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FINAL PAPER

"*Shari'a* Density in Post-Arab Spring Constitutions: The Landscape of Postconflict Authority and Transition"

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Abstract:
This essay draws on our empirical database in which we examine "*shari'a* density"—the amount of shari'a language, norms, principles, prescriptions, prohibitions, and guarantees—in the constitutions of all modern Muslim-majority states, 1947-present.[2] The dataset includes the revised and fluctuating constitutions from recent conflict states (i.e., Afghanistan, Iraq, Egypt, Tunisia, Libya, etc.). While the role of religion, Islamist parties, and *shari'a* in governance are receiving renewed attention in the aftermath of the post-9/11 wars and the Arab Uprisings, few scholars have comparatively examined exactly how *shari'a* principles are embedded in states' formal constitutions—a fascinating study in history, political consensus, and blending religious with state law. Moreover, *shari'a* is often distinguished as God's law—"that which Allah has ordained in the Quran, complemented by the Sunna," as M. Cherif Bassiouni notes—whereas Islamic law includes both divine *shari'a* and human-made *fiqh* (Islamic jurisprudence). Thus, insofar as *shari'a* embodies "divine law" and *fiqh* includes efforts by jurists to interpret *shari'a*, constitutions are a fascinating test case to probe the differences between *shari'a* aspirations and *fiqh*-based articles in actual charters, the formal structures of authority in *fiqh*-based knowledge, and how states in conflict settings negotiate *shari'a* principles to establish post-crisis forms of authority.

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1.0 INTRODUCTION

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[2] C. Zoli, E. Schneider, C. Schuster, A. Razavi, M. Saleh, & J. Myers, Muslim State Armed Conflict & Compliance Dataset (MSACC) 1947-2014, 2012, Distributed by Syracuse University, Institute for National Security & Counterterrorism (INSCT), College of Law/Maxwell School of Public Affairs, http://insct.syr.edu/projects/security-in-the-middle-east-islam/conflict-compliance-in-muslim-states/. The datasets gather information on the 57 constitutions-in-force of all Organization of Islamic Cooperation (OIC) states, as well as the 7 superseding constitutions and drafts from post-Arab Spring states, bringing the total to 64 constitutions for all 57 states.

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> "Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state," Plato, *The Laws* [3]

1.0 INTRODUCTION:

Political scientists working in the Middle East have faced an intellectual reckoning in light of the Arab Spring uprisings.[4] In addition to failing to anticipate these events, scholars tended to overestimate the stability of Arab authoritarian regimes and, more troubling, sidelined inquiry not related to regime type, authoritarianism, or obstacles to democratization.[5] As Howard & Walters (2014a) note, if *predicting* transformative political events, such as revolutions, may be a bridge too far for the social sciences, disciplinary pressures made political scientists "ill-equipped to *explain* the uprisings"—a reasonable expectation. Moreover, "dominant paradigms within the discipline caused scholars" to "overemphasize" persistent authoritarianism and "marginalize" other research questions—those not tied to authoritarianism, modernizing reform, or democratization—including dynamics of popular mobilization and participation, arguable more relevant to understanding current transformations.[6] Even now, "continued emphasis on authoritarian persistence risks treating the recent uprisings essentially as non-events if they do not lead to democratization."[7]

One positive outcome from this self-reflexive moment is a "broadened conceptualization of authoritarianism as an object of study," so that scholars may now explore "how political repression and participation are debated and enacted locally, and how oppressive power relations can be established, routinized, and contested across different regime types." [8] All of this has demonstrably enabled a "renewed focus" on political change and social movements including those "tied to democratization."[9]

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[3] Plato, *The Laws* (London, NY: Penguin Classics, 1070: 174).

[4] See Marc Morjé Howard & Meir R. Walters (2014a), "Reflections Symposium: Explaining the Unexpected: Political Science and the Surprises of 1989 and 2011," *Perspectives on Politics*, 12.02: 394-408; Jeff Goodwin (2011), "Why We Were Surprised (Again) by the Arab Spring," *Swiss Political Science Review* 17(4): 452–56; and Lisa Andersen (2012), "Too Much Information? Political Science, the University, and the Public Sphere," *Perspectives on Politics* 10(2): 385–96.

[5] See Howard & Walters (2014a: 394-5), *supra* note 4, and Gregory Gause (2011b), "Why Middle East Studies Missed the Arab Spring: The Myth of Authoritarian Stability," *Foreign Affairs* 90(4): 81–90. Amidst the soul searching over the failure to predict the Arab Spring (and earlier political transformations), some scholars have found the culprit in disciplinary pressures to study familiar regions and topics "centrally entwined with U.S. global power politics," including political and economic "underdevelopment," persistent authoritarianism, and obstacles to democratization, regime change, and "modernizing" reform.

[6] For examples, see Asef Bayat (2010), *Life As Politics: How Ordinary People Change the Middle East* (Stanford, CA: Stanford University Press); Ellen Lust-Okar & Saloua Zerhouni, eds. (2008), *Political Participation in the Middle East* (Boulder, CO: Lynne Rienner Publishers); and Lisa Wedeen (1999), *Ambiguities of Domination: Politics, Rhetoric, and Symbols in Contemporary Syria* (Chicago: Univ. of Chicago Press) and (2008), *Peripheral Visions: Publics, Power, and Performance in Yemen* (Chicago: Univ. of Chicago Press).

[7] Marc Lynch, "Response to Howard & Waters," *Perspectives on Politics,* 12.02(2014): 415–416; and (2012), *The Arab Uprising: The Unfinished Revolutions of the New Middle East* (Perseus, 2012); and ed., *The Arab Uprisings Explained: New Contentious Politics in the Middle East* (Columbia University Press: Columbia Studies in Middle East Politics: 2013). Howard & Waters (2014a: 395) use the example of resurgent security and old guard forces in Egypt as a possible affirmation of the authoritarian persistence literature—but while not wrong, the emphasis is off, "highlight(ing) a tendency to minimize the relevance of mass uprisings simply because they have not led to democracy, and they eschew the question of why scholarship on authoritarian persistence generally overlooked the possibility of popular mobilization before the fact."

[8] Howard & Waters (2014a: 395).

[9] Howard & Waters (2014a: 395). This reflexive moment is captured in a special section in the 2014 issue of *Perspectives on Politics:* 12.02. For why scholars missed the Arab Spring, see, *supra* note 4, Gregory Gause III (2011a), "The Middle East Academic

This essay, too, is interested in such local negotiations of political change and authority, but its focus is on these developments as they are brought to bear on constitutions, including recent fluctuating documents among conflict and Arab Spring states (i.e., Afghanistan, Iraq, Egypt, Tunisia, Libya, etc.).[10] While religion, Islamist parties, even *shari'a* in governance are also receiving renewed attention in the aftermath of both the Arab Spring debates and the post-9/11 wars, few scholars have empirically examined how *shari'a* principles are embedded in states' constitutional documents or discourse—a fascinating study in history, political contention and consensus, and blending religious with state law.[11]

To complicate matters, such contentious discussions occurring across post-Arab Spring states (and beyond) are proceeding today with an unusual stakeholder: God. It might be thought that this divine interlocutor is a worry for only western traditions. But Plato's concern that "where the law is subject to some other authority and has none of its own" then "the collapse of the state…is not far off" is not only a western precept.[12] This cornerstone statement of the rule of law is a cross-cultural phenomenon, evident in antique and medieval forms in China, India, Islam and elsewhere (see Weeramantry 1997; Tamanaha 2004).[13] Notably, Weeramantry mentions the rightly-guided Caliphs, the Prophets immediate four successors, who

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Community and the 'Winter of Arab Discontent': Why Did We Miss It?" in *Seismic Shift: Understanding Change in the Middle East* (Washington, DC: Stimson Center); (2011b), "Why Middle East Studies Missed the Arab Spring; and Lisa Anderson (2011), "Demystifying the Arab Spring: Parsing the Differences Between Tunisia, Egypt, and Libya," *Foreign Affairs* 90(3): 2-7. For earlier explanations of such oversight, i.e., "preference falsification," see Timur Kuran, (1995), "The Inevitability of Future Revolutionary Surprises," *American Journal of Sociology* 100(6): 1528–51; and Charles Kurzman (2004), *The Unthinkable Revolution in Iran* (Cambridge, MA: Harvard University Press).

[10] Constitutions are what Hans Kelsen calls the "grundnorm" or "basic norms" underlying any legal system and from which other domestic norms derive their validity; constitutions embody the "higher" legal norms within a legal system, from which other "lower" norms are often created and authorized. See Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Clark: Lawbook Exchange, 2009), 115; and Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, 2nd ed. (London: Butterworths, 2001), 104.

[11] Notably, Dawood I. Ahmed & Tom Ginsburg's recent research has empirically demonstrated that "constitutions which incorporated Islamic supremacy clauses were accompanied by more human rights and are indeed even more rights-heavy when compared to constitutions of other comparable jurisdictions which did not incorporate these clauses." *See* Ahmed & Ginsburg (2014) "Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions," *University of Chicago, Public Law Working Paper* No. 447, 4, Aug. 14, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=243898312.

[12] See, Aristotle, *Politics*, (1988), Stephen Everson, ed. (Cambridge, Mass.: Cambridge University Press), Book III, 1286, p. 78: "Now, absolute monarchy, or the arbitrary rule of a sovereign over all citizens, in a city which consists of equals, is thought by some to be quite contrary to nature;. . .That is why it is thought to be just that among equals everyone be ruled as well as rule, and therefore that all should have their turn. And the rule of law, it is argued, is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law. . .Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire."

