

USIP Position Paper

The Challenges and Opportunities of Islamic Review: Lessons for Afghanistan from the Experiences of other Muslim Countries¹

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Over the last fifty years, many Muslim countries have drafted or amended their constitutions to include a type of clause that I will call here “Shari`a Clauses.” These clauses provide that all state legislation must be consistent with Shari`a.² All countries that have written Shari`a Clauses into their national constitution sooner or later must grapple with certain basic questions. Among them are the following: Are these clauses justiciable—that is, can judges enforce them by reviewing laws for consistency with Islam and striking down laws that do not comply? If so, what type of judicial institution should be entrusted with the job of Islamic review? What method of reasoning should this institution use to interpret the Shari`a Clause? Finally, how can the Shari`a Clause be harmonized with other constitutional commands that the state protect democracy and the principles of international human rights law? Having written a Shari`a Clause into its 2004 constitution, Afghanistan must soon address one, and likely all, of these questions.

Given the central position of Islam in Afghan history and the strong role that Islam has played in the formation of Afghanistan’s national identity, it makes sense that the drafters of Afghanistan’s 2004 constitution included a Shari`a Clause. Article 3 of the 2004 Afghan constitution states, “In Afghanistan, no statute [*qanun*] can be contrary to

the beliefs and rulings [*ahkam*] of the sacred religion of Islam.”³ It appears that no Afghan court has decided a case interpreting this provision to date. Thus, we are not certain the clause is justiciable. For reasons I will describe, however, it seems likely that the clause will ultimately be found justiciable. If so, Afghans must decide what institution will interpret the Shari`a Clause. As I will describe, choosing a method of interpretation will not be a simple task.

As Afghan scholars, judges and government officials prepare to resolve the open questions of how to implement Article 3 of the constitution, they might benefit from the experience of other countries that have already grappled with the challenge of applying a Shari`a Clause. Afghanistan will find that there are remarkably different approaches to interpreting and implanting such clauses. It will also find that a few judiciaries have found ways to interpret Islamic law consistently with a large number of liberal rights. Indeed, judges in some countries have exercised Islamic review in a way that not only *tolerates* government protection of human rights, including women’s rights, but actually *requires* such protection as a matter of Islamic law. In this paper, I will describe how different nations answered for themselves the types of questions that await Afghanistan. I will then consider what, if anything, Afghanistan can learn from them.

1. Is Article 3 of the 2004 Afghan Constitution (Afghanistan’s Shari`a Clause) justiciable?

Whenever a nation adopts a constitution with a Shari`a Clause, that nation must address a threshold question: Is the clause justiciable? If a Shari`a Clause is “non-justiciable,” judges have no power to enforce it. The executive and legislature have the sole power to decide what Islam requires. Once the political branches have concluded to

their own satisfaction that their legislation is consistent with Islam, the courts cannot question their judgment. To put it differently: the courts are not empowered to hear court cases asserting that the state legislation or regulations are unenforceable on the grounds that they are inconsistent with Islam.

It may seem strange that a country would adopt a Shari`a Clause but conclude that courts should not enforce it. There are, however, a number of valid reasons to adopt non-justiciable Shari`a Clauses.⁴ Thus, the drafters of some constitutions have deliberately inserted into Shari`a Clauses explicit language that declares the clause to be non-justiciable.⁵ In other cases, constitutions have Shari`a Clauses *without* explicit language precluding judicial enforcement of the clause; nevertheless, judges read a principle of non-justiciability into the clause and thus declare themselves incompetent to police compliance with the Shari`a.⁶ That said, the public in Muslim countries has generally soured on the idea that Shari`a Clauses should be non-justiciable. Accordingly, non-justiciability is increasingly the exception and not the norm.⁷

To date, no Afghan judicial body has issued any formal ruling declaring a law consistent or inconsistent with Article 3 of the 2004 constitution.⁸ All indications, however, are that Afghan scholars and judges believe that Article 3 is justiciable. Afghans thus should begin to discuss both *who* should review laws for consistency with Islam and *what methods* Afghans want those people to use.⁹

2. Should the judicial institution entrusted with the power of constitutional review establish a special bench to handle cases of Islamic review?

If, as most expect, Article 3 will be held justiciable, then it raises the question of who should interpret and apply the provision and strike down laws that are inconsistent

with “the beliefs and rulings of the holy religion of Islam.” In Afghanistan, this question is complicated by the ongoing debate about who has the power of judicial review.¹⁰

Although Afghanistan’s constitution seems to assume that the power of judicial review exists in *some* judicial entity, debate has emerged about whether the entity with the power of judicial review is the Supreme Court or, instead, the constitutionally created judicial commission commonly referred to as the Article 157 Commission.¹¹

