

**THE BASIS FOR JUDICIAL REVIEW IN THE FEDERAL SUPREME COURT IN  
IRAQ:  
MEDIATING BETWEEN DEMOCRACY AND HUMAN RIGHTS THROUGH ISLAM'S  
SETTLED RULINGS**

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University of Pittsburgh, 2019

This dissertation concerns Article 2 of the Iraqi Constitution of 2005, which states that Iraq is a modern Islamic constitutional democracy. The Article contains what is commonly referred to as a "repugnancy clause," which prohibits the enactment of any law that is contrary to Islam's settled rulings, the principles of democracy, and the rights guaranteed in the Constitution. The repugnancy clause allows the constitutional court to invalidate laws that violate the constitution and uphold laws that do not. Currently, the Iraqi Federal Supreme Court's method for determining whether or not a particular law is repugnant to the Constitution and Islamic settled rulings as per Article 2 is inconsistent and arbitrary. The core question in this dissertation is: What is the best way to successfully implement the Repugnancy Clause of the Constitution of Iraq? I propose an approach that focuses on the classical Islamic concept of the Maqasid, an Arabic word that means intent, purpose, or objectives of Sharia. This approach will also fulfill the two other main purposes of Article 2 referred to above, which are to ensure that the law is also consistent with the principles of democracy on the one hand and the principles of human rights on the other hand.

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## 1.0 AN INITIAL OVERVIEW AND INTRODUCTION

Currently, delving into constitutional religious matter in Iraq is treading on dangerous ground because unwise interference in the diversity of Iraq's religions and sects would generate many complicated problems when the writers attempt to critique or evaluate the role of religion in state constitutions.<sup>1</sup> These constitutional religious matters are in need of a comprehensive, and legitimate, legal solution rather than tinkering only. From the beginning of the post-Saddam era, leading advisors have taken the position that the Constitution needed to "incorporate some standards drawn from Islamic law and should indeed refer directly to Islamic law as a source of law with application to either legislation, judicial review, or both."<sup>2</sup> In fact, when the current Constitution of Iraq was drafted, this position was addressed through what is known as a repugnancy, or non-contradiction, clause. This is a constitutional article that prevents legislatures from enacting any law inconsistent with certain fundamentals of state ideology and values. In Iraq, these are the settled rulings of Islam, the principles of democracy, and human rights. In the case of

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<sup>1</sup> There are at least three different levels of schisms in Iraq. The first is ethnic, with the Arab the first population, the Kurds, and the smaller groups of Assyrians, Turkmens, Armenians, and others. The second divide is religious: 96% of all Iraqis are Muslims which divided into Shia and Sunni which includes Sunni Arabs and Sunni Kurds. Christians make up most of the rest of the population. The third faultline is regional: the Shia live largely in the central and southern region, the Sunni in the north, and the Kurds in the northern highlands. Makau Mutua, *The Iraq Paradox: Minority and Group Rights in A Viable Constitution*, 54 BUFF. L. REV. 927, 932 (2006).

<sup>2</sup> Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857,861-62 ( 2004-2005). Feldman served as senior constitutional advisor to the Coalition Provisional Authority in Iraq, concerning an imposed constitutionalism issue.

a contradiction, the law is void.<sup>3</sup> This dissertation will describe how standards drawn from Islam can serve as a primary basis for the repugnancy clause.

Unfortunately, constitutional courts throughout the Islamic world have failed to apply their so-called repugnancy clauses in a consistent fashion. Because interpretations of “the repugnancy clauses” are inconsistent in certain ways, courts have not developed an overarching theory of what “repugnancy” means, resulting in broad legal confusion. Iraq’s Federal Supreme Court (FSC) is no exception to this regrettable trend.<sup>4</sup> It has interpreted Article 2 of Iraq’s Constitution in an *ad hoc* fashion on bases and principles that are very hard to discern from a careful reading of the cases.

In order to avoid the legal confusion that results from applying the repugnancy clause of the Constitution of Iraq inconsistently, this dissertation suggests a methodology for the judicial review of the laws concerning the repugnancy clause. Specifically, later chapters will offer a theory of repugnancy for particular use in Iraq based on the classical Islamic concept of the *Maqasid*, or goals, of the Sharia. The FSC needs to define “Islam's Settled Rulings” as five essential values of Islam (*Maqasid* Sharia). These essential values of Islam are extrapolated from the *Quran*, *Sunnah*, and the basic rules of the Jurisprudential Islamic schools, but they are derived by humans not as a divine aspect of law. There is no sacredness in them.

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<sup>3</sup> Haider Ala Hamoudi, *Repugnancy in the Arab World*, 48 WILLAMETTE L. REV. 427 (2012).

<sup>4</sup> At the time of the Constitution's ratification, the Federal Supreme Court already existed as created by the Transitional Administrative Law in 2004 and established under an implementing “Supreme Court Law No. 30 of 2005.

The proposal discussed herein is based on a classical Islamic concept and therefore carries with it certain legitimacy and authority as a result. It has the advantage of a combination of flexibility, adaptability and yet also legitimacy so as to be able to be made consistent with the other two parts of the repugnancy clause of Constitution of Iraq, which are, respectively, the fundamental principles of democracy and human rights. This particular understanding of Islam's Settled Rulings will not only be consistent with democracy and human rights values, but indeed will support their realization. In addition, if successful, Iraq would produce a unique template for other nations on a similarly democratic path. In view of this method, the development of the constitutional and judicial processes for Iraq is of great import.

There are several central questions, raised by this proposal: 1) How should the repugnancy clause be applied in constitutional courts of modern Islamic countries? 2) Will courts be able to set aside laws if incompatible with Islam's Settled Rulings, democracy, and human rights? (In other words: How best can the repugnancy clause operate in practice?) 3) Are the essential values of Islam (*Maqasid Al- Sharia*) a good basis for applying the Repugnancy Clause? 4) How can Iraq's three government branches realize and support human rights and democracy in light of Islam's Settled Rulings? These are the central questions at the foundation of this dissertation.

## **1.1 The First Chapter: The Role of Religion in the Iraqi legal system**

This chapter will illustrate the history of the relationship between the state and religion in the Iraqi constitutional realm. This Chapter will review some basic descriptive facts about the role of Islam in the Iraqi legal system. Such background provides a useful context in evaluating Iraq's constitutional framework as concerns the role of Islam. The chapter will not address the process of state Islamization, and the possibilities of a theocratic state, much less a state that resembles those of the classical era. The chapter presupposes the existence of a state with the characteristics of a modern nation state with a legal basis such as a constitution and a democratic mechanism.<sup>5</sup>

Formally, there has been a state and a constitution in Iraq since 1925. All of Iraq's Constitutions referred to the shape of the state and its institutions and its protection of rights and freedoms and therein lie the foundations of Iraq's social, economic and political values. In addition, these successive Constitutions approved the role of religion in the legal system. Although the role of religion is sometimes ambiguous, the Constitutions, not religious texts, remain the governing basis of the state, as this chapter will explain later.<sup>6</sup> This does not mean that the constitution established a shadow religious state within state secular liberalism. The current constitution of 2005 introduced a unique text which expanded the role of religion to be a prerequisite for passing any law and granted a role to Islamic jurists in the constitutional judiciary.

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<sup>5</sup> ABDULLAHI AHMED AN-NA'IM, ISLAM AND THE SECULAR STATE : NEGOTIATING THE FUTURE OF SHARI'A, 232 (2009).

<sup>6</sup> See *infra* part 2.3. See also, CHARLES TRIPP, A HISTORY OF IRAQ 45 ( 2007).

<sup>7</sup> Therefore, the focus of the dissertation is on the application of Article II of the Iraqi constitution in a civil state not a theocratic state. That being said, the legal efforts surrounding the previous historical legal efforts are a bona fide contribution to the contemporary Islamic legal thought of applying Sharia.

The chapter begins with definitions of particularly opaque and frequently misunderstood terminology. It defines two problematic words: Sharia and *Fiqh*. These terms are inevitably relevant and extremely important when one wants to interpret the role of religion in the legal system. Explained here simply, Sharia is a general provision which sources include the Qur'an and the *Sunnah*, transmitted by the Islamic prophet Muhammad. However, there are many interpretations, *fiqh*, by Muslim jurists, and these interpretations may diverge between the different *Shia* and *Sunni* schools. Also, a fair number of *fiqh* rules stem from *ijtihad* which is the juristic effort to derive a rule from sources such as *qiyas*, which is reasoning by analogy, rather than from clear directives on specific subjects.<sup>8</sup>

This chapter argues that all the uses that have emerged in legal realm were *Fiqh*, not Sharia and there was an overemphasis on *Fiqh*. Ultimately, *Fiqh* is an interpretation used in teaching and cannot be compared to legal rules. Indirectly, the overemphasis on *Fiqh* has worked to distort the role of religion in law with a central focus of this chapter proposing the restructuring of the critical distinction between Sharia and *Fiqh* in public legal consciousness.

After exploring a deeper understanding of Sharia and *Fiqh*, terms and concepts integral to the role of religion in the legal system, this chapter will illustrate the initial integration of rules of

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<sup>7</sup> Article 92, section 2, Dustour Jumhuriyat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

<sup>8</sup> Ashley S. Deeks, Matthew D. Burton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INT'L L.J. 1, 21 (2007).

Islam into the Iraqi legal system, which was through the Ottoman Civil Code, or Majallah al-*Ahkam al-Adliye* [hereinafter “Majallah”], in the nineteenth century.<sup>9</sup> This was the first major codification in the modern Islamic world led to the integration of *Fiqh* into the legal system. This happened during the Ottoman Empire and it codified the *Fiqh* of Hanafi school. Although the Ottomans attempted to emulate the European legal renaissance in creating a civil code in the Majallah, they nevertheless gave a great authority to Hanafi school. As a result, Majallah was “a compilation of rules rather than an analytical and logical statement of general principles of the law to be applied by deduction to specific cases and extended by analogy to cases.”<sup>10</sup> Also, it was applied in most territories ruled by the Ottomans, including Malaya, India, Egypt, and Iraq.<sup>11</sup> The impact of the Majallah has continued until current times in some laws such as the Iraqi Civil Code and the Personal Status Code.

In the wake of Ottoman period, Islamic countries, including Iraq, have used several ways to express the role of Islam in their constitutions. Some of these constitutions refer to Islam only as the religion of the State. Others have mentioned specifically Islamic *Sharia*. Some have declared *Sharia* as “a” source of law; others have ensured that *Sharia* is “the” source of law.<sup>12</sup> This variance is likewise reflected in past Iraqi Constitutions.

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<sup>9</sup> TARIQ ALBASHARI, ALSSIAQ ALTTARIKHI LITAQNIN ALSHRYE [HISTORICAL CONTEXT OF CODIFY OF SHARIA] 21 (2012) (Arabic).

<sup>10</sup> Dan E. Stigall, *Iraqi Civil Law: Its Sources, Substance and Sundering*, 16 J. TRANSNAT'L. L. & POL'Y. 1, 15-16(2006). See also, LAW IN THE MIDDLE EAST 294 (MAJID KHADDURI, HERBERT J. LIEBESNY, eds.,1955). See also, Anderson, J. N. D. (James Norman Dalrymple), Sir. Islamic law in the modern world. [New York] : New York University Press, ACLS Humanities (1959).

<sup>11</sup> Najmaldeen K. Kareem Zanki, *Codification of Islamic Law Premises of History and Debates of Contemporary Muslim Scholars* 130, INTERNATIONAL JOURNAL OF HUMANITIES AND SOCIAL SCIENCE (July 2014).

<sup>12</sup> See general, Clark B. Lombardi, *Constitutional Provisions Making Sharia "A" or "The" Chief Source of Legislation: Where Did They Come from? What Do They Mean? Do They Matter?* .28, No. 3 AM. U. INT'L L. Rev.733-74 (2013) and Hussin, supra note 101 at 11

These Iraqi Constitutions and their history, along with the role of Islam therein and in the Iraqi legal system, will be the focus of the next section of Chapter One. In 1925, the British' colonial ruler drafted a new constitution for Iraq. This Constitution considered Islam as the official religion of the State, and it provided that justice shall be administered in the Sharia courts in accordance with the terms of the Sharia doctrine peculiar to each of the Islamic sects.”<sup>13</sup>

After the 1925 draft, Iraq adopted constitutions in 1958, 1964, 1968, and 1970. Following the transfer of power after the Ba'ath Party, Iraq adopted an interim constitution known as the Transitional Administrative Law of 2004<sup>14</sup>, and finally, in 2005, Iraq ratified the Constitution currently in force. The 2005 Constitution of Iraq has given broad and modern significance to the Repugnancy Clause because it evolved this clause to include, in addition to Islamic rules, protecting principles of democracy and human rights. Article 2 states:

First: Islam is the official religion of the State and it is a fundamental source of legislation:

- A. No law that contradicts the Islam's Settled Rulings may be established.
- B. No law that contradicts the principles of democracy may be established.
- C. No law that contradicts the rights and basic freedoms stipulated in this constitution may be established.

Second: This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice such as Christians, Yazidis, and Mandi Sabeans.<sup>15</sup>

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<sup>13</sup> Article 13,77, al-Qanun al'Asasi al-Iraqi [The Organic Law] of 1925(Iraq).

<sup>14</sup>This law was established in 2003 by Coalition Provisional was an institution established according to Resolution the Security Council stated “ Supports the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority;”. S.C.Res. 1483,9 (May 22, 2003).

<sup>15</sup> IRAQ CONST. *supra* note 7 art.2.



The problem is that the Iraqi Constitution neglects to specifically define “Islam's Settled Rulings,” “Principles of Democracy,” or “basic rights and freedoms.” The term Islam’s settled rulings itself is complicated, as there is so much variation that it is difficult to come up with clear/unequivocal settled rulings actually. This might be normal and acceptable in new democracies, but the FSC in Iraq has to take a lesson from other democracies to develop methodologically sound interpretations for these basic components of the repugnancy clause. For instance, in the United States, it has been more than 200 years since the Constitution was created, yet the Supreme Court still provides new and modern interpretations that can address the needs of the people. Thus, the Iraqi judiciary could discover a way to implement and interpret its Constitution, serving as a great paradigm for modern Islamic countries.<sup>16</sup>

In sum, exploring and analyzing the role of religion in the wording of previous and current Iraqi constitutions is the primary goal of this section. This historical review will present evidence that will justify the final wording of the repugnancy clause in Iraq and provide the relevant historical context that gave rise to that clause.

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<sup>16</sup> Nathan J. Brown, *Constitutionalism, Authoritarianism, and Imperialism in Iraq*, 53 *DRAKE L. REV.* 923(2002).

## 1.2 The Second Chapter: The Concept of the Repugnancy Clause in the Trends of Legal Thought

This chapter presents the constitutional court's practice which deals with the interpretations of the repugnancy clause in the constitutional courts of the modern Islamic world. Although Islam has been addressed in more than twenty-five constitutions in the Islamic world, only a few of these constitutions have provided a repugnancy clause.<sup>17</sup> These include the Pakistani Constitution of 1973, Iran's 1979 Constitution, the Iraqi Constitution of 2005, the Constitution of the Republic of the Maldives of 2008 and the Algerian Constitution of 2016.<sup>18</sup> The first use of a repugnancy clause in the Islamic world was in the Supplementary Fundamental Laws of Iran in 1907 where it was used implicitly. That constitution established the learned doctors of theology (the '*ulama*') to determine whether such laws as may be proposed do or do not conform to the rules of Islam.<sup>19</sup> The first constitution that explicitly mentioned a repugnancy clause was in Pakistan in 1973.<sup>20</sup>

First, I outline the background about the judicial review and repugnancy standard in United States of America and how the Supreme Court operated a form of repugnancy standard in practice. Equally important, this part will explain the rise of judicial review, which is linked up with "repugnancy standards." The U.S. method, as a founder of judicial review in 1803 in *Marbury v.*

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<sup>17</sup> MOHAMMED SALIM AND MOHAMED AHMED ALI MUFTI, AL-ISLAM FI DISATIR ALDDUAL AL'IISLAMIA: DIRASA MQARN [ISLAM IN THE CONSTITUTIONS OF ISLAMIC COUNTRIES: A COMPARATIVE STUDY] 18 (Arabic).

<sup>18</sup> Art. 10 of Algerian Constitution of 2016 also adopted so-called "repugnancy clauses" which forbid the institutionalization of practices that conflict with Islamic morals, as well as constitutional amendments that conflict with either the democratic or Islamic character of the state, or the rights of its citizens. However, the term "rulings of Islam" is also, mentioned in the preamble to the Tunisian Constitution of 2012, which states: "... based on the rulings of Islam and its purposes and tolerant objectives." Alg. CONST. art. 2.

<sup>19</sup> HADI ENAYAT, LAW, STATE, AND SOCIETY IN MODERN IRAN, PALGRAVE MACMILLAN, 99 (2013).

<sup>20</sup> Hamoudi, *supra* note 3 at 429, and *See, e.g.,* Haider Ala Hamoudi, *Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution*, 7 U. ST. THOMAS L.J. 692, 708 (2010).

*Madison*, will be examined. This case was a significant event in the legal scene globally. This would be useful for developing the Iraqi method of operating the Iraqi' repugnancy clause.

Second, in the same line, this chapter examines the protection of Islamic values in some Islamic countries as part of examining their method of implementation of the repugnancy clause. This chapter examines the repugnancy clause in the Islamic countries that prevent any action that is perceived to go against Islamic rules. This chapter will use the comparative method to examine the repugnancy clause's application in the contemporary Islamic Constitutions of Egypt and Iran, examining the text of the constitution and the constitutional courts' actions in applying the clause in these countries. Each of these countries present a specific style of judicial review. This section will also describe the approaches of implementation of repugnancy clauses in these countries and explain why they have been deficient. The most important purpose for this chapter is to discover the varying interpretations of repugnancy clauses in terms of extracting the fundamental rules for judicial review and how these rules are applied in modern constitutional courts.

In the case of Islamic countries, the scope of repugnancy clauses is varied. The courts in these countries look at an Islamic schools of thought only, which was derived from interpreting Sharia to articulate Islamic rules. For example, the Constitution of Iran states the Islamic Consultative Assembly cannot enact laws contrary to Islam and the Twelver Jafri School [in *usul al-din and fiqh*].<sup>21</sup> By contrast, in Egypt as a *Sunni* school, a generalized vision of Islam defines the entire scope of Article 2, which states: "[T]he principles of Islamic Sharia are the main source of legislation."<sup>22</sup> Moreover, the Supreme Constitutional Court of Egypt interpreted Article 2 to

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<sup>21</sup> Articles 12 and 72 QANUNI ASSASSI JUMHURII ISLAMI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980].

<sup>22</sup> CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014.

mean that all future legislation must be consistent with universally applicable scriptural rules of Islamic *Fiqh*, not the goals of Sharia.<sup>23</sup>

Part three essentially discusses how the repugnancy clause of the Iraqi Constitution has been implemented. This part will be an in-depth analysis of several complex issues that address the operation of the repugnancy clause in the context of Article 2 of the Iraqi Constitution of 2005. This section will determine the meaning of the Iraqi repugnancy clause by looking at the intention of these words, as the drafters of the Constitution of Iraq envisioned them, and based on the original understanding of the FSC, reflected in its decisions. Moreover, it is very important to review how the FSC has considered the repugnancy clause. Practically, from 2010 until 2018, the Court received more than twenty claims concerning the interpretation of the repugnancy clause, most of them related to family law. The court, in these cases, pursued varying approaches to adjudicate Islam's Settled Rulings. The FSC in the decision of 60/2010 pertaining to the role of Islamic values in the Iraqi Constitution adopted a provocative approach when it interpreted repugnancy clause. For instance, the judge can play the role of Islamic jurists or go directly to interpret the provisions of the Quran to solve a problem thereby ignoring any previous opinions of the *Fiqh*.<sup>24</sup> In contrast, in the case of 9/2015, the court concluded that “Islam's Settled Rulings” seek to achieve the “ultimate justice” between a spouse.<sup>25</sup> According to this understanding, the court attempted to apply the essential values of Islam, which led to ultimate justice even though ultimate justice is a very broad concept. In doing so, the court did not look directly at either the Quran and *Sunnah* of

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<sup>23</sup> Al- Mahkama al-Dusturiyah al-ulya [Supreme Constitutional Court], case no. 10 session of 29 June 1974, year 4. (Egypt)

<sup>24</sup> Al-Mahkama Al-'itihadya al-'ulya [Federal Supreme Court], [FSC], Decision No. 60 of 2010, available at [http:// www.iraqja.iq/view.738/](http://www.iraqja.iq/view.738/). (Iraq)

<sup>25</sup> Al-Mahkama Al-'itihadya al-'ulya [Federal Supreme Court], [FSC] Decision No. 9 of Nov. 21, 2015, available at [http:// www.iraqja.iq/view.722/](http://www.iraqja.iq/view.722/). (Iraq).

Prophet, or the opinions of the sects of Islam to solve this issue. On the other hand, the FSC, in the decision of case 61/ 2011, attempted to avoid involving these issues by deferring to the lawmakers to enact a law dealing with family law.<sup>26</sup>

In sum, these three cases illustrate three different ways the clause has been interpreted. Unpacking the role and effects of courts in the constitutional context is important for rounding out the field of comparative perspectives on judicial review of the repugnancy clause to establish a distinct method of decision-making that offers genuine guidance for Iraqi courts. Thus, this dissertation will suggest ways that some of these cases could have better employed the repugnancy clause and describes cases that have properly done so. It concludes that, when used properly, *Maqasid* can help to interpret “Islam's Settled Rulings” in a satisfactory and convincing method, which can be applied to the repugnancy clause in view of the principles of democracy and human rights which also appear in the clause.

### 1.3 The Third Chapter Theory of Maqasid in the Classical and Contemporary Perspective

In this chapter, I will review the Maqasid or goals, of the *Sharia*, in classical and modern theories, then describe how they continue to matter, and specifically how they are relevant in *Sunni* and *Shia* discourse as well as modern understanding of the *maqasid*, focusing in particular on the Iraqi case. Maqasid are classified into three levels of priorities, which are necessities (*darurat*), needs (*hajiyyat*), and luxuries (*tahsiniyat*).<sup>27</sup> These levels are extrapolated from the Quran, *Sunnah*, and the basic rules of the Jurisprudential Islamic schools. Necessities are further classified into

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<sup>26</sup> Al-Mahkama Al-'itihadia al-'ulya [Federal Supreme Court], [FSC] Decision No. 61 of Jan. 31, 2011, available at [http:// www.iraqja.iq/view.712/](http://www.iraqja.iq/view.712/). (Iraq).