[13] C.G. Weeramantry, *Justice without Frontiers: Furthering Human Rights, V1* (Martinus Nijhoff Publishers: 1997): 132; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (NY: Cambridge University Press, 2004). For one conventional hadith on the rule of law, narrated by Aisha, one of the Prophet's wives, see Bukhari, V4, Book 56, Number 681: "The people of Quraish worried about the lady from Bani Makhzum who had committed theft. They asked, 'Who will intercede for her with Allah's Apostle?' Some said, 'No one dare to do so except Usama bin Zaid, the beloved one to Allah's Apostle.' When Usama spoke about that to Allah's Apostle, Allah's Apostle said (to him), 'Do you try to intercede for somebody in a case connected with Allah's Prescribed Punishments?' Then he got up and delivered a sermon saying, 'What destroyed the nations preceding you, was that if a noble amongst them stole, they would forgive him, and if a poor person amongst them stole, they would inflict Allah's Legal punishment on him. By Allah, if Fatima, the daughter of Muhammad stole, I would cut off her hand.'" Center for Jewish-Muslim Engagement (CJME), University of Southern California, Center for Religion & Civic Culture, M. Muhsin Khan trans., *Sahih Bukhari, Book 56*, "Virtues and Merits of the Prophet (pbuh) and his Companions," http://www.usc.edu/org/cmje/religious-texts/hadith/bukhari/056-sbt.php.

placed themselves under the scrutiny (and penalties) of local laws.[14] Plato's articulation may be distinctive—medieval Islamic jurists might object to "law" as a disembodied "master of the government"—but they agreed with his conclusion: that "government is [law's] slave," and when such an arrangement holds, "men enjoy all the blessings that the gods shower on a state."[15]

A second-order complication is which part of Islamic law is actually God's. That is, *shari'a* itself is often distinguished as God's law—"that which Allah has ordained in the Quran, complemented by the Sunna," as M. Cherif Bassiouni notes[16]—whereas the more general term, 'Islamic law' includes both divine *shari'a* and human-made *fiqh* (Islamic jurisprudence). Thus, insofar as *shari'a* embodies "divine law," and *fiqh* includes earthly efforts by jurists to interpret *shari'a*, constitutions are a fascinating place to probe not only political contention in moments of social transformation but the life of a polity and its changing referents of political community. Dimensions of this conversation include differences between *shari'a* aspirations[17] and *fiqh*-based articles in actual charters, the formal structures of authority in *fiqh*-based knowledge, and how states in postconflict settings negotiate *shari'a* principles to establish post-crisis forms of authority. What has been too often missing from this inquiry is comparative data: metanational study of transitioning Muslim states and constitutions in their *shari'a* content in ways that would provide a factual basis for such inquiry.

The essay, thus, proceeds as follows. Section one examines scholarly debate—and its limits—in appraisals of constitutional reform among postconflict Muslim states. In this context, the best work understands that Arab Spring political mobilizations often dresses political contention in constitutional reform (Brown 2014: 308) and, further, as part of this packaging, links shari'a, governance, and law anew, as questions of Islamic authority are pressed, once again, into public debate and discussion. Moreover, while comparative politics in the Middle East has successfully moved the discussion from resilient authoritarianism to the power and diversity of political contention, what has been missed in the process is the opportunity to synthesize political and legal scholarship and explore Arab Spring states creative constitutionalism—however imperfect or messy. *The shari'a content of constitutions during this time of political transformation is interesting not only because it raises questions of "divine" and state law and their differences, but because it reveals a moment when political agents have in some cases achieved something difficult: advancing shari'a aspirations, not to replace formal structures of authority (as in*

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[14] Weeramantry (1997: 132). Caliph Uthman ibn Affan, third of the four Rashidun "rightly-guided caliphs," was reported to have sued a Jewish subject for a missing coat of armor—but to no avail. The judge would not give him standing as his witnesses (his slave and son) were not permissible witnesses. For proto-qadi and qadi independent "Chief Justices of the Empire" (Weeramantry, 1997: 132) who developed "epistemic authority" independent of state power during and after the Abbasid caliphate, see Wael Hallaq, *The Origins and Evolution of Islamic Law* (NY: Cambridge University Press, 2005): 34-40; 66; 77; 165.

[15] See Lubna A. Alam, "Keeping the State Out: The Separation of Law and State in Classical Islamic Law;" Review of *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* by Rudolph Peters (Cambridge Univ. Press, 2005), *Michigan Law Review*, 105.06 (2007): 1255-1264. See, also, Joseph Schacht's, *An Introduction to Islamic Law* (Clarendon Press, 1964: 175) early statements on this issue: Islamic law "represents an extreme case of a 'jurists' law'; it was created and developed by private specialists; legal science and not the state plays the part of a legislator, and scholarly handbooks have the force of law."

[16] M. Cherif Bassiouni, *Shari'a and Islamic Criminal Justice in Time of War and Peace* (New York: Cambridge University Press, 2014), 39. See, *supra* note 13, Hallaq, *Origins and Evolution of Islamic Law* (2005), 1; see, *supra* note 14 Schacht, *Introduction to Islamic Law* (1964: 1).

[17] For the aspirational and functional elements of constitutions, see J. Liolos, "Erecting New Constitutional Cultures: The Problems and Promise of Constitutionalism Post-Arab Spring," *Boston College International & Comparative Law Review* (2013), 36(1): 219-254.

the Iranian revolution of 1979 or even in Saudi Arabia's basic law, though that is changing), but to negotiate post-crisis forms of governance. To bring these points home, section two draws on empirical inquiry into "*shari'a* density"—the shari'a language, norms, principles, prescriptions, prohibitions, and guarantees—in the constitutions of modern Muslim (OIC member) states, 1947-present. The data includes revised constitutions from recent conflict states (i.e., Afghanistan, Iraq, Egypt, Tunisia, Libya, etc.). This empirical work, thus, helps frame—and even test—scholarly claims about the recent role of religion and *shari'a* in governance in and beyond the recent Arab Uprisings.

2.0 SHARI'A GOVERNANCE AND THE LIMITS OF ISLAMIC LAW:

The role of religion, Islamist parties, and *shari'a* in governance is receiving renewed attention in the aftermath of the post-9/11 wars and the Arab Spring uprisings. Yet, few scholars have comparatively examined exactly how *shari'a* principles are embedded in states' formal constitutions—a fascinating study in history, political contention and consensus, and the creative blending of religious with state law. In fact, quite the contrary, as legal scholars Haider Ala Hamoudi (2009) and Lama Abu-Odeh (2004), among others, have pointed out, the western legal academy appears to have adopted *shari'a* and its dominance as a foregone conclusion, fixating on discovering *shari'a* content across diverse Muslim states' legal systems—whether present or not.[18] Perhaps, everything "Islamic"—especially Islamic law—has attracted interest since 9/11 in part because "it was commonly assumed that it was some rule grounded in Islamic religious sources that the attackers saw as licensing their acts."[19] But more troubling still for Abu-Odeh was what U.S. "pedagogical acts of instruction on Islamic law" in U.S. law schools revealed—a created fantasy in a unitary and foundational conception of "Islamic law"—one that "bear[s] almost no relationship to courses on law taught in the Islamic world itself" or to actual law in Muslim countries.[20]

This fantasy of Islamic law generated in the western academy has several precepts: First and foremost, it depends on a rhetorical slippage that substitutes a unitary "Islamic Law" for diverse "law in Muslim countries," while ignoring the diverse evolution of Islamic law and its interpretation across schools, regions, regimes, and local contexts (so that, for instance, Indonesian Islamic legal legacies vary in country and from Saudi traditions). Second, this concept of "Islamic law" is decidedly medieval. It adopts an odd historical reversal in which "elaborate" discussions of medieval jurisprudence are raised to address modern problems: terrorists are imaginarily tried via medieval criminal codes;[21] Islamic law's historical position on adultery, stoning, and lashing are explored in detail from the seventh to ninth centuries to frame contemporary women's rights "as if such punishments have not been banished" from most countries'

[18] Haider Ala Hamoudi, "Dream Palaces of Law: Western Constructions of the Muslim Legal World*," Hastings International and Comparative Law Review,* 32.2 (2009): 803-814; Lama Abu-Odeh, "The Politics of (Mis) recognition: Islamic Law Pedagogy in American Academia," *The American Journal of Comparative Law* (2004): 789-824.
[19] Abu-Odeh (2004: 790).
[20] Abu-Odeh (2004: 791).
[21] See Frank E. Vogel, "The Trial of Terrorists under Classical Islamic Law," *Harvard International Law Journal* 43.1 (2003): 53-64.

criminal codes "for over a century" and "as if contemporary constitutions in the Islamic world, constructed out of post-enlightenment ideas, are of no relevance whatsoever."[22] Third, this approach ignores how law in most Muslim states is a hybrid of Islam and transplanted European legal traditions (usually dominant), which are themselves treated as "a foreign import" and "thing to be displaced and replaced with something more authentic."[23] Last, the positive law of the Islamic world, which "informs its codes, treatises, law reports, legal institutions, legal curricula in law schools"—including constitutions—remains opaque to legal scholars, revealing a strange paradox: "in most other regions, scholars are typically invited to pay attention to law *outside* of positive law," whereas in "the Islamic world one has to do the opposite"—"call attention to law *in the books, in the classroom, and in the courts.*"[24] In short, this reified Islamic law is approached in such a way as to "exaggerate" its power "to signify [all] legal practices in the contemporary Islamic world."[25]

Our work in building a metanational dataset that tracks all Muslim state's *shari'a*-based constitutional provisions—discussed in the following section—is, of course, one attempt to fill this gap in positive law at the empirical level.[26] One preliminary example in Figure 1. (below) from our dataset indicates the extensiveness of this hybridity, for instance: it compares all shari'a articles for every states' constitution with each respective state's inclusion of Universal Declaration of Human Right (UDHR) articles. Not only does the figure indicate which states have the highest degree of shari'a density—the most shari'a laden articles in their constitutions is in the blue shaded portion of the chart, such as Iran and Saudi Arabia. It also shows these same state constitutions' quantity of UDHR articles, in the pink shaded portion of the chart.

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[22] Abu-Odeh (2004: 791).

[23] Abu-Odeh (2004: 791). Rainer Grote & Tilmann J. Roder, eds., *Introduction to Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (New York: Oxford University Press, 2012): 4, treat the earliest constitutional reform processes, originated in Tunisia, Egypt and the Ottoman Empire in the second half of the nineteenth century, inspired by European constitutional models. Jan Michiel Otto shows colonial and postcolonial influences on the constitutional drafting processes among Muslim states, such that European legal language has travelled into the corpus of these constitutions. See J.M. Otto, ed., *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press: 2010): 35.

[24] Abu-Odeh (2004: 791).

[25] Ibid.

