REPUGNANCY IN THE ARAB WORLD

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I. INTRODUCTION

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

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

II. THE COLLISION OF REPUGNANCIES AND ECONOMIC REALITIES

In 1980, Article 2 of the Egyptian Constitution was amended so that *shari'a* became *the* principal source of legislation rather than *a* principal source of legislation, as it had been prior to the amendment.[7] On its surface, the enhanced role of judicial review as a result of this rather small change is not apparent. The amendment seems to require that the *sole* principal source material for any law would be *shari'a,* though presumably other material could be used as well, so long as its use was not so broad as to be deemed "principal." Logistically, it is difficult to imagine a court examining a complex piece of legislation, trying to find a source for each and every provision in it, and then making a determination as to whether or not the legislation as a whole "principally" derives from *shari'a* or any other source. Moreover, not only is such an approach logistically difficult, it also would almost surely result in the invalidation of large amounts of vitally important legislation.[8] The fact is that in drafting most modern law, from securities laws[9] to bankruptcy laws,[10] the vast compendia of norms

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

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

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

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

These rules, as developed by individual jurists, are not always consistent with one another.

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

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

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

25. 'ABD AL-RAZZAQ AHMAD SANHURI, 3 MASADIR AL-HAQQ FI AL-FIQH AL-ISLAMI: DIRASA MUQARANAH BI-AL-FIQH AL-GHARBI [THE SOURCES OF T

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

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

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

III. ISLAMISTS AND REPUGNANCY

A. The Egyptian Muslim Brotherhood

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

30. *Id.* at 104.

31. *Id.* (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Iraqi Federal Supreme Court seems to endorse this result of

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

In both of these cases, the Fe

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

Ennahda objects to the stigmatizing of Islam that it claims took place historically in Tunisia. For example, President Borguiba went so far as to refer to the Islamic headscarf, the touchstone of pious Islamic observance among women in the contemporary era, as an "odious rag."[64] It also broadly embraces religious themes in its rallies and encourages public displays of religion.[65] However, Ennahda has said repeatedly and forcefully that it is not interested in Islamizing Tunisia's existing law, even the highly controversial (though Islamically derived) family laws, which are among the most progressive in the region,[66] or the rules on alcohol,[67] the consumption of which is often presented by commentators as an example of a *shari'a* prohibition on which there is virtually universal agreement.[68] The only way that this could possibly be consistent with a repugnancy clause would be if that clause did not relate to existing s.7( )]0 Tcuk29(y .6(e)-2.7TJ7.tha)7..9998 -1.2

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

IV. THE I

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

Yet any Islamist figure with even a marginal understanding of political and economic realities is as aware as the SCC was in 1985 of the potentially devastating effects that a complete ban on interest would be likely to have on any national economy in the modern world. The SCC's creative dodge may not be the only one available, but having been employed in the Arab world once, it seems to have proven itself remarkably attractive. Under this approach, the judiciary will be excluded from considerations of Islamicity with respect to existing, vita95 -1.1ionsn. the

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

Iraq's Shi'a Islamist political parties are not much different. While their leaders are in some (though not all) cases more obviously Islamist in orientation,[86] in that they don the traditional robes and turbans of Shi'a trained scholars, their political priorities are self-evidently focused more on issues that do not concern the *shari'a*. There is some level of predictable demagoguery relating to *shari'a*—efforts to ban or restrict the sale of alcohol,[87] for example, or reform religious curricula in schools[88]—but these occupy a relatively modest proportion of attention in relation to other, more pressing concerns. Among these are negotiations over a hydrocarbon law,[89] wrangling about the future of Iraqi federalism,[90] and debates over the separation

83. *Id.*

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

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

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

87. Haider Ala Hamoudi, *Why an Iraq Ruled by Law is Becoming More Hopeful*, THE DAILY STAR (LEB.) (July 9, 2009), http://www.dailystar.com.lb/Law/Jul/09/Why-an-Iraq-ruled-by-law-is-becoming-more-hopeful.ashx#axzz1rBIeSa7R (describing efforts to ban alcohol in the Iraqi legislature). In addition, Iraqi political authorities appear to go on periodic

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

V. CONCLUSION: THE FUTURE OF ISLAMISM

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

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

91. There are, for example, frequent concerns respecting the possibility of executive interference with judicial independence.