<sup>27</sup> JASSER AUDA, MAQASID AL-SHARI'A AS PHILOSOPHY OF ISLAMIC LAW-: A SYSTEMS APPROACH, 3(,2008).

five objectives of Islam, which refer to the general aims that Islam strives to fulfill with respect to human life as well as the specific aims these legal injunctions have set down to achieve these aims. The five essentials are namely: preservation/protection of faith; preservation/protection of life; preservation/protection of intellect; preservation/protection of property; and preservation/protection of offspring.<sup>28</sup> *Shia* scholars such as Ibn Babawayh or Al-Shaykh al-Saduq and Mohammed Bin Jamal Aladdin Alazani, developed the theory of the basic purposes as a standard of the legality of legislation.<sup>29</sup>

Recently, there are many contemporary scholars who support the development of the idea of *Maqasid* and consider it as suitable method in the legal realm. These figures include Taha Jabir al-Alwani and Mohammed Hussein Fadlallah. They attempt to give a modern and broad meaning of the *Maqasid* that is compatible with democracy and human rights and functional in the modern era. For example, under this reading of the *Maqasid*, the freedom of beliefs could refer to protection of faith, family protection could refer to parentage, and human development could refer to preservation of property.<sup>30</sup> Thus, *Maqasid* are not themselves legal outcomes, but they constitute a method to extrapolate the rules of Islam, and they are flexible and adaptable enough to be interpreted in a manner consistent with democracy and human rights. The method is similar to inductive reasoning in philosophy realm, which is a logical process in which multiple premises,

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<sup>28</sup> *Id.* However, Muslim scholars declared that all the revealed religions, specifically, Judaism and Christianity agreed upon protecting these interests. Law professor and former Tunisian Minister of Education Mohamed Charfi holds that it was not the three monotheistic religions that gave birth to the concept of human rights. Yet "the Bible, the Gospels and the Qur'an essentially contain messages of love, charity and liberty. It is said in the Qur'an that humanity is God's vicar on earth. See also, David L. Johnston, *Maqasid Al-SHARIA: Epistemology and Hermeneutics of Muslim Theologies of Human Rights*, Die Welt des Islams, 156 (2007).

<sup>29</sup> See ALI RETHA AL-SADR, MAQASID ALSHRYET WAMASALIH AL'AHKAM - FI FAQIH AL'IIMAMIA [PURPOSES OF THE SHARIA AND THE INTERESTS OF PROVISIONS - IN THE JURISPRUDENCE OF THE IMAMI], Nosos Mossera, <http://nosos.net/page/125/?act=news&sec=0&id=t=1> (last visited Apr 4, 2018). (Arabic).

<sup>30</sup> JASSER AUDA, FAQAH ALMUQASID: ANATT AL'AHKAM ALSHSHAREIAT BIMAQASIDIHA [JURISPRUDENCE PURPOSES: ENTRUST ITS PURPOSES LEGAL PROVISIONS], 18-22 (2001). (Arabic).

all believed to be true or found to be true most of the time, are combined to obtain a specific conclusion.<sup>31</sup> Importantly, the *Maqasid* method does not limit to examining the *Fiqh* that directly shapes personal understanding of the rulings of Islam in a particular time and place, and at the same time, does not picture it as a completely new and independent form of legal practice. Simply, *Maqasid* are higher objectives of Islam that emphasize public interest and well-being (Maslaha), reject literal readings of sacred texts, and grants priority to the spirit of the message of the Qur'an and *Sunnah*.<sup>32</sup> Therefore, these purposes, interests and values are a guide for legislators and adjudicators when there are no provisions that govern the case beyond the FSC.

After a brief discussion of the concept of *Maqasid*, the next Chapter will describe how using the *Maqasid* will work in practical applications, as opposed to the earlier section which lays out how the *Maqasid* will work in theory. The purpose of this chapter is to develop an approach of judicial review in terms of the Islam's Settled Rulings which, as described in the previous section, should be based on *Maqasid*. This part will attempt to propose an appropriate solution to the misreading of the repugnancy clause, one that can be adopted by the FSC in Iraq and is based on the *Maqasid*.

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<sup>31</sup> Dan Hunter, *Near Knowledge: Inductive Learning Systems in Law*, 5 VA. J.L. & TECH. 9 (2000).

<sup>32</sup> MOHAMMAD HASHIM KAMALI, *SHARIH LAW: AN INTRODUCTION*, 76 (2008).

## **1.4 The Fourth Chapter: Applying the Maqasid Method in the FSC to Operate the Repugnancy Clause**

Finally, Chapter Four will examine *Maqasid's* method as a method of judicial review that helps to protect human rights and democratic values. This chapter refutes the notion that Islamic values, democracy, and human rights cannot work together. Thus, the chapter will assert that a certain reading of the *Maqasid* can be an appropriate method to adopt Islamic values consistent with the values of democracy and human rights. These values will be protected under Islamic constitutionalism and its specific religious system. This does not mean that democratic and human rights values have to be read within the general parameters of Islam because *Maqasid* are interpreted by humans and therefore there is some variability in how humans will read Islam's true spirit. However, in the context of the Iraqi Constitution, *Maqasid* and Islam's settled rulings have no sovereignty over the values of democracy and human rights. The three components must be read on equal footing.<sup>33</sup> Arguing the judicial side, on the basis of *Maqasid*, will not be easy, especially if we adhere to the jurisprudential interpretations of the Sharia. However, *Maqasid* opens the door to a contemporary vision of the Constitution's containment of Islam in a simplified and clear legitimate and consistent way in which the constitutional judge can then resolve disputes relating to the review of laws under the terms of the repugnancy clause, which, as noted, give equal footing to democracy and human rights. Ultimately, *Maqasid*, in terms of secular or religious constitutionalism, could be defined in a way that is consistent with the human rights and, hence democracy.

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<sup>33</sup> Joseph Khawam, *A World of Lessons: The Iraqi Constitutional Experiment in Comparative Perspective*, 37 COLUM. HUM. RTS. L. REV. 717, 754 (2006).



Regarding human rights, some schools claim that Western and Islamic societies possess somewhat different notions of what constitutes core human rights. Undoubtedly, there is a dispute about the meaning of human rights between the Arab countries and other countries in Europe. This may add other obstacles in applying Article 2 of the Constitution of Iraq. However, to solve this issue, each community could build upon its inherent moral base, rather than to impose outside morals that may or may not reflect the popular consensus.<sup>34</sup> Alongside these internal moral groundings, there are agreed-upon human rights principles that cannot be ignored and the international community can mitigate this gap by opening a forum for all religious views.<sup>35</sup> Therefore, this dissertation suggest the *Maqasid* method as a best way to protect human rights in Iraq because the *Maqasid* emphasize the importance of human life also. Democracy and human rights values can be an object of protection under the *Maqasid* method and this specific religious system will mimic and embrace these values in the legal trajectory.<sup>36</sup> As an example, this section will discuss apostasy, an act of abandonment of the Islamic religion. Criminalizing apostasy goes against an important principle of human rights, freedom of religion, and yet seems endorsed by much *fiqh*.. In light of *Maqasid*, criminalizing apostasy will be reject because protection of the freedom of belief can be understood to be one basic aim of Islam and the legislators and judges have to apply this goal of Sharia and ignore any jurisprudential opinion.<sup>37</sup>

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<sup>34</sup> As An-Na'im suggests "so long as there is a perception of exclusive Western authorship of the concept of human rights and its normative implications." ABDULLAHI A. AN-NA'IM, HUMAN RIGHTS AND THE CHALLENGE OF RELEVANCE: THE CASE OF COLLECTIVE RIGHTS, IN THE ROLE OF THE NATION-STATE IN THE 21ST Century: Human Rights, International Organizations, and Foreign Policy 7 (Monique Castermans-Holleman et al. eds, 1998).

<sup>35</sup> Melanie D. Reed, *Western Democracy and Islamic Tradition: The Application of Shari'a in A Modern World*, 19 AM. U. INT'L L. REV. 485, 486 (2004).

<sup>36</sup> See Auda, *supra* note 27, at 3.

<sup>37</sup> See *general*. TAHA JABER AL-ALWANI, LA 'IKRAH FI ALDDIN, [ THERE IS NO COMPULSION IN RELIGION] (2006)(Arabic).

Regarding the values of democracy, if the FSC must develop a democratically legitimate interpretation of Islam's Settled Rulings based on the *Maqasid*. To ensure this, Islamic democracies must make certain that the institutions interpreting and enforcing democracy and those enforcing the repugnancy clause like the FSC “are all deeply familiar with each other’s work and also are able to predict how the coordinate institutions are likely to interpret and enforce the constitution going forward.”<sup>38</sup> The main issue in connection with the role of Islamic jurisprudential experts in the court. This section deals with whether the knowledge immunity of the Islamic jurists is consistent with the democratic values. Are traditional methods of interpreting Sharia compatible with modern judicial review?

In conclusion, Islamic integration into the state is not a coincidental occurrence in Iraq. There are several factors that have contributed to make Islamic values a vital part of the legal system. This integration takes shape through various methods to achieve Islamic constitutionalism in Iraq. The current Constitution of Iraq in 2005 involves a unique integration of Islam in view of the repugnancy clause. Article 2 provides that no law can be enacted repugnant to Islam's Settled Rulings, democracy, and human rights values. While other Islamic countries, such as Egypt and Iran have adopted this clause, the repugnancy clauses in those cases concentrated on Islamic rules only, rather than alongside democracy and human rights values. In addition, if we look deeply at the Iraqi Supreme Court decisions, we can find that this court deals with the repugnancy clause in arbitrary and inconsistent ways because the phrase “Islam's Settled Rulings” is an ambiguity. The misreading of the repugnancy clause will not happen when the court applies a *Maqasid* method to interpret Islam's Settled Rulings, consistent with the other components of Article 2 of the Iraqi constitution, democracy and human rights. Having identified the *Maqasid* legislation, judges must

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<sup>38</sup>Clark B. Lombardi, *Designing Islamic Constitutions: Past Trends and Options for a Democratic Future*, INT'L J. CONST. L. 615,643 -45 (2013).

check whether the law in question hinders the achievement of this goal. For example, if a law causes more harm to human life, this law must be unconstitutional. Thus, this dissertation proposes to reform the repugnancy clause, thereby eliminating inconsistent and arbitrary interpretation of Islam's Settled Rulings. This will allow the FSC in Iraq to avoid both extremes of interpretation and will introduce a new, complex approach to the study of balancing Islamic, democratic and human rights values on equal footing.

## 2.0 FIRST CHAPTER: THE ROLE OF RELIGION IN THE IRAQI LEGAL SYSTEM

### 2.1 Introduction

In modern constitutionalism, as many scholars have noted, the role of religion cannot be disregarded. Ran Hirschl estimated that “one half of the world's population lives in polities where religion plays a significant role in politics, and of that, a billion people live in countries where an official religion has been constitutionalized.”<sup>39</sup> Moreover, the judicial review of Sharia provisions has become dominant in the new constitutionalism of the Islamic world.<sup>40</sup> In Iraq, the increasingly important role of religion generated the current version of the Constitution of 2005, which acknowledges the desire to contain religion in the legal system.<sup>41</sup> This chapter will discuss if a constitution contains religious values based on popular demands, what the role of these values in judicial review should be? And the extent to which this role is reflected in the constitutional system in Iraq. This chapter argues that, at least in the case of Islam, if the introduction of religion into the

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<sup>39</sup> RAN HIRSCHL, *THE RISE OF CONSTITUTION THEOCRACY* 4-6 (Harvard University Press. ) (2010). In addition, an new Pew Research Center survey of Muslims in 39 countries around the globe finds that most adherents of the world's second-largest religion are deeply committed to their faith and want its teachings to shape not only their personal lives but also their societies and politics. While many Muslims favor making Sharia official law in their country, the report finds that there also is widespread support for democracy and religious freedom. Pew Research Center's Forum on Religion and Public Life, *The World's Muslims: Religion, Politics and Society* 9, 46-47 (Apr. 30, 2017), available at <http://www.pewforum.org/the-worldsmuslims-2013>

<sup>40</sup> Intisar Rabb, *The Least Religious Branch? Judicial Review and the New Islamic Constitutionalism*, 17 *UCLA J. INT'L L. & FOREIGN AFF.* 75, 84 (2013).

<sup>41</sup> According to The Independent High Electoral Commission (IHEC), More than 78 percent of 9.8 million voters in the October 15 2005 referendum approved the constitution' draft. As well as, The Shi'is and Kurds struck a strategic bargain in which Shi'i concessions to Kurdish autonomy were matched by a Kurdish willingness to allow the Islamists a freer hand outside of Northern Iraq. . . . Ultimately, the Shi'i-Kurd understanding on federalism allowed a larger role for Islam at the national level than might otherwise have been possible. Noah Feldman & Roman Martinez, *Constitutional Politics and Text in the Next Iraq: An Experiment in Islamic Democracy*, 75 *FORDHAM L. REV.* 883, 885 (2006).

legal system is a popular demand, then, the meaning of religion should be devoted to the principles or the spirit of Sharia, not the interpretations and explanations of religious jurists.

To lay all of this out, I will divide this chapter into two sections. The first section will be an introduction to some necessary terms to understand the context of Islam in the legal system because some legal scholars have not recognized how religion functions as a legal matter. Understanding Islamic legal terminology will help clarify this. Then, in two stages, we will look at how the legislative and judicial branches have used the role of religion in the legal system of Iraq. Stage I is the stage where the kernel of the roles of Islam in the legal system of Iraq first appear. I will call this stage the traditional role of religion in the previous constitutions of Iraq. Stage II is the stage of formal constitutionalizing of the role of religion through the adoption of repugnancy clause by the 2005 Constitution of Iraq.

## **2.2 Thematic Terminology in the Islamic constitutions**

As the introduction shows, there is a critical distinction between the terms Sharia and *Fiqh* that this chapter will examine. This part argues that the role of Islam inside the Iraqi legal system was traditionally based on *Fiqh* and not all of Sharia. This part will first define Sharia, and then the two terms with which it is often confused. These are *Fiqh* and *fatwa*. Then, I will present some differences between the judicial mechanism and the *Fiqh* mechanism to show the difficulties of applying *Fiqh* in the judicial review. Finally, I will end with the assessment of these applications of Islamic terms in the legal concept to show that what has been applied in Islamic states was *Fiqh* rather than Shari'a.

### 2.2.1 Sharia

As concerns the all-important term “Sharia,” it conceptually refers to divine revelation from God to the prophets represented by the Quran, which is verbally revealed by God to Muhammad through the angel Gabriel (Jibril), gradually over a period of approximately 23 years.

<sup>42</sup> As well as, the *Sunnah* of Prophet which is the orally transmitted record of the teachings, deeds, sayings, and silent permissions (or disapprovals) of the Islamic prophet Muhammad, whether related to worship, beliefs or transactions.<sup>43</sup> In other words, Sharia refers to “commands, prohibitions, guidance and principles that God has addressed to mankind pertaining to their conduct in this world and salvation in the next.”<sup>44</sup>

In the Islamic legal sphere, the Qur'an and *Sunnah* are supposed to be only the Islamic legal sources but it is not a legal code. Thus, the real role of legislators is to determine the methods of using these sources in light of social needs. <sup>45</sup> As Arkoun described, Sharia has “a built-in dynamism that is sensitive and susceptible to changing needs of the time.”<sup>46</sup> Therefore, Sharia must be visible and distinctly evident; people do not need to experience hardship to reach this path, but the benefits of this path must be available to people in general.

Comparative legal scholars attempt to derive meaningful insights of Sharia based on the different ways. For example, Vogel's concept of Shari'a illustrates the importance of clear definitions and interpretations of these terms. Vogel defines Sharia as “A rule stated categorically

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<sup>42</sup> Also written as Shari'ah. See Thomas Patrick Hughes, A Dictionary of Islam 572 (1895), available at <http://answering-islam.org/Books/Hughes/index.htm>. (last visited Feb 10, 2019).

<sup>43</sup> ABDUL KARIM ZAIDAN, ALMUDKHAL LIDIRASAT ALSHRYET ALASLAMYT, [INTRODUCTION TO THE STUDY OF ISLAMIC LAW] 5-6 (1969). (Arabic).

<sup>44</sup> Kamali, *supra* note 32 at 41.

<sup>45</sup> GIBB, H. A. R. , 'MOHAMMEDANISM: AN HISTORICAL SURVEY', Anonymous Translator, 90(1949).

<sup>46</sup> MOHAMMED ARKOUN, TA'RÎKHIYYAT AL-FIKR AL-'ARABIYY AL-ISLÂMIYY, [HISTORIOGRAPHY OF ARABIC AND ISLAMIC THOUGHT] , 166 (1996) (Arabic).

and clearly in a Qur'anic verse or in an authentic hadith”<sup>47</sup> This definition would be acceptable in a theological context, but in a constitutional context, it must be more comprehensive, so that legislators, lawyers, and judges can work with it.<sup>48</sup> When it comes to the issue of the repugnancy clause, as will be discussed in detail throughout this text, Vogel's interpretation of Sharia will obstruct operation of that clause because it deals with issues that lie outside of the judges’ and legislature’s scope of authority, to rely on the jurists’ authority since they created these rules.

The most common mischaracterization of Sharia in the West, outside of scholarly circles, is deriving from the use of the term "Islamic Law", the term “Sharia law.” This is a misnomer because Sharia is not law in the modern sense of the word.<sup>49</sup> Sharia is a broader concept than this, i.e., it is an ethical, social, religious, spiritual and scientific system that regulates Muslim affairs. Procedurally, Sharia is a group of moral and ethical, principles, include political, economic, social and criminal laws that God has set forth to regulate the life of the individual and society on Earth according to his decree.<sup>50</sup> The scope of Sharia extends beyond that of the law, which is one reason why close analysis of the relationship between the two, such as found in this paper, are required.

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<sup>47</sup> FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA XIV (2000). See Also, Bernard Lewis, The State and the individual in Islamic society International Symposium on "The Moral and Political Vision of Islam"; Paris; 3, 1982, <http://unesdoc.unesco.org/images/0005/000521/052142eb.pdf> (last visited Jan 10, 2018).

<sup>48</sup> Arkoun, *supra* note 46 at 255.

<sup>49</sup> Nathan J. Brown, *"Sharia and State in the Modern Muslim Middle East,"* INTERNATIONAL JOURNAL OF MIDDLE EAST STUDIES, 363 (Aug., 1997).

<sup>50</sup> KHALED M. ABOU EL FADL, AND GOD KNOWS THE SOLDIERS: THE AUTHORITATIVE AND AUTHORITARIAN IN ISLAMIC LAW DISCOURSE 171 (2001). Intisar A. Rabb, *"We the Jurists": Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527, 542 (2008)

### 2.2.2 Fiqh

The second term is Islamic jurisprudence or *Fiqh*, which means the understanding of provisions of Sharia by Muslim jurists.<sup>51</sup> Some jurists define *Fiqh*, which the scholars have derived from revelation, as equivalent to Sharia.<sup>52</sup> They consider *Fiqh* as basically part of Sharia. *Fiqh* is best conceptualized, however, as an understanding of *Sharia*. These historical understandings are diverse, fallible, and depend on the method of extracting the ruling and the scientific environment of the scholars who support any given school.<sup>53</sup> Thus, many schools of *Fiqh* have emerged to produce different interpretations of Sharia in particular circumstances of individual and social life. Most of the famous scholars such as *Abu Hanifa* (d. 767), *Ja'far al-Sadiq* (d. 765), their student *al-Shafi'i* (767-819 A.D.), *Ahmad b. Hanbal* (d. 855) and some of supporters of *Malik* (d. 795), were found in Iraq.<sup>54</sup> These schools were numerous because the rules were derived from textual manifestations of Shari'a to apply in different places and times. Since they were derived to be widely applicable, the texts of Sharia are broad and general and need to be

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<sup>51</sup> ABDUL MONEIM AHMAD AL-NIMR, EILM ALFQH [AL-FIQH], AL-KHALUD PRESS, 13-14 (1990) (Arabic).

<sup>52</sup> AHMED MAHMOUD EL-SHAFEI AND RAMDAN ALI EL SAYED, ALMUDKHAL LIDIRASAT ALFAQIH ALASLAMI [THE INTRODUCTION TO THE STUDY OF ISLAMIC JURISPRUDENCE], 12 (2003).(Arabic). Also, Hamoudi assert this meaning of Fiqh "is a vast juristic compendia of rules derived from sacred text, spanning centuries across various schools of thought." Haider Ala Hamoudi, *The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law*, 56 AM. J. COMP. L. 423, 434-35 (2004).

<sup>53</sup> Hossein Esmacili, *The Nature and Development of Law in Islam and the Rule of Law Challenge in the Middle East and the Muslim World*, 26 CONN. J. INT'L L. 329, 360 (2011).

<sup>54</sup> Sunnis are guided by four major schools of Islamic law which are spread throughout the world: the Hanafi, located in the Arab Middle East and South Asia; the Maliki, found in North, Central and West Africa; the Shafii in East Africa and Southern Arabia and Asia; and finally the Hanbali primarily in Saudi Arabia.<sup>19</sup> Of the schools the Shi'i adopted, the Ja'fari is the most important. The core difference between the Shi'a and the Sunnis concerns the assumption of political and religious authority following the death of the Prophet Muhammad. The Shi'a believe that during his lifetime, the Prophet Muhammad specifically designated his cousin and son in law Ali ibn Abi Talib as the infallible leader of the Muslim community after his death. The Shi'a further believe that there are 12 such infallible leaders, referred to as Imams. ROBERT GLEAVE, INEVITABLE DOUBT: TWO THEORIES OF SHI'I JURISPRUDENCE 1 (2000); AMIRHASSAN BOOZARI, SHI'I JURISPRUDENCE AND CONSTITUTION: REVOLUTION IN IRAN, 9 (2011); LABEEB AHMED BSOU, ISLAMIC HISTORY AND LAW : FROM THE 4TH TO THE 11TH CENTURY AND BEYOND, 19( PALGAVE MACMILLAN , 2016).



interpreted. Also, because of the spread of Islam and the non-Arab embrace of Islam, the need for new interpretations of Sharia is in line with these expansions.<sup>55</sup> Most tellingly, there is much literature on how the main schools were formed. This phenomenon produced over-interpretations which led to the difficulty of understanding the Sharia and made it more complex.