[26] See the Muslim State Armed Conflict & Compliance Dataset (MSACC) 1947-2014, Syracuse University, Institute for National Security & Counterterrorism (INSCT), College of Law/Maxwell School of Public Affairs, available at: http://insct.syr.edu/projects/security-in-the-middle-east-islam/conflict-compliance-in-muslim-states/. The dataset gathers information on the 57 constitutions-in-force of all OIC states, as well as the 7 superseding constitutions and drafts from post-Arab Spring states, bringing this portion of the dataset to a total of 64 of constitutions for all 57 states.

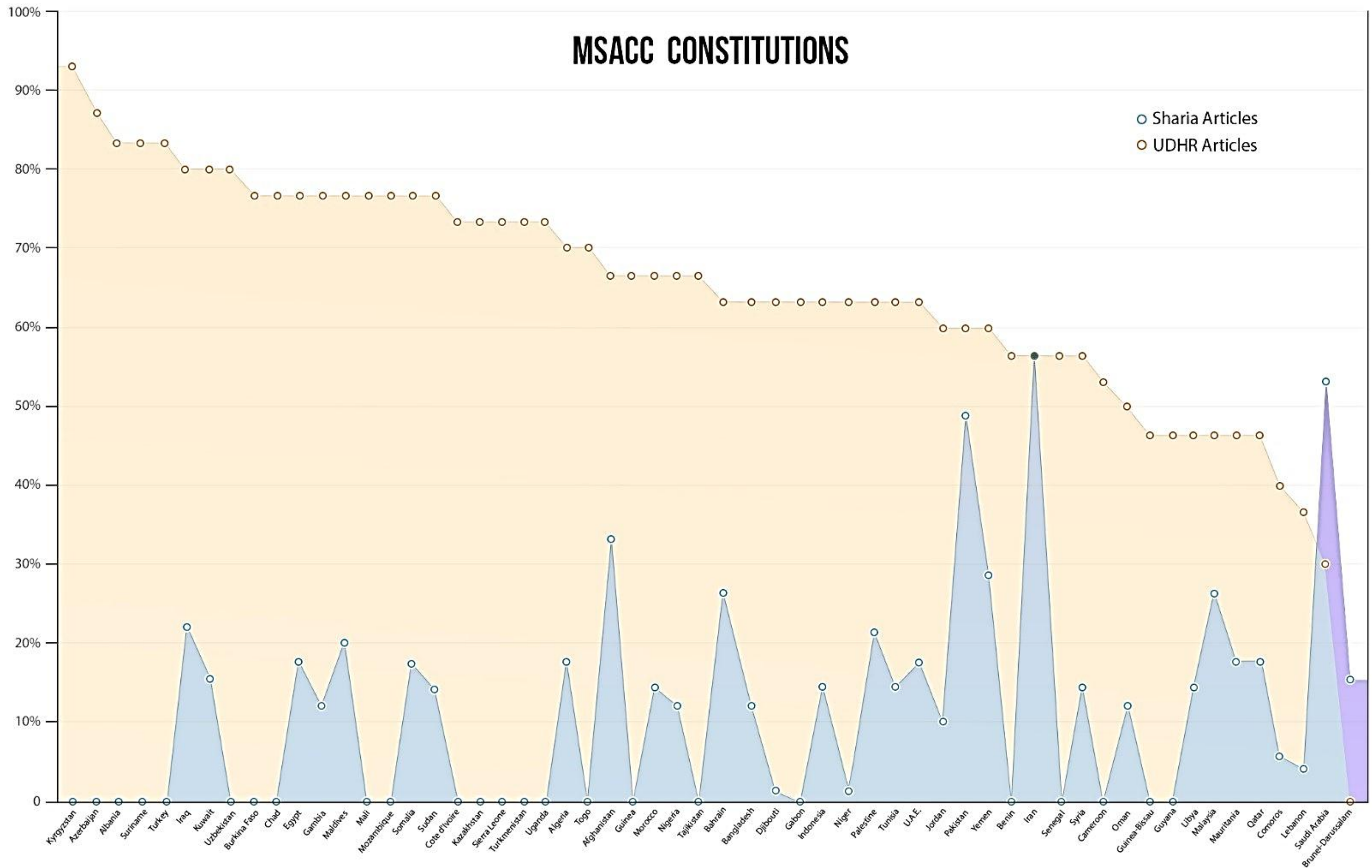

Figure 1. All Shari'a Articles by State as Compared with UDHR Articles

Hamoudi, among other scholars, notes a similar, troubling tendency well beyond the legal academy and ots pedagogy—in western approaches to rule of law reform in postconflict Muslim states.[27] Using well-known examples of "shari'a guarantee" or "repugnancy" clauses—the injunction, as in Article 2 in the Iraqi 2005 constitution, that all existing laws must conform with Islam—Hamoudi notes a near obsession with *shari'a* [28] as the presumed core legal and normative foundation of all modern Muslim constitutions and in matters of governance, generally.[29] One prominent theme on this subject is "the perception of the near

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[27] Hamoudi, "Dream Palaces of Law" (2009).

[28] See, for instance, Clark Lombardi, "Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State," *Columbia Journal of Transnational Law* 37 (1998): 81; Larry Cata Backer, "Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering," *Indiana Journal of Global Legal Studies* 16.1 (2009): 85-172; Noah Feldman & Roman Martinez, "Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy," *Fordham Law Review* 75.2 (2006): 883-920, p.884-5; Ran Hirschl, "The Theocratic Challenge to Constitution Drafting in Post-Conflict States," *William and Mary Law Review* 49.4 (2008): 1179-1211.

[29] "Repugnancy clauses" are "those constitutional provisions that, in language that varies from nation to nation, require legislation to conform to some core conception of Islam." See Haider Ala Hamoudi, "Repugnancy in the Arab World," *Willamette Law Review* 48 (2012): 427-450, p. 427. See, also, historical, colonial era discussions of these clauses as imposed by the British, particularly among African states, originally designed to limit local customary law to the extent it was deemed repugnant to principles of natural justice or public policy, See N.S. Peart, "Section 11(1) of the Black Administration Act No 38 of 1927: The Application of the Repugnancy Clause," *Acta Juridica* (1982) 99-116; T.W. Bennet, "Customary Law in South Africa," (2004): 67, p. 68; A.N. Allott, "What Is to Be

ubiquitous role of Islam" and Islamic law—albeit of a medieval kind—in "governing the legal order of Muslim states" in a manner that is "entirely distorting." [30] Like Abu-Oden, Hamoudi believes this prevalent story told about Islamic law, itself "a template for a broader misunderstanding of the Muslim world," posits secular law in the region as "illegitimate," to be "viewed with suspicion," and sustainable only "by brutal suppression of alternatives."[31] In fact, when and where obvious secular Muslim legal institutions, traditions, and government mechanisms present themselves, "[t]his is where our [western] scholars insert themselves, where the media leaves off, and provide, as their answer to the conundrum, that same *shari'a*."

In the case of Iraq, here is the logic that Hamoudi identifies:

> If the Constitution, it is argued, declares that laws may not be passed that violate the core tenets, or unambiguous rulings, or certain provisions of the *shari'a* (the so-called repugnancy clause), then the legislature becomes in essence an administrative authority, enacting secular codes but at the same time in doing so not only avoiding contravening God's rule, but indeed acting in furtherance of the goals of God's Law. As to whether this is good or bad, the learned will differ, but it is the story. The religion, above all, from a legal perspective, is fundamentally about the discovery of God's Law from sacred text, and all else must be justified on the basis of that.[32]

If *shari'a* is not dominant in the black letter law, it must be so in the spirit of the constitution; and if it is not obvious in the text of the constitution, then the legislature becomes a proxy agent for deep-seated *shari'a*. Even when secular alternatives are made forcibly available—as in the U.S. invasion of Iraq that toppled already secular Saddam Hussein in Iraq in 2003—Islam still "inserts itself," according to this view, in the "form of classical *shari'a,"* the "body of rules and norms derived from sacred text by the medieval jurists of the four schools of thought," which is substituted for "the law of the land."[33] Not only is it essential to expose this *shari'a* bias, Hamoudi argues, but to offer alternative "rudimentary ideas on how law, both Islamic

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Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950," *Journal of African Law*, 28. 1/2, in *The Construction and Transformation of African Customary Law* (1984): 56-71; and Gerald M. Caplan, "The Making of Natural Justice in British Africa: An Exercise in Comparative Law," *Journal of Public Law* 13 (1964): 120-133. Hamoudi (2012: 427, n.1) points out that these colonial natural law clauses are the reverse of Islamic repugnancy clauses "in that they subvert an indigenous law in favor of a Western transplant," and the term was used "in the Islamic constitutional context as early as 1973, where it appeared in the 1973 Constitution of Pakistan, 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." See the Iraqi Constitution (2006), Art.2: "First: Islam is the official religion of the State and is a foundation source of legislation: A. No law may be enacted that contradicts the established provisions of Islam. B. No law may be enacted that contradicts the principles of democracy. C. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution. Second: This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandean Sabeans."

[30] Hamoudi (2009: 805). See, also, Clark B. Lombardi, "Designing Islamic Constitutions: Past Trends and Options for a Democratic Future," *International Journal of Constitutional Law* (2013) 11.03: 615-645, p. 615, for a treatment of "shari'a guarantee clauses," in which "a growing number of countries have adopted constitutional provisions requiring that state law be consistent with Islamic law (sharia)," even as Muslims are "deeply divided about what types of state action are consistent with sharia."

[31] Ibid, 806.

[32] Ibid, 806-7.

[33] Ibid, 806.

and secular, in the Muslim world might better be studied and understood, particularly by comparatists."[34] The recent historical record provides a very good place to start.

That is, these topics are not merely academic—particularly in Iraq and Afghanistan, where U.S. forces played an advisory role in constitutional drafting processes.[35] Other post-Arab-Spring states—notably, Tunisia, Egypt, and Libya—used their political transitions, in part, as a constitutional moment: in the case of Egypt, for instance, the constitution changed three times in three years (from 2011-2013). As Nathan Brown (2014: 308) notes, political mobilizations in Egypt and elsewhere captured such political contention in constitutional reform and in that context, shari'a and governance were raised once again, as fundamental questions of political authority were hashed out in public debate.