Whichever institution ultimately emerges to exercise judicial review, a second question will need to be answered. Should the institution that practices judicial review establish a specialized bench to review consistency of laws with the Shari`a? Some countries have decided that questions of Islamic review require special expertise. Iran, for example, provides that before legislation enters into force, it should be subject to Islamic review. Iran places the power of abstract Islamic review entirely in a specialized body of Islamic scholars.¹² In Pakistan, the constitution provides for Islamic review of legislation by a hybrid institution known as the Federal Shariat Court. This institution is dominated by judges but also includes some Islamic scholars.¹³ (There is some ambiguity about what qualifies someone as a scholar qualified to sit on the court. Technically they are supposed to be “*ulama*” a term that is sometimes reserved for scholars with specialized training in traditional approaches to Islamic legal interpretation. Some people who have occupied the seats reserved for *ulama* do not seem, however, to have this type of training.) Some countries with justiciable Shari`a Clauses have concluded that the legal training provided to those being trained for the nation’s legal professions generally equips students with the training necessary to resolve questions of Islamic review. Such countries allow regular benches of their constitutional court(s) to

resolve all questions of constitutional review, including questions of Islamic review. Such countries include Egypt and the United Arab Emirates (U.A.E.).¹⁴

In Afghanistan, both the Supreme Court and the Article 157 Commission can by law establish special benches. Under the 2004 constitution, the Supreme Court can be staffed either by people trained generally in law or by people trained specifically in Islamic law.¹⁵ The constitution does not clearly specify the structure of the court. Apparently, a court organization law could be enacted that would require a specialized bench to hear cases of Islamic review—a bench where at least some members have specialized training in Islamic law. Similarly, the structure of the Article 157 Commission is left to be formed and organized by a future law, subject only to the proviso that the President has the power to appoint all members.¹⁶ It too could be structured with a special bench.

The experience of other countries, however, suggests that establishing a specialized bench may not be necessary in Afghanistan, and it even gives reason to believe that a special bench could lead to some unnecessary problems. Special benches are useful in countries where the public deems the regular judiciary unqualified to engage with Islamic scriptures or legal reasoning. Afghanistan differs from most countries that have specialized benches because most members of the judiciary have historically had strong training in Islamic law. Afghan universities generally have two departments which train legal professionals: the Faculty of Law and Political Science; and the Faculty of Shari`a.¹⁷ These faculties, once almost entirely separate from each other, now have at least some overlap in course coverage and at some universities there is cross-teaching across faculties. Nevertheless, they still emphasize different legal subjects and continue

to maintain significantly different identities and cultures.¹⁸ Importantly for the question of Islamic review in Afghanistan, the judges on the courts of general jurisdiction, including most judges on the Supreme Court, have historically been trained in the Shari`a faculties, which provide systematic training in both classical Hanafi *fiqh* and modernist theories of Islamic law.¹⁹ So long as this situation continues, it is not clear that a specialized bench would contain more expertise than a regular bench of the courts or commission.

If graduates of Afghanistan's Faculties of Law and Political Science begin to staff the judiciary in greater numbers, Afghanistan may face new pressure to create a specialized bench for the purpose of performing Islamic review—one dominated by judges who are graduates of a Shari`a faculty. Establishing such a bench will still, however, have the costs that we will describe below. If recruitment patterns for the judiciary suggest that the judiciary as a whole may soon come to be seen as incapable of carrying out Islamic review, Afghanistan may want to focus new energy on projects of educational reform that have recently been discussed. Already some universities have begun to explore how they might coordinate the legal curriculum taught in their faculty with the one taught in the Shari`a faculty. More support for these projects may help to ensure the ongoing viability of a unified process of regular judicial review and Islamic review. That would be a good thing, because dividing the processes of regular judicial review and Islamic review can have significant costs.

Creating a special bench for interpreting the Shari`a Clause can create significant inefficiencies. In cases where Islamic review occurs separately from all other judicial review, cases that implicate two constitutional issues (one of which involves a question of

consistency with Islamic law) would need to be divided. The Islamic issues must be heard before one bench and the non-Islamic issues heard before a different bench. Furthermore, by forcing a single tribunal simultaneously to address all Islamic and non-Islamic challenges to a law, a nation increases the chances of a decision that consciously addresses the potential tensions between Islamic and non-Islamic provisions and, ideally, comes up with an interpretation of these provisions that harmonizes them. Given the credibility of Afghan judges on questions of both Islamic and secular law and the need for efficient constitutional adjudication, it seems unnecessary for Afghanistan's judges to place the power of Islamic review in a special tribunal.²⁰

3. *What method of interpretation should those who practice Islamic review use?*

No matter who is entrusted with the power of Islamic review, that institution will have a difficult task. It will have to identify “the beliefs and rulings of Islamic law” and then will have to determine whether state legislation is consistent with these norms. If Afghans today actually agreed unanimously upon the method that Muslims should use to identify the rulings of Islamic law, this task would perhaps be straightforward. There is, however, no uniform agreement on questions of interpretive methodology. Not only do Sunni and Shiite Muslims differ in Afghanistan, but there are also considerable points of disagreement among Sunni Muslims.

In the pre-modern era, Sunni Muslims recognized four different “schools” of law as equally orthodox, and even *within* a particular Sunni school it was understood that different scholars could reach slightly different interpretations of God's law.²¹ In the

modern era, even more competing Sunni interpretations exist. Many Sunni Muslims around the world, including Afghanistan, today favor interpretations of law deeply informed by one of the four traditional schools of law. Alongside them, however, are many other Muslims who have been influenced heavily by modernist Sunni scholars.²² Such Muslims favor methods of legal reasoning and interpretations of law that can depart significantly from those of the traditional schools.