Finally, there is the matter of *fatwa*. As a practical matter for jurists, when a Muslim faces some difficult or perplexing situation, he or she can ask a scholar for his opinion of the Sharia ruling for that situation. This scholar's opinion in response to that question is called a *fatwa*. In this case, the questioner is free to choose whether or not to follow the *fatwa* in his or her case and his authority requires no official appointment or status. Thus, the *fatwa* of a religious scholar is not directly binding on the individual as law. Under the *Shia* method, the questioner is religiously bound to follow their *mujtahid's*<sup>56</sup> decrees, which means that the act must be consistent with the *fatwa* of the *mujtahid*.<sup>57</sup> However, the questioner is not legally bound, it is purely an ethical obligation. Subsequent to their issuance, most of these interpretations and *fatwas* have been described as educational references that are taught and classified in a way to facilitate learning of *Fiqh*. There is a clear confusion between the function of the judge and the function of the jurists because they can be consulted in many areas, including what is within the jurisdiction. Therefore, it is necessary to distinguish between the two functions by considering the former as *only'ikhbar* (statement) and the latter *as'ilzam* (binding).<sup>58</sup>

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<sup>55</sup> ANN ELIZABETH MAYER, ISLAMIC LAW IN ISLAM: THE RELIGIOUS AND POLITICAL LIFE OF A WORLD COMMUNITY 233 (Marjorie Kelly ed., 1984).

<sup>56</sup> *Mujtahid's* or *marja'* taqlid or source of emulation. A *marja'* was expected to be a mature and respectable learned man known for his devotion to the faith and his intelligence. For more details, see Janet Afary, *The place of Shi'i clerics in the first Iranian constitution*, Critical Research on Religion 327 - 346 (November 15, 2013)

<sup>57</sup> ABUL QASEM AL-KHU'I, AL-A'ISA'EL AL-MUNTAKHABA[ELECTED MATTERS - ACTS OF WORSHIP AND TRANSACTIONS] 2-3 (1985)(Arabic)

<sup>58</sup> Muhammad Khalid Masud, *Shatibi's Philosophy of Islamic Law* 137-40 (1973) (Ph.D. dissertation, McGill University (Canada))(Available at ProQuest Dissertations and Theses Global <https://www.proquest.com/products-services/dissertations/>).

In connection with the above, the person who possesses piety and profound knowledge of Sharia is the one who is qualified to interpret divine rules and he is capable of *ijtihad*. *Ijtihad*, literally, it means exertion or effort, "striving." In the *Fiqh* realm, *Ijtihad* is a term referring to independent reasoning for understanding or deriving rules of *Fiqh*, in a process.<sup>59</sup> Within Shi'ism, for example, the status of *mujtahid* depends on "his success and reputation after a long learning process undertaken in renowned *madrastas* (schools) of a given city." <sup>60</sup> In addition, Islamic jurists have used techniques such as analogical reasoning (*qiyas*) and consensus (*ijma*), the consideration of the public interest (*maslaha*)<sup>61</sup>, and a variety of concepts developed to constitute the field of the sources of jurisprudence, or *usul al-fiqh*.<sup>62</sup>

All of these tools can be read as part of jurisprudence functions because they concern the interpretation of the Sharia and deriving rules from Sharia, which are different from direct deduction from Sharia itself. This will lead to a core question. Do lawmakers, judges and practitioners need to invoke all of these overlapping and inconsistent rules of classical jurists when they are enacting, implementing and reviewing a law? It seems unrealistic to expect this.

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<sup>59</sup> Auda, *supra* note 29 at 47. See also, SAYYED MOHAMED TAQI AL-HAKIM, THE GENERAL PRINCIPLE OF COMPARATIVE JURISPRUDENCE, 561 (1979) (Arabic).

<sup>60</sup> Chibli Mallat, *Shi'ism and Sunnism in Iraq: Revisiting the Codes*, ARAB LAW QUARTERLY, 143(1993).

<sup>61</sup> See generally, M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. Islamic & Near E. L. 135, 155 (2002). See also, IMARAN AHSAN & KHAN NYAZEE, THEORIES OF ISLAMIC LAW: THE METHODOLOGY OF IJTIHAD 208(2d ed. 2016).

<sup>62</sup> *Usul al-fiqh* carries the literal meaning 'the origins of the law' or 'the roots of the law', but it can also be translated as 'principles of understanding' or 'Islamic legal theory' in that it constitutes the interpretive methodology undergirding Islamic jurisprudence. *Alshafee* attempted to develop a methodology that enables the *mujtahid* (an Islamic legal expert who makes new legal pronouncements through *ijtihad*) to extract from the indications (*dalalat*) found in the sacred texts practical rules susceptible to provide the best guidance for the *mukallaf* (person in full possession of his or her mental capacities and thus addressed by the divine discourse) in both the religious rituals (*ebadat*) and in transactions (*muamalt*). Ahsan & Nyazee, *Id.* at 137.

### 2.2.3 Judicial Mechanism Versus Jurisprudential Mechanism

In the context of the inclusion of Islamic rules in the legal system, there will remain a tension between the function of the jurist and the function of the judge. Historically, there has been an overlap between these two functions and there is no clear separation between them. In view of the current development and the diversity of functions, there is no doubt that we will need to separate these two functions in order to avoid any tension that may arise between them, which could lead to conflict. In general, this section will attempt to propose a dividing line between them. In this section, I argue that the judicial question differs from the *Fiqh* question. The judicial question is: What is the most suitable law and how would it apply in order to ensure a legitimate judicial review? The judicial questions within the Islamic constitutional order should be concerned with what the law is, and how the wording of the law complies with the Constitution. If the judge must consider the tools of Islamic jurisprudence to interpret the Islam's Settled Rulings, this will not be functional. For example, the consensus refers only to the consensus or agreement by the non-binding interpretations of Sharia which is subject to environments and times and based on the epistemic nature of scholars rather than legal or social needs.<sup>63</sup>

In contrast, *Fiqh* questions are different from legal questions because, with *Fiqh* questions, Islamic jurists use the advisory opinions i.e. “*fatwa*” to determine whether Islam prohibits a certain action, or labels this action as a sin, as well as attempting to invoke aspects of worship, which might punish Muslims in the hereafter. Notably, not all actions of the Prophet Muhammad are deemed legislation. A large number of his actions are not considered legislation; these are special

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<sup>63</sup> Rabb, *supra* note 50 at 541. Also, Wael Hallaq, Maqasid and the challenges of modernity, AL-JAMI'AH: JOURNAL OF ISLAMIC STUDIES 1, 10 (2011).

to him alone and cannot be circulated to all Muslims, such as the number of wives.<sup>64</sup> Thus, the function of Islamic jurists is to detect the Islamic ruling in a particular issue. For example, when the judges review a law, they do not ask whether this law is a sin or not because this is the function of Islamic jurisprudence not the function of the court. *Fiqh* scholars do not make laws but rather research and decide in favor of one of the bodies of evidence by using their tools.

#### 2.2.4 Evaluation of incorporating Sharia or *Fiqh* in the Constitutional realm

What is apparent from all these definitions is that Sharia and *Fiqh* are different, with the latter being a means of trying to understand the former. This section takes up instead the more focused task of trying to determine whether Sharia or *Fiqh* apply in the constitutional realm. As well as whether *Fiqh* as interpretation of Shari'a can operate the repugnancy clause in the Islamic world.

Unfortunately, an initial problem is that the distinction between *fiqh* and Sharia is not properly understood among Muslim and non-Muslim audiences alike and the terms thus “overlap to a large degree and are used by some scholars interchangeably.”<sup>65</sup> Legal scholars have not differentiated between the concept of Sharia as a revelation of God and the jurisprudential rulings that religious scholars drew from Sharia. Thus, they refer to Sharia as general principles which are agreed upon by all Islamic sects without the details and parts where opinions vary from one sect,

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<sup>64</sup> See: SAAD AL-DIN AL-OTHMANI, ALDIYN WALSIYAS.. TAMYIZ LA FASL [RELIGION AND POLITICS .. SEGREGATION NOT SEPARATE] 16-20 (2015) (Arabic). For example, the Prophet Muhammad said "I am only a human being, and you people (opponents) come to me with your cases; and it may be that one of you can present his case eloquently in a more convincing way than the other, and I give my verdict according to what I hear. So if ever I judge (by error) and give the right of a brother to his other (brother) then he (the latter) should not take it, for I am giving him only a piece of Fire."

<sup>65</sup> Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 Geo. WASH. INT'L L. REV. 695, 720 (2004)

to another.<sup>66</sup> For example, *Abdul Razek Ahmed Al-Sanhouri*, who is an Egyptian legal scholar and professor, usually mixes the terms *Fiqh* and Sharia, when he writes of Sharia as a source of civil law and explains Sharia as *Fiqh*.<sup>67</sup> In the same line, *An-Na'im* notes that Sharia is, across all relevant schools of thought, “a complex normative system of often-conflicting rules developed by jurist schools or jurisprudential trends.”<sup>68</sup> In fact, this is *fiqh*, and the invocation of *Fiqh* creates the impression that a given rule is incontestable divine law.<sup>69</sup> Others emphasize that the rules of Islam are the result of the “work of a diverse community of *Fiqh* scholars operating according to their own collective standards of integrity and professionalism.”<sup>70</sup> However, that might be correct if the Islamic jurists do not have epistemic authority which added sanctity to their rules.<sup>71</sup>

To be clear, Sharia cannot be changed, but *Fiqh* is subject to change because it varies according to different perceptions and circumstances, variables of life that require consideration of the provisions of Sharia.<sup>72</sup> If there are any changes, they will come from the understanding of the people and their level of awareness of Sharia goals, and there are no changes in the realities and essence of these systems. Sharia embodies systems and principles which are characterized by inclusiveness, stability, balance and permanence because it is a divine system.<sup>73</sup> As Abou El Fadl

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<sup>66</sup> ABDUL MONEIM FARAJ AL-SADAH, 'ASUL ALQANUN [ORIGINS OF LAW] 108(1987)(Arabic )

<sup>67</sup> ABDUL RAZZAQ AL-SANHURI, EL WASEET FI SHARH EL QUANON EL MADNY, 60, (Vol VIII, 2nd edition, Moustafa El Fikey ed., Cairo, Dar El Nahda El Arabia ,1991) (Arabic).

<sup>68</sup> Abdullahi An-Na'im, supra note 68 at 34.

<sup>69</sup> Asifa Quraishi-Landes, *The Sharia Problem with Sharia Legislation*, 41 OHIO N.U. L. REV. 545, 548 (2015).

<sup>70</sup> Asifa Quraishi-Landes, *Islamic Constitutionalism: Not Secular. Not Theocratic. Not Impossible*, 16 RUTGERS J. L. & RELIGION 553, 554 (2015).

<sup>71</sup> Mallat claims that this overlapping of *Fiqh* rules "might be similar to the sense of law in American constitutional law and similar common law systems a sometimes confusing collection of doctrines and rules, based on a foundational text, subject to clarification or refinement by qualified jurists endowed with the authority to say what the law is." CHIBLI MALLAT, *THE RENEWAL OF ISLAMIC LAW: MUHAMMAD BAQER AS-SADR, NAJAF, AND THE SHI'ITE INTERNATIONAL*, 79 (1993).

<sup>72</sup> YOUSEF AHMAD MOHAMMED AL-BADAWI, MDAKHAL ALFAQIH AL'IISLAMII WAISWALIH [INTRODUCTION TO ISLAMIC JURISPRUDENCE AND ITS ORIGIN] 30-31, (Dar Al-Hamed / Amman, Jordon 2007) (Arabic).

<sup>73</sup> SA'ID HAWY, AL'IISLAM [ISLAM] 64 (Dar al-Kuttab al-Ulami, Beirut, 2, 1979)(Arabic).

related, “The Sharia is God's Will in an ideal and abstract fashion, but the *Fiqh* is the product of the human attempt to understand God's Will. In this sense, Sharia is always fair, just and equitable, but *Fiqh* is only an attempt at reaching the ideals and purposes of Sharia.”<sup>74</sup>

In the constitutional realm, it is important to distinguish between Sharia and *Fiqh* because the Islamic constitutional context requires adopting immutable and unchangeable concepts. Unfortunately, however, the role of Islam inside the legal system was traditionally based only on *Fiqh* and not all of Sharia. Therefore, the best way of approaching this issue and by assessing legal understandings of the role of religion is by focusing on reconstructing the critical distinction between Sharia and *Fiqh* in the public legal consciousness.

This distinction between Sharia and *Fiqh* leads to yet another core question: Can *Fiqh*, as an interpretation of Sharia, feasibly work in the context of constitutional court? This seems highly unlikely, for a variety of reasons. First, the characteristics of law are different from those of *Fiqh*. In fact, at least in the perspective of civil law system, highly valued qualities of any legal rules are stability, continuity, rationality, and logic. These rules must be able to be administered by a single set of state institutions and rendered easily accessible to lawyers and judges.<sup>75</sup> *Fiqh*, by contrast, is a detailed explanation of the provisions of Sharia which has disparate understandings depending on the circumstance of place and time in which the jurists driving the *Fiqh* originated.<sup>76</sup> As Hallaq observes, “There are anywhere between two and a dozen opinions, if not more, each held by a different jurist ...there is no single legal stipulation that has monopoly or exclusivity.”<sup>77</sup> For this

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<sup>74</sup> KHALED ABOU EL FADL, SPEAKING IN GOD’S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN, 32(2001).

<sup>75</sup> According to Black’s Law Dictionary, a legal rule is an established or prescribed standard for action; an authoritative principle; the general norm for conduct in a specific kind of situation; a principle, standard, or regulation that governs the internal workings of a court or an agency. Black’s Law Dictionary 1357 (18th ed. 2004).

<sup>76</sup> See Intisar A. Rabb, *Ijtihad*, Oxford Islamic Studies Online, <http://www.oxfordislamicstudies.com/article/opr/t236/e0354> (last visited May 8, 2017).

<sup>77</sup> WAEL B. HALLAQ, SHARIA: THEORY, PRACTICE, TRANSFORMATIONS, 27 (CUP 2009).

reason, there was an urgent need to codification to state the law clearly and concisely.<sup>78</sup> Thus, using *Fiqh* in the constitutional court would cause confusion. *Fiqh* can constitute materials for a legal system but is not a legal system itself.<sup>79</sup> Therefore, in Islam, there was no historical need for judicial review because the judge often relied on jurisprudential of the school who imitating it and not on the rules of Shariah that he interprets. Quraishi's emphasis that there was very little checking of sovereign power of Islamic schools of thought,<sup>80</sup> which means that the interpretation of Sharia is still restricted by the understanding of *Fiqh* scholars.

In addition, *fatwa* is often used for a personal matter which relates to the specific situation of the questioner. Most Islamic jurists refused to enforce their doctrines on the entire Islamic world. For example, when Malik (712 -795 A.D.), the eponym of the Maliki school, wrote the book *Al-Muwatta*, which contains both hadiths and legal judgements, the caliph Mansur wanted it to be the binding law of the entire Muslim community. Imam Malik was very frightened by the idea and said: "No, don't do that, the Prophet's companions are spread throughout the land bearing with them a lot of knowledge, and this is what has reached me of it; so let people choose what they want"<sup>81</sup> Thus, the salient distinction between law and *fatwa* is that one is an objective, public compulsory rule that is formally promulgated, and the other is an interpretation privately derived and publicized by an individual. Moreover, the *Shia* doctrine requires lay Sh'a to follow living jurists and they are forbidden from following deceased jurists because the valid opinion is the one

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<sup>78</sup> Ferdinand Fairfax Stone, *Primer on Codification*, 29 TUL. L. REV. 303, 304 (1954-1955). Also, the codification of *Hanafi Fiqh* during the Ottoman era was to leave the traditional details of *Fiqh* which were for the purpose of education to create a legal rules.

<sup>79</sup> FAZLUR RAHMAN, SOCIAL CHANGE AND EARLY "SUNNAH", ISLAMIC STUDIES, 205, (1963).

<sup>80</sup> Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67, 74 (2006).

<sup>81</sup> AHMED UBAYD ALKOBAYSI, AL-AHWAL AL-SHAKHSIYAH FI AL-FIQH WA-AL-QADA WA-AL-QANUN [Personal Status] (12th ed. 2007) (Arabic) There is, however, another story about Imam Ahmed when he called a book of one of his students "the book of disagreements" because he said the Islamic jurisprudence is basically disagreements, and he considered this "rahmah" = mercy or blessing upon this nation/ummah.

that is capable of resolving all disputes against its validity which “factual contingencies and changes in time and space played a crucial role.”<sup>82</sup> It is true that this has contributed to the renewal of *Fiqh* so that it is in keeping with modern developments, especially if the jurist is a judge. However, in the legal sphere and for jurists, this will inevitably lead to an instability of laws because the current jurists can rule contrary to previous ones.<sup>83</sup>

Predictability is also one of the important conditions of legal rule, which mean laypersons can recognize or anticipate a law easily without any difficulty managing their affairs effectively.<sup>84</sup> Judge Learned Hand once said that the language of law must not be foreign to the ears of those who are to obey it.<sup>85</sup> This element is difficult to achieve in *Fiqh* because the *Fiqh* is written by excessively technical language as al-Sadr indicated.<sup>86</sup> Thus, laypersons could face a hardship to understand Sharia concept.<sup>87</sup> As a result, the Islamic constitutional judge cannot have this authority when he interprets a law.<sup>88</sup>

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<sup>82</sup> ALĪ AL-ḤUSAINĪ SĪSTĀNĪ, *MASA'IL AL-MUNTAHABA: AL-'IBĀDĀT WA-'L-MU'ĀMALĀT* [ SELECTED MATTERS] 7( 2001). See also, Boozari, *supra* note 54 at 125.

<sup>83</sup> For example, in Iran, article 167 asserts that “The judge is bound to endeavor to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgment on the basis of authoritative Islamic sources and authentic fatawa. He, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgment.” Practically, The Supreme Court is unable to ignore a Grand Ayatollah fatwa on which a judge issued a sentence, and favor another Grand Ayatollah fatwa, on which a different judge issued a sentence, for a similar case. This is the disarray through which the sensitive task of making judiciary precedent, an element of legal stability and harmony in a judicial system, currently presides. IRANIAN CONST, *supra* note 21 art. 167

<sup>84</sup> Stefanie A. Lindquist, Frank C. Cross, Stability, Predictability and the Rule of Law: Stare Decisis as Reciprocity Norm, <https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf> (last visited Sep 2, 2018).

<sup>85</sup> I meant that the religious rules as a law not as subject of protection which is different when the court note in *Thomas v. Review Bd* that “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714, 101 S. Ct. 1425, 1430, 67 L. Ed. 2d 624 (1981).

<sup>86</sup> MUHAMMAD B-AQIR AL-SADR, *AL-FATAWA AL-W-ADIHAH WAFQAN LI-MADHHAB AHL AL-BAYT* [CLEAR LEGAL OPINIONS ACCORDING TO SHI'I LAW] 48-53 (1977). In contrast, the Qur'an describes Shari'a not *Fiqh* as “enjoining the right and forbidding the wrong. [Quran 7:165].

<sup>87</sup> A Mujtahid, who has the power to understand Sharia and to pronounce it, is unlike non-mujtahids who have no power to self-forecast any rule unless mentioned in the *fiqh* literature. Thus, the Islamic jurists have the only epistemic authority to interpret Sharia. Hamoudi, *supra* note 20 at 697.

<sup>88</sup> An-Na'im, *supra* note 5 at 19.



Some might argue that basically, in civil law systems, jurists write commentaries on the meaning of codes, but their texts are not a primary source of law, rather they are doctrines and form an essential part of law. For example, in the literature on constitutionalism, judges might use jurists' commentaries, for reference only to ensure the consistency of their opinions and not as a primary source.<sup>89</sup> Moreover, Vogel asserts that “[*Fiqh*] is epitomized, not in a system of objective, formal, general, public, compulsory rules, but in the unique decision of an individual conscience (an *ijtihad*) applied to the evaluation of a concrete act.”<sup>90</sup> In this conception, it is necessary to “give life to the religious rules in the form of state law”<sup>91</sup> as Hamoudi suggests, but these rules must be rendered consistent with the elements of legal rules which should be stable, prospective, promulgating, predictable, non-contradictory and congruent.

Indeed, the complication of integrating *Fiqh* into a legal system raises serious questions. For instance, Sharia as interpreted by whom? Using which interpretive tools? Following which particular school? Or operating independently of the established schools? The interpretive issues can be substantial, and must be considered, “especially in the context of modern efforts to incorporate it into a legal system when several sources of law may be involved.”<sup>92</sup>

A more nuanced understanding of Shari'a and *Fiqh* would be necessary to answer these key questions that inevitably arise when using Shari'a in the legal system. It is also clear that the core quandary of the wording of repugnancy clauses is the concept that reflects Islamic settled rulings that would be interpreted by the constitutional court. In addition, the scope of the compatibility of this interpretation with the rights and principles of Islam is enshrined in the

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<sup>89</sup> JOHN THORNTON, U.S. LEGAL REASONING, WRITING, AND PRACTICE FOR INTERNATIONAL LAWYERS, 17 (LexisNexis, 2014).

<sup>90</sup> Vogel, *supra* note 47 at 32.

<sup>91</sup> Haider Ala Hamoudi, *Resurrecting Islam or Cementing Social Hierarchy?: Reexamining the Codification of "Islamic" Personal Status Law*, 33 ARIZ. J. INT'L & COMP. L. 329, 339–40 (2016).

<sup>92</sup> Stilt, *supra* note 65 at 722.

Constitution as well as socio-political needs. Adopting a rigid concept of Sharia or *Fiqh*, in all its specifics, certainly will not fulfill the mandate to promote and develop a better operation of the repugnancy clause. Instead, it will confuse and restrict the actions of legislators, judges and lawyers, as we will notice in the next part.

By better understanding the terms Sharia and *Fiqh*, and how these terms have been confused in the legal realm, this section asserts that it is necessary to separate the Sharia values from the historical understandings that carried varying interpretations which do not help judicial function in light of operating the repugnancy clause. This section has paved the way to a discussion of how Iraqi constitutions address these terms which have also been affected by this confusion over terminology.

## 2.3 Previous Constitutions

In the modern era, the first step of introducing religion into the Iraqi legal system was in the Ottoman Empire, when *Fiqh* were codified to emulate law in its contemporary form. The Majallah was the first-ever legal codification project in Islamic history. It covered the areas of debt, property, personal status, and juridical law. It was abolished in Turkey in 1926, three years after the new Turkish republic was founded. However, it continued in force in former Ottoman provinces, including Iraq, for some time thereafter.<sup>93</sup> Indeed, the Majallah was applied in Iraq until 1937, long after the Ottomans were no longer in control.

