective? Several answers might be offered to explain this rather bewildering state of affairs.

First of all, ironically, as they gain a measure of political power, Islamist parties often find themselves in *precisely the same bind in which the Egyptian SCC found itself nearly three decades earlier*. That is to say, it is nearly inconceivable that any political movement in any reasonably developed state—including Iraq, Egypt and Tunisia—could determine that money interest on a loan was somehow not *riba*, a practice stridently condemned in the Qur'an. The Islamist consensus has developed deep roots, and is the basis for the practice of Islamic finance. As a result, any claim by any Islamist political movement to the contrary will immediately give rise to suspicion that the Islamist movement in question has been compromised by “Westoxification.”⁷⁰

To reiterate the point, the problem with a more liberal interpretation concerning money interest and *riba* is not *doctrinal*, as ample doctrinal arguments have been raised that rise at least to the

70. See *supra* Part III.1 regarding Islamist consensus on the subject of money interest. Respecting the term “Westoxification” and its Iranian origins, see Ben Schott, *Westoxification & Modern Toxicity*, N.Y. TIMES BLOG (Apr. 12, 2011, 11:47 AM), <http://schott.blogs.nytimes.com/2011/04/12/westoxification-modern-toxicity>. The influential Hamid Algar translates the same Farsi term as “xenomania.” AYATOLLAH RUHOLLAH KHOMEINI, ISLAM AND REVOLUTION: WRITINGS AND DECLARATIONS OF IMAM KHOMEINI (1941-1980) 152 n.23 (Hamid Algar ed. and trans., 1981).

level of plausibility.⁷¹ Rather, it is *political*, in that such a reading, however plausible from a doctrinal standpoint, is simply not one the broader Muslim lay public would deem to be sufficiently Islamic.⁷² That Islamist movements and advocates of Islamic finance have tied the money interest prohibitions to the promotion of social justice, however ill-conceived, only makes any justificatory effort in defense of money interest harder to obtain.⁷³ In other words, when money interest is suggested to be a means to favor the rich and those with capital at the expense of ordinary laborers, as has often been argued,⁷⁴ then a softening of the hostility to interest is more than merely the abandonment of Divine Command in favor of Western imposed imperative, as if that were not enough. It also appears to be a capitulation to rich capitalist forces in derogation of the working classes and the poor. Hence any Islamist political figure, if asked the question directly, would almost certainly be forced to indicate that the taking of money interest on a loan was a grave sin, and repugnant to the *shari'a*.

Yet any Islamist figure with even a marginal understanding of political and economic realities is as aware as the SCC was in 1985 of the potentially devastating effects that a complete ban on interest would be likely to have on any national economy in the modern world. The SCC's creative dodge may not be the only one available, but having been employed in the Arab world once, it seems to have proven itself remarkably attractive. Under this approach, the judiciary will be excluded from considerations of Islamicity with respect to existing, vital legislation, and the reform of the laws to ensure their compliance with *shari'a* will be left in the discretion of the legislature. The legislature can ignore it in favor of higher priorities, or, should it wish to pander to conservative elements, it can defer the matter indefinitely using the standard set of tools available in any legislature's toolkit—hearings, commissions, and the production of endless reports concerning the matter.

Money interest is the most obvious example where the dichotomous approach proves appealing, but it is by no means the only one. Another example might well be the *hudud*, the strict

71. See *supra* notes 23–25 and accompanying text.

72. See *supra* notes 26–29 and accompanying text.

73. Haider Ala Hamoudi, *Mohammad's Social Justice or Muslim Cant: Langdellianism and the Failures of Islamic Finance*, 40 CORNELL INT'L L.J. 89, 92–95 (2007) (describing the roots of Islamic finance relating to the realization of social justice).