Whatever institution eventually performs Islamic review will have to determine its own method of interpreting Islamic law. Some in Afghanistan believe that the courts, when they perform Islamic review, should defer to Hanafi *fiqh*—meaning the interpretation of Islamic law that has been taught over the centuries by the scholars of the Hanafi school. The champions of this position point out that most Sunni Afghans have traditionally favored the Hanafi interpretation of Islamic law. Indeed, the special place of Hanafi jurisprudence in Afghan governance can, they say, be seen in Article 130 of the 2004 constitution. Article 130 instructs judges to fill any “gaps” in legislation by importing rules from traditional Hanafi *fiqh*.

Afghanistan’s population is not entirely Sunni, however, and its Sunni population is not entirely Hanafi. Thus, some Afghans dispute the idea that the constitution requires state law to respect Hanafi understandings of Islamic law.²³ They argue that Article 3 does not mention Hanafi *fiqh* precisely *because* the drafters of the constitution and those who approved it understood that the legislature is free to enact laws that depart from Hanafi interpretations of Islamic law if it so chooses. Only when the legislature fails to enact a rule that is consistent with any interpretation of Islamic law does Article 130 instruct judges to fill in the “gap” by issuing a ruling based on Hanafi *fiqh*.

The experience of other Muslim countries suggests that adopting this second interpretation would have some advantages for Afghanistan. First, it will appeal to Afghan Muslims, including but not limited to Shi'ites, who favor interpretations of Islamic law other than the traditional Hanafi ones. It can thus help create broader legitimacy for the law. Second, courts that measure the "Islamicness" of state legislation by reference to something broader than the laws of any one classical school provide us with the most striking examples of Islamic review that tolerates and, in places, reinforces the protection of human rights. So long as a critical mass of the public is willing to accept such an approach, then adopting this type of approach would ease the task of harmonizing Shari'a Clauses with clauses guaranteeing democratic freedoms and human rights.

The experiences of Egypt and Pakistan are, in this regard, instructive for Afghanistan. In Egypt, regular benches of Egypt's constitutional court carry out Islamic review as part of their normal practice of judicial review. As discussed above, Pakistan by contrast assigns the task of Islamic review to a special branch of the court system. In both countries, however, legislation is measured against Islamic norms that judges identify through a hybrid method of reasoning that combines elements of traditional and modern interpretation. In each, the courts have developed an interpretation of Islamic law (and of the restraints that Islamic law places on the ruler) that is consistent with many elements of liberal constitutionalism and, in some ways, reinforces it. It is not clear that Egyptian and Pakistani courts have been equally successful at winning a critical mass of the public over to their conceptualization of Islam or their method of determining that a law was Islamically legitimate. There are indications that the Egyptian courts are more

successful in this way than the Pakistani.²⁴ Taken together, the Pakistani and Egyptian examples demonstrate that an argument for a modernist inspired theory can be made and that it can, at least under some circumstances, be compelling to important segments of the populace.

Other scholars and I have published work describing in detail the interpretive method of the Egyptian judges who perform Islamic review.²⁵ Although there is less work on the Pakistani courts, there is some.²⁶ Furthermore, the technique the courts use can be understood from a look at the cases, which are widely reported.²⁷ Here then I will give only a brief account of the theories. Those who wish to study them in more depth should refer to those longer works or to the case law.

In the 1970s, Egypt and Pakistan amended their constitutions to include justiciable Shari`a Clauses. In the 1980s and 90s courts in Egypt and Pakistan began to perform Islamic review. Governments in what are today the states of Egypt and Pakistan historically had a special relationship with Hanafi scholars and thus to Hanafi interpretations of Islamic law. Naturally, when the Egyptian and Pakistani constitutions were amended to require Islamic review, courts debated whether to measure state law against Hanafi interpretations of Islamic law.²⁸ Some suggested in the alternative that even if Hanafi interpretations were not followed, state law must at least be consistent with the interpretation of *some* classical school. Ultimately, however, courts chose not to favor classical interpretations over modernist ones. Noting that the citizenry divided over the type of interpretation of Islamic law that was preferable, the courts in both Egypt and Pakistan have each tended to use a hybrid method—one that incorporates some elements of traditional interpretation as taught by the classical schools but was heavily shaped by

modernist approaches to legal reasoning as well. Indeed, it is arguably more modernist than traditional.

The Egyptian and Pakistani courts' methods of performing Islamic review differ in a few significant ways. Nevertheless, they share some basic similarities. For one, each court's method betrays the influence of modernist Islam. Like many modernist theories, each draws upon the classical Islamic theory of *siyasa shar'iyya*.²⁹ Each also draws similar lessons from modernist theory. For example, courts in each country hold that the law of an Islamic state must respect the letter of the revealed rules whose meaning is indisputable and whose application to the case at hand is clear. Each also follows modernists, however, in finding many cases in which no such rule can be found. In such cases, each court agrees that in such a case the court need not, and *should* not, reason out new rules by strict analogy to a clear scriptural rule—the method that the jurists in the classical schools would use. Rather, the courts hold that they should ask whether the law of the state is consistent with the overall spirit of God's law. If so, state law must be deemed consistent with Shari'a.