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<sup>93</sup> *Id.* at 698.

In the constitutional domain, the Ottomans drafted their first constitution in 1876.<sup>94</sup> This constitution was one of the reforms of the mid-nineteenth century to maintain the Ottoman Empire in the face of Western legal development.<sup>95</sup> The Constitution recognized equality and the protection of religious minorities. It included the *Sharia* guarantee clause, which was understood to require a symbiotic relationship with Islamic jurists.<sup>96</sup> This constitution made Islam the religion of state. In fact, this Ottoman Constitution had significant influence on the succeeding Iraqi Constitutions and the constitutions of other Islamic countries.<sup>97</sup>

Previous attempts to incorporate Islamic values into the Iraqi legal system were not effective for several reasons. First, the dominance of one school under the control of Al Sultan, which is an Arabic abstract noun referring to the king or president. Al Sultan attempted to obtain political legitimacy by using the Hanafi doctrine which was appropriate to the direction of the government at this time.<sup>98</sup> This led to the instability of laws and the dominance of one interpretive approach to the legal system. Second, the role of a judge was limited to only apply the Hanafi

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<sup>94</sup> In general, there are four models of the role of religion in the Constitution. The first when the constitution stipulates that the state is secularly and religion has no significant role in political life, such as the Turkish and French constitution. The second is the Arab model, which provides a general formula where there is a religion of the state or the religion is the source of legislation. Third, the Iranian model, which is based on a religious guidance or clerics with broad powers in governance and legislation. Finally, the American model that took the position of neutrality of religion. At least twenty-five Islamic countries incorporate some form of Islamic law directly into their constitutions, while others either allow courts to apply Islamic law in matters of personal status, or convene special courts to apply Islamic law for Muslim minority populations. See Rabb, *supra* note 50 at 540 even when governments were limited in their ability to formally allow religion to shape laws and policies, religion's role was still evident. A man who had publicly uttered anti-Christian statements in New York in 1818 was not convicted of blasphemy, since such a crime could not be enforced in a state that upheld religious freedom. But he was convicted of offending public sensibilities. Sarah Barringer Gordon, "Religion in United States Law," in Oxford International Encyclopedia of Legal History, ed. Stanley Katz 115 (Oxford: Oxford University Press, 2009). See also, COMPARATIVE JUDICIAL REVIEW 117-18(Erin F Delaney & Rosalind Dixon eds., 2018).

<sup>95</sup> IZA HUSSIN, CIRCULATIONS OF LAW: COSMOPOLITAN ELITES, GLOBAL REPERTOIRES, LOCAL VERNACULARS, LAW AND HISTORY REVIEW, 773-95(2014). See also M Khadduri, & Liebesny, *supra* note 10 at 292

<sup>96</sup> Clark B. Lombardi, *supra* note 38 at 618.

<sup>97</sup> NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT ,26 (2002) and Samy Ayoub, *The Sulṭān Says": State Authority in the Late Ḥanafī Tradition*, ISLAMIC LAW AND SOCIETY 239 (2016).

<sup>98</sup> W. M. Ballantyne, *The Majella: Introduction.* " ARAB LAW QUARTERLY, 364-66(Aug., 1986).

school. In fact, the function of judges was to apply existing, recognized Hanafi rules, or principles of this school, that facilitated the understanding of the law, and these principles supposed to be general and stable.<sup>99</sup> Finally, there was an overlap of functions between the judge and the legislature. This meant that there was a clear absence of standards of judicial review because the legislative and judicial authority were closely related. The jurist has laid down rules and the role of the judge was to follow and apply these rules only, unless this judge also has the power of *ijtihad*.<sup>100</sup> There was therefore no need for judicial review. As a result, judicial review could not be established through the constitutional realm because Iraq at this time was part of the Ottoman Empire and there was no Iraqi Constitution.

The second attempt to constitutionalize Islamic values in the contemporary era of Iraq, as opposed to codifying *Fiqh*, occurred shortly after 1921 by two Britons legal scholars, Hubert Young and Edwin Drawer. While a committee of three Iraqis was permitted to review the proposed draft, any final changes had to win the approval of the Colonial Office in Britain.<sup>101</sup> The new resulting Constitution of Iraq was promulgated in 1925. This Constitution was entitled *al-Qanoon al-Asasi al-Iraqi* (The Iraqi Basic Law). It contained 123 articles and continued to be effective until the Iraqi monarchy was overthrown in 1958. With regard to the relationship between the State and religion, under this Constitution, Iraq was a state run by civilian governments. This Constitution adopted judicial review in accordance with Article 82, which provided that “A High

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<sup>99</sup> ROBERT GLEAVE, 'THE QADI AND THE MUFTI IN AKHBARI SHI'I JURISPRUDENCE' IN PERI BEARMAN, WOLFHART 237-448 (Heinrichs & Bernard G. Weiss eds, 2008).

<sup>100</sup> H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD, 187 (5TH ED, 2014).

<sup>101</sup> MAJID KHADDURI, INDEPENDENT IRAQ, 1932-1958: A STUDY IN IRAQI POLITICS, 6 (2d ed. 1960). This supports the claims that the increasing prominence of “Islamic law” in public discourse and political debate was driven by both the new definitions and delineations of this field by colonial regulations, and by their active appropriation by Muslim elites in each of these societies. See also, Iza R. Hussin, The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State, 226 (2008) (Ph.D. dissertation, University of Washington) (Available at ProQuest Dissertations and Theses Global <https://www.proquest.com/products-services/dissertations/>).

Court shall be established for ... the interpretation of laws, and their conformity with the Constitution.”<sup>102</sup> However, this Constitution did not contemplate evaluating the Islamicity of laws by the judiciary because it did not include a repugnancy clause. Judicial review was thus limited to ensure that law conformed to the Constitution, not Islamic values.<sup>103</sup> The Iraqi Constitution of 1925 did provide, however, two cases of the role of religion in the state. The first case established that the official religion of the state was Islam.<sup>104</sup> The second case was the approval of religious courts to each of *Sunnis* and *Shia* for matters of personal status, and then to the different schools within the *Sunnis* according to their own affiliations.<sup>105</sup> As a result, Article 77 required that a judge appointed for a particular city should follow the *Fiqh*’ school of the majority of the residents of this city, while there should always be both *Sunni* and *Ja’fari Shia* judges in Baghdad and Basra.<sup>106</sup> Nothing in this Constitution indicated the relationship of religion to the enactment of laws. In the wake of the 1925 Constitution, after the 1958 Revolution that ended the monarchy, there were a series of interim, republican constitutions. Most of these “republican” constitutions stipulated that Islam was the official religion of the state and provided guarantees of freedoms and rights.<sup>107</sup> The question of the Islamicity of law was not raised in these interim Constitutions, as

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<sup>102</sup> For more details, See, e.g., Nigel G. Davidson, *The Constitution of Iraq*, 7 J. COMP. LEGIS. & INT’L L. 41, 44 (1925).

<sup>103</sup> The only decision issued by this court was in 1939. The issue in this case was whether the law against harmful advertising was against the constitution. This law was allowed much room to operate in executing to conduct investigations and searches with suspects people without permeation from the judiciary. The Court held that the this matter is the power of the judiciary and did not authorize the executive branch suspension of legal claims. *Id.*

<sup>104</sup> AL-QANUN AL’ASASI AL-IRAQI [THE ORGANIC LAW], *supra* note 13 at art. 13 states: Islam is the official religion of the State. Freedom to practice the rites; of the different sects of that religion, as observed in Iraq, is guaranteed. Complete freedom of conscience and freedom to practice the various forms of worship, in conformity with accepted customs, is guaranteed to all inhabitants of the country provided that such forms of worship do not conflict with the maintenance of order and discipline or public morality.”

<sup>105</sup> Stilt, *supra* note 65 at 740.

<sup>106</sup> al-Qanun al’Asasi al-Iraqi [The Organic Law], *supra* note 13 at art 77.

<sup>107</sup> See, Article 4, Dustur al-Iraq al-Muaqqat[The Interim Iraqi Constitution] of 1958, Article 4, Dustur al-Iraq al-Muaqqat[The Interim Iraqi Constitution] of 1970, Mashru' Dustur al-Iraq Tammuz 1990 [Draft Constitution of Iraq of July 1990].

with the 1925 Basic Law. Only in its 1964 interim constitution did Iraq briefly adopt a provision that required the head of state be a Muslim and it described Islam as “the basic foundation” of the Constitution.<sup>108</sup> Overall, the role of Islam in the legal system was diminished over these years. Indeed, Sharia as “a” or “the” source of law was not mentioned in the Iraqi Constitutions at all, but only in some Iraqi laws.

Moreover, these constitutions did not establish a judicial mechanism to protect freedoms and rights generally, except the Constitution of September 1968 which adopted judicial review over the constitutionality of laws through Article 87. This Article states:

A Supreme Constitutional Court shall be established by law<sup>109</sup> to interpret the provisions of this Constitution, decide on the constitutionality of laws, interpret administrative and financial laws, and examine the conformity of executive orders with the constitution and laws. Its decision shall be binding<sup>110</sup>

At this time, there was less concern about the protection of freedoms and rights via judicial review because the Court consisted of a mix of senior politicians as well as judges.<sup>111</sup> In addition, executive authority alone had the right to appeal the unconstitutionality of laws.<sup>112</sup>

Alongside Iraqi constitutions, there was significant legislation that included Islamic provisions. This included the Iraqi Civil Code of 1945 and Iraqi Code of Personal Status of 1959, which remains in force today. As with the Majallah, the legal provisions of these laws were derived from the provisions of (*Fiqh*), whether in personal or family relations, or in civil law.

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<sup>108</sup> DUSTUR AL-IRAQ AL-MUAQQAT[THE INTERIM IRAQI CONSTITUTION] of 1964.

<sup>109</sup>The law was enacted and named as The Law of the Supreme Constitutional Court No. 159 of 1968.<http://wiki.dorar-aliraq.net/iraqilaws/law/18745.html>.

<sup>110</sup> Dustur 27 Aloo 1968 al-Muwaqqat [Provisional IRAQ CONST. of September 27, 1968].

<sup>111</sup> See Article 1 of The Law of the Supreme Constitutional Court *supra* note 109.

<sup>112</sup> *Id.* at art. 5.

### 2.3.1 Religion in the Iraqi Civil Code

Although the Civil Code was a statutory law and had nothing to do with the Constitution, and although it used *Fiqh*, this law, nevertheless, handled Islam wisely and drew a comprehensible path for judges to apply Islamic principles in civil matters. Egyptian legal expert Dr. *Abdul Razzaq al-Sanhuri*, developed this civil code which replaced the Majallah al-Ahkam al-Adliyya.<sup>113</sup> The drafting Committee considered that Majallah should be subject to development in two ways. On the one hand, Islamic jurisprudence should be regarded as an integral part of the law, and that the rulings should be taken from all Islamic schools. On the other hand, the Code could use foreign laws as long as they did not contradict the spirit of Islamic jurisprudence.<sup>114</sup> Therefore, the hierarchy of sources in the Civil Code mimicked the French Civil Code of 1804 with some important changes. Article 2 of this Code thus stated:

- (1) The legislative provisions shall apply to all matters covering these provisions in the letter trend and content.
- (2) When the written law is silent on a certain topic, the court shall adjudicate according to custom and usage; In absence of custom and usage, in according with the principles of the Islamic Shari'a, which are most consistent with the provisions of this law, but without being bound by any specific school of thought, Otherwise, courts may look to the principles of equity in making decisions.<sup>115</sup>

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<sup>113</sup> Enid Hill , *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971* [Part II] ARAB LAW QUARTERLY, 182 (May,1988).

<sup>114</sup> Abd al-Razzaq al-Sanhuri, "Min Majallat al-akkam al-'adliyya illa al-Qanun al madani al-iraqi wa harakat al-taqnin al-madani fi 'usur al-hadith" (*From the Majalla to the Civil Code of Iraq and Civil Codification in the Modern Era*), Majallat al-qada' 2(2), 8 (1936).al-Sanhuri apply talfiq method which means the derivation of rules from material of various schools of Islamic law. In modern times talfiq was advocated by Muhammad Abduh (d. 1905 ) and his student Muhammad Rashid Rida (d. 1935 ) as a means to reform Islamic law. Ikhtilaf (differences of opinion) were a source of intellectual wealth, they reasoned, that ought to be utilized for the benefit of the whole community. See Wael Hallaq, and Layish A. 'Talfiq'. Encyclopaedia of Islam, Second Edition. Ed. P. Bearman et al. BRILL REFERENCE ONLINE. Web. 3 May 2019.

<sup>115</sup> Al-Qanun al-Madani [Civil Code] art. 1(2 (Iraq).

In light of this Article, Sharia is one of sources from which the law derives the status of obligation that judges must apply to legal disputes. This Article considered Shari'a as a secondary official source which meant Sharia may be referred to only when there is no legislation or customary rule that can be applied.<sup>116</sup>In other words, if a judge faces a legal dispute, he/she usually first goes to the text of this law, and if he cannot find the appropriate text, he fills the gaps using customs, and then with the principles of Sharia. In describing the principles of Sharia, Fiqh concepts are used, because the Article asserts that the decisions of the court shall not be bound by any specific school of thought.<sup>117</sup>This is a good example of the conflation between the meaning of Sharia and meaning of *Fiqh* in the Iraqi legal system when it refers to Sharia but actually means *Fiqh*.

Despite this conflation, this law was an important shift in two different respects. First, it contained legal principles, which the court could use instead of detailed doctrinal explanations of *Fiqh*. Second, it incorporated principles of Shari'a that could come from any school, which was an explicit recognition and inclusion of both *Sunni* and *Shi'a* schools. In this way, the Iraqi legal system was, some extent, freed from the details of jurists' epistemic authority and a new wave of general rules were introduced that could be applied to multiple cases.

### 2.3.2 Religion in the Iraqi Code of Personal Status

Historically, in the Islamic world the discussions of the role of religion and constitutionalism often invoke questions of personal status.<sup>118</sup>Personal status law has always

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<sup>116</sup> JAFAR AL-FADHLI MUNTHER AL-FADL, INTRODUCTION TO THE STUDY OF LEGAL SCIENCES, 23 (1987).

<sup>117</sup> Lombardi, Constitutional Provisions Making Sharia, *supra* note 12, at 743.

<sup>118</sup> Rabb, *supra* note 50 at 532.



covered marriage, divorce, child custody, inheritance, and other family-related matters. Most Iraqi constitutions in this era did not mention anything about personal status.<sup>119</sup> The only Constitution that mentioned a personal status issue was the interim Constitution of 1970, which only stated that: "Inheritance is a guaranteed right, regulated by the law."<sup>120</sup>

Until 1959 in Iraq, personal status matters were historically governed mainly by uncoded *Fiqh* and were heard by religious courts (*Jafari* and *Sunni*). Some Christian and Jewish communities had spiritual councils which were competent to adjudicate issues of personal status.<sup>121</sup> The first personal status code in Iraq was issued by the military coup regime in 1959. It consisted of 177 articles. This code became applicable to all Iraqis, even non-Muslims. The drafters of this law tried to make compromises that fit the reality of the society in the time of the military coup in 1958 that deposed the Iraqi monarchy. Hence, the law is a combination of *Sunni* and *Shia* jurisprudence, as well as some ideas of its framers, which were not mentioned in any Islamic schools.<sup>122</sup> The Law of Personal Status of 1959 *inter alia* was favorable to women rights relative to comparable laws throughout the region.<sup>123</sup> Many amendments have been made because this law adopted the specific opinion of one of the Islamic schools rather than based on general and abstract legal rules. The role of Islam explicitly appeared in this Code when Article 1 provided that:

(1) "The legislative provisions of this code shall govern all matters covered by them, whether expressly or by implication"; in article 1 (2) that "If there is no legislative provision which can be applied, judgment shall be given according to those *principles of*

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<sup>119</sup> Nathan J. Brown, Carnegie Endowment for Int'l Peace, Debating Islam in Post-Baathist Iraq 2 (Mar. 2005), available at [www.carnegieendowment.org/files/PO13.Brown.FINAL2.pdf](http://www.carnegieendowment.org/files/PO13.Brown.FINAL2.pdf). <https://www.cfr.org/background/iraq-drafting-constitution> (last visit Mar. 5, 2018).

<sup>120</sup> Interim IRAQ CONST. of 1952, *supra* note 107 art. 17.

<sup>121</sup> AL-QANUN AL'ASASI AL-IRAQI [THE ORGANIC LAW], *supra* note 13 at art. 78-79.

<sup>122</sup> Hamoudi, *supra* note 91 at 336.

<sup>123</sup> For example, this law made polygamy extremely difficult, granted child custody to the mother in case of divorce, prohibited repudiation and marriage under the age of 16. Personal Status Law, Law No. 188 (1959) (Iraq) [hereinafter Law No. 188].

*the Sharia* which are most suited to the provisions of this code "; and in article 1 (3) that " The courts shall be guided in all this by the law established by legal precedents and Islamic jurisprudence in Iraq and in the other Muslim countries whose legislation approximates to that of Iraq.<sup>124</sup>

This Article granted the judge a great amount of discretion among Islamic schools to fill gaps when the law does not govern a specific matter of family law in Iraq. In this case, a judge was required to follow the principles of Shari'a rather than the jurists' interpretations of Sharia, but in practice, they did not do so.<sup>125</sup> They instead routinely cited *Fiqh*. Also, this article supported focusing on case precedents to resolve cases as is done in common law countries.

In sum, from the drafting of the Majallah forward, the focus of incorporating Islamic values in the Iraqi legal system centered around *Fiqh*. The Majallah was very close to being a codification of *Hanafi Fiqh*. Likewise, the Iraqi Code of Personal Status and the Iraqi Civil Code attempted to introduce *Fiqh* into the legal system in a more general way. That said, it was not yet a recognition of *Maqasid*, but rather a choice of principles derived from distinct *Fiqh* schools. Moreover, there was a judge who worked under legal rules based on *Fiqh* principles. The judge could choose from *Fiqh* schools, but he was not relying on *Maqasid*. While the Iraqi Code of Personal Status and the Iraqi Civil Code thus continued to use *Fiqh*, they also served as the cornerstones of the subsequent stages, including the 2005 Constitution. As the next section will show, the new Constitution tried to move beyond the stage of *Fiqh* codification to adopt a more general role of Islam by stipulating the principles of Islam as well as the principles of democracy and human rights as bases for judicial review.

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<sup>124</sup> *Id.*

<sup>125</sup> Anderson J. N. D. ,*A Law of Personal Status for Iraq*,THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY,543-45 (Oct., 1960).

## 2.4 The Repugnancy Clause Era

In the wake of the Iraqi war of 2003, Iraq was ruled by the United States civil administrator, Paul Bremer, leading the Coalition Provisional Authority (CPA), which was established as the transitional government of Iraq by the U.S.-led forces in the spring of 2003. The initial tasks of the CPA were to connect with a representative assembly of Iraqis from around the country which would write a new constitution to be subsequently approved by popular referendum.<sup>126</sup> To this end, the CPA formed the Iraqi Governing Council (IGC)<sup>127</sup>, which was the chief Iraqi political entity throughout the period of formal occupation.<sup>128</sup> Observing the map of political parties in Iraq shows that there was a clear dominance of the religious parties.<sup>129</sup> These parties sought a greater role for Shari'a in the legal infrastructure, which was later reflected in the drafting of the interim constitution, Transitional Administrative Law. It is noteworthy that the role of both Islam and democracy in the Iraqi legal system was supported by the *fatwa* issued by Grand Ayatollah Ali al-Sistani who was the most prominent *Shia' Marja'* in Iraq.<sup>130</sup> This *fatwa* said that "any constitution not drafted by a democratically elected body and serving the best interests of the Iraqi people or express their national identity whose backbone is sound Islamic religion and noble social values, would be 'unacceptable.'"<sup>131</sup> Certainly, this *fatwa* was a far-sighted vision to avoid the Constitution

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<sup>126</sup> Feldman & Martinez *supra* note 41 at 891. See also, L. PAUL BREMER III, MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE ,292-99 (2006).

<sup>127</sup> The twenty-five members of the IGC chose from the major parties and personalities to serve as part of their rotating, nine-man presidential council. HAIDER ALA HAMOUDI, NEGOTIATING IN CIVIL CONFLICT: CONSTITUTIONAL CONSTRUCTION AND IMPERFECT BARGAINING IN IRAQ, 49 (U. Chicago Press 2013).

<sup>128</sup> See NOAH FELDMAN, WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING, 38-39 (2004).

<sup>129</sup> For more background on the Shi'i religious parties, See, e.g., Juan Cole, The Iraqi Shiites: On the History of America's Would-Be Allies, BOSTON REV., Oct.-Nov. 2003, at 21, available at <http://www.bostonreview.net/BR28.5/cole.html>.

<sup>130</sup> Noah Feldman, *Third Annual Henry Lecture: The Democratic Fatwa: Islam and Democracy in the Realm of Constitutional Politics*, 58 OKLA. L. REV. 1 (2005)

<sup>131</sup> The relevant portion of the fatwa read as follows:

being seen as having been drafted under occupation as well as opening the door to democratic thought of arranging the new phase in the country.

#### **2.4.1 Transitional Administrative Law for Iraq (TAL)**

In May 2004, the CPA issued the Transitional Administrative Law for Iraq TAL, which was the supreme law of Iraq during the transitional period between CPA control and Iraqi self-governance.<sup>132</sup> Drafting the TAL, required approval from Islamic parties on IGC. These parties attempted to impose their vision about the role of religion in the legal system through the following principle: "Islam is the principal source of legislation."

There were lengthy discussions in this regard until a compromise formula was approved embodying this principle.<sup>133</sup> At the end of the day, the (TAL) provided this wording: "No law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this law may be enacted during the transitional period."<sup>134</sup> Thus, this is one of the first time that a repugnancy clause has been applied through the mechanism of the constitution. As Sheikh Humam Hamoudi, chairman of the Constitution Drafting Committee, confirmed, this phrasing represented the middle ground of all parties, and it was agreed that "the brief references

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Those forces [the Coalition] have no jurisdiction whatsoever to appoint members of the Constitution preparation assembly. Also, there is no guarantee either that this assembly will prepare a constitution that serves the best interests of the Iraqi people or express their national identity whose backbone is sound Islamic religion and noble social values. The said plan is unacceptable from the outset. First of all, there must be a general election so that every Iraqi citizen - who is eligible to vote - can choose someone to represent him in a foundational Constitution preparation assembly. Then the drafted Constitution can be put to a referendum. All believers must insist on the accomplishment of this crucial matter and contribute to achieving it in the best way possible.