Yet, notably, this overarching, even exclusive concern with *shari'a,* is a topic, by contrast, that garners little interest among respective Muslim legal establishments, according to Hamoudi. In perusing the Supreme Federal Court of Iraq's decisions on constitutional matters, Hamoudi has "yet to come upon a case that even cites Article 2 of the Constitution at all."[36] The explanation for this absence is notable: Baghdad judges "hardly wish to pronounce on *shari'a* in a manner that might vex the jurists of Najaf," in part because "the Constitution envisages judge and jurist working together on the Court, and no Iraqi judge I have met has the slightest proclivity toward working on a court with people that have no legal training and whose professional culture is entirely different."[37] As one judge explained, "So long as the court stays out of *shari'a,* then Najaf will probably stay out of the court." [38] So much for a lack of church-state separation in the Muslim world. In Tunisia, the inclusive constitutional drafting committee (the National Constituent Assembly) made a decision relatively early on (Mar. 2012) to eliminate prolonged discussion of the constitutional role of Islam—understanding its divisive potential—while the more important debate remained over the form of government (i.e., parliamentary system).[39] Ultimately, despite claims of contradiction, Tunisia maintained

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[34] Ibid. Hamoudi (2009: 813) also notes that "all of our law schools would do well with a few more Muslim lawyers and legal professionals and a few less experts on medieval jurisprudence."
[35] See Feldman & Martinez, *supra* note 28, and Deeks, *infra* note 34, respectively.
[36] Ibid. See, also, Haider Ala Hamoudi, "Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution," *St. Thomas University Law Review* 7.3 (2011): 101-123; and "The Death of Islamic Law," *Georgia Journal of International and Comparative Law* 293.
[37] Ibid, 808.
[38] Ibid.
[39] "Tunisia's Islamist Ennahda Edges Away from Sharia," *BBC News,* 26. Mar 2012, http://www.bbc.com/news/world-africa-17517113. One of the first acts even before President Zine El Abidine Ben Ali's departure (14 Jan. 2011) was the election (23 Oct. 2011) of a National Constituent Assembly (NCA) to draft the new constitution. The NCA issued on 16 Dec. 2011 an interim constitutive law (*Law on the Provisional Organization of Public Authorities*) to put in place a transitional government, supersede the 1959 constitution, and guarantee human rights during the drafting period. After some constitutional tussling over Prime Minister Mohamed Ghannouchi's status as acting President, the Constitutional Council (authorized by Art. 56) declared the presidency vacant, noted (under Art. 57) that Fouad Mebazaa (house of Parliament leader) was to become interim President (sworn in on 15 Jan. 2011). Vigorous debate, several assassinations of opposition leaders, and an obstructionist Islamist Ennahda party (which finally stepped back from power) delayed progress. The new constitution was put to vote on 26 Jan. 2014 and adopted by the NCA (200–12 vote with 4 abstentions) with these remarks by President Marzouki: "With the birth of this text, we confirm our victory over dictatorship."

Islam as a state religion, but posited "the people" as the source of political legitimacy in both text and government.[40]

At issue in elite scholars' shari'a obsession is a fascinating oscillation between decrying the malevolent rise of "theocratic constitutionalism" as per, Backer (2009), Satloff & Trager (2012) among others, and its opposite, the perspective that hopes for the advent of rule of law "in the benighted Abode of Islam."[41] Either way, from this notion that *shari'a* justifies the enactment of secular and civil codes through Islamic constitutionalism, much follows in western academic and even policy discourse: "How to justify the trial and capture of Osama Bin Laden? Try him according to classical Islamic criminal rules!" How to deal with development loans from the international community for postconflict reconstruction in Iraq, "simply create the rules in the manner that comply with Islamic finance!,"—whether Islamic banks exist in Iraq or not.[42]

Yet, in even transitioning states, very different and more balanced solutions are at work. Referring again to Iraq, Hamoudi notes that despite being empowered to do so under Article 2, Iraq's Federal Supreme Court has not taken up the charge to rule on the conformity of any law to the "settled rulings of Islam," as mentioned, making the repugnancy clause "swiftly devolving" from a matter of importance during constitutional drafting negotiations into "one that is more symbolic than real," equivalent to an "assertion of identity, primarily of the Islamic variety" rather than "a phrase of legal substance."[43] Iraqis have achieved "a careful, unspoken consensus, that irrespective of the extent to which Islam or Islamic law is to be relevant in Iraq, the judiciary is not the institution best equipped to address questions of Islamicity of law," and, thus, Article 2 and the very idea of repugnancy are "at best, marginal in terms of its legal effect."[44]

A similar "balancing" approach—bordering on the inchoate—is likewise evident in the aspirational language of the new Tunisian 2014 constitution:

> We, the representatives of the Tunisian people, members of the National Constituent Assembly, Taking pride in the struggle of our people to gain independence and to build the State, to eliminate autocracy and achieve its free will, as a realization of the objectives of the revolution of freedom and dignity. . .and to break with oppression, injustice and corruption; Expressing our people's commitment to the teachings of Islam and its open and moderate objectives, to sublime human values and the principles of universal human rights, inspired by our civilizational heritage. . ., and

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[40] Zaid Al-Ali and Donia Ben Romdhane, "Tunisia's New Constitution: Progress and Challenges to Come," *Open Democracy*, 16 Feb. 2014, available at: https://www.opendemocracy.net/arab-awakening/zaid-al-ali-donia-ben-romdhane/tunisia%E2%80%99s-new-constitution-progress-and-challenges-to-.

[41] Ibid, 807. See, *supra*, note 23 Backer, "Theocratic Constitutionalism" (2009); Robert Satloff & Eric Trager, "Egypt's Theocratic Future: The Constitutional Crisis and U.S. Policy," *The Washington Institute*, Dec. 3, 2012, accessed August 12, 2014, http://www.washingtoninstitute.org/policy-analysis/view/egypts-theocratic-future-the-constitutional-crisis-and-u.s.-policy.

[42] See, *supra*, note 16, Vogel, "Trial of Terrorists under Classical Islamic Law" (2003); Mark J. Sundahl, "Iraq, Secured Transactions, and the Promise of Islamic Law," *Vanderbilt Journal of Transnational Law* 40 (2007): 1301-1344 (arguing for making the standard secure transaction provision in Art. 9 of the Uniform Commercial Code (UCC) Islamic finance compliant); Clark Lombardi & Nathan J. Brown, "Islam in Egypt's New Constitution," *Foreign Policy, December* (2012): 2013-19.

[43] Hamoudi *"Ornamental Repugnancy"* (2011: 104).

[44] Ibid.

from our enlightened reformist movements that are based on the foundations of our Islamic-Arab identity and to human civilisation's achievement. . .; With a view to building a participatory, democratic, republican regime, under the framework of a civil State where sovereignty belongs to the people through peaceful rotation of power through free elections, and on the principle of the separation of powers and balance between them; in which the right to association based on pluralism, neutrality of administration and good governance constitute the basis of political competition; and where the State guarantees supremacy of the law, respect for freedoms and human rights, independence of the judiciary, equality of rights and duties between all male and female citizens and fairness between all regions…[45]

Notice the inclusive language, which may be considered contradictory, but serves to develop a Tunisian political identity, balanced by historical and cultural framings, with an eye toward political unity and procedural inclusivity.

To be fair, some legal scholars under scrutiny, Feldman & Martinez (2006), for instance, anticipate—only one year after the finalized Iraqi 2005 constitution—that "the text alone is unlikely to determine the balance once and for all" between "Islam and democracy in Iraq's political order."[46] No doubt, Hamoudi, Abu-Oden, Howard & Walters (2014a; 2014b) would likely object to these opposed terms: the counterweight to democratic governance is more likely authoritarianism (or lack of governance altogether), not Islam. Yet, Feldman & Martinez get right the fact that for many reasons, "including the ongoing insurgency, the constitution's own textual ambiguities, and rapidly shifting ethnic and sectarian alliances," the "final balance" in Iraq "will depend as much on everyday political practice as on specific constitutional provisions."[47] In this sense, they are also right to suggest that the "Iraqi constitutional process continues, even after ratification of the document itself."[48]

But it is therefore odd—and telling—that Feldman & Martinez offer a "caveat" that would not only seem to affirm Hamoudi's worries but undermine their own analysis. They note that although their essay "focuses on the interaction between Islamic and democratic principles in the Iraqi constitutional process," it is "a striking fact that this interaction was not the major source of controversy among domestic political actors inside Iraq as the drafting unfolded."[49] Who then, one wonders, was this subject "the major source" of interest and controversy for?—a question Hamoudi has in effect answered. The authors continue:

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[45] Preamble, Tunisian (2014) constitution, unofficial English trans., available at http://www.jasmine-foundation.org/doc/unofficial_english_translation_of_tunisian_constitution_final_ed.pdf.
[46] Noah Feldman & Roman Martinez, "Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy," *Fordham Law Review* 75.02 (2006): 883-920.
[47] Feldman & Martinez (2006:884)
[48] Ibid.
[49] Ibid, 885.