According to the Egyptian and Pakistani courts, then, the state must obey *some* rules announced by the scholars, but not all. The courts distinguished between two types of Islamic rule that scholars had developed over the years:

1. The first was the unambiguous scriptural rule that the scholars had found in the Qur'an or a trustworthy *hadith*.
 - Importantly, among the clear scriptural principles, Egyptian and Pakistani courts followed modernist thinkers in saying that two scriptural principles are particularly important:

(a) that Muslims act with justice (*'adl*)

(b) that Muslims act to promote the public interest (*maslaha*).

2. The second type of rule was the supplementary rule, which the Egyptian courts, following a number of classical and modern thinkers alike, have called the “*ijtihadi*” rule or principle. *Ijtihadi* rules were ones that Muslim thinkers had extrapolated logically from clear scriptural rules.

The Egyptian and Pakistani courts each stressed that the vast majority of the rules contained in the classical Islamic law books (the books of *fiqh*) are laws of this second, *ijtihadi*, type.³⁰ Having differentiated between these two types of rule, they each held that their constitution’s Shari`a Clause only prohibits the state from enacting laws that are inconsistent with clear scriptural rules and principles (including the rules that require the law to act in accordance with justice and beneficence). In other words, the state is free to enact laws that are inconsistent with classical interpretations of Islamic law (interpretations that are favored by the majority of religious scholars in the nations), so long as the state laws are consistent with scriptural principles and promote both “justice” and “public benefit.”

As it turns out, the Egyptian and Pakistani courts identified few unambiguous scriptural rules other than the principles requiring people to behave justly and in the public interest. Their conclusions about the Islamicness of laws have thus tended to depend in many cases upon their judgments about fairness and the benefit of these laws. By doing so, judges sought to harmonize Islamic and liberal values. In defining what was fair or beneficial, judges kept in mind popular understandings of these terms— understandings that were informed by traditional Hanafi interpretations of Islamic law, which were central to many citizens’ fundamental ethical beliefs. At the same time, the

judges seem to have been informed as well by principles of democracy and human rights, which the constitution had also declared to be core elements of ethical governance.

The application of this theory appears to have helped support a rise in judicial power in these countries—or at least a rise in judicial aggressiveness. Given the theory of Islamic review developed by the Egyptian and Pakistani courts, nearly every law is potentially subject to review for basic fairness and public utility. Islamic review has thus greatly expanded the potential scope of judicial power. As the public became comfortable with the theory and began to support the court’s exercise of it, the courts became more aggressive in wielding this power. They sometimes used “Islamic” reasons to provide additional support for rulings that aggressively interpreted “secular” provisions of the constitution. In other cases, they used “Islamic” principles of justice and fairness to protect un-enumerated rights.³¹

What was the result? From the 1980s through the 2000s, Egyptian and Pakistani judges proposed a centrist vision of “Islam” far less traditional than strong traditionalists in their respective countries wanted and far less liberal than the strong liberals wanted. On the other hand, insofar as it has been accepted by the public and obeyed by the government, this jurisprudence has helped promote a society that was both *more* Islamic and *more* liberal than it would have been in the absence of Islamic review.

A caveat made in the previous paragraph deserves to be highlighted. The ability of such a theory to effectively embed a harmonized version of Islamic liberalism depends upon the degree to which the courts can make it compelling to a broad cross-section of citizens. The Egyptian and Pakistani courts seem to have had different degrees of

success in this respect. The Islamic jurisprudence of the Egyptian courts has received strikingly little public criticism from either the traditionally trained Islamic scholars (the *ʿulama*), or conservative lay Islamists.³² In Pakistan, however, both the traditional *ʿulama* and conservative lay Islamists alike have regularly disparaged the Supreme Court’s method of Islamic review.³³ Interestingly, some academic observers based in “Western” universities also criticize the Pakistani courts method of performing Islamic review as well. This academic criticism arises neither because the critics are opposed to re-examining traditional Islamic rules nor because they dislike the liberal results. Rather, it arises from a belief that the courts’ efforts to harmonize the Islamic tradition with liberal mores has been unconvincing. While harmonization could in theory be done effectively, the courts have done it in a way that is needlessly uninformed, unsophisticated and, ultimately, unconvincing.

The different receptions of modernist Islamic review in these two countries raise interesting questions that have yet to be examined. Among them is the question of why the Egyptian courts’ jurisprudence of Islamic review has been better received than the Pakistani courts’? One should be clear too that courts in the future might move away from this type of theory. Given the recent turmoil in both Egypt and Pakistan, we can only speculate about whether Islamic review will continue to function in these countries as it did in the 1980s, 90s and 2000s.³⁴ Even with those open questions and those uncertainties about the future, it seems that Afghanistan might still draw valuable lessons from Egypt and Pakistan’s experiments to date in Islamic review.