Letter from Grand Ayatollah Ali Al-Sistani (June 26, 2003), available at <http://www.sistani.org/messages/eng/ir5.htm>. (last visited Oct. 30, 2017).

<sup>132</sup> The Transitional Administrative Law (Mar. 8, 2004) [hereinafter TAL].

<sup>133</sup> Feisal Amin al-Istrabadi, *Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law*, 50 N.Y.L. SCH. L. REV. 269, 269 & n.1 276(2005-2006).

<sup>134</sup> TAL, *supra* note 132, art. 7(A).

to Islam in three paragraphs of the interim constitution should be left untouched.”<sup>135</sup> However, for decades before this, no such advanced formula for the role of Islam in the legal system was ever adopted. This formulation was comprehensive and broad but was not easy or practical. The literal reading of this article affirms that Islam, not Shari'a, was one of the sources, but not the only source. These universally agreed tenets of Islam are not specific about any method brought into being to determine them. In addition, the TAL did not refer to the method by “which scholarly consensus could be authoritatively expressed.”<sup>136</sup>

The International Crisis Group correctly predicted that the role of Islam in this Article was not an actual problem at the time. Problems, however, would arise when interpreting the Constitution and its application. Therefore, in the future, there must be a strong constitutional court capable of finding convincing and moderate interpretations of the role of Islam in the Constitution.<sup>137</sup> Moreover, the Interim Constitution was drafted by the CPA and IGC which were not representative and certainly were less Islam oriented than the popular parties. The final Constitution, as discussed in the next section, was established by an election as per Sistani's insistence, and , while retaining some similar language, overall it reflects something different.

## **2.4.2 The Current Constitution of 2005**

On October 15, 2005, I was one of the millions of Iraqis who said yes to the new Constitution. Before that time, during the Ba'athist regime, the Iraqi government applied the Louis

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<sup>135</sup> Liz Sly, "Shiites Want to limit Islamic References in Iraqi Constitution", Chicago Tribune, 26 May 2005. <http://cabinet.gov.krd/a/d.aspx?a=3317&l=12&r=24&s=010000>. (last visited Jan. 10, 2018).

<sup>136</sup> ZAID AL-ALI, CONSTITUTIONAL LEGITIMACY IN IRAQ: WHAT ROLE LOCAL CONTEXT? IN *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, 635, 622 (Rainer Grote & Tilmann Röder eds., 2012).

<sup>137</sup> International Crisis Group, Iraq: Don't Rush the Constitution, Middle E. Rep., June 2005, at 13.

XIV method based on his statement: “I am the state and the state is me.” The Iraqi government was one person. The morals, values, laws and Constitution concentrated all power in Saddam Hussein’s own hands. Therefore, all democratic institutions will have to be established from scratch. Currently, Iraq has its own Constitution based on the will of the Iraqi people. It was the democratic nature of the constitution that necessitated the repugnancy clause, because the people approved it by more than 78%.

Unfortunately, the current Constitution of 2005 was drafted in a rush over the course of less than five months because the Coalition Provisional Authority (CPA) wanted to transfer a power to the Iraqis as soon as possible in fulfillment of the TAL. As a matter of national urgency, elections for the National Assembly of Iraq were held on January 30, 2005. These elections resulted in the advancement of *Shia* religious parties and they gained more than half of the seats of the National Assembly.<sup>138</sup> Soon after, in May 2005, a committee entrusted with the drafting of the Constitution was formed, and there was a popular referendum in October 2005. As a result of the rush, the consensual language produced was “sufficiently ambiguous and to some extent contradictory as to be appealing to all sides.”<sup>139</sup>

Nevertheless, there has been a trend towards integrating Islamic values into the Constitution while preserving democratic values and human rights guarantees.<sup>140</sup> The wording combines these three elements: Islam, democracy, and human rights. Article 2 of Iraq's Constitution reads as follows:

First: Islam is the official religion of the State and it is a fundamental source of legislation:  
A. No law that contradicts Islam’s settled rulings may be established.  
B. No law that contradicts the principles of democracy may be established.

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<sup>138</sup> See al-Istrabadi, *supra* note 133 at 273.

<sup>139</sup> Haider Ala Hamoudi, *Religious Minorities and Shari'a in Iraqi Courts*, 31 B.U. INT'L L.J. 387, 397 (2013).

<sup>140</sup> Nathan J. Brown, *supra* note 119 at 2.

C. No law that contradicts the rights and basic freedoms stipulated in this constitution may be established.

Second: This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice such as Christians, Yazedis, and Mandi Sabeans.<sup>141</sup>

Article 2 establishes Islam as the official religion of the State and incorporates a legal system with religious origins as the source of law.<sup>142</sup> It ensures the protection of principles of democracy and rights and freedoms as well as Islam's settled rulings by involving the repugnancy clause which is a unique provision compared with other wordings of this clause in Islamic countries. Article 2 also recognizes that the majority of Iraqis have an Islamic identity.<sup>143</sup>

The approach of embedding Islam into the constitutional structure appears, conceptually, in several other Articles as well. Article 3 of the Constitution decrees that Iraq "is part of the Islamic world,"<sup>144</sup> Article 41 grants Iraqis freedom in their commitment to their personal status according to their religions,<sup>145</sup> and Article 92 requires that the FSC include Islamic jurists (Islamic clerics).<sup>146</sup> All of the hot-button provisions showed tensions inherent in the formulations of the role of religion, which was the subject of intense debate and discussion by the Iraqi constitution makers and reflected a genuine desire to include Islam in the Iraqi legal system. These Articles would be the common future obstacles which might face the FSC applying the repugnancy clause as related to the role of religion.

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<sup>141</sup> IRAQ CONST. *supra* note 7 art. 2 (second).

<sup>142</sup> Consider that beyond the Preamble, fourteen of the constitution's 139 total articles make direct or indirect reference to Islam or religious values. IRAQ CONST. pmbl. & arts. 2, 3, 7, 10, 12, 14, 29, 35, 39, 40, 41, 43, 48, 89. All of these Islamic Articles would have been approved by 78 % in the referendum if both a majority of voters nationwide voted "yes" in the constitutional referendum of Oct. 15, 2005. See Edward Wong, *Iraqi Constitution Vote Split on Ethnic and Sect Lines; Election Panel Reports No Major Fraud*, N.Y. TIMES, Oct. 23, 2005, § 1, at 4.

<sup>143</sup> IRAQ CONST. *supra* note 7 at art. 2.

<sup>144</sup> *Id.* art. 3.

<sup>145</sup> See *Id.* art. 41.

<sup>146</sup> See *Id.* art. 92, §2.

### **a. Islam as a Foundation sources of legislation**

Feldman who served as senior constitutional advisor to the Coalition Provisional Authority in Iraq, asserted that the role of Islam in the new Iraq was never in doubt because this would unfairly divorce the Iraqi people from their culture and undoubtedly lose their support.<sup>147</sup> However, a very controversial stage of the negotiations during the creation of the 2005 Constitution was over Islam and the sources of law. Primarily, the Islamist proposal was Article 1, which described Iraq as an Islamic state and Islam as the basic source of its legislation. Then, they attempted to change the role of Islam several times by making Islam "the fundamental source," "the first source," "the basic source," "a main source," "a source among sources," and "a fundamental source."<sup>148</sup> These numerous formulations have one meaning: that Islam is the preferred source when a law arises out of no other source, such as the case law, general principles of law, natural law or the rules of justice, and it has to be respected and taken into account. This is a very important issue, which would affect the future of the Iraq in terms of its status as a secular or theocratic state.<sup>149</sup>

In order to end these arguments, Grand Ayatollah Sistani was consulted, and he gave preliminary approval with the status of Islamic law as "a" source.<sup>150</sup> The final working text of Art. 2 (first) become: "Islam is the official religion of the State and is a foundation source of legislation"<sup>151</sup> By making Islam "a foundation source of legislation," Article 2 makes Islam the

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<sup>147</sup> Feldman, *supra* note 2 at 878.

<sup>148</sup> Deeks & Burton, *supra* note 8 at 21.

<sup>149</sup> In his time as Transitional Administrator Paul Bremer, was determined to veto any draft constitution for an independent Iraq that made Islam the chief or principal source of legislation. See Gihane Tabet, Women in Personal Status Laws: Iraq, Jordan, Lebanon, Palestine, Syria, at 10 UNESCO SHS (SHS Papers in Women's Studies/Gender Research Paper Series 10 No. 4, 2005) (emphasis added), available [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Women\\_in\\_Personal\\_Status\\_Laws.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Women_in_Personal_Status_Laws.pdf).

<sup>150</sup> Deeks & Burton, *supra* note 8 at 8.

<sup>151</sup> See IRAQ CONST. *supra* note 7 art. 2(first).



preferred source of legislation but not the only source of legislation which controls all other legislation. Thus, this provision will not impose actual obligations on future legislatures or on the FSC because it is a "symbolic gesture, honoring the central importance of Islam to the lives of many Iraqis."<sup>152</sup> This article already invokes Islamic symbolism in the indefiniteness of the previous clause of Article 2, which states that "this Constitution guarantees the Islamic identity of the majority."<sup>153</sup>

Despite the resolution of this issue, there are some tensions in the final language. Some of the questions suggest a vigorous debate, such as why Iraqi drafters of the constitution reference "Islam," instead of "Sharia" which is the case in analogous Islamic constitutions? As mentioned in the previous section, there are many interpretations of Sharia by Muslim jurists and it may be different between the school of *Shias* and *Sunnis*. Thus, the Iraqi drafters have taken a new path contrary to what has been established by the legislation and the judiciary in the Islamic world since the Syrian Constitution of 1950, which stated that "the Islamic *Fiqh* shall be the chief source of legislation."<sup>154</sup> Islamic constitutions that followed Syria's required the law of the country to be consistent with the norms and values of Shari'a, rather than *Fiqh*. However, no constitution had adopted the term "Islam" until Iraq. Clearly, Islam is the entire religion, which includes worship, beliefs, moralities, and Shari'a itself. Islam represents all of the rulings that the religion has brought to the conduct of human affairs. In terminology, the concept of Islam is thus broader than the concept of Sharia and includes theology, philosophy, mysticism, and other matters.<sup>155</sup>

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<sup>152</sup> See Deeks & Burton, *supra* note 8 at 10-11.

<sup>153</sup> IRAQ CONST. *supra* note 7 at art. 2, Section 2.

<sup>154</sup> AL-DUSTUR AL-SURI 9/5/1950[Syrian Constitution of September 5,1950], and Syria Constitution of 1973 art. 3.

<sup>155</sup> Rabb, *supra* note 50 at 536.

Perhaps the Constitution's founders in Iraq adopted this broad concept to guide the Iraqi Council of Representatives to comprehensive ways to derive judgments or perhaps to take a different route from those adopted by other Muslim countries which produce unworkable definitions of Sharia that more resemble *Fiqh*.<sup>156</sup> On the other hand, it might be true that using Islam is "too vague a notion to serve as a source of legislation"<sup>157</sup> because it literally means that any aspect of Islam could be a source of legislation. However, in the case of Iraq with this diversity of the Islamic heritage, the legislature needs presumably broad sources to enact a law to deemphasize actual rules of Islamic law or of the system of the Sharia in general. At the end of the day, if relying on the self-interpretation of the constitution, meaning the articles of the Constitution interpret each other, the closest meaning to the concept of Islam here is the Islam Settled rulings, not Islam itself.

The Iraqi Council of Representatives (COR) has no special mechanism to rely on Islam as a source of law as part of the process of proposing a law.<sup>158</sup> The outlined mechanism is a process to make law generally, not something having to do with Islam's settled rulings or democracy and human rights, specifically. In this area, the legislature desperately needs to take specific measures to support the implementation of Article 2 of the Constitution. For example, the legal committee could examine the constitutionality of laws to determine whether they conform with Article 2. This requires stability and full awareness of the provisions of Islam's settled rulings, democracy, and human rights. This legislation will produce consistency with the principles of the Constitution, as well as help with the stability of the laws and avoid a ruling on unconstitutionality in future.

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<sup>156</sup> Clark Benner Lombardi, *Islamic Law As A Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in A Modern Arab State*, 37 COLUM. J. TRANSNAT'L L. 81, 87 (1998).

<sup>157</sup> Rabb, *supra* note 50 at 536-537.

<sup>158</sup> Hamoudi, *supra* note 20 at 710.

In addition, procedurally, when enacting a law, the legislature needs to describe its sources broadly with clear goals and principles, whether from the Sharia or Islam itself. In all of this, the primary burden would seem to fall on the COR to use Islam as a source for legislation. At the end of the day “absent any clearly identified implementing structure, the effect of such a provision would not be to Islamize the legal order but to give moral support to any attempts to draw on Islamic law through normal political and constitutional channels”<sup>159</sup>

#### **b. The Tripartite repugnancy clause in the Iraqi Constitution**

This part will explain the most prominent challenges brought forth by the wording of the Repugnancy Clauses. In fact, the FSC will play a significant role to activate Article 2 in the long term and the synthesis of and balance between Islam, human rights and democracy. In this context, the clause in the new Constitution addressed some of the difficult issues to legitimate the new political system. In fact, as described above, article 2 (first) lists three sets of principles to which Iraq's laws must adhere. These are first, Islam's settled rulings, second, human rights and third, the principles of democracy. No law can be enacted that violates the principles of any one of these three. Reading these components together, will invite future challenges. First, the Court will face a potential conflict of multiple interpretations each of democracy, human rights, and Islam's Settled Rulings,<sup>160</sup> which will certainly be reflected in the decisions of the FSC. As these elements, especially Islam's Settled Rulings, have many interpretations and applications in the world, this makes it difficult to find common ground globally.

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<sup>159</sup> See Nathan Brown, *supra* note 119 at 2 and David Pimentel & Brian Anderson, *Judicial Independence in Post Conflict Iraq: Establishing the Rule of Law in an Islamic Constitutional Democracy*, 46 GEO. WASH. INT'L L. REV. 29, 37 (2013).

<sup>160</sup> Rabb, *supra* note 50 at 541.

By contrast, Article 7 of the TAL of 2004 states: no law can contradict to the universally agreed tenets of Islam. This provision was the historical source for Article 2, but during the negotiation, Article 2 has led to a huge debate about respecting Islam and a simultaneous adherence to Islam, human rights, and democracy.<sup>161</sup> Tension arises in large part because of how Sharia as *Fiqh* is often defined, namely in terms of premodern rules of law. For example, Dr. Zayed Alsumidaie, one of the members of the committee of writing the draft of the Constitution of Iraq in 2004, has explained that the committee discussed the meaning of “Islam's settled Rulings,” and they chose this wording as a compromise to appease all parties. He stated that the wording has an ambiguous meaning, and it would be open to many readings that could expand or narrow interpretations.<sup>162</sup>

Theoretically as a legal source, human rights are clear, because they are provided by very broad international conventions such as the Universal Declaration of Human Rights of 1948, as well as many international conventions that have been very detailed in the concept of human rights. However, as a practical matter, the application of the concept of human rights varies from one state to another and the Iraqi court must adopt a clear line of application which is consistent with human rights charters. More specifically, the FSC can rely on the close meaning of human rights which the Constitution invoked in section two which included the Rights and Freedoms.

On the other hand, the concept of democracy will be the most difficult to implement because of the influence of different ideas of what it means in terms of theory and practice. The existence of a constitution, fair elections, and representatives of the people are important criteria in the democratic system but also subject to interpretations and criticism that make it difficult for

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<sup>161</sup> Deeks & Burton, *supra* note 8 at 6-18.

<sup>162</sup> E-mail from Ziyad Alsumidaie, members of the committee of writing the Iraqi constitution, to Oday Mahmood. (Jan.23 2016.01:19 CST)(Arabic). Also, see Deeks & Burton, *supra* note 8 at 14.

the court to adopt a clear concept of democracy. For instance, in light of the diversity required in Iraq, the current disputes in Iraq are over the nature of democracy. Most of the *Shia*, including Sistani, object to any dilution of pure majoritarian rule as being somehow anti-democratic. This objection might be a more significant problem than disputes over Islam, where there is more flexibility. Moreover, in light of the divine sovereignty demand by Islamists groups, who would be the legislator God or the human? and to what extent the role of *Fiqh* experts in the court. Thus, the clause could motivate the FSC to lay down a principle of statutory interpretation akin to the one in United States jurisprudence that “courts will construe statutes to avoid possible constitutional conflicts, if multiple statutory readings are available.”<sup>163</sup>

The other issue is the inherent conflict between the establishment of the concepts of Islam, democracy, and human rights, where there will be great difficulties in finding a strong link between them.<sup>164</sup> For example, some argue that it is difficult to adopt a constitution that contains elements of Islam because Islam is fundamentally incompatible with democracy.<sup>165</sup> In contrast, there is another trend that argues Sharia is indispensable in a Muslim society that wants to activate the role of Islam in the legal system. Therefore, they propose a practical process of combining Islam and democracy by understanding Islam as modern and as embodying a "set of principles, methodology, and a process of discourse that searches for the Divine ideals. . . [A] work in progress, never complete."<sup>166</sup> This has certainly the potential to enhance the harmony among Islam, democracy, and human rights, in order to work in a single legal system where there are no preconceptions about Islam, but rather principles and values that can be updated and developed

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<sup>163</sup> *Id.* at 12.

<sup>164</sup> *Id.* at 13.

<sup>165</sup> Alex Shank, *Constitutional Shari'a: Authoritarian Experiments with Islamic Judicial Review in Egypt, Iran, and Saudi Arabia*, 102 GEO. L.J. 519, 522, 523-24.

<sup>166</sup> *Id.*

according to the needs of society. This supports the idea of *Maqasid* as a practical concept in line with human rights and democracy. The court cannot really use *Fiqh* to do this, *Fiqh* do not update and develop in the same way as *Maqasid* could.

### **c. Constitutional Court Structure and Function**

The prevailing idea in the process of drafting Constitutional court provisions was to provide for the preliminary judicial review of legislation and to regulate the membership of court.<sup>167</sup> In fact, part of the negotiators aim was to "consider the constitutionality of the laws before submitting them" to the COR, similar to Constitutional Conseil in France, and what is being done in Iran.<sup>168</sup> This suggestion was different from the ideas contained in the TAL whose aim was instead to adopt a judicial review similar to the American experience.<sup>169</sup> The final wording gave the FSC authority for "reviewing the constitutionality of laws and regulations in effect," and for "interpreting the provisions of the constitution."<sup>170</sup>

The second issue related to the Constitutional Court was Court membership. Article 92 (2) requires that court shall be made up of a number of judges, experts of Sharia canonists, and law experts. *Shi'a* Islamists suggested to have *Fiqh* experts on the FSC because the repugnancy clause set down that the law must be non-opposition with the Islam's settled rulings which necessitates the inclusion of *Fiqh* experts as well as professors of law, lawyers, and judges in all three areas

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<sup>167</sup> Deeks & Burton, *supra* note 8 at 46.

<sup>168</sup> In Iran, the Guardian Council reviews laws before their enactment in order to ensure their compatibility with the principles of Islam and the Constitution. This Council is a purely religious-political institution because it consists of six religious men selected by the Supreme Leader and six jurists, specializing in different areas of law from among the Muslim jurists nominated by the Head of the judicial power. See IRAN CONST. *supra* note 21 at arts. 91-99.

<sup>169</sup> The Supreme Court Law No. 30 of 2005, merely states that it shall consist of one president and eight members, but in practice, since the Federal Supreme Court's adoption, all nine have been judges. The Supreme Court Law contains no provisions for removal of judges from the Court.

<sup>170</sup> IRAQ CONST. *supra* note 7 at art. 93.

mentioned in the pregnancy clues.<sup>171</sup> The experts of *Fiqh* could be interpreted as clerics or judges who have substantial knowledge in Sharia. However, these interpretations would expand the role of religion in the Iraqi legal system. Some might argue that they might negatively affect democracy and human rights values.

In fact, there was a significant discussion about adding the term Islamic jurists “fuqaha’ Sharia”. This dispute was resolved by adding the term “experts of Islamic *Fiqh*.”<sup>172</sup> This is a trend towards the application of the *Fiqh* in all its details and not the constants of the provisions of Islam. At the time of the Constitution's ratification, the FSC already existed as created by the Transitional Administrative Law in 2004 and established under the implementation of “Supreme Court Law” in 2005. The Supreme Court Law merely states that it shall consist of one president and eight members, but in practice, since the FSC's adoption, all nine have been judges. The Supreme Court Law contains no provisions for removal of judges from the Court. There has been no addition of experts in Islamic jurisprudence to the Court yet and all members have been judges.<sup>173</sup>

The number and types of members of the Court are supposed to be regulated by a law issued by a two-thirds majority vote of the Iraqi Council of Representatives. In 2007, the Council of Representatives attempted to pass a draft law that sought to redefine the organization and jurisdictional mandate of the court. The bill of FSC says: The Council of Representatives will suggest creating an “advisory commission” in the Supreme Federal Court which consists of two legal experts and two experts in Islamic jurisprudence.<sup>174</sup> Unfortunately, so far, the Council of

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<sup>171</sup> Deeks & Burton, *supra* note 8 at 52 and Feldman & Martinez, *supra* note 41 at 917.

<sup>172</sup> Feldman & Martinez, *Id.*

<sup>173</sup> Article 3, Federal Supreme Court Law No. 30 of 2005(Iraq).

<sup>174</sup> Draft Federal Supreme Court Law of 2007 (Iraq), translated in Statutes, Global Just. Prac.: Iraq, <http://gipi.org/library/primary/statutes> (follow “DRAFT Federal Supreme Court Law” hyperlink) (last visited Oct. 16, 2017).

Representatives has not yet issued a law of the FSC, but they discussed a bill in 2015 without a vote on it. The only law passed in this regard is the law of Higher Juridical Council, which renders HJC primary responsibility to nominate Judges to serve in the FSC, among many administrative functions.<sup>175</sup>

#### **d. Personal Status law**

After 2003, there was a great desire on the part of the religious parties in Iraq to create a new system of personal status, to end the state of exclusivity that prevailed in the previous law, Law No. 188 of 1959.<sup>176</sup> There was a clear insistence on including personal status in the constitution and linking this law to each person's religion and sects determined by the jurists of these groups.<sup>177</sup> The constitutional effort prevailed and the final draft of the personal status provision provides "All Iraqis are free in their commitment to their personal status in accordance with their beliefs, sects, or choices, and this will be regulated by law."<sup>178</sup> The implementation of this provision requires enacting a new law. If this law is enacted, it will create a future problems that may conflict with Article 2 of the Constitution, which stipulates Islam's settled rulings are a criterion for examining laws. Indeed, at least for the Muslim community, this is a step backward in Iraqi legislation after it has given up the stage of detailed *Fiqh* complexities and adopted an advanced stage of the drafting of extensive texts derived from the spirit of Sharia.<sup>179</sup> Article 41 leads to the expansion of the role of historical content of *Fiqh* and the personal interpretation of Sharia, as well as, absent of the legal standards which govern the role of *Fiqh*. For example, some parties have interpreted Article 41 widely by imposing some religious and social perceptions of

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<sup>175</sup> Law of Higher Juridical Council No. 45/2017, art. 3 (third) (Iraq).