74. *Id.*

punishments established by medieval jurists for particular violations of Divine Command.⁷⁵ These included the well-known punishment of stoning for adulterers, amputation for thieves, and death for apostates who do not repent.⁷⁶ Because the *hudud* were crimes against God, the punishments could not be mitigated by an exercise of judicial discretion.⁷⁷ Yet at the same time, and perhaps for the same reason, the evidentiary standards were quite strict, in some cases impossibly so.⁷⁸ This would make enforcement of the *hudud* perhaps rare as a realistic matter, yet nonetheless a matter of some concern for any secular Muslim or member of a minority religion who was not eager to countenance even the remote possibility of adulterers stoned or apostates killed. Even committed Muslims, those who are interested in ensuring that Islam play some role at the state, and who might otherwise be attracted to the message of the Egyptian Muslim Brotherhood regarding economic reform and social justice, might well recoil at excesses of this sort. If measures like this were undertaken, they could damage the reputation (and electoral prospects) of the Brotherhood. However, given the long history of conservative Muslims using the Egyptian courts to force the divorces of supposed apostates with some level of success,⁷⁹ the Brotherhood could not claim to more conservative elements of their base that they

75. Mohammad Fadel, *Public Reason As A Strategy For Principled Reconciliation: The Case Of Islamic Law And International Human Rights Law*, 8 CHI. J. INT'L L. 1, 4–5 (2007).

76. See *id.* at 5.

77. Fadel mentions the *hudud* as raising “particularly thorny problems” because of the obligation to enforce them once proven. *Id.* at 5.

78. The paradigmatic example is the prosecution for *zina*, or fornication, which requires four eyewitnesses to the sexual intercourse. Quraishi, *supra* note 15, at 179. For a more general review of the strict rules of evidence in relation to the *hudud*, see RUDOLPH PETERS, *CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY* 13–14 (2005).

79. Though Egypt does not prosecute the *hudud*, its personal-status laws do not permit the marrying of Muslims to non-Muslims, and conservative Muslim groups or individuals have successfully used these rules to order divorces as between a couple which does not desire one on the grounds that one is an apostate who has effectively renounced Islam. The most well-known instance is that of the Egyptian intellectual Nasr Abu Zayd, whose writings on the Qur'an were deemed sufficiently heretical by some as to be a form of apostasy, a position that the Egyptian courts ultimately endorsed, thereby causing Abu Zayd to flee Egypt for Europe with his wife, where he lived out the remainder of his life. See Kristen Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 734–39 (2005). The Egyptian government then took measures to institute standing requirements in proceedings of this sort, so that random people could not interpose themselves and demand a divorce that neither member of the couple nor their families sought. This was the basis upon which similar proceedings instituted against another Egyptian liberal, the writer Nawal Al-Sadawi, were dismissed. *Id.* at 738.

had no interest in the *hudud* and were indifferent to declarations of apostasy. The SCC dodge permits them to avoid the issue.

It might also be noted that Islamist groups are not ignorant of the dominant trends in much of the world in favor of secular states, and they genuinely express concern about such trends. To the extent that the representatives of Ennahda raise Islam at all in Tunisia, it is to express broad resentment against what they view as the marginalization of Islam and persecution of the pious by the prior dictatorial regime.⁸⁰ Various members of Iraq's Constitutional Commission expressed to me the view that one of the primary purposes of the repugnancy clause was to ensure that Iraq would not develop into Turkey—so that laws that ban the headscarf, for example, as is done in Turkey in some contexts, would be struck down as void by a court or other institution whose function it was to ensure that law did not develop in a manner that was repugnant to *shari'a*. The concern seemed genuine, albeit paranoid. The fierce reaction of the Egyptian Muslim Brotherhood to an Egyptian Cabinet Member's suggestion that the wearing of the headscarf was a regressive and backwards practice demonstrates the extent to which similar concerns pervade in Egypt.⁸¹ A repugnancy clause that does not apply to existing legislation addresses this fear adequately, as it still enables the courts to strike down any potential future legislation that would be deemed hostile to Islam.