In Afghanistan, there is good reason to believe that the public could find a carefully constructed modernist theory compelling. Most Afghan judges, to this day,

come from the Shari`a faculties of Afghan universities. Most are comfortable working in Arabic with scriptures and classical sources. Most are trained in both classical and modernist methods of engaging with those scriptures. Judges thus have considerable credibility on questions of Islamic law. Furthermore, their training seems to give them the tools to develop a version that is more compelling to the Afghan public. The doctrine of *siyasa shar`iyya* is already a subject of study in the Shari`a faculties of Afghanistan's universities, and classes in Islamic thought engage with some modernist thought.³⁵ The Afghan judiciary thus seems capable of adopting and carefully applying a modernist and largely liberal approach to Islamic legal reasoning that a critical mass of citizens accepts (as is true to date in Egypt). As noted already above, reform of legal education and changes in the pattern of judicial recruitment might eventually shake the Afghan public's belief in the Islamic qualifications of their judiciary. As noted too, Afghanistan can take steps to ensure that judges who are trained in the Faculty of Law and Political Science receive adequate Islamic legal training alongside their "secular" legal training. One hopes that legal education and judicial training continue to provide the judiciary with the tools needed to exercise convincingly a type of Islamic legal analysis that can harmonize Islamic norms convincingly with the needs of modern society and with the constitution's liberal democratic commitments.

Conclusion: Implications of the Egyptian and Pakistani experience for Afghanistan

Every contemporary Muslim country with a constitutional Shari`a Clause interprets and applies that clause in distinctly unique ways. That is because every country's system for implementing a Shari`a Clause reflects in some way that country's particular institutional, political and social environment. Nevertheless, countries with

Shari`a Clauses exhibit certain general patterns in their answers to each of the questions about the justiciability of the clauses, the legal institutions which handle the clauses, and their methods by which they interpret the clauses. The general approaches can be tweaked to function in different countries. Armed with an understanding of the different general approaches, Afghanistan should be able to choose one and then adjust it to meet Afghanistan's specific needs.

If, as I assume, Afghanistan declares Article 3 to be justiciable, then it must choose an institutional model for Islamic review. Although many nations have chosen to create specialized institutions specially tasked with the power of judicial review, I have suggested that Afghanistan is different from many of those countries. It is quite possible that Afghanistan will not gain any benefit in having a specialized bench and will suffer inefficiencies in adjudication. While this is a choice that Afghans themselves must make, I think it makes sense to follow the general approach followed by nations like Egypt, which vest the power of Islamic review in the same body that practices regular judicial review.

No matter who is vested with the power of Islamic review, that institution will have to adopt a method of performing Islamic review. Afghanistan should try to adopt a method that furthers Afghanistan's ongoing constitutionalist project—the project of creating a state that is Islamically legitimate in the eyes of the people and also respects the constitution's commitment to Islam with its parallel commitment to democracy and human rights. As it works toward this goal, Afghanistan might benefit from a study of the courts that have successfully integrated a constitutional commitment to respect Islam into a recognizably democratic and liberal framework. Afghanistan cannot simply adopt

another country's jurisprudence of Islamic review. Nevertheless, Afghans can fruitfully study the way that certain basic interpretive choices of other countries have facilitated the work of courts that harmonize Shari`a Clauses, on the one hand, with constitutional rights guarantees, on the other.

Notwithstanding the checkered reception of modernist methods of Islamic review in some countries, Afghanistan could benefit from a choice to adopt the general approach of the Egyptian and Pakistani constitutional courts and might well be able to make a modified version effective in Afghanistan. The theory is consistent with Islamic doctrines long taught in Afghanistan. Furthermore, Afghan judges have the training to apply it in a manner that is well grounded in text and tradition. In the hands of the right judges, Afghan courts could use a nuanced version of the approach carried out successfully in Egypt to date and, less successfully, in Pakistan. They could harmonize in a convincing way Afghanistan's commitment to Islam with the nation's commitment to principles of democracy and human rights. In so doing, Afghanistan's judges would build judicial power and reinforce a constitutionalist culture that protects many (though possibly not all) liberal rights. This is an ambitious goal. The experience of other countries suggests, however, that it this goal can be accomplished. It is certainly a goal that is well worth pursuing. Such an interpretation and application of the constitution's Shari`a Clause would legitimize the state in Islamic terms. At the same time, it would permit, and ideally would reinforce, the state's commitment to democracy and human rights.

¹ This is a revised version of a paper given at a US Institute of Peace sponsored workshop on the Afghan constitution held in Kabul on September 20-21, 2011. It draws upon research carried out at the University of Washington through the University of Washington's Afghan Legal Educators' Project. It benefits also from research carried out with the assistance of the Carnegie Corporation of New York's Carnegie Scholars' Program. All opinions expressed and any mistakes are the author's own and not those of the Carnegie Corporation, the Funders of the Afghan Legal Educators Project or any of the interlocutors on this project. In transliterating Arabic terms, diacritical marks such as macrons and dots are not used. The Arabic letter `ayn will be indicated by a reverse apostrophe.

² See Clark B. 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," *American University International Law Review* 21 (2006), pp. 381-82, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=910426.

³ The Constitution of Afghanistan 1382 A.H. (hereinafter "Constitution"), available in Dari Pushto at <http://www.afghan-web.com/politics/currentconstitutiondaripashto.pdf>. This translation departs from the unofficial English translation available at http://www.afghan-web.com/politics/current_constitution.html. I have departed here from the unofficial translation by translating qanun (قانون) as "legislation" rather than "rule" and "ahkam" (أحكام) as "ruling" rather than "provision." Article 3 is supplemented by another constitutional provision, Article 130, which instructs judges to fill in "gaps" in legislation by reference to a specific type of Islamic law—specifying that judges should answer questions that are not resolved by the code gaps by importing into Afghan law rules drawn from Hanafi *fiqh* (the interpretation of Islamic law taught by scholars associated with the Hanafi school of Islamic law). This will be discussed below.