<sup>176</sup> Hamoudi, *supra* note 139 at 393.

<sup>177</sup> Deeks & Burton, *supra* note 8, at 21 and Feldman & Martinez, *supra* note 41 at 907. Also, Stilt, *supra* note 65 at 751-55.

<sup>178</sup> IRAQ CONST. of 1952 *supra* note 107 at art. 39.

<sup>179</sup> See *supra* chapter one which pointed the role of religion in the Iraqi legal.



women's rights, especially regarding the right to marry. They proposed a bill of law amending the Personal Status Law No. 188 of 1959. Suggesting that Muslims subject to this law may submit a request to the court of Personal Status if they want to apply his/her doctrine of religious rulings of personal status.<sup>180</sup> This could provide a provision that conflicts with *Sunni* schools because they have different rules, which violates Article 14. Moreover, this might discriminate between Iraqi people when they aren't equal before the law if different laws apply to different sects. Different rules for different sects could contradict Article 14 which asserts that Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status.

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<sup>180</sup> Minutes of the session of the Iraqi Parliament No. (18) Paragraph IX (14/9/2017) (Arabic). <http://ar.parliament.iq>. (last visit May 6, 2017) Hamoudi criticized this law "The draft was atrociously drafted as a technical matter. Among other things, internal contradictions and inconsistencies proliferated, certain phrasings seemed impossibly vague and incapable of being the subject of rational adjudication, and the draft often used different words to denote the same concept." Hamoudi, *supra* note 91 at 352.

### **e. Religious Freedom**

Religious Freedom is one of the constitutional freedoms that may be highly controversial when Article 2 (first) of the 2005 Constitution is implemented. It may present a major challenge to the Constitutional Court of Iraq. Article 2 (second ) insists on the “guarantee the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandeans Sabians.”<sup>181</sup> Article 7 of the Constitution also bans any party that adopts, incites, facilitates, glorifies, promotes or accusations of being the “infidelization” (*takfir* in Arabic) of other.<sup>182</sup> Article 14 asserts that Iraqis are equal before the law, without discrimination based on religion.<sup>183</sup> Also, Articles 42 through 43 assert the freedom of thought, conscience, freedom of worship , and belief.<sup>184</sup> In the face of these constitutional guarantees of freedom of religion, the main issue remains the right to change religion and the rights of religious minorities, which are omitted in the constitution.<sup>185</sup>

The Iraqi Constitution made a reservation regarding Article 42, which protects the freedom of religion.<sup>186</sup> In contrast, Article 2 of the Constitution affirms that Islam is the religion of official states and the foundational source of law. This seems to prohibit conversion from Islam to other religions and makes the protection of religious minorities more controversial in the face of protecting Islamic identity. Even if, in Iraq's Penal Code of 1969, there is no reference to apostasy as a crime,<sup>187</sup> the absence of such a law does not mean that Muslims are freely able to convert to

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<sup>181</sup> IRAQ CONST. of 2005 *supra* note 7 at Article 2, Section 2.

<sup>182</sup> *Id.* Art. 7.

<sup>183</sup> *Id.* Art. 14.

<sup>184</sup> *Id.* art 41-43.

<sup>185</sup> Hamoudi, *supra* note 30 at 406.

<sup>186</sup> This Article states “each individual shall have the freedom of thought, conscience, and belief” IRAQ CONST. *supra* note 7 at art. 42.

<sup>187</sup> Penal Code No. 111 of 1969 (as amended) (Iraq).

another religion.<sup>188</sup> This may support other laws which prohibited a Muslim woman to marry a non-Muslim man,<sup>189</sup> or a non-Muslim to inherit from a Muslim.<sup>190</sup> I agree with Hamoudi that the strong language of protecting religious freedom in the constitution is noteworthy,<sup>191</sup> but the inconsistent interpretation of Article 2 might motivate setting aside the texts and applying the subjective utilitarian method for a group who have power.

Moreover, Article 43 specifically references religious minorities by granting religious exercise rights to “the followers of all religions and sects.”<sup>192</sup> Reading this article in conjunction with article 2 of the constitution may raise questions: Can non-Muslims be part of legislative power when Islam is a fundamental source of legislation and no law can exist that contradicts its rulings? Currently, the judiciary and legislation in Iraq have been awarded election quotas for minorities to ensure their political rights.<sup>193</sup> But the concerns above will continue unless precise features are drawn up to protect religious minorities in Iraq. One can speculate, in light of protecting the freedom of religion, it will be a great challenge beneath the surface to steer the Constitutional Court in Iraq in the context of counterbalance between Islam’s settled rulings and the principles of human rights.

#### **f. Women’s Rights**

The Constitution asserts women's rights such as the principle of equality, prohibits discrimination on the basis of gender, ensures political participation by granting women an

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<sup>188</sup> Hamoudi, *supra* note 139 at 404.

<sup>189</sup> Law No. 188 *supra* note 123 at art. 17.

<sup>190</sup> *Id.* at art. 90.

<sup>191</sup> Hamoudi, *supra* note 139 at 406.

<sup>192</sup> IRAQ CONST., *supra* note 7 at art. 43.

<sup>193</sup> For example, The FSC decided that the Amending the Electoral Law No. 16 of 2005 was unconstitutional and a violation of equal protection. This is because the limitation of the right of voting of the Sabian minority to the governorate of Baghdad alone harms the candidate as it harms the Sabian minority.[Federal Supreme Court of Iraq], decision No. 6 of 2010, p. 1-2 (Iraq). Hamoudi, *supra* note 139 at 412.

elections quotas to ensure their representation in the Council of Representatives.<sup>194</sup> However, there are provisions related to women's rights in Iraqi constitution and codes that could harm women's rights in the case of any arbitrary interpretations of Article 2 and other articles of the Constitution which ensure women's rights.<sup>195</sup> Specifically personal status issues, since some Islamic jurists' opinions may not be in line with international conventions on women's rights. For example, there are scholars who permit the marriage of girls under the age of ten if her parents had the consent of the religious leaders from the *Shia* or *Sunni* Muslim community to which her parents belong. Iraq also made a reservation of Article 2(g) of CEDAW, which required the reform of the legal system to abolish any law that constituted discrimination against women. Article 16 of CEDAW, which provides for the equality of men and women regarding the right to marry, addresses related issues.<sup>196</sup> Hence, the role of the FSC will have to resolve this dispute between the religious and social perceptions of women's rights and the women rights imposed by international laws.

## 2.5 Conclusion

Through this historical articulation of the role of religion in the Iraqi legal system, it can be concluded that there was a clear historical impact of religious concepts on the legal system. This was a reflection of broad and urgent popular demands, especially in the daily dealings of people in commercial contracts and personal status matters and is a reality not to be ignored in the political and constitutional mix. The popular demand for religion caused the inclusion of jurists

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<sup>194</sup> IRAQ CONST., *supra* note 7 art. 14,20,29 and 49.

<sup>195</sup> Shiva Falsafi, *Civil Society and Democracy in Japan, Iran, Iraq and Beyond*, 43 VAND. J. TRANSNAT'L L. 357, 432 (2010).

<sup>196</sup> Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, OHCHR, Ratifications & Reservations: <http://indicators.ohchr.org/> (last visited April. 9, 2018).

who dominated the roots of the legal system through both the judicial and the legislative branches. Seemingly in accordance with the popular view, this domination has changed the real role of legal drafting in the organization of daily life because of the ramifications of schools of *Fiqh* and their insistence on small details and particularities. This historical reading shows that the legal system sought to apply Islamic *Fiqh* rather than Sharia. The laws applied in Iraq are at most a codified version of *Fiqh*, which itself is not uniform on most principles of law and is the product of human reason, not direct divine command.<sup>197</sup> No longer possible today, in light of the myriad legal complexities of a modern state, the law refers a judge to one of the schools of Islamic jurisprudence only and obliges the judge to apply it. For example, Saudi Arabia, which adheres to one school, is still issuing regulations to fill the gaps found by judges.<sup>198</sup> There is a difference between changing *Fiqh* and established Sharia, and this application of one school produced a distorted application of Sharia.

It is, therefore, necessary to adopt a new understanding of the application of Sharia separate from the traditionalist forms of *Fiqh* but within the objectives of Sharia. Currently, for the first time in the Iraqi constitutional scene, Article 2 opens the door to a different approach which gives a supreme role to religion, democracy, and human rights in the legal system. It does this through the incorporation of religion into the Constitution to continue to influence the legal system, but without going into the details of *Fiqh*. This was incarnated in the repugnancy clause, which recognizes the role of religion in the Constitution by preventing the enactment of any law which is contrary to religion in accordance with the Islam's settled rulings adopted by the Iraqi Constitution of 2005. The tensions inherent in this formulation have provoked a wide-ranging

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<sup>197</sup> Hallaq, Maqasid, *Supra* note 63 at 23-24.

<sup>198</sup> MOHAMED S. EL-AWA, THE ROLE OF THE PURPOSES OF ISLAMIC LAW IN CONTEMPORARY LEGISLATION, a lecture delivered in faculty of Dar al- Ulum,, Cairo University, 19 (2006)(Arabic).

discussion which has not yet been resolved. These tensions could only be resolved in the courts through the proper implementation of Article 2. This robust shift in the role of religion in the legal system from statutory law to constitutional law highlights the question of the impact of religion established by the repugnancy clause for the legislative process and the interpretation of the repugnancy clause by constitutional courts in modern Islamic countries.

### **3.0 SECOND CHAPTER: THE CONCEPT OF THE REPUGNANCY CLAUSE IN THE TRENDS OF LEGAL THOUGHT**

#### **3.1 Introduction**

Constitutional texts should be examined alongside the judicial practice in relation to interpretation of these texts to understand the concepts and practices employed in the interpretive context. This chapter argues that constitutional courts throughout the Islamic world have failed to apply repugnancy clauses in a coherent fashion. On upcoming analysis, the courts' interpretations of repugnancy clauses have several bases and rationales that prove to be mutually contradictory and, correspondingly, offer conflicting guidance to judges, lawyers, and legislators. I will discuss two of them (Iran and Egypt), underlining their differences.

But before discussing the specific subject of Islamic law repugnancy, this chapter will start with a discussion of the United States experience of judicial review. It is important to address a different method, the common law method, because the new constitutional court in Iraq needs to look at a variety of approaches around the world. The United States' judicial review has its vital roots in a repugnancy theory of a sort, and this repugnancy can be compared in some helpful ways with modern repugnancy clauses in the Islamic world. To see this clearly, we need to take a closer look at some of the Constitution's key provisions.

One key provision, Article VI, makes the Constitution the supreme law of the land and requires the court to be "bound thereby, any thing in the Constitution or Laws of any State to the

Contrary notwithstanding.”<sup>199</sup> In addition, the court is granted the power to decide cases arising under the Constitution, laws, and treaties of the United States.<sup>200</sup> Gradually, the United States judicial review has evolved in line with society's needs and political orientations as well as a judge's own values, which may vary over time.<sup>201</sup> A consideration of these issues ensures that the United States has its own unique method of applying the repugnancy clause related to the history of its developing judicial system, and the political impact of judicial determinations.

After discussing the United States experience, I will discuss the specific question of Islamic repugnancy in the two Islamic countries. This section will explore how the idea of repugnancy has developed in Islamic constitutionalism over the decades and will reflect on its meaning and implications in the framework of the new constitutional texts in the Iraqi Constitution of 2005, given the concept's prominence there. Specifically, these countries have their own approaches to judicial review of the repugnancy clauses that are drawn from their vague understanding of the role of Islam in the constitutional context. The chapter will then analyze the decisions of the Iraqi FSC which deals with repugnancy clause cases and will suggest a means of interpretation whereby the Court can help ease tensions between Islam's settled rulings on the one hand, and democracy and human rights on the other.

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<sup>199</sup> Article VI, cl. 2 of THE US CONSTITUTION states: “This Constitution, and the Laws of the United States ... and all Treatises ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.”

<sup>200</sup> The precise language is: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” U.S. CONST. art. III, § 2.

<sup>201</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*, 43(1980).



### **3.2 The United States Model of Judicial Review and the Repugnancy Standard**

This section will carefully examine the roots of judicial review in the U.S. to demonstrate its method of progressive implementation of the concept of judicial review as a form of repugnancy. In addition, the following question will be addressed: How did the Supreme Court come to be seen as the necessary guardian of constitutional values through the repugnancy clause of the United States Constitution? This discussion will also highlight elements of Islamic repugnancy through parallel interpretation. In other words, in the Islamic countries, the repugnancy clause operates the same way as the Guarantee clause and the Equal Protection clause operate in the United States: to protect the fundamental integrity of the basic premises on which the governmental and constitutional system is founded.<sup>202</sup> Thus, it is important to examine the United States method to better understand which methods can be appropriated in Iraq, with particular reference to developing of the operation of the Iraqi repugnancy clause.

#### **A-The Roots and Scope of the Repugnancy Clause in the United States**

To understand American judicial review, it is particularly important to focus on the roots of judicial review in England, which initially governed the United States under the British colonial system. In fact, before judicial review had a name in the United States, the British practice was understood in terms of review under a repugnancy standard by the parliament rather than the court.<sup>203</sup> For political reasons, British governments were keen to impose their legal hegemony over

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<sup>202</sup> Larry Catá Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PENN ST. L. REV. 671, 710 (2009).

<sup>203</sup> Some commentators claimed that the history of judicial review in the United States, the birthplace of judicial review, is related to repugnancy standard and rooted in the thirteenth century in Bracton, England. Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 513 (2006).

all colonies, through the English doctrine of parliamentary supremacy, with the court subordinate to this doctrine.<sup>204</sup> Under this doctrine, the parliament has absolute epistemic authority and judges could not violate the laws “either for causes or persons, within any bounds.”<sup>205</sup> The traditional meaning of legislative sovereignty is: if the parliament violates the constitutional rules, there are no “illegal consequences” that the courts can address.<sup>206</sup> However, the colonial office's application of repugnancy was reflective of policy and practice to assert the parliamentary supremacy, rather than a judicial positive criterion of repugnancy.<sup>207</sup>

One commentator has laid down that the idea of judicial review in England appeared gradually. However, this idea was not to strike down a law if it was contrary to the constitution, but the judge occasionally asserted that the government must adhere to the constitution. For example, in 1610, Dr. Bonham's case,<sup>208</sup> the precursor of the doctrine of judicial review by a federal judge in the United States, was decided.<sup>209</sup> The chief justice was Sir Edward Coke whose work proved influential in shaping American law.<sup>210</sup> He asserts that “when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law

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<sup>204</sup> Louis E. Wolcher, *A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and the United Kingdom*, 13 VA. J. SOC. POL'Y & L. 239, 245 (2006).

<sup>205</sup> R.H. Helmholz, *Bonham's Case, Judicial Review, and the Law of Nature*, 1 J. LEGAL ANALYSIS 325, 328 (2009).

<sup>206</sup> Wolcher, *supra* 204 note at 277–78.

<sup>207</sup> *Id.* at 279.

<sup>208</sup> Dr. Bonham's Case, 8 Co. Rep. 114 (Court of Common Pleas [1610]) In brief, “Dr. Bonham, a Cambridge University graduate in medicine, was forbidden to practice his profession in London by the Royal College of Physicians unless he first secured its license (Clark 1964, 208-217). He rejected the demand. In response, the College first fined him, then ordered his imprisonment, in both instances acting under a royal grant, one expressly confirmed by an Act of Parliament, and which confined the practice of medicine in London to men who had first been admitted to practice by the College. Dr. Bonham had not been so admitted. He did not have a license from the College and he refused to seek one. He disputed the validity of the action taken against a graduate of his ancient university. In due course, he sued the College for false imprisonment and the case came on before the Court of Common Pleas, in which Sir Edward Coke then served as Chief Justice. The Court held in Dr. Bonham's favor.” R.H. Helmholz, *supra* note 205 at 327. In the same context, see also, *King v. Earl of Banbury, Skinner*, 517, 526-7 (K. B. 1694), *Day v. Savage, Hobart* (3d ed. i67i) 85 (K. B. 1614) and *The City of London v. Wood*, 12 Mod. 669, 687 (K. B. 1701) Dudley Odell McGovney, *The British Origin of Judicial Review of Legislation*, 93 PENN L. REV 1 (1944).

<sup>209</sup> Helmholz, *supra* note 205 at *Id.*

<sup>210</sup> *Id.*

will control it and adjudge such Act to be void.”<sup>211</sup> Thus, the human laws cannot be freed from the natural law. But there was no evidence that English courts rejected a law because it was contrary to the common law.<sup>212</sup> This idea was carried to America as a “veritable proposition” and the British colonial courts could exercise a power to hold colonial laws invalid if it contrary to some higher England, which meant the framers of the Constitution of the United States were familiar with the idea of judicial review.<sup>213</sup>

This trend towards the idea of repugnancy was not stable in terms of its scope. There were other broad components of repugnancy, such as natural law, divine law, human law alongside the common right and reason, and common law. James Stephen, Colonial Office counsel from 1713 to 1734, asserted that the scope of review in England was not “distinctly ascertained... but it is assuming to be in perfect harmony with English law.”<sup>214</sup> In addition, the United States judges also regularly applied primarily at levels as general as natural law, divine law, and human law.<sup>215</sup> For example, in *Robin v. Hardaway*, Justice Mason, by citing Bonham's case, argued: "Now all acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void"<sup>216</sup> Another example, in *Roper v. Simmons*, Justice Anthony Kennedy asserted on the abolish the death penalty for juveniles "noting that the nation had reached a consensus against the juvenile death penalty since the number of states that either have no capital punishment or do not allow it for offenders under 18" had reached a tipping point. "<sup>217</sup> Kennedy

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<sup>211</sup> *Id.* at 354.

<sup>212</sup> McGovney, *supra* note 208 at 3.

<sup>213</sup> *Id.*, at 8.

<sup>214</sup> Damen Ward, *Legislation, Repugnancy and the Disallowance of Colonial Laws: The Legal Structure of Empire and Lloyd's Case (1844)*, 41 VICT. U. WELLINGTON L. REV. 381, 388 (2010).

<sup>215</sup> Philip Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1, 12 (2003).

<sup>216</sup> *Robin v. Hardaway*, Jefferson iog, 114 (Va. 1772) The court cited Bonham's case.

<sup>217</sup> 543 U.S. 551, 112 S. W. 3d 397 (2005).

referred to the new method of interpreting the constitution when the people themselves, as represented by state decisions, create meaning within the Constitution.

The variety of sources that judges used were, to some extent, a result of the absence of a written constitution. At this point, one could understand that general conceptions of the scope of repugnancy in the United States arose as a reaction to the uncertain methods and the absolute parliamentary sovereignty of British colonial legal system. In sum, the English method continued to be applicable to American colonial law, but this method stopped short of embracing judicial review in the modern sense. It later formed the basis of the judicial review in United States, though U.S. courts developed their own unique method of judicial review.

## B-The Rise of Judicial Review in the United States

After ratification of the Constitution, "repugnancy" and judicial review continued together to govern the federal review of state legislation. The Constitution explicitly authorizes only a very limited type of judicial review that occurs when the judges of states' courts are "bound" by federal law notwithstanding "contrary" state law.<sup>218</sup> In addition, Section 25 of the Judiciary Act of 1789 authorizes the United States Supreme Court to reverse any judgment of a state's highest court if it was "repugnant to the Constitution, treaties or laws of the United States."<sup>219</sup>

After that, the Supreme Court in *Marbury v. Madison* established its right to judicial review to determine the constitutionality of federal laws, judicial decisions, or acts of a federal government official.<sup>220</sup> In *Marbury*, Chief Justice John Marshall insightfully explained that the Constitution exists to impose limits on government powers, and these limits are meaningless unless subject to judicial enforcement.<sup>221</sup> He pointed out that "long and well established" principles addressed "the question, whether an act, repugnant to the Constitution, can become the law of the land."<sup>222</sup> The Court held that the judicial department has the duty to say what the law is.<sup>223</sup>

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<sup>218</sup> The Supremacy Clause states:

That this Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to be Contrary notwithstanding. U.S. CONST. art. VI, cl. 2. However, the question arises as to why the framers of the Constitution did not directly provide Supreme Court judges the power of judicial review? This has raised questions about the scope of US judicial power. Bilder claims that "the Framers of the Constitution presumed that judges would void legislation repugnant to the Constitution." # Others have argued that the conformity to constitutions "evolved only because one branch of government was willing to go beyond its constitutional authority." Hamburger, *supra* note 216 at 3.

As noted above, the absence of a direct constitutional bond for judicial review has made it a double-edged sword. On the one hand, the judiciary has a wide scope for practicing judicial review. This has led to a lack of clarity and specificity concerning the idea of judicial review. for general information. Bilder, *supra* note 204 at 509.

<sup>219</sup> Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 83, 85-87.

<sup>220</sup> *Marbury v. Madison*, 5 U.S. 137, 138, 2 L. Ed. 60 (1803).

<sup>221</sup> *Id.* at 176.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 177.

Although this right is not expressly provided in the Constitution,<sup>224</sup> the court justified this right by relying on its power of interpreting the Constitution. The interpretation power allows the court to protect the Constitution against any transgressions or breaches. It is clear that the judicial branch's province is to state and clarify the law. The court assured its position and power to exercise judicial review of federal laws and acts.<sup>225</sup> Hence, a law repugnant to the Constitution is void because "the courts, as well as other departments, are bound by" the Constitution.<sup>226</sup>

Originally, the basis of the repugnancy clause is constitutional values, as well as other American laws that fueled the territorial application of relevant laws. While judicial review is rooted in repugnancy, it has evolved into something else. No longer can a judge set aside a statute because it is "repugnant" to reason, or some other external indicia, but only if it is contrary to the Constitution. As Hamilton explained "the power of the people" is superior to both legislative and judicial power. Judges are to be governed by the will of the "people ... declared in the Constitution," and "no legislative act, therefore, contrary to the Constitution, can be valid."<sup>227</sup> Hence, the components of the United States repugnancy doctrine derive from the values and principles affirmed by the Constitution itself and protect the fundamental integrity of democratic government and republican form.<sup>228</sup> This is true even if the Supreme Court invokes natural law under Chief Justice Marshall, but it is used to complete provisions of positive law in cases not fully determined by positive law.<sup>229</sup> Realistically, in America, when judges interpret these values and principles, they have a great deal of discretionary power. They can examine

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 180.