"Federalism, not religion, proved the most contentious issue of all in Iraqi constitutional negotiations." [50] Like, Tunisia, the brass tacks of governance, its form and structure, remain the priority. Feldman & Martinez continue: "From the beginning, most Iraqi politicians agreed that their new regime would embrace Islam, democracy, and human rights simultaneously." [51] Such priorities, again, echo Tunisia's 2014 Preamble—however wide-ranging and inchoate. "The only serious differences on these issues," Feldman & Martinez note, "concerned precisely how to balance these commitments within the constitutional text"—a familiar problem. In fact, the authors mention, the "Iraqi drafting debates over this balance were often fierce" as "competing attitudes over Islamic politics. . .fueled many of the most passionate arguments over specific constitutional provisions."[52] Curiously, though Iraqi federalism was rife with passionate interest and debate for Iraqis, nevertheless, the "article examines the Iraqi constitution's approach to federalism only to the extent that the federalism settlement may impact the role of Islam in Iraq's emerging political and constitutional order." [53] Even clear political priorities that foreign advisors can see from their privileged 'on the ground' perspective embedded in the Iraqi constitutional drafting process are subordinated to "everything Islam." [54]

Hamoudi and Feldman could not be more diametrically opposed in their view of postconflict constitutionalism. In their debate, we can make out the anatomy, not only of current assessments of post-Arab Spring transitioning states and their struggles, but a broader set of assumptions about law and political authority in Muslim states. Hamoudi critiques Feldman for going even further than Backer's (2009) "theocratic constitutionalism" in finding in *shari'a* guarantee or repugnancy clauses (in Iraq and elsewhere) primordial evidence of the "rise and return of the Islamic State"—after its dramatic collapse over a century ago. If such articles (i.e., Article 2) were so important to the Iraqi legal and policy framework to fuel the "Rise of the Islamic State" (or even to create "theocratic constitutionalism"), one would think that "surely the Iraqis themselves would have paid more than passing attention" to these articles by now.[55] Such arguments, the use of *shari'a* to justify the laws of the Muslim world, Hamoudi notes, are "even more misguided when we leave the world of constitutionalism." Not even an Islamist party in Iraq recommended, for instance, using Islamic criminal penalties to try Saddam Hussein, and the divisions over his trial and execution "divide[d] neatly along sectarian lines, not levels of religiosity."[56] In fact, Hamoudi notes, "no Iraqi legal professional I know, no matter how devout, no matter how Islamist, would find navigating medieval criminal *shari'a* any more

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[50] Ibid. For more on the federalism question, see Haider Ala Hamoudi, "Post-Ratification Consensus Construction: The Federalism Question," in *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (University of Chicago Press, 2013): 151-182.
[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] A counterpoint is legal advisors at the U.S. Embassy in Bagdad Ashley S. Deeks & Matthew D. Burton's account of the Iraqi constitutional drafting history which, once again, begins with "Islam as a Foundation Source"—but ostensibly as a reflection of drafters' recorded conversations from late June 2005 when the first set of provisions emerged from the Constitutional Committee, until mid-October 2005, when Iraqi leaders agreed on final changes. See "Iraq's Constitution: A Drafting History," *Cornell International Law Journal* 40 (2007): 2-84.
[55] Hamoudi, "Ornamental Repugnancy" (2011:102).
[56] Ibid.

comprehensible than Attorney General Mukasey would."[57] Such distinctions are important in a moment when nonstate actors are, indeed, hearkening back to Feldman's Islamic primordialism to undermine existing states in the Levant—polities in which matters of balance, not to mention political inclusivity, are aggressively dismissed.

While such purist approaches have somewhat subsided as the events of 9/11 have receded in time and as scholarship has evolved, twin insights are now available both within the legal and political scholarship on these constitutional and postconflict questions. [58] First, the reality that "legal pluralism," is the better, more accurate marker of the discussions and debates of political authority (codified in constitutions) in postconflict states, not primordial *shari'a*, even when communities seem to be fighting over the role of Islam and shari'a authority. Second, constitution drafting itself is a defining political and political-identity moment—a moment in which at the very least political elites must struggle together for both political consensus and hegemonic consent, a moment complicated by external experts proffering well-intentioned help and advice.

No doubt, what complicates understanding this moment, as all sides might agree, is that much of the controversy surrounding Islamic provisions in constitutional debate rests upon confusion, on the opacity of what constitutes *shari'a* or even Islamic law, more broadly. For Hamoudi, this gap has been unfortunately filled, however, in the current U.S. legal and policy discourse by overreliance on the false assumption that contemporary Islamic rules are derived from classical doctrine, and further that such shari'a doctrine has everything to do with how modern Muslims approach governance.[59] Quite the contrary, the past remains not only an invention, but a means to validate an approach rather than to accurately reflect past norms, a product of mediation among competing influences in modern Muslim society.[60]

3.0 SHARI'A DENSITY: BUILDING A SHARI'A DENSITY CONSTITUTIONAL DATASET

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[57] Ibid. The same point could be made about Art. 9 and Islamic finance in a state in which there are no significant Islamic banks, there have been no moves by any major Islamist party to ban the taking of interest on a loan, and the Minister of Finance, from the country's largest Islamist party, has agreed to reductions of state debt in a manner that recognizes a reduced, but very real, obligation to pay down debt, with interest.

[58] It is worth noting, that such purist approaches are seeing a resurgence among nonstate and transnational armed groups. See C. Zoli & C. Schuster, "What Egypt's New Constitution Tells Us About Political Transition," *The Fletcher Forum of World Affairs,* July 22, 2014, http://www.fletcherforum.org/2014/03/12/zoli_schuster/; C. Zoli & E. Schneider, "Sharia Strategy: Rule of Law Replacing the State," Feb. 4, 2014, Carnegie Endowment for International Peace; and C. Zoli & E. Schneider, "shari'a Courts Move to the Battlefield," Feb 3, 2014, *Harvard National Security Journal*, http://harvardnsj.org/2014/02/sharia-courts-move-to-the-battlefield-jabhat-al-nusra-opens-a-legal-front-in-the-syrian-civil-war/.

[59] Haider Ala Hamoudi, "The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law*," The American Journal of Comparative Law*, 56 (2008): 423-470, p. 423 (noting that "Given the structural pluralism of the rules of the classical era, "there is no sensible way that modern rules could be derived from classical doctrine, either in letter or in spirit," and efforts to forge such rules have failed").

[60] Hamoudi (2008: 423) takes a stab at two of those "major influences." One is a movement of resistance, "clothed in Islamic rhetoric, against the dominant global economic and political order in order to create a separate Muslim sphere within which the Muslim polity may operate," The other posits the "need to engage the broader global order, commercially and politically, in order to restore some level of political and economic power to the Muslim world." In either case, "a proper study of influences of this sort that have led large numbers of Muslims to adopt particular shari'a positions on economics, finance, war, and numerous other realms is absolutely vital in the post 9/11 era in order to understand and engage substantial, important segments of the Muslim community in their call for a reinvigoration of the shari'a."

As mentioned, few scholars have examined how *shari'a* principles are embedded in states' formal constitutions—in cross-national and comparative empirical inquiry—or explored transitioning Muslim states' constitutions in terms of *shari'a* content. Without such data, it is difficult to test rudimentary claims of "constitutional Islamization"[61] in which Muslim constitutional regimes are seen as increasingly moving away from earlier "secular arrangements" toward laws based in *shari'a*, as per Feldman's (2008) "rise of the Islamic state" thesis.[62] On this matter, incidentally, we found only 21 constitutions out of 64—less than half—that declared *shari'a* to be the main source of legislation. In fact, only 34 out of 64 total constitutions, slightly more than half, even stipulate Islam as the state religion—whereas 28 have no official state religion. Such preliminary descriptive findings add caution to rising Islamization theses—particularly in matters of law and governance in conflict and postconflict settings.

More subtly, academic debate on Islamic constitutionalism also often features doubts that a state, drawing from Islamic law constitutionally, can sustain liberal democratic values or human rights.[63] Bruce Rutherford, Intisar Rabb, and Clark Lombardi, for instance, believe Islamic constitutionalism supports democratic values—institutions that constrain the state, public participation, and rule of law—but find this compatibility more ambiguous or indeterminate when it comes to individual rights.[64] Hamoudi, as mentioned, finds the fixation on "constitutional Islamization" overblown as the role of repugnancy clauses are "extremely limited" and only selectively applied.[65] Once again, we found that only 9 constitutions of the 64 contain repugnancy clauses prohibiting laws (or decisions by councils) from being contrary to Islam or that stipulate Islamic law cannot be abridged by domestic law; we also found that only 5 constitutions contained repugnancy clauses that prohibited political institutions from being contrary to Islam.

I mention these preliminary examples to indicate—not only the direct utility of cross-national data on longstanding scholarly and policy debates—but to show how empirical findings can change the very course and paradigmatic questions under discussion in ways that advance the research.

Figure 2. Shari'a Density by County

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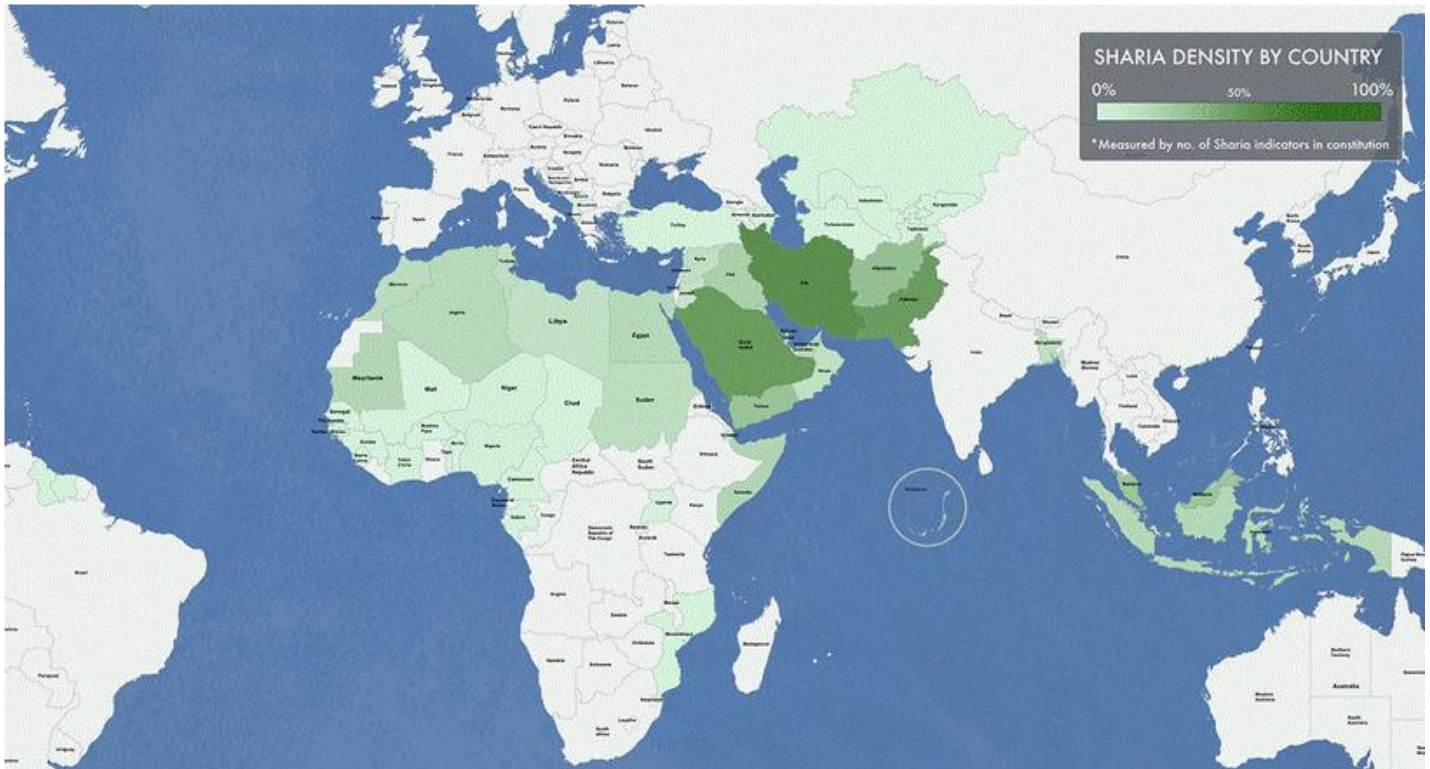
[61] Intisar Rabb describes "Islamic constitutionalism" as a "modern governing structure of limited powers in which a written constitution designates Islamic law as a source of law." *See* Intisar A. Rabb, "We the Jurists: Islamic Constitutionalism in Iraq," *University of Pennsylvania Journal of Constitutional Law* 10, no.3 (2008): 527- 579, 528.