⁴ The most significant one is that in many countries Muslims disagree deeply about how to interpret Islamic law and thus about what state compliance with Islamic norms looks like. For a general overview of the breakdown in consensus in Islamic law around the world and some of its ramifications, see Wael Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), particularly pp. 357-550. Given the lack of consensus in a particular country, some might plausibly conclude that the choice of an interpretation of the version of Islamic law that governs the state should simply be the interpretation that has the broadest support—as determined by the normal operation of the political process.

⁵ For example, the text of Sudan's 1998 constitution seemed to declare that legislators must ensure that their law is consistent with Shari`a but also leaves their judgment judicially unreviewable. See Constitution of the Republic of the Sudan (1998), Article 65. Similarly, Pakistan's constitution once suggested that state law would have to be consistent with Shari`a, but declared at the same time that this rule was not judicially enforceable. Although this was changed, the constitution of Bangladesh (which was once part of Pakistan) continues to require that state laws and state action be guided by "faith in the Almighty Allah" and simultaneously declares that this requirement is not to be

enforced by judges. See Constitution of the People's Republic of Bangladesh 1972 (as amended to 1996), Article 8.

⁶ Judges in a number of important jurisdictions, however, hold that Shari`a Clauses are *partially* non-justiciable. For example, the Egyptian Supreme Constitutional Court in 1985 declared that Article 2 of the Egyptian constitution required all law to conform to Shari`a principles. Nevertheless, it insisted, courts had the power to enforce this command only with respect to laws enacted after 1981. For a discussion of the background to this decision and the controversies surrounding it, see Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari`a into Egyptian Constitutional Law* (Leiden/Boston: E.J. Brill, 2006), 159-173. The Federal Supreme Court in the UAE has adopted a nearly identical principle, and applied it in the context of the UAE's Shari`a Supremacy Clause. See Butti Sultan Butti Ali Al-Muhairi, "The Position of Shari'a within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause concerning Shari'a," *Arab Law Quarterly* 11 (1996), pp. 219-44, here at pp. 235-39.

⁷ In Pakistan, the constitution was amended specifically to make non-justiciable Shari`a clauses justiciable. The process by which this happened was quite convoluted. For a discussion of this process, see Charles H. Kennedy, "Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan," *The International and Comparative Law Quarterly* 41 (1992), pp. 769-87 and, particularly pp. 769-72.

⁸ This statement must be made with some hesitation. It is very difficult for outsiders to do research on Afghan case law. Based on the information available to me, however, courts do not seem to have decided many Article 3 challenges to Afghan legislation, and certainly have not struck down any high profile laws. The only widely reported use of the judiciary's Article 130 powers has involved the decision by courts to try citizens for the uncodified crime of insulting the Prophet Muhammad (SLH).

⁹ In unofficial, but widely reported, statements, judges have opined about the "Islamicness" and thus the constitutionality of laws. Furthermore, in the context of constitutional litigation that does not involve judicial review, Afghan judges have regularly asserted the power and duty to interpret Islamic law. In a number of cases, the Supreme Court has said that Article 3 gives courts the duty to identify areas where legislation has failed to regulate the behavior that it should. Such cases trigger Article 130. Article 130 instructs that when courts must resolve a case and no positive legislation provides an answer, then judges must develop a rule of decision drawn from Hanafi interpretations of Islamic law. Such laws presumably apply only until the legislature enacts statutes to regulate the behavior. On this point, see an advisory letter opinion of the Supreme Court of Afghanistan issued in connection with the blasphemy prosecution of Parwiz Kambaksh: Supreme Court of Afghanistan Correspondence No: 1545/733 (July 10, 2007) transmitting to litigants to opinion reached in Letter 1109 of the Supreme Court High Council (July 10, 2007) [copy on file with author].

¹⁰ J. Alexander Thier and John Dempsey, "USIP Peace Briefing: Resolving the Crisis over Constitutional Interpretation in Afghanistan" (March 2009), available at

<http://www.usip.org/publications/resolving-crisis-over-constitutional-interpretation-afghanistan>.

¹¹ Id.

¹² The 1979 Iranian constitution, as amended to date, instructs judges not to enforce laws or regulations that are inconsistent with the *Shari`a*. Article 4 suggests, however, that in exercising their judgment, they are to be guided by the Guardian Council, which is to be staffed by classically trained Islamic scholars. See Constitution of the Islamic Republic of Iran, 1979 (as amended to 1989), Articles 4, 72, and 91-98. For a brief discussion of the Council and some of its recent work, see <http://www.nyulawglobal.org/globalex/iran1.htm> and <http://www.globalsecurity.org/military/world/iran/guardian.htm>.

¹³ The Supreme Court's Shariat Appellate Bench, which is the highest body in that special court system, is still dominated by judges who have received only the normal, "secular" training. See Constitution of the Islamic Republic of Pakistan (as amended to date) Articles 203 (A) - (J). For more details about the structure of Pakistan's Federal Shariat Court, see Jeff Redding, "Constitutionalizing Islam: Theory and Pakistan," *Virginia Journal of International Law* (2004), pp. 759-827.