<sup>227</sup> The Federalist No. 78, at 394 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>228</sup> Art. IV, § 4.

<sup>229</sup> Stephen E. Gottlieb, *Does What We Know About the Life Cycle of Democracy Fit Constitutional Law?* 61 RUTGERS L. REV. 595, 621–22 (2009).

legislative history, fidelity to the text, previous judicial decisions, public policy considerations and even simple common sense. Also, they are likely to be influenced by temperament, emotion, experience, personal background, and ideology.<sup>230</sup>

The United States judiciary has been subject to competing theories in relation to the application of judicial review. It is unclear which theory explains the application of the judicial review process. The scholar Tara Smith helpfully categorizes the approaches as textualism, public understanding, originalism, democratic deference or popular constitutionalism, perfectionism or living constitutionalism, and minimalism.<sup>231</sup> These categories are a reflection of the preferences of the judges of the Supreme Court. No judge is ever exclusively dominant at any given time but depends on how the judicial branch examines the case.<sup>232</sup> For example, in the view of one notable scholar, Richard Posner, whose work is influential but controversial, in light of economic realities, the American approach is not solely based on constitutional values but has been extended to include basic democratic principles and economic realities.<sup>233</sup> That this claim can even be made by one as influential as Posner demonstrates that the American scope of judicial review is very flexible, which, in turn, can lead to vagueness or uncertainty in application. This vagueness entitles a constitutional judge broad space for interpretation in light of social, political and economic shifts.<sup>234</sup> To see this in action, consider the Tillman Act, passed by Congress in 1907. At the time,

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<sup>230</sup> RICHARD A. POSNER, *HOW THE JUDGES THINK*, 174 (2008). He has discovered eight theories refer to political, economic, sociological, psychological, organizational, strategic, pragmatic and attitudinal impact on the judge behavior. 19-59.

<sup>231</sup> TARA SMITH, *JUDICIAL REVIEW IN AN OBJECTIVE LEGAL SYSTEM* 45-66 (2015). Also, see JACK M. BALKIN, *LIVING ORIGINALISM*, 55 (2011).

<sup>232</sup> Wolcher, *supra* 204 note at 250. He described these elements as external points of view on law. A text can always be viewed, from the external standpoint of an observer, as being a function of history, culture, and personal circumstance.

<sup>233</sup> Posner, *supra* note 230 at 35.

<sup>234</sup> *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER*, 155 (Sanford Levinson & Steven Mailloux, 1989).

no one objected to this law.<sup>235</sup> This act prohibited corporations and national banks from making monetary contributions to national political campaigns,<sup>236</sup> and stated that “corporations are only fictitious persons laid down by law, do not have the same First Amendment rights to political activity as real people do”<sup>237</sup> However, in a recent case, the court found that “a limitation on a corporation's ability to make independent expenditures in a political election is an unconstitutional ban on free speech.”<sup>238</sup> This example illustrates the United States judicial review method and its relevance in present day, still involved in the process of criticism and evolution.

Historically, as a backlash to the wide scope of the judicial review process in the United States, some opponents claim that it undermines democracy on the ground that it restricts the rights of the majority in the legislature.<sup>239</sup> John Hart Ely claimed that in judicial review “a body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representative that they cannot govern as they like.”<sup>240</sup> Ely suggested judges should strengthen the democratic process by using a “participation-oriented, representation-reinforcing approach to

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<sup>235</sup> Judge Scalia, however, looked at this expansive role of judge. In 1997, he wrote that the situation in America was “not customary or a reflection of the people’s practice, but is a law developed by the judges.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, 7 (1997).

<sup>236</sup> Tillman Act, Pub. L. No. 59-36, 34 Stat. 864, 865 (1907) (codified as amended at 2 U.S.C. § 441b(a) (2006).

<sup>237</sup> Ronald Dworkin, *The Decision That Threatens Democracy*, *The New York Review of Books*, <https://www.nybooks.com/articles/2010/05/13/decision-threatens-democracy/> (last visited Jun 7, 2018). Dworkin suggested, institutional mechanisms to ensure respect for legal principles “must be guided by principle by some theory of why speech deserves exemption from government regulation in principle.”

<sup>238</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

<sup>239</sup> Robert Lowry Clinton, *Democracy, the Supreme Court, and Our Two Constitutions*, 8 FAULKNER L. REV. 1, 15 (2016). See also, Ilya Somin, *Democracy & Judicial Review Revisited the New Old Critique of Judicial Power*, 7 Green Bag 2d 287, 293 (2004) The overriding point, however, is that representation- reinforcement considerations must be taken seriously in any analysis of the possible anti-democratic impact of judicial consent decrees. This is particularly true in cases involving the interests of groups that are largely barred from participation in the political process.

<sup>240</sup> Ely, *supra* note 201 at 5. Some might argue that at least in the United States, the theories of Ely and Chemerinsky are not correct. The judges are chosen by elected representatives primarily on political, rather than legal, grounds. Also, Democracies can make bad decisions, and those decisions can undermine important democratic rights, values, and procedures. See, for example, Annabelle Lever, *Democracy, and Judicial Review: Are They Really Incompatible?* DECEMBER 2009 | Vol. 7/No. 4 and MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).



judicial review.”<sup>241</sup> Ultimately, he admitted that popular reaction against the judicial review has not in fact, materialized in more than a century and a half of the American experience.<sup>242</sup>

In contrast, Chemerinsky described the role of judicial review in a democratic system as follows: “The Constitution protects substantive values from majoritarian pressures, and judicial review enhances democracy by safeguarding these values.”<sup>243</sup> Therefore, Supreme Court decisions that strongly promote democracy perform an important and justifiable function in the United States. In the same context, Dworkin asserted that “robust judicial review is a potentially progressive check on the tyranny of the majority, and it is also consistent with the protection of democracy.”<sup>244</sup> This debate has influenced the Supreme Court’s tendencies on issues that address individual rights.<sup>245</sup> Thus, the American judicial review process has been most active in the protection of democracy itself and as a vital corrective to unlimited democracy.<sup>246</sup>

Indeed, the idea of using judicial review to validate some core values of the republic survives in constitutional theories to date, including in the views of John Hart Ely and Erwin Chemerinsky, as concerning democracy. One of the complex concepts the Supreme Court addresses is great flexibility in relation to the concept of repugnancy standard. Specifically, in

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<sup>241</sup> The same idea about the judicial review was detailing in European, In France, “constitutional supervision originally emerged as a function of the legislature and not of the judiciary, as prerevolutionary judicial activism had led most French democrats to view the judiciary as a potential bastion of privilege and reaction.” In Sweden and Norway, “the parliament played a major, often preponderant, role in constitutional supervision. “Nathan Brown, Judicial Review and the Arab World, 9 (4) JOURNAL OF DEMOCRACY 86 (Oct., 1998).

<sup>242</sup> Id. at 47-48.

<sup>243</sup> ERWIN CHERMERINSKY, INTERPRETING THE CONSTITUTION, 7 (1987). He defined democracy broadly “democracy is seen as a system of government in which majoritarian procedures operate within a structural framework that promotes tolerance for minorities, freedom of expression and respect for the worth and dignity of the individual.

<sup>244</sup> RONALD DWORKIN, FREEDOM'S LAW : THE MORAL READING OF THE AMERICAN CONSTITUTION, 15(1969).

<sup>245</sup> See for example, *Luther v. Borden*, 48 U.S. 1, 12 L. Ed. 581 (1849).

<sup>246</sup> Brown , *supra* note 241 at 85-99.

relation to how repugnancy is used to protect governmental integrity or the republican form of government, which should be considered as a protector of basic individual rights and liberties.<sup>247</sup>

In contrast, the Iraqi Constitution does not view judicial intervention, when there is a political question, as a problem. Unlike Iraq, the Supreme Court of U.S., in some cases, considers Guarantee Clause, which is most notably related to the protection of democracy, claims as political questions and nonjusticiable, it does not treat all Guarantee Clause claims in the same way.<sup>248</sup> The FSC in Iraq has direct judiciary power to protect democracy as one of the components of the repugnancy clause and in other parts of the Constitution as well. For example, the Law of the Independent Electoral Commission of Iraq No. 11 of 2007 granted the Higher Juridical Council a primary duty to nominate Judges to serve Electoral Judicial Panel. This panel has the sole jurisdiction to adjudicate appeals on the Board of Commissioners final decisions. In addition, the Supreme Court has the authority to ratify the final results of the general elections for the Council of Representatives. Practically, In the election of 2018, Iraq's Supreme Judicial Council named nine judges to take over election body after fraud allegations.

The next section, therefore, will ignore the American legal debate about the role of the court when facing a political question, and instead will focus on the positive role of the U.S. Supreme Court, in light of its protecting democratic values. Examining the U.S. Supreme Court's

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<sup>247</sup> Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 851 (1994).

<sup>248</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 288, 124 S. Ct. 1769, 1782, 158 L. Ed. 2d 546 (2004)" also see *New York v. United States*, 505 U.S. 144, 184 (1992). For an argument that the Guarantee Clause should be justiciable, see Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'y 103, 106-07 (2000) He argues "if the Court were to develop judicially manageable standards under the Equal Protection Clause, it could do so equally well under the Republican Form of Government Clause. He concluded that the shift ground to equal protection was made for no reason other than to avoid the appearance of a departure from the nonjusticiability precedents" See also, Ann Althouse, *Time for the Federal Courts to Enforce the Guarantee Clause?--A Response to Professor Chemerinsky*, 65 U. COLO. L. REV. 881, 884 (1994) She notes that "The Court began to realize the danger with the concern Justice Douglas expressed in *Baker v. Carr*, that "leaving the political branches to determine whether a government is republican in form invites factional and partisan collusion with no constitutional remedy."

method of employing constitutional values is helpful in the context of the discussion of how to develop a convenient and efficient mechanism for applying the repugnancy clause in the Iraqi Constitution. Despite the value of these theories in the United States context, the next section claims that if the Iraqi legal system imitated the American approach, a number of obstacles would need to be addressed. In Iraq, wholesale adaptation of the American judicial model is not feasible. However, some aspects of existing judicial approaches can be used, individually, rather than as a complete system, to ensure the application of the repugnancy clause jurisprudence in a consistent manner.

### **C-Comparison of the Iraqi and United States Methods of Judicial Review**

As mentioned above, the model of judicial review in the United States, as a common law system, would face many obstacles if applied in Iraq. This section will explain those obstacles to implementing the U.S. model of judicial review in Iraq, in textual and practical ways. These arguments will be supported by examining United States judicial review methods and considering whether there is a method to adopt some features of the United States system that would be appropriate in Iraq and be consistent with a transparent application of Article 2.

After the Iraq War, the Americans, as leaders of a coalition of victorious nations, played an essential role in the drafting of the new Constitution for Iraq.<sup>249</sup> Like all modern constitutions, these Constitutions explicitly stipulated the right of the FSC to review laws as well as, interpret the Constitution. Nevertheless, the previous historical background of judicial review in the United States makes a comparison between the exercise of judicial review in America and Iraq hard to

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<sup>249</sup> For more information about the role of US in Iraqi Constitution process, see Feldman & Martinez, *supra* note 41 at 919.

apply because some obstacles would need to be addressed. Judicial review in the United States in light of applying repugnancy standards has a broad scope that Iraq could use to develop its repugnancy clause. However, the entire concept of the flexible scope of repugnancy, a key component of effective judicial review, might need time to become acceptable in Iraq's legal system. There are two difficulties in applying the U.S. model of judicial review in Iraq. The first difficulty is the methods of applying judicial review are contested in Iraq, which makes the outcomes unclear. The other difficulty concerns the nature of the judicial system in Iraq, which was built on a civil law model, with an unusual combination between Sharia and Western law. The result is a system that is radically different from the Anglo-American common law system.<sup>250</sup>

#### **a. The Scope of Repugnancy**

As noted above, United States judicial review methods can be criticized because of their polycentric interpretations. Indeed, these methodologies represent the development and needs of the United States community in light of its own circumstances as Justice Scalia asserted.<sup>251</sup> However, these current methods do not indicate a stable and clear case that can be applied in Iraq.

For instance, the Iraqi constitution goes beyond the idea of originalism when it permitted the court to use supreme values (Islamic settled rulings, democracy, and human rights) as criteria to examine the constitutionality of laws alongside the provisions of the Constitution. This requires that the scope of review of the constitutional judge be more comprehensive than the legislator when examining the constitutionality of a law because the judge evokes adaptable general principles, not specific rules.

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<sup>250</sup> Craig R. Giesze, *Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising Under International Law on the Eve of the Second Summit of the Americas?*, 32 INT'L LAW. 51, 60 (1998).

<sup>251</sup> Scalia, *supra* note 235 at 38.

At the same time, it is important for constitutional judges to have some space to develop and rationalize their judgments, unlike other judges. However, the Iraqi Constitution provides more than one source that a judge can use to ascertain the conformity of a law with the Constitution: Islam's settled rulings, democracy, and human rights. Perhaps these sources would restrict the authority of the judge when he/she attempts to use common law reasoning. This method could open the door to constitutional judges manipulating the interpretations of these three elements in broad ways. At times in the United States, the judiciary significantly supports democracy, and, at other times, the judiciary seems to contradict the will of the ruling majority. This situation, without a doubt, derives from the judiciary being greatly influenced by important political trends in the United States, as Supreme Court judges in the United States are chosen by politicians.<sup>252</sup> Thus, the core challenge for the Iraqi judge is to craft an acceptable concept that involves consideration of democracy, human rights and Islam's settled rulings. By the same token, neither country's Constitution has developed a clear concept of democracy. This opens the door for the judiciary to create a broad meaning of democracy. The U.S. Constitution is conspicuously silent on the contours of democracy.<sup>253</sup> Likewise, the Iraqi Constitution does not provide clear and specific guidelines to synthesize Islamic, democratic, and human rights issues.<sup>254</sup>

Since the Iraqi courts have a history of operating in non-democratic settings, this is a new challenge that Iraqi courts might face. Certainly, there are many philosophical interpretations of these elements, but Iraqi courts could work with the following temporary solutions. First, procedurally, the court could enable parties to submit adversarial briefs describing a specific issue

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<sup>252</sup> The Constitution gives the president the power to nominate and, with Senate approval, to appoint judges. U.S. CONST. art. II.

<sup>253</sup> Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 963 (2011).

<sup>254</sup> Feldman & Martinez, *supra* note 41 at 916.

of Islam's settled rulings, democracy, and human rights. The other solution is to accelerate the formation of the court structure through as Article 92 provides: The FSC shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars.<sup>255</sup> This solution will ensure that each member of the court will bear his/ her moral, legal, and intellectual responsibility so that the interpretation of these concepts will align with the needs of the community. It will also ensure that the interpretation secures the operation of the Article and does not disrupt the Constitution. Moving forward, the FSC needs to use the reasoning and/or rational approach adopted from the common law rather than a strictly textual approach to setting a static definition of democracy, human rights, and Islam's settled rulings.

On the other hand, judicial review is based on varying issues. There are limits as to how much Iraqi courts can use the American judicial review method because that method does not involve the same religious imperatives as the Iraqi system requires. As Fiss indicates “An equally remarkable feature of the American system is that the freedom of the external critic to deny the law, and to insist that his moral, religious, or political views take precedence over the legal interpretation, is a freedom that is not easily exercised.”<sup>256</sup> The American judiciary, when examining any law, bases its examination on protecting the principles and values of the Constitution as well as the values of American democracy rather than religious values because the United States Constitution is largely predicated on separation of church and state through the Establishment Clause of the First Amendment.<sup>257</sup> Unlike the United States Supreme Court, the

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<sup>255</sup> IRAQ CONST., art. 92. This article states “First: The Federal Supreme Court is an independent judicial body, financially and administratively.

Second: The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives.”

<sup>256</sup> Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 750 (1982).

<sup>257</sup> U.S. CONST, amend. I: The first amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Iraqi FSC and legislature needs to build their reviews on some of the religious values found in the Iraqi Constitution like considering Islam as the official religion of the state. While the United States Constitution adopted a relatively neutral outlook towards religion, the Iraqi Constitution, for social and, perhaps, political reasons, has moved away from neutrality and has adopted religious values as a basis for examining the constitutionality of laws.

Does this mean the methods the Supreme Court uses to interpret religion cannot be used in Iraq, even if they yield a different result? In Iraq, we can employ religious neutrality by rendering the government neutral on established interpretations of religions in the personal status sphere because the personal law mostly depends on morals and culture.<sup>258</sup> The government cannot support or oppose a religion in this area. Specifically, personal law issues require a proper activation of Article 41 which guarantees that "Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices"<sup>259</sup> Some might argue that the actions of diverse religions may conflict with Islam's settled rulings or democracy or human rights. I will deal with these arguments in the following chapters.<sup>260</sup>

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<sup>258</sup> Hamoudi, *supra* note 91 at 382.

<sup>259</sup> IRAQ CONST. *supra* note 7 at art. 41.

<sup>260</sup> For example, In Pakistan the held that Muslim Personal Law' must be "the personal law of a particular sect of Muslims, based on the interpretation of Holy Qur'an and Sunnah by that sect." the court here grant people to create their own interpretation of Holy Qur'an and Sunnah which mean having several personal law according to different Islamic school. Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 VA. J. INT'L L. 759, 777 (2004).

### **b. The Basis of the Iraqi Legal System**

Iraq is a civil law country transitioning to include common law principles, as concerns constitutional review. This transition needs to be thoughtful and methodical. However, no one can claim that the civil law system in Iraq has been irrevocably buried ever since 2003. The former Iraqi Republics inherited their legal system from the civil law tradition of Europe, mixing it with Sharia. As Al-Sanhuri, one of the drafters of the Iraqi Civil Code, asserts, “the new legislation has to look at the new codification of Western standards, [the French legal system] and choose the modern provisions of Islamic law from different schools.”<sup>261</sup> The Iraqi legal system still adheres to civil law in most legislative and judicial functions, and there is no robust professional legal or academic discourse that promotes the understanding of judicial precedent. This influences constitutional interpretation. In a civil law state, judges are trained in civil law; getting judges from that same system to adhere to different standards when they are appointed to the constitutional court is quite difficult. For instance, the judges in Iraq rely on a strict palette of positive law without reference to principles of either Islamic or natural law, except where the written law is silent.<sup>262</sup> Judges in civil law countries think they have less power to interpret the law using perfectionism or popular constitutionalism methods.<sup>263</sup> In this environment, of course, these beliefs can affect interpretive approaches and the power of judges can be limited to determining the facts to which the laws apply. Therefore, in civil law countries, only Supreme Court judges have explicit power of interpretation, unlike common law judges who have more room to interpret even if there is no explicit power in the constitution.<sup>264</sup> Constitutional judges in Iraq require a greater power of interpretation, as opposed to their current role, in order to defeat the basic purpose of these provisions.

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<sup>261</sup> Hill, *supra* note 113 at 183.



In theory, the nomination of judges in Iraq is subject to complex criteria that require a particularly independent judiciary. The Constitution stipulated in four articles that judicial power is independent.<sup>265</sup> For example, the judges of the FSC in Iraq are nominated by the judiciary, not a political body, even though they must be confirmed by Iraqi parliament.<sup>266</sup> This situation might be because the Iraqi judicial system is affected by the judiciary in Islamic constitutional contexts which “[does] not derive from its relationship to majoritarian politics or constitutional limitations on power.”<sup>267</sup> Therefore, again in theory, the judge needs to separate his/her political views from his/her judicial functions because it is the sphere of rules, rights and principles. In addition, the judges in civil law countries are functionaries. They are civil servants and “the judicial process is narrow, mechanical, and uncreative.”<sup>268</sup> Even if Iraq adopts judicial review, the court’s ability to carry out judicial review may be constrained, unlike judges with the common law apparatus, experience, and bearing to perform the task adequately. Nevertheless, in Iraq it would be more practical if the constitutional judges were granted broader discretion than ordinary judges. Constitutional judges deal with issues concerning the constitutional rights of members of society as a whole, rather than individual cases, as are handled by the judges in the civil law system.

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<sup>262</sup> Hamoudi, *supra* note 127 at 66

<sup>263</sup> In essence, legal perfectionism as a doctrine provides that the state should promote an interest in each citizen pursuing a well-led life. For more information about perfectionism see, Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969(1994).

<sup>264</sup> Glenn, *supra* note 100 at 161.

<sup>265</sup> IRAQ CONST. *supra* note 7 at Articles 19, 87-88, 92.

<sup>266</sup> At the time of this dissertation writing,, judges are worked on the FSC according to the provisions established under the TAL which did not adopt the issue of expertise in Islamic law. Also, Law of the Higher Judicial Council No 45 of 2017 art. 3 stated that “The Higher Judicial Council shall perform the following tasks:III. Nomination of members of the Federal Supreme Court of judges.

<sup>267</sup> Rabb, *supra* note 40 at 83.

<sup>268</sup> JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA*, 36-38 (Stanford 4d ed 2018).

Ultimately, the analysis presented here suggests that we cannot find clear parameters for applying the comprehensive United States judicial review method in Iraq for many reasons, including historical, social, political and legal ones. The most important of these reasons is the legal one because the Supreme Court follows a very broad interpretation method. The inclination of the American judiciary to the rational and reasonable adaptation of cases has moved far from the original concept of the repugnancy clause in the United States, which now follows certain principles and rules according to which the judge can examine a law. If there are any violations of these principles and rules, a law will be invalid. This procedure will certainly not be compatible with the nature of the judicial system in Iraq, which is closely linked to the notion of civil law. The civil law system limits the judge's ability in applying the law only rather than develop or create a law. Even in terms of protecting democracy, the role of the judiciary in Iraq seems somewhat configurable. The main advantage of judicial review in America, which the Iraqi judiciary has proposed to apply, is the rationality of formulating judgments. I hope this logical method will be followed by the Iraqi judiciary to justify applying the substance of legal rule rather than political interests. Because of the difficulties in following the complete model of United States judicial review in Iraq, it is necessary to look at other models from the Islamic world which might be more feasible in Iraq.