[62] Noah Feldman, Introduction to *The Fall and Rise of the Islamic State* (Princeton: Princeton University Press, 2008), 2.

[63] *See* Rabb, "We the Jurists" (2008); Hannibal Travis, "Freedom or Theocracy? Constitutionalism in Afghanistan and Iraq," *Northwestern University Journal of International Human Rights* 3, no. 4 (2005): 1-52; Clark B. Lombardi, "Can Islamizing a Legal System ever Help Promote Liberal Democracy?: A View from Pakistan," *University of St. Thomas Law Journal* 7, no.3 (2010): 649- 691, 650. Travis (2005) argues that Islamic constitutionalism is inherently undemocratic and by its constitutional incorporation, states may become "enduring…Islamic fundamentalist" states antithetical to human rights. Lombardi (2010) argues that "constitutional Islamization" is not intrinsically inconsistent with democratic values, but Muslims "embrace differentiated views" on *shari'a*, whose results depend upon whether Islam itself is understood as consistent with the rule of law. Rabb, likewise, sees a problem with *shari'a* understood as a monolith across constitutions as it excludes this "legal interpretative process" and varying results—though Rabb also raises concerns about whether the "modes of legitimate and authoritative interpretation" can be reconciled with democratic and religious concerns.

[64] Bruce K. Rutherford, "What Do Egypt's Islamists Want? Moderate Islam and the Rise of Islamic Constitutionalism." *Middle East Journal* 60, no.4 (2006): 707-731, 731.

[65] Haider Ala Hamoudi, "The Death of Islamic Law," *Georgia Journal of International Law* 28 (2010): 294-334.



3.1 Defining Shari'a for Empirical Inquiry

In determining a research design to compare *shari'a* constitutional content across all modern Muslim states, a foremost methodological concern was to arrive at a working definition of shari'a. Using interdisciplinary scholarship on Islamic law to make this determination,[66] most discussions describe *shari'a* as the "religious"[67] or "sacred" law of Islam,[68] "an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects," a set of codes that places "on an equal footing ordinances regarding worship and ritual, as well as political and (in the narrow sense) legal rules." [69] There is a practical dimension to *shari'a*, as Abdullahi An-Na'im emphasizes: "complying with the dictates of shari'a is the way to realize Islam… in the daily lives of Muslims."[70] Beyond rules and compliance, *shari'a* also constitutes the quotidian and ethical aspects of Muslim daily life—one of Hallaq's (2013) simplest points in his latest discussion of Islamic governance—from familial obligations, to economic, political and international exchanges.[71] As Joseph Schacht explains, *shari'a* itself amounts to the "typical manifestation of the Islamic

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[66] *See* Wael B. Hallaq, *An Introduction to Islamic Law* (NY, Cambridge Univ. Press: 2009)*; supra* note 14, Schacht, *Introduction to Islamic Law* (1964); Mohammad H. Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 2003).
[67] See, *supra* note 13, Hallaq, *Origins and Evolution of Islamic Law* (2005: 1).
[68] Gerhard Bowering, ed., *The Princeton Encyclopedia of Islamic Political Thought* (Princeton: Princeton University Press, 2012), 497.
[69] See, *supra* note 14, Schacht, *Introduction to Islamic Law* (1964: 1).
[70] Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of shari'a* (Cambridge: Harvard Univ. Press, 2008), 10.
[71] Wael Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (NY: Columbia University Press, 2013).

way of life, the core and kernel of Islam."[72] Finally, insofar as Islamic law refers to both *shari'a* and *fiqh* (Islamic jurisprudence), where *shari'a* is "divine law" in the Quran and *Sunna* (the sayings and doings of Prophet), and *fiqh*, jurists' interpretive efforts,[73] Islamic law means both *shari'a,* the divine and canonical law of Islam, and its jurisprudence.[74] In this sense, Islamic law is derived from *shari'a* through juristic interpretation, so that *shari'a* is a source of Islamic law, not its entire body.[75] It is in this derivative and epistemic capacity that Bassiouni describes as "*shari'a* policy."[76]

Our analysis of *shari'a* content in Muslim state constitutions includes *rules* from Islamic law, found in primary Quranic and *Sunna* sources,[77] and general shari'a *principles* i.e., the "general principles, guidance, prescriptions and proscriptions" contained in primary sources.[78] The difference between "rules" and "principles" has been the subject of much debate, as adherence to "principles" requires states to follow the "spirit" (or "basis") of shari'a norms, a broader category than rules, and allows for juristic and legislative interpretation and modernization.[79] This distinction is visible in the provisions of some of the post-Arab Spring constitutions: the 2013 Egyptian constitution declares that "the principles of Islamic shari'a are the principal source of legislation,"[80] and the task of interpreting the "principles of Islamic Sharia" rests with the Supreme Constitutional Court.[81] We found, for instance, 9 constitutions from our dataset that follow the *provisions* or *spirit* of *shari'a*, whereas 21 have clauses declaring that *shari'a* as the main source of legislation—for a total of 30 (again, less than half) declaring some soft or hard shari'a bedrock at work in the charter.

Relatedly, scholars have pointed out that discussions of the role of religion in state affairs have become animated in post-Arab Spring constitutional drafting processes. In Egypt, for instance, the debate centered on whether to retain the pre-existing *shari'a* supremacy clause (Article 2 in the 2012 constitution),[82] which had made principles of *shari'a* "the principal source of legislation." Many commentators both within

[72] See, *supra* note 14, Schacht, *Introduction to Islamic Law* (1964: 1).
[73] John L. Esposito, ed., *Oxford Dictionary of Islam* (New York: Oxford University Press, 2003), 148.
[74] Y.Y. Haddad & B.F. Stowaser, eds., *Islamic Law and the Challenges of Modernity* (Walnut Creek: AltaMira Press, 2004), 4.
[75] M. Cherif Bassiouni, *shari'a and Islamic Criminal Justice in Time of War and Peace* (NY: Cambridge University Press, 2014): 40-43.
[76] Bassiouni (2014: 253) notes that modern Islamic legal thought in postconflict justice "has been impaired by the lack of development in the techniques and application of…the goals and policy of the sharia."
[77] *See* Majid Khadduri, "Nature and Sources of Islamic Law," *George Washington Law Review* 22 (1953): 3.
[78] The *Sunna* is what the Prophet Muhammad has said, done, or tacitly approved. See Hallaq, *Introduction to Islamic Law* (2009: 16).
[79] C. Zoli & C. Schuster, "*What Egypt's New Constitution Tells Us About Political Transition*," *The Fletcher Forum of World Affairs,* July 22, 2014, http://www.fletcherforum.org/2014/03/12/zoli_schuster/.
[80] Clark Lombardi, "Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State," *Columbia Journal of Transnational* Law 37 (1998): 81, 97-98; Kristen Stilt, *Islam is the Solution: Constitutional Visions of the Egyptian Muslim Brotherhood*, 46 Texas Int'l L.J. 73 (2010). Full text of the 2013 Egyptian Constitution available at: http://www.atlanticcouncil.org/images/publications/20131206EgyptConstitution_Dec.pdf.pdf
[81] For a discussion of the contentious issues related to interpreting the "principles of Islamic Sharia," as well as implication of "the principle source of legislation" rather than "a chief source of legislation," used in the 1971 Constitution, see *supra* note 36, Lombardi & Brown, "Islam in Egypt's New Constitution" (2012). See also Clark Lombardi & Nathan J. Brown, "Do Constitutions Requiring Adherence to shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law," 21 *Am. U. Int'l L. Rev.* 379 (2006).
[82] Art. 2 of the 2012 Egyptian Constitution reads as: "Islam is the religion of the state and Arabic is its official language. The principles of Islamic Sharia are the principal source of legislation." *See* "The New Constitution of the Arab Republic of Egypt," available at: http://www.constitutionnet.org/files/final_constitution_30_nov_2012_-english-_-idea.pdf.

and outside the country lamented the risks of incorporating such a clause in the new 2014 constitution.[83] Moreover, the introduction of Article 219,[84] which more narrowly defined shari'a "principles," to include only Sunni doctrine was particularly controversial.[85] Article 219 was omitted in the current constitution-in-force in Egypt (adopted by referendum in January 2014), the new constitution continues to retain Article 2, which makes principles of shari'a the "principal source of legislation."[86]

While the omission of the Article 219 makes the 2013 Egyptian constitution more pluralistic and open for broader interpretation, it continues to exist in an environment where concerns are rife that a constitution incorporating Islam cannot provide democracy and human rights. Despite this general skepticism, as Hanna Lerner warns, it is useful to consider that "the ideal of liberal constitutionalism is not compatible with the political realities and the types of conflict that characterize contemporary societies deeply divided by the religious character of the state."[87] At the same time, as Lerner has described, a "permissive constitutional approach," which employs strategies of "constitutional ambiguity, ambivalence and vagueness," permitting larger dynamism in the interaction between governance and religion, allows democratic values to exist in a religion based constitutional arrangement.[88] Therefore, constitutions such as the 2013 Egyptian constitution, arguably, allows this permissiveness to exist through its broader (rather than "restrictive approach" reflected in suspended Article 219) approach—despite its evidently Islamic character by virtue of the Shari'a supremacy clause (Article 2).