¹⁴ For Egypt's Supreme Constitutional Court and its exercise of Islamic review, see generally Lombardi, *State Law as Islamic Law*, and Lombardi and Brown, "Do Constitutions?." For the UAE Federal Supreme Court and its exercise of Islamic Review, see Al-Muhairi, "The Position of Shari'a," and George Sfeir, "Source of Law and the Issue of Legitimacy and Rights," *Middle East Journal* 42 (1988), pp. 436-46. Since Egypt is undergoing constitutional reform right now, it is unclear whether a special tribunal or a special bench of the Supreme Constitutional Court will be created in the future to handle Islamic review. See the discussion in Nathan Brown and Amr Hamzawy, "The Draft Party Platform of the Egyptian Muslim Brotherhood: Foray into Political Integration or Retreat Into Old Positions?" (Washington D.C: Carnegie Endowment for International Peace: Carnegie Papers, Middle East Series, no 89).

¹⁵ Constitution of the Islamic Republic of Afghanistan, Articles 117-118.

¹⁶ Constitution of the Islamic Republic of Afghanistan, Article 157.

¹⁷ See generally, M.G. Weinbaum, "Legal Elites in Afghanistan," *International Journal of Middle East Studies* (1980), pp. 39-57, particularly pp. 40-41. See also Bruce Etling, "Legal Authorities in the Afghan Legal System (1964-1979)," available online at <http://www.law.harvard.edu/programs/ilsp/research/etling.pdf>.

¹⁸ Weinbaum and Etling (who draws heavily on Weinbaum's research) present a picture of nearly separate educational institutions feeding into entirely different sections of the legal system. Much work has been done to promote some cooperation and, ideally, coordination of coursework and teaching. Personal conversations with Afghan Deans of both Law and Shari`a faculties and also with numerous faculty and graduates of these faculties make clear that progress on this goal is uneven and incremental, but nevertheless real.

¹⁹ See Weinbaum and Etling, *supra* note 17.

²⁰ It is possible that developments in legal education and judicial staffing may make the idea of a special bench more compelling to many if the Afghan judiciary evolves. That is particularly true if the constitutional tribunals in the future come to be staffed with significant numbers of graduates of the Schools of Law and Political Science. Even in that case, however, it might be preferable for Afghanistan to respond by integrating into the standard “law” curriculum more training in Islamic law and thus retain the “Islamic” credentials of the regular constitutional court.

²¹ For histories of the evolution of Sunni Islamic thought and the rise of the orthodox “schools” of law, see generally Wael Hallaq, *Shari'a*, and Knut Vikor, *Between God and the Sultan: A History of Islamic Law* (Oxford: Oxford University Press, 2005).

²² The rise of modernist Islamic legal thinking was a phenomenon that took place throughout the Muslim world, and was watched from Afghanistan. For a broad overview of the phenomenon and criticism of it, see Hallaq, *Shari'a*, pp. 357-550. For a discussion of the way in which the rise occurred in the Arab world, see Lombardi, *State Law as Islamic Law*, pp. 59-119. For a discussion of the evolution of modernism in Indonesia, see R. Michael Feener, *Muslim Legal Thought in Modern Indonesia* (Cambridge: Cambridge University Press, 2007).

Those who draft Shari'a Clauses are well aware that Muslims who agree that law should be subject to Islamic review in the abstract often disagree about how to perform it. They thus wish to leave it in the hand of the courts to select a method of identifying Islamic principles and of measuring state compliance with them. One speculates that it is for this reason that the language of Shari'a Clauses often leaves unclear what method courts should use to interpret Islamic law when they perform Islamic review. In this respect, Article 3 of Afghanistan's 2004 constitution is typically ambiguous. In my conversations with Afghan scholars and government officials, from the date the constitution was adopted to the present, I have continued to find significant disagreement about how judges should identify the “Islamic” rulings that the statutes must respect.

²³ This is based on personal conversation with Afghan professors from both the law and the *Shari'a* faculties. Their argument goes as follows: Afghanistan's 2004 constitution is absolutely clear that judges may be required to answer questions that are not addressed by statute. When they do so, Article 130 of the constitution instructs them not only to fill the gaps with Islamic law, but specifies that they should fill the gaps with rules that are consistent with Hanafi interpretations of Islamic law. Article 3, they say, does not create the same restraints on the legislature. It instructs the legislature to statutes that are consistent with “the creed and rulings of Islam,” but does *not* specify that the legislature should defer to Hanafi interpretations of Islam. In so doing, it is said, the drafters seem deliberately to have left judges free to depart from Hanafi interpretations. Indeed, some go farther and argue that the constitution encourages them to do so.

²⁴ See discussion below.