But the most important point is not so much what Islamist groups seek to evade as what they seek to advance. The casual observer might be surprised by the manner in which mainstream Islamist movements do not seem terribly concerned about *Islam*. There is, for example, in the platform of the Brotherhood's current surrogate political party, requisite praise for Islam and the principles of the *shari'a*, articulated at such a high level of abstraction that they would not be deemed objectionable by any political movement—even a non-Muslim one.⁸² Beyond this, the almost singular focus is on

80. See Marks, *supra* note 69.

81. Yasmine Salah & Sara El Sirgany, *Religious Scholars Slam Farouk Husni for Anti Veil Remarks*, DAILY STAR EGYPT, Nov. 19, 2006 (describing demand by Brotherhood members of parliament that Culture Minister Farouk Husni resign for having made statements disparaging the veil) (on file with author).

82. FREEDOM AND JUSTICE PARTY, *supra* note 46, at Part 1 "Principles and Directions of the Party" (including as *shari'a* principles respect for human rights, freedom of worship, freedom of thought, respect for religious minorities, equality of all people, and reliance on democracy for political life).

more standard political and economic issues. Effective and lawful state governance, development, economic reform, and social justice constitute the bulk of the platform, with Islam mentioned only briefly at the start and end.⁸³ Ennahda's representatives make almost no reference to Islam beyond anodyne appeals for religious freedom.⁸⁴ The almost exclusive singular focus of its candidates has been on economic issues.⁸⁵

Iraq's Shi'a Islamist political parties are not much different. While their leaders are in some (though not all) cases more obviously Islamist in orientation,⁸⁶ in that they don the traditional robes and turbans of Shi'a trained scholars, their political priorities are self-evidently focused more on issues that do not concern the *shari'a*. There is some level of predictable demagoguery relating to *shari'a*—efforts to ban or restrict the sale of alcohol,⁸⁷ for example, or reform religious curricula in schools⁸⁸—but these occupy a relatively modest proportion of attention in relation to other, more pressing concerns. Among these are negotiations over a hydrocarbon law,⁸⁹ wrangling about the future of Iraqi federalism,⁹⁰ and debates over the separation

83. *Id.*

84. Kirkpatrick, *supra* note 62; Sayre, *supra* note 66.

85. Kirkpatrick, *supra* note 62; Sayre, *supra* note 66.

86. Most obviously, the Sadrists are led by Moqtada al-Sadr, who is a Shi'i jurist by training and who invariably appears in public in the dress of a jurist. The same might well be said of the leader of another Shi'a Islamist organization the Supreme Islamic Council of Iraq, Ammar al-Hakim. See ISLAMIC SUPREME COUNCIL OF IRAQ, <http://www.almejlis.org> (last visited July 11, 2012).

87. Haider Ala Hamoudi, *Why an Iraq Ruled by Law is Becoming More Hopeful*, THE DAILY STAR (LEB.) (July 9, 2009), <http://www.dailystar.com.lb/Law/Jul/09/Why-an-Iraq-ruled-by-law-is-becoming-more-hopeful.ashx#axzz1rBIeSa7R> (describing efforts to ban alcohol in the Iraqi legislature). In addition, Iraqi political authorities appear to go on periodic raids to close down unlicensed liquor stores in Baghdad, though after some time the raids cease and the stores open again. The latest round of raids occurred in January of 2010. Liz Sly, *Baghdad Crackdown Corks Drinkers' Spirits*, L.A. TIMES (Jan. 24, 2010), <http://articles.latimes.com/2010/jan/24/world/la-fg-iraq-booze24-2010jan24>. Based on accounts of colleagues, a great number of liquor stores have reopened.

88. Steven Lee Myers, *Iraqi Cleric Avoids Using His Power to Sway Voters*, N.Y. TIMES, Mar. 3, 2010, at A4.

89. Iraqi politicians have been debating a hydrocarbon law for nearly half a decade. REX ZEDALIS, *LEGAL DIMENSION OF OIL AND GAS IN IRAQ: CURRENT REALITIES AND FUTURE PROSPECTS* 54–78 (2009) (describing framework law in draft form since 2006). One has yet to pass, leaving Iraq to export its oil on legal bases that are defensible, but somewhat nebulous. *Id.* at 244–69 (offering a thorough legal analysis of the authority to export in the absence of law).