3.2 Sample Frame

3.3 Constitutional Categories as Indicators of Shari'a Density

Given the broad reach of *shari'a* norms in the legal, political, and social aspects of Muslim life, we organized *shari'a* constitutional content under 6 representative thematic categories, which are comprised of 52 indicators taken directly from the language of sample constitutions. That is, the 52 indicators are nothing more than common shari'a based content found within the constitutions, with substantially similar language from various constitutions combined into like columns and then sorted into 6 thematic groups. Analysis is, thus,

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[83] Sara Labib argues that Arts. 2 and 219 of the 2012 Egyptian constitution gave the "government power to play an intrusive role in the lives of the citizens by invoking religion." She also states that Salafis always considered Art. 2 as "mere décor," which they sought to correct by specifically defining "principles" under Art. 219. *See* Sara Labib, "Constitutional Highway to Theocracy," *Open Democracy*, Dec. 13, 2012, https://www.opendemocracy.net/sara-labib/constitutional-highway-to-theocracy.

[84] Art. 219 provides: "The principles of Islamic Sharia include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community."

[85] It was argued that the drafting process was non-pluralistic—excluding non-Islamists and religious minorities—that led to Art. 219 being restrictive and narrow. The new article, therefore, is far stricter than the very broad Art. 2, and it now specifically describes to "legislators how to examine Sharia." *See* Satloff & Trager, "Egypt's Theocratic Future (2012).

[86] See Art. 2, "Draft Constitution of the Arab Republic of Egypt, 2013" http://www.constitutionnet.org/files/final_constitution_-idea-_english-2_dec_2013-signed.pdf. See *supra* note 36, Lombardi & Brown, "Islam in Egypt's New Constitution" (2012).

[87] Hanna Lerner, "Permissive Constitutions, Democracy and Religious Freedom in India, Indonesia, Israel and Turkey," *World Politics* 56, no.4 (2013): 609-655, 611.

[88] Ibid.

based on the 52 indicators rather than the 6 categories, which serve as an organizational tool rather than a basis for meaningful interpretation.

A brief description of these categories is provided here—see Appendix I (below) for a more detailed description of our methodology and coding scheme. Moreover, given space constraints I only provide limited findings and their discussion, by category, below.

(1.) ***Sources of Shari'a (Quran, Sunna, Hadith) category:*** includes constitutional provisions that give principal or heightened significance to shari'a in the charter i.e., constitutional provisions stating that shari'a is the supreme law of the land; shari'a takes precedence over (or contravenes) domestic or international norms; shari'a is the main source of legislation; the constitution must follow the spirit or principles of Islam; Islam is the state religion; etc. This category includes what are known as shari'a "supremacy" clauses, that is, "clauses in constitutions that privilege the status of Islamic law" or emphasize its "normative superiority."[89]

(2.) ***Law & Legislative Shari'a Rules*** for authorizing and/or contravening domestic law and legislation (i.e., *shari'a* guarantee or repugnancy clauses). Clauses declaring shari'a as "the" or "a" source of law were first introduced in Syria in 1950 and can since be found in 38 constitutions, as Clark Lombardi (2013) notes.[90] These and related provisions are included in the "law and legislative" category in the dataset and have featured in the work of Hirschl, Feldman, Rabb, Lombardi, etc., who discuss them under the theme of "constitutional Islamization." We use the "law and legislative" category to reflect constitutional provisions that make a direct link between *shari'a* norms and the legal and legislative make-up of the country: provisions that require laws, including penal codes, to be *shari'a* based or those specifying that domestic law cannot be contrary to *shari'a* (i.e., repugnancy or guarantee clauses).[91] Such clauses that require legislation to comport with *shari'a* render laws contrary to Islamic rules or principles void.[92] Including *shari'a* guarantee or repugnancy clauses in our dataset offers an empirical baseline for framing debates over "constitutional Islamization" or "Islamic constitutionalism"[93] and Feldman's "rise of the Islamic state."[94]

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[89] See Ahmed & Ginsburg (2014), *supra* note 10, "Constitutional Islamization and Human Rights."
[90] *See* 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?," *American University International Law Review* 28 (2013): 733-74, 743-46.
[91] Clark Lombardi, "Designing Islamic Constitutions: Past Trends and Options for a Democratic Future," *Legal Studies Research Paper No. 2013-18*, 4.
[92] Hamoudi, "Ornamental Repugnancy" (2011: 121).
[93] Intisar Rabb describes "Islamic constitutionalism" as a "modern governing structure of limited powers in which a written constitution designates Islamic law as a source of law." *See* Intisar A. Rabb, "We the Jurists: Islamic Constitutionalism in Iraq," *University of Pennsylvania Journal of Constitutional Law* 10, no.3 (2008): 527- 579, 528.
[94] Noah Feldman, Introduction to *The Fall and Rise of the Islamic State* (Princeton: Princeton University Press, 2008), 2.

(3.) ***Shari'a regulation of Political Institutions category***: refers to *shari'a*-based political structures in constitutional provisions, such as articles requiring government officials and political leaders to be Muslim, or those mandating the creation of special Islamic advisory or *shura* councils. Azizah al-Hibr (1992) notes that the principle of *shura* or consultation represents the most fundamental principle of Islamic governance, mandated in the Quran itself, and visible in the practices of Prophet Muhammad and the Rightly-Guided Caliphs.[95] Nathan Brown (2002), likewise, notes that since the beginning of Muslim states implementing a form of western constitutionalism (Tunisia was the first Muslim country to adopt a constitution in 1861), the emphasis has been on submitting political authority to *shari'a* [96]—a move that balances constitutionalism while maintaining allegiance to Islam, with constitutional provisions purposely framed in an Islamic idiom to make the former palatable.[97]

If, in light of such history, scholars are not surprised to see such shari'a based political elements continue to date, in contrast to Feldman (2008), we did not find an increasing trend among transitioning Muslim states to declare themselves Islamic or in applying shari'a in their constitutions.[98] Likewise, only 7 constitutions out of 64 in our dataset mandated *shura* councils—not exactly a resounding indication of the prevalence of shari'a based institutions of political authority.

We did find that 61 out of the 64 constitutions in our sample delineate a three-branch government system, while only three constitutions did not (Brunei-Darussalam, Egypt's 2011 transitional constitution, and Libya's 2011 constitution). This finding is interesting in light of the legal legacy of autonomous judicial and legislative branches of governance "independent of governmental control,"[99] as per Hallaq's account of medieval learned judges or *qadis* who defended "Quranic Truth" independent of the influences of the ruler.[100] To what extent these branches actually exercise autonomy (reflected in *shari'a* tradition) in modern Muslim majority states is beyond our scope.

(4.) **The "Judicial and Criminal" thematic category** includes constitutional provisions that refer to establishing sharia-based judicial structures or guidelines for judges. We included in this category any constitutional provisions establishing Islamic court systems, discussing jurisdictional guidelines of cases involving Muslims, or those requiring judges adherence to *shari'a* in their decisions.

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[95] Azizah Y. al-Hibri, "Islamic Constitutionalism and the Concept of Democracy," *Case Western Reserve Journal of International Law* 24 (1992): 1-27, 21.
[96] Nathan J. Brown, *Constitutions in a Non-Constitutional World: Arab Basic Laws and the Prospects for Accountable Government* (Albany: State University of New York Press, 2002), 20.
[97] Nathan J. Brown & Adel Omar Sherif, "Inscribing the Islamic shari'a in Arab Constitutional Law," in *Islamic Law and the Challenges of Modernity*, Y.Y. Haddad & B.F. Stowasser eds. (Walnut Creek: AltaMira Press, 2004), 55 – 59.
[98] Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton: Princeton University Press, 2008), 2.
[99] John L. Esposito and John O. Voll, *Islam and Democracy* (New York: Oxford University Press, 1996), 4.
[100] Wael B. Hallaq, *Sharia: Theory, Practice, Transformations* (New York: Cambridge University Press, 2009), 39.

(5.) As Islamic law has its own well-developed system of inheritance, finance, and economics,[101] we created the category of **"Property, Commerce & Economics"** to include provisions that refer to *zakat* (charity), *wakf* (property given to charity), and *jizya* (taxes on non-Muslims). We also included constitutional provisions that refer to *shari'a* for regulating or governing property rights and financial institutions based on Islamic criteria, etc.[102]

(6.) Finally, we developed the **"Social, Cultural, and Family Law"** category to cover the social and familial institutional aspects of *shari'a* provided for in Muslim constitutions.[103] We included constitutional language in which *shari'a* was injected into social, cultural, and family norms and institution, such as those requiring the state public education system to be based on Islam, state-provided security for Islamic cultural institutions, or provisions that families must be founded on the Islamic religion.

4.0 CONCLUSION: POST-ARAB SPRING POLITICS & LAW: NEW HORIZONS

The Arab Spring uprisings have posed stark challenges in political science and international relations research in the Middle East, which had for some time focused on entrenched authoritarianism, weak political, economic and civil society institutions, and the barriers to the spread of otherwise empowering ideas and practices diffused by information network and technologies.[104] These events upset settled assumptions about the political trajectories of many states, including Tunisia, Iraq, Egypt, as well as Afghanistan, Libya, and others and, in doing so, they made scholars take a second look at differences between states, postrevolutionary dynamics, popular resistance and mobilization trends (beyond the Arab-Israeli conflict and fundamentalist notions of resistance). Only lately have we gone even farther to examine discrepancies between formal and informal structures of authority in and beyond Islamic legal norms, including how political actors negotiate *shari'a* principles to establish post-crisis forms of authority.