²⁵ See generally, for example, Lombardi, *State Law*, pp. 174-258; Lombardi and Brown, “Do Constitutions,” pp. 415-29; Baudouin Dupret, “‘La Charī'a est la source de

la législation’: interpretations jurisprudentielles et théories juridiques,” *Annuaire de l’Afrique du Nord* 34 (1995), pp. 261-8; Nathalie Bernard Maugiron, “Les principes de la sharia sont la source de la législation’: la Haute Cour constitutionnelle et la référence à la loi Islamique,” in *Le Prince et son juge: droit et politique dans l’Égypte contemporaine: a special issue of Egypte/Monde Arabe* 2 (1999) ed. Nathalie Bernard-Maugiron and Baudouin Dupret, pp.107-26; Frank Vogel, “Conformity with Islamic Shari’a and Constitutionality under Article 2: Some Issues of Theory, Practice, and Comparison,” in *Democracy, the Rule of Law and Islam*, ed. Eugene Cotran and Adel Omar Sherif (CIMEL Book Series No. 6; London: Kluwer, 1999), 525-44.

²⁶ See, for example, Muhammad Qasim Zaman, “Religious Discourse and the Public Sphere in Contemporary Pakistan,” *Revue des mondes Musulmans et de la Méditerranée* (2008) 55-73.

²⁷ For a summary of case law through the early 1990s, see Nasim Hasan Shah, *Islamisation of Law in Pakistan*, 47 PLD 1995 Journal (1995) pp. 37ff. For those who wish to read the case law themselves, the cases are reported in the *Pakistan Legal Decisions* or in a specialized court reporter, entitled *National Law Reporter: Shariat Decisions and Shariat Statutes*.

²⁸ The Islamic Review Clause in the Egyptian Constitution requires the state to respect “The Principles of the Islamic Shari’a [*mabadi al-Shari’a al-Islamiyya*].” The provisions of the Pakistani Constitution that empower courts to exercise judicial review require that the state respect “the teachings and requirements of Islam as set out in the Holy Qur’an and Sunnah,” without clarifying whether the courts, in interpreting the implications of these provisions should use any particular method or defer to any particular existing interpretation. In the Egyptian case, early litigants specifically requested that the Court interpret the constitution’s Shari’a Clause by incorporating Hanafi interpretations and was rejected. See Lombardi, *State Law*, pp. 202-218. The Pakistani cases are less dogmatic in reflecting Hanafi law as an interpretive prism, but the preference for allowing judges to interpret primary scriptural sources unfettered by a preference for any classical interpretive tradition becomes increasingly pronounced over time. See, e.g., Zaman, “Religious Discourse.”

²⁹ This is a theory which argued that the positive law of the state should be considered sufficiently “Islamic” to be legitimate if it met two criteria: (1) it did not require Muslims to violate an unambiguous command in a scripture that was generally understood to be authentic and (2) it served the public interest in a way that God tended to favor. This theory came to be accepted among a number of thinkers in a variety of schools, including the Hanafi school. For a discussion of the theory, see Baber Johansen, “A Perfect Law in an Imperfect Society: Ibn Taymiyya’s Concept of ‘Governance in the Name of the Sacred Law’” in *The Law Applied: Contextualizing the Islamic Shari’a*, ed. P. Bearman, W. Heinrichs, and B. G. Weiss (London: I.B. Tauris, 2008) p. 267. For a slightly different explanation of the doctrine and a discussion of the way in which elements of the doctrine were appropriated into the thinking of influential modernists in the Arab world, see Lombardi, *State Law*, pp. 48-100.

³⁰ In so doing, they are consistent with a number of extremely important Muslim thinkers. (They include the founder of Pakistan's Jamaat-i-Islami, the founder of Egypt's Muslim Brotherhood and the famous rector of al-Azhar Mahmud Shaltut.) The public has thus been willing to accept the theory in the abstract.

³¹ For a discussion of the connection between the Egyptian courts' use of Islamic review and a rise in judicial activism, see Clark B. Lombardi, "Egypt's Supreme Constitutional Court: Managing Constitutional Conflict in an Authoritarian, Aspirationally 'Islamic' State," *The Journal of Comparative Law* 3 (2008), pp. 242-249. For an indication that this might have been occurring in Pakistan, drawing in part upon the work of Martin Lau, see Clark B. Lombardi, "Can Islamizing a Legal System Ever Help Promote Liberal Democracy: A View from Pakistan," *University of St. Thomas Law Journal* 7 (2010), pp. 685-690, available at <http://ssrn.com/abstract=1829483>.

³² For a discussion of this phenomenon and a discussion of why this might be true through the early 2000s, see Lombardi, *State Law*, pp. 259-74. That it continues to be true would seem to be indicated by the fierce reaction to a proposal by some Muslim Brothers to strip the Supreme Constitutional Court of Egypt of Jurisdiction over Islamic review and give jurisdiction to a special body of scholars. Presumably this new body would favor a more traditional method of reasoning—or at least reach more conservative results. This provoked a backlash both within the Brotherhood and among the public at large, leading the Brotherhood to hastily renounce it. See the discussion in Brown and Hamzawy, "The Draft Party Platform".

³³ For a description of the 'ulama' and Islamist critiques and a forceful articulation of the idea that the court could do a better job of engaging with traditional thought, see generally, Zaman, "Religious Discourse."

³⁴ In the wake of the Arab Spring and a series of political crises in Pakistan, both Egypt and Pakistan are likely to see significant changes in their constitutional and legal systems. It is unclear whether the practice of Islamic review in Egypt and Pakistan will continue to function as it did in the 1980s, 90s and 2000s.

³⁵ Information taken from numerous conversations with faculty at the Shari'a faculties of Kabul University and Balkh University, over the period from 2008-2011.