90. In 2005, the Sunni Arab political leaders abandoned the constitutional process in disgust because the constitution recognized broad rights of federalism to whatever parts of

of powers.⁹¹ Thus, Prime Minister Maliki hails from an Islamist party and has remained in power for over six years, and yet Iraqi law remains no more or less committed to *shari'a* than it had been in the past.⁹² Even a *constitutional* commitment commonly understood to require the legislature to bring the Personal Status Code (governing family law and inheritance) further into conformity with *shari'a* has not advanced,⁹³ nor have any Islamist leaders shown very much interest in advancing it, at least in my conversations with them.

V. CONCLUSION: THE FUTURE OF ISLAMISM

The point of these reflections on the preferences of Islamist parties is not to suggest that they have embraced a robust form of secularism, for plainly they have not, nor is there any indication at all that they intend to. Family law remains firmly within the orbit of *shari'a* even in relatively progressive Tunisia, and there is no real suggestion that religion would cease to be taught in public schools throughout the Arab world. Yet Islamist *legislative* agendas in the Arab states have clearly moved beyond Islam, because of political and economic realities, and in order to mobilize a base of voters who are less concerned about state mechanisms for enforcement of aspects of *shari'a* and more concerned about how their lives might be

Iraq, other than Baghdad, wished to become autonomous regions and the Shi'a expressed a desire to form such a region throughout all of Iraq's south. ANDREW ARATO, *CONSTITUTION MAKING UNDER OCCUPATION* 232–33 (2009). In a rather strange twist of irony that is remarked on in much greater detail in my own upcoming book on the Iraq constitution, the Shi'a reconsidered their demand for autonomy and now seek a centralized state which Sunni forces are now resisting. Sunnis in some provinces now demand the right to form a region pursuant to the constitution. *Sunnis Push for Federal Region in Western Iraq*, MIDDLE.E. REP. (Jan. 31, 2011).

91. There are, for example, frequent concerns respecting the possibility of executive interference with judicial independence. Compare Rod Nordland, *Maliki, Trailing In Iraqi Vote, Is Contesting the Result*, N.Y. TIMES, Mar. 28, 2010, at A4 (describing Federal Supreme Court of Iraq as “nominally independent”), with Charles P. Trumbull IV & Julie B. Martin, *Elections and Government Formation in Iraq: An Analysis of the Judiciary's Role*, 44 VAND. J. TRANSNAT'L L. 331 (2011) (broadly defending Iraqi judiciary as competent and independent). Another frequent area of concern is the power of Iraq's legislature and independent agencies vis-à-vis the executive branch. Haider Ala Hamoudi, *Decision 88: Balance of Power under the Iraq Constitution*, JURIST (Mar. 18, 2011), <http://jurist.org/forum/2011/03/decision-88-checks-and-balances-in-iraq.php>.

92. Haider Ala Hamoudi, *Dream Palaces of Law: Western Constructions of the Muslim Legal World*, 32 HASTINGS INT'L & COMP. L. REV. 803 (2009).

93. Article 41 of the Constitution requires that Iraqis be given freedom to pursue the personal status rules based on their “religion, sect, belief or choice”, but that this would be organized by law. No such organizing law has been passed or even presented in the legislature.

improved by state activity. Hence Islamist parties offer agendas respecting employment, wages, private sector growth and anticorruption certain to be more appealing to average voters, even if such platforms are not distinctively Islamic.

Thus, in the end, as social movements, Islamist organizations obviously reflect their Islamic values and may seek to expand them, through campaigns to encourage the headscarf, competitions for young men to memorize the Qur'an, or even funding women-only public transportation. As a *political and legislative* agenda, however, Islam is largely (though certainly not entirely) absent, and the law of the state is largely immunized from any sort of review concerning its Islamicity. Contrary to the Muslim Brotherhood's nearly century old slogan, it seems that Islam is no longer the solution.