Legal scholars, including Islamic legal historians, have also felt the disruption and too often themselves focused on the past and classical jurisprudence, including to explain contemporary political violence (see El Fadl 2001; Wael Hallaq 2003).[105] This signal era comes with an old identity crisis, attached to

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[101] See, for example, Timur Kuran, "Islamic Economics and Islamic Subeconomy," *The Journal of Islamic Perspectives* 9, no.4 (1995): 155-173; *Also See*, Ibrahim Warde, *Islamic Finance in a Global Economy* (Edinburgh: Edinburgh University Press, 2010).
[102] *See Generally*, Fuad Al-Omar and Mohammad Abdel-Haq, *Islamic Banking: Theory, Practice and Challenges* (London: Zed Books, 1996).
[103] For a discussion of the societal aspects of shari'a, which includes personal laws such as rules regulating marriage, divorce, inheritance, etc., *See* Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, Tahir Mahmood, ed., (New Delhi: Oxford University Press, 2009).
[104] Mark Lynch ed., (2014), *The Arab Uprisings Explained: New Contentious Politics in the Middle East* (Columbia Studies in Middle East Politics, Columbia University Press, 2014); Eva Bellin, "Reconsidering the Robustness of Authoritarianism in the Middle East: Lessons from the Arab Spring," *Comparative Politics*, 44(2), 2012: 127-149; Ellen Lust-Okar*, Structuring Conflict in the Arab World: Incumbents, Opponents, and Institutions* (NY: Cambridge University Press, 2005).
[105] Khaled Abou El Fadl, "Islam and the Theology of Power," *Middle East Report* (2001): 28-33. For a few examples, see, also, Khaled Abou El-Fadl, "The Rules of Killing at War: An Inquiry into Classical Sources," *The Muslim World* 89. 2 (1999): 144-157; "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries," *Islamic Law and Society* (1994): 141-187; and Wael Hallaq, "Justice Matthew O. Tobriner Memorial Lecture: 'Muslim Rage'

Islamic law: crumbling Islamic civilization in a modern age which has left Muslims with a profound sense of alienation and injury; nation-state failures of development, entrenched authoritarianism, inability to respond effectively to other states' belligerence (colonialism); the rise of fundamentalist movements, political Islam, extreme political violence, including terrorist groups, which is no "simple aberration unrelated to the political dynamics of a society (El Fadl 2001:28).

If there is some success in moving toward such dynamic processes, still, the role of regimes for political meaning making in them, including legal norms, is still in its infancy—not the least because a clear path to familiar ends (stability, democracy, development, reconciliation) has not been forthcoming. By widening the aperture on traditional authoritarian politics and barriers to social reform, early glimmers of how power and authority are being contested and reconstituted (no matter where they lead) are on the horizon.

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and Islamic Law," *Hastings Law Journal* 54 (2003): 1705-1745*;* "Introduction" in *shari'a: Theory, Practice, Transformations* (Cambridge University Press, 2009): 1-24.

5.0 Appendix I: Shari'a Density Constitutional Categories & Indicators

1. ***Shari'a Sources:*** We based the "sources" theme on constitutional provisions that give principal or heightened significance to shari'a in the charter i.e., constitutional provisions stating that shari'a is the supreme law of the land; shari'a takes precedence over (or contravenes) domestic or international norms; shari'a is the main source of legislation; the constitution must follow the spirit or principles of Islam; Islam is the state religion; etc. This category includes what are known as shari'a "supremacy" clauses, that is, "clauses in constitutions that privilege the status of Islamic law" or emphasize its "normative superiority."[106] The "rule" and "principle" dichotomy is visible in the provisions of some post-Arab Spring constitutions: for instance, the 2013 Egyptian constitution declares that "the principles of Islamic Shari'a are the principal source of legislation."[107]

2. ***Law & Legislative Shari'a Norms:*** Clauses declaring shari'a as "the" or "a" source of law were first introduced in Syria in 1950 and can since be found in 38 constitutions, as Clark Lombardi (2013) notes.[108] These and related provisions are included in the "law and legislative" category in the dataset and have featured in the work of Hirschl, Feldman, Intisar A. Rabb, Lombardi, etc., who discuss them under the theme of "constitutional Islamization." We use the "law and legislative" category to reflect constitutional provisions that make a direct link between *shari'a* norms and the legal and legislative make-up of the country: provisions that require laws, including penal codes, to be *shari'a* based or those specifying that domestic law cannot be contrary to *shari'a* (i.e., repugnancy or guarantee clauses).[109] Such clauses that require legislation to comport with *shari'a* render laws contrary to Islamic rules or principles void.[110] Including *shari'a* guarantee or repugnancy clauses in our dataset offers an empirical baseline for framing debates over "constitutional Islamization" or "Islamic constitutionalism"[111] in which Feldman (2008) argues that constitutional regimes of Muslim

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106 See Ahmed & Ginsburg (2014), *supra* note 10, "Constitutional Islamization and Human Rights."
107 Clark Lombardi, "Islamic Law as a Source of Constitutional Law in Egypt" (1998); Kristen Stilt, "Islam is the Solution: Constitutional Visions of the Egyptian Muslim Brotherhood," 46 *Texas Int'l L.J.* 73 (2010). The full text of the 2013 Egyptian Constitution is available at: http://www.atlanticcouncil.org/images/publications/20131206EgyptConstitution_Dec.pdf.pdf.
108 *See* 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?," *American University International Law Review* 28 (2013): 733-74, 743-46.
109 Clark Lombardi, "Designing Islamic Constitutions: Past Trends and Options for a Democratic Future," *Legal Studies Research Paper No. 2013-18*, 4.
110 Hamoudi, "Ornamental Repugnancy" (2011: 121).
111 Intisar Rabb describes "Islamic constitutionalism" as a "modern governing structure of limited powers in which a written constitution designates Islamic law as a source of law." *See* Intisar A. Rabb, "We the Jurists: Islamic Constitutionalism in Iraq," *University of Pennsylvania Journal of Constitutional Law* 10, no.3 (2008): 527- 579, 528.

states are increasingly moving from earlier "secular arrangements" toward governments and laws based in *shari'a*, which he terms as the "rise of the Islamic state."[112]

3. The **"political institutions" category** in our dataset refers to *shari'a* based political structures in constitutional provisions, such as those articles requiring government officials and political leaders to be Muslim, those mandating the creation of special Islamic advisory or *shura* councils. Azizah al-Hibr (1992) notes that the principle of *shura* or consultation represents the most fundamental principle of Islamic governance, mandated in the Quran itself, and visible in the practices of Prophet Muhammad and the Rightly-Guided Caliphs.[113] Nathan Brown (2002), likewise, notes that since the beginning of Muslim states implementing a form of western constitutionalism (Tunisia was the first Muslim country to adopt a constitution in 1861), the emphasis has been on submitting political authority to *shari'a* [114]—a move that balances constitutionalism while maintaining allegiance to Islam, with constitutional provisions purposely framed in an Islamic idiom to make the former palatable.[115] If, in light of such history, scholars are not surprised to see such shari'a based political elements continue to date, in contrast to Feldman (2008), we did not find an increasing trend among transitioning Muslim states to declare themselves Islamic or in applying shari'a in their constitutions.[116] Likewise, only 7 constitutions out of 64 in our dataset mandated *shura* councils—not exactly a resounding indication of the prevalence of shari'a based institutions of political authority.

4. **The "judicial and criminal" theme** includes constitutional provisions that refer to establishing sharia-based judicial structures or guidelines for judges. We included in this category any constitutional provisions establishing Islamic court systems, discussing jurisdictional guidelines of cases involving Muslims, or those requiring judges adherence to *shari'a* in their decisions.

5. As Islamic law has its own well-developed system of inheritance, finance, and economics,[117] we created the category of **"property, commerce & economics"** to include provisions that refer to *zakat* (charity), *wakf* (property given to charity), and *jizya* (taxes on non-Muslims). We also included

[112] Noah Feldman, Introduction to *The Fall and Rise of the Islamic State* (Princeton: Princeton University Press, 2008), 2.
[113] Azizah Y. al-Hibri, "Islamic Constitutionalism and the Concept of Democracy," *Case Western Reserve Journal of International Law* 24 (1992): 1-27, 21.
[114] Nathan J. Brown, *Constitutions in a Non-Constitutional World: Arab Basic Laws and the Prospects for Accountable Government* (Albany: State University of New York Press, 2002), 20.
[115] Nathan J. Brown & Adel Omar Sherif, "Inscribing the Islamic shari'a in Arab Constitutional Law," in *Islamic Law and the Challenges of Modernity*, Y.Y. Haddad & B.F. Stowasser eds. (Walnut Creek: AltaMira Press, 2004), 55 – 59.
[116] Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton: Princeton University Press, 2008), 2.
[117] See, for example, Timur Kuran, "Islamic Economics and Islamic Subeconomy," *The Journal of Islamic Perspectives* 9, no.4 (1995): 155-173; *Also See*, Ibrahim Warde, *Islamic Finance in a Global Economy* (Edinburgh: Edinburgh University Press, 2010).

constitutional provisions that refer to *shari'a* for reglating or governing property rights and financial institutions based on Islamic criteria, etc.[118]

6. We used the **"social, cultural, and family law"** thematic category to cover the social and familial institutional aspects of *shari'a* provided for in Muslim constitutions.[119] We included constitutional language in which *shari'a* was injected into social, cultural, and family norms and institution, such as those requiring the state public education system to be based on Islam, state-provided security for Islamic cultural institutions, or provisions that families must be founded on the Islamic religion.

No Density: 0%
Low Density: 1-25%
Medium Density: 26-50%
Medium-High Density: 51-75%
High Density: 76-100%

Our analysis of the shari'a content in a constitution derives from the 52 columns on the shari'a chart organized under the six overarching categories mentioned before. We took the decision of using the 52 columns for analysis, rather than the measure of sharia content under the six categories, so that results would include more variation. By using six as the maximum number and then analyzing where each constitution fell on a spectrum of 0-6, results would not have been significant indicators of just how much shari'a, or lack thereof, was in each constitution. By using a 0-52 scale as a basis for our analysis, meaningful variation between each constitution is discernible and the actual amount of shari'a content present in the constitutions was more accurately reflected in the resulting analysis. Using the columns in the dataset, we have assigned each state's constitution, or constitutions, a density indicator. We define density simply as how much shari'a content a constitution includes. For example, if a given constitution indicates shari'a provisions in 10 out of the possible 52 columns on the shari'a chart, then that constitution's score is 19% (10/52). We have used the following standard density definition for all scoring.

[118] *See Generally*, Fuad Al-Omar and Mohammad Abdel-Haq, *Islamic Banking: Theory, Practice and Challenges* (London: Zed Books, 1996).
[119] For a discussion of the societal aspects of shari'a, which includes personal laws such as rules regulating marriage, divorce, inheritance, etc., *See* Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, Tahir Mahmood, ed., (New Delhi: Oxford University Press, 2009).