### 3.3 Notion of Repugnancy Clause in the Constitutional Courts of Iran and Egypt

To discover a clear view about the repugnancy clause in Islamic countries, this section will examine applications of the repugnancy clause in Iran and Egypt, the Islamic countries that adopted this clause early and have developed Islamic judicial review in advanced ways.<sup>269</sup> These two countries have presented a single specific style of repugnancy clause. These models provide the most relevant models to the current Iraqi context. The central question in this chapter surrounds how a specific point of law, like a repugnancy clause, can be resolved within foundational laws and their interpretive mechanisms as applied in these countries. To some extent, the drafters of the Iraqi Constitution have been affected by these countries. This section will show how the modern Islamic constitutional courts have used the repugnancy clause in an inconsistent way, which the Iraqi FSC should not appropriate. In 1907, Iran was the first country in the Middle East that had adopted the Repugnancy clause,<sup>270</sup> but by a non-judicial branch. The Iranian method of repugnancy review provides an important case study because it represents the general *Shia* design

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<sup>269</sup>I intended to study the Pakistani method of operating of the repugnancy clause because the idea of repugnancy started in Pakistan, which is contained in the constitution of 1973, is based on the diversity of Pakistani society like as in Iraq. But because the Pakistani model is having a lot of differences. For example, in terms of the composition of the federal Shariat court which should include the ulema (religious scholars) only as a member of this court. In addition, the decisions of the federal Shari'a Court are just binding in the lower level of the court thus it can be appealed to the Supreme Court. Finally, the scope of repugnancy clause Which is limited to a law that repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet. The Constitution of 1973 provides a special chapter of Provisions relating to the Holy Qur'an and Sunnah. According to Article 227, "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." PAKISTAN CONST. art. 227, *substituted by* The Legal Framework Order, 2002, C.E.'s Order No.24 of 2002(Pak.).

Moreover, this Constitution established the Federal *Shariat* Court, which has the power to review any law that might be inconsistent with Islam. It specifically indicates as follows:

This Court may, [either of its own motion or] on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam. PAKISTAN CONST. art. 203 (1)(d). For more information about repugnancy clause of Pakistan see: Moeen H. Cheema, *Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law*, 60 Am. J. Comp. L. 875, 880 (2012) and Redding, *supra* note 260 at 771.

<sup>270</sup> Article 2, QANUNI ASSAASSI IRAN [IRANIAN CONSTITUTION] 1906.

of scrutiny of law. In contrast, the *Sunni* method of judicial review of repugnancy clauses can be examined by considering the Egyptian method which was adopted in the wake of the implementation of the Constitution of 1970. Each of these countries applies a different legal school of constitutional interpretation generally, and in terms of the way in which they applied the repugnancy clause. The common factor between Iran and Egypt is that they have failed to apply the repugnancy clause in a consistent and clear way.

### 3.3.1 Iran as a *Shaa* Method of Implementing a Repugnancy Clause

The application of the repugnancy clause in Iran was extended when the 1907 Supplement to the Fundamental Law was drafted, providing that “At no time must any legal enactments of the National Consultative Assembly . . . be at variance with the sacred principles of Islam.”<sup>271</sup>

After this came the second generation of the repugnancy clause, which was much more robust than the first. After the Iranian revolution, the Constitution of 1979 in Article 4 declared that “All civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the *fuqaha'* of the Guardian Council are judges in this matter.”<sup>272</sup> Under these Articles, Iran presented the “most concrete Islamic challenge to classical constitutionalism in the Middle East”<sup>273</sup> because of the way it empowered Islamic jurists to be the interpreters of the constitution.

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<sup>271</sup> *Id.*

<sup>272</sup> IRAN CONST. *supra* note 21 at art. 4.

<sup>273</sup> Schank, *supra* note 165 at 550

The core feature of the implementation of repugnancy clause in Iran is that the examination of laws is a political review rather than a judicial review. This has caused it to fail. It is a political review in terms of reviewing mechanism itself. The following discussion explains the roots of repugnancy in Iran and examines the practical application of the repugnancy clause.

### **A. The Roots of the Repugnancy Clause in Iran**

The idea of repugnancy was related to the active role of Islamic jurists in Iran. Religious scholars—referred to as *Maraji'* in the *Shi'a* school of Islam—had a significant impact in drafting the 1907 Constitution and the laws, as well as playing a powerful role in shaping the repugnancy clause in that era.<sup>274</sup> The social and historical indicators of this period emphasize that any reform must be approved by the clergy. Thus, a group of jurists joined the drafting committee and called for an important consideration of Islamic jurists in the constitution and objected to everything which was inconsistent with *Shia* theological doctrine in the Constitution.<sup>275</sup> The clerics justified their right of judicial review for several reasons. The first was that the parliament was incompetent in understanding the religious sources; the jurists have exclusive authority to interpret and understand these texts because they are representatives of God. The other point is based on the theory of the Imam's occultation, under which the *Shias* believe that there is an Imam who is the successor of the Noble Prophet Muhammad.<sup>276</sup> This Imam has not yet appeared, but there are the

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<sup>274</sup> JANET AFARE, *THE IRANIAN CONSTITUTIONAL REVOLUTION, 1906-1911*, 95 (1969) The original Fundamental Law, containing 51 Articles, was promulgated on December 30, 1906 by Shah Muzaffaru'd-Din Shah. The following supplementary laws were ratified by Shah, Muhammad 'Ali on October 7, 1907. In fact,, a cooperation between Islamism and libesim in Iran have been a recurring feature of Iranian history .see for example, Boozari, *supra* note 54 at,111.

<sup>275</sup> Afare, *Id.*

<sup>276</sup> As Shi'ites, they believed leadership of the Muslim community rightly belonged to male descendants of Prophet Muhammad through the line of the Prophet's cousin Ali and his wife, the Prophet's daughter, Fatima.

The twelfth "imam" The twelfth "imam" (as the descendants/ rulers are called in this tradition) had gone into a state of "occultation" in the 9th century and would reappear only at the end of time, as a Mahdi or "rightly guided" one, and (along with Jesus) usher in a period of peace and justice before the final judgment. For more , See SAID AMIR

deputies of the hidden imam who are the clerics with higher knowledge of religious matters. Therefore, the parliament may not have the guardianship of the deputy of the hidden Imam, and only the clergy can have role to review the legislation in terms of its compliance with the *Shia* Islam.<sup>277</sup> Thus, the committee established a council of clerics to review and rewrite any constitutional articles or laws which conflict with Sharia.<sup>278</sup> Subsequently, this idea became a legal article in the Supplementary law of 1907 by establishing a committee of clerics with absolute power over the Parliament.

Article 2 of the Supplementary law stated:

At no time must any legal enactment of the Sacred National Consultative Assembly, established by the favor and assistance of His Holiness the *Imama* of the Age (may God Hasten his glad Advent!), the favour of His Majesty the Shahinshah, of Islam (may God multiply the like them!), and the whole people of the Persian Nation, be at variance with the sacred rules of Islam or the laws established by His Holiness the Best of Mankind (on whom and on whose household be the Blessings of God and His Peace).

It is hereby declared that, it is for the learned doctors of theology (the ‘ulama) – may God prolong the blessing of their existence! – to determine whether such laws as may be proposed are or are not conformable to the rules of Islam; and it is therefore officially enacted that there shall at all times exist a committee composed of not less than five *jujahids* or other devout theologians, cognizant also of the requirements of the age, [which committee shall be elected] in this manner. The ‘ulama and Proofs of Islam shall present to the National Consultative Assembly the names of Twenty of the ‘ulama possessing the attributes mentioned above; and the Members of the National Consultative Assembly shall, either by unanimous acclamation, or by vote, designate five or more of these, according to the exigencies of the time, and recognize these as Members, so that they may carefully discuss and consider all matters proposed in the Assembly, and reject and repudiate, wholly or in part, any such proposal which is at variance with the Sacred Laws of Islam, so that it shall not obtain the title of legality. In such matters the decision of this ecclesiastical committee shall be followed and obeyed, and this article shall continue unchanged until the appearance of His Holiness the Proof of the Age (may God hasten his glad Advent).<sup>279</sup>

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ARJOMAND, THE SHADOW OF GOD AND THE HIDDEN IMAM: RELIGION, POLITICAL ORDER, AND SOCIETAL CHANGE IN SHI'ITE IRAN FROM THE BEGINNING TO 1890 (1984).

<sup>277</sup> Boozari, *supra* note 54 at 52 he claims also that this theory was developed in the theory of *wilayat al-faghih guardianship of jurist*.

<sup>278</sup> VANESSA MARTIN, ISLAM AND MODERNISM: THE IRANIAN REVOLUTION OF 1906, 118 (1989).

<sup>279</sup> IRAN CONST. *supra* note 21 at art. 2.

This article includes a detailed explanation of how to choose the members of the application committee by National Consultative Assembly. There must be not less than five religious' jurists of the highest rank (*mojtahedin-e terāz-e avval*), who have the authority to reject or repudiate, wholly or in part, any constitutional articles or law contrary to the sacred laws of Islam. Further, Article 27 asserts the idea of repugnancy that there is no validity to any proposed laws if those laws conflict with sacred laws.<sup>280</sup> Muhammed Hussain Naini, one of the Islamic jurists involved in the new constitution discussions, tried to draw the parameters of the method of reviewing the law by the Committee of Islamic Jurists. Naini argued that if the concern is about the text-based rule of Sharia when the rule is general, immutable, and can be imparted from the Quran, Sunnah, and reports attributed to the Imams, this concern is subject to the mastery of jurists' knowledge because they possess specialized knowledge.<sup>281</sup> On the other hand, if it is related to rational findings by rational individuals in social praxis, it should be considered a valid source of law. This law is Islamic as long as it does not conflict with Sharia rules.<sup>282</sup>

In fact, this committee was not established, and never exercised its official functions, because most of the supporters of the role of clerics in the National Consultative Assembly had withdrew. Informally, only two clerics were authorized to review the laws by identifying any law that did not conform to Islam. Some attempts were made to revitalize this Committee, but those attempts have not been successful.<sup>283</sup> However, this was an attempt to develop a new step toward the repugnancy clause in Iran. Despite never being brought into being, it did become a cornerstone for the next constitution.

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<sup>280</sup> THE RULE OF LAW, ISLAM, AND CONSTITUTIONAL POLITICS IN EGYPT AND IRAN, 88 (Saïd Amir Arjomand & Nathan J. Brown eds., 2013).

<sup>281</sup> Boozari, *supra* note 54 at 129.

<sup>282</sup> *Id* at 131.

<sup>283</sup> ADINEH ABGHARI, INTRODUCTION TO THE IRANIAN LEGAL SYSTEM AND THE PROTECTION OF HUMAN RIGHTS IN IRAN, 41 (2008).

## **B. Practicing the Repugnancy Clause**

The second phase of applying the idea of repugnancy in Iran began after the Iranian Revolution in 1979. The new Constitution adopted the idea of reviewing the regulations of Majlis al-Shura to ensure they were in conformity with Islamic standards and the constitution.<sup>284</sup> The Constitution prescribed the repugnancy clause in several Articles. Article four states that:

All civic, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic standards. This principle governs all the articles of the constitution, and other laws and regulations. The determination of such compatibility is left to the Fuqaha' of the Guardian Council.<sup>285</sup>

The constitution also states that decisions of the council may not contradict the Islamic standards and the laws of the country.”<sup>286</sup> This Constitution established the Council of Guardians which was the council of Legal experts and clerics to protect the Islamic standards and the Constitution.<sup>287</sup> However, this Constitution created a new path for repugnancy review. The Iranian method lies in the composition of this Council in term of its structure, and the scope of the repugnancy components.

### **a. The Role of Jurists in Repugnancy Clause Operation**

The role of jurists (clerics) increased after 1979 because of the religious ideologies which were adopted in the new constitution. Article 2 listed the religious principles of the Islamic Republic of Iran, including:

1. one God (“There is no god but God”), the exclusive attribution of sovereignty and the legislation of law to Him, and the necessity of surrender to His commands;
2. divine inspiration and its foundational role in the articulation of the laws;
3. the justice of God in creation and legislation;

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<sup>284</sup> IRAN CONST. *supra* note 21 at art. 105

<sup>285</sup> *Id.* art. 4.

<sup>286</sup> *Id.* art. 72.

<sup>287</sup> *Id.* art. 91.



4-a. the continuous striving to reason (ejteḥād) of qualified jurists (fuqahā) who possess the necessary qualifications based on the book (Qur'an) and the Traditions of the infallibles (ma'sumin), peace be upon them all;<sup>288</sup>

All of these religious ideologies supported the robust role of the cleric in constitutional life. These religious principles have been promoted by constitutional procedures that guarantee the protection and preservation of these principles. This Constitution increased the power of the jurists, in the absence of the hidden Imam, from the religion-legal to the political sphere and allowed this power to deploy by virtue of one or a council of selected *Shia* jurists.<sup>289</sup> At this time, Ayatollah Ruhollah Khomeini as a revolutionary leader and the deputy of the Hidden Imam developed the idea of the Guardianship of the Jurist from the traditional notion of “general deputyship” of the Hidden Imam, and has been established in the constitution of the Islamic Republic of Iran by the near-equivalent terms *vali-ye faqih*.<sup>290</sup> Ruhollah Khomeini, the Iranian *Shia* cleric who led the revolution that overthrew Mohammad Reza Shah Pahlavi in 1979, became the Supreme leader of the Islamic Republic of Iran from 1979-89. He laid down the idea of the Guardianship of the Jurist which was based on the writing of the Iraqi scholar Muhammad Baqer al-Sadr.<sup>291</sup> In his book, *The Islamic Government, the government of Jurists*, Khomeini articulated this theory as follows:

If the ruler adheres to Islam, he must necessarily submit to the faqīh, asking him about the laws and ordinances of Islam in order to implement them. This being the case, the true rulers are the fuqahā themselves, and rulership ought officially to be theirs, to apply to them, not to those who are obliged to follow the guidance of the fuqahā on account of

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<sup>288</sup> *Id.* at art.2 see also art. 6, 56.

<sup>289</sup> Arjomand, and Brown *supra* note 280 at 80.

<sup>290</sup> Article 53 asserts : During the absence (ghayba) of his holiness, the Lord of the Age, May God all mighty hasten his appearance, the sovereignty of the command [of God] and religious leadership of the community [of believers] in the Islamic Republic of Iran is the responsibility of the faqīh who is just, pious, knowledgeable about his era, courageous, and a capable and efficient administrator, as indicated in Article 107. Moreover, Constitution of 1979 required the rank of marja' iyyat for the Leader of the Islamic Republic of Iran, and for membership in an alternative leadership council, which was eliminated in Articles 107 and 109 of the 1989 amended constitution. The Council for the Revision of the Constitution, however, carelessly retained the phrase, “or Leadership Council” in the title of Chapter 8 of the amended constitution. IRAQ CONST. *supra* note 21.

<sup>291</sup> Chibli Mallat, *On the Specificity of Middle Eastern Constitutionalism*, 38 CASE W. RES. J. INT'L L. 13, 33 (2006).

their own ignorance of the law If a worthy individual possessing these two qualities arises and establishes a government, he will possess the same authority as the Most Noble Messenger ('a) in the administration of society, and it will be the duty of all people to obey him....Now that this much has been demonstrated, it is necessary that the *fuqahā* proceed, collectively or individually, to establish a government in order to implement the laws of Islam and protect its territory. If this task falls within the capabilities of a single person, he has personally incumbent upon him the duty to fulfill it; otherwise, it is a duty that devolves upon the *fuqahā* as a whole.<sup>292</sup>

In Khomeini's iteration, the jurists, who have a greatest knowledge of Islam, in political life "[a]ctually ascribes to the *fuqahā* the duty of being guardians of the beliefs, ordinances, and institutions of Islam in order to protect them from injustice excess, greed, corruption and any other base human instincts thus they would assume political power as well."<sup>293</sup> He asserted that the just jurists who are addressed by God are the Supreme Legislator. Thus, jurists are the successors of the Imam.<sup>294</sup>

In this vein, after the Iranian revolution, the theory of Guardianship of the Jurist moved from the realm of ideals into operation. The new constitution gave to the guardian jurist (*wali-e faqih*) the three powers that were given to the president: commander in wartime, Supreme Leader in peacetime and the highest official in the country. In addition, the guardian jurist had the power to appoint all key figures to the government, including the judiciary, army, and the Council of Guardians.<sup>295</sup> The constitution established the Council of Guardians which is empowered to examine legislation and oversee elections to ensure they did not contradict the standards of Sharia.<sup>296</sup> The Council consisted of six members of the Islamic jurists who were chosen by the Supreme Leader to determine whether the proposed laws conformed to the Islamic standards. Additionally, the Council contained six members of Muslim's legal expert who were nominated

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<sup>292</sup>IMAM KHOMEINI, ISLAMIC GOVERNMENT: GOVERNANCE OF THE JURIST, 32- 36(1970).

<sup>293</sup> *Id.* at 42.

<sup>294</sup> *Id.*

<sup>295</sup> Mohsen Kadivar Home Page, <http://www.kadivar.com> (last visited Dec. 21, 2018).

<sup>296</sup> IRAN CONST. *supra* note 21 art.94 ,96.

by the head of the judiciary, who was himself appointed by the Supreme Leader, and the majority of parliament.<sup>297</sup> The function of the six legal experts on the Council was to examine the compatibility of the law with the Constitution.<sup>298</sup> The jurist has effective veto power over Parliament by nullification of all proposed and existing laws not in the line with Islamic standards. Thus, the main function of the Council of Guardians is to protect the Constitution as the ideological foundation of the Islamic Republic of Iran and all branches are dominated by one ideology.<sup>299</sup> To ensure this power, the council obliged the judiciary to “refer any laws and regulations judges considered in violation of Islamic standards to it.”<sup>300</sup> Indeed, reviewing a law is of particular interest to clerics. No one has the power to interpret or understand these sources except the Islamic Jurists. This power could give them the opportunity to Islamicize the society and the state.

#### **b. The Scope of Repugnancy Clause**

Article 4 stipulated that all proposed laws must be compatible with the “Islamic standards” (*mavāzin-e eslāmi*, i.e., norms of the shari‘a), and any found inconsistent with those standards are null and void, including the Constitution itself. This could be understood to imply that the Islamic standards arise from *Shia* scriptural sources. The real question here, within the institutional legal standpoint: is there an accurate Islamic standard on which the Council of Guardians relied when examining the Islamicity of laws? I argue that there is not. The Council uses various means to test Islamicity in various cases, and often capitulates to the epistemic authority of Islamic Jurists who resort to circularity and complexity in describing the meaning of Islamic standards, in order to

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<sup>297</sup> *Id.* Art. 91.

<sup>298</sup> *Id.* art. 91 ,96 also see Article 110: The authorities and responsibilities of the leader:6. issuing appointments, dismissals, and accepting the resignation of b. the highest position of the judiciary power.

<sup>299</sup> Kristin J. Miller, *Human Rights of Women in Iran: The Universalist Approach and the Relativist Response*, 10 EMORY INT’L L. REV. 779, 804 (1996).

<sup>300</sup> Guardian Council I , 1,125-26 cited by Arjomand and Brown, *supra* note 280 at 36.

promote their authority.<sup>301</sup> For example, the Council of Guardians at times relies on a “Quranic verse, a hadith, and a jurisprudential rule, to invalidate government expropriation of urban land.”

<sup>302</sup> In the case of special privileges of parliament, the Council of Guardians has used “Islamic origin” to argue that parliament has no special privilege by asserting that this privilege has no Islamic origin to justify it.<sup>303</sup> At the same time, the supreme judiciary council ordered the courts to apply “authentic Islamic texts and reliable *fatwas*” by which they mainly mean Khomeini’s book *Tahrir Wasila* (“Juristic Compendium of *Fiqh* Rules”) to making Jurist rules the law of the state.<sup>304</sup> In fact, having such vague standards will complicate Council Members' analysis with political motivations, as they are allowed extreme discretionary power.<sup>305</sup>

In addition, the Council of Guardians is not required to document its verdicts with reference to the articles and principles of law that have determined the conclusion, unlike Article 166 of the constitution, which requires ordinary courts do that. Furthermore, the Council of Guardians did not establish any mechanism for reviewing administrative law and governmental regulations for conformity with Islam.<sup>306</sup> Finally, there is no mechanism in the constitution to resolve conflicts between parliament and the Council.<sup>307</sup> As a result, attempts to dominate have created a dispute between the parliament and the council on many issues<sup>308</sup> All of these criticisms led to proposals to reform the Council and find a way to expand the idea of repugnancy.

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<sup>301</sup> Unfortunately, No single sources is known in Arabic or English that traces the evolution of this council and the cases that have been tried therein.

<sup>302</sup> The council decision of 29/5/1360 (August 20, 1981) cited by Arjomand and Brown *supra* note 280 at 52.

<sup>303</sup> Seyed Doraid Mousavi Mojab, *A Review of Parliamentary Privilege with an Approach to Iranian Legal System*, 5 Chi.-Kent J. Int'l & Comp. L. 4 (2005).

<sup>304</sup> MAJID MOHAMMADI, JUDICIAL REFORM AND REORGANIZATION IN 20TH CENTURY IRAN, 130 (2008).

<sup>305</sup> Mougheh Shisheneh Mozafarian, *the Fallacy of Hejab in Iran: A Critique of Islamic Judicial Review As Performed by the Guardian Council of the Islamic Republic*, 12 S. CAL. REV. L. & WOMEN'S STUD. 279, 289 (2003).

<sup>306</sup> Arjomand and Brown, *supra* note 280 at 36.

<sup>307</sup> Mohammadi, *supra* note 304 at 151.

<sup>308</sup> IRAN CONST. *supra* note 21 at art.166.

### **c. The test of Public Interest (Maslaha) as a Basis for the Repugnancy Clause**

The role of jurists was not limited, and expanded over time, most clearly in 1988 when Khomeini issued a letter to the vice president to assert the state's *Maslaha*, which is determined by Islamic jurists, is one of the primary commandments of Islam, and has priority over all derivative commandments, even over prayer, fasting, and pilgrimage to Mecca.”<sup>309</sup> To serve this commitment, the Constitution was amended in 1989 to form the Expediency Council, which means the Council of *Maslaha*. All members of this Council are appointed by the Supreme Leader.<sup>310</sup> The provisions of the Constitution affirm that this Council is an executive authority, but it exercises a wide power over other authorities.<sup>311</sup> The Expediency Council protects the public interest as the priority of the country and this protection would provide protection, in return, to the other pillars of religion.<sup>312</sup> This Council has important powers, for example, as noted, it adjudicates disputes between the Parliament and the Council of Guardians and holds some legislative powers.<sup>313</sup> Due to the amendment, the absolute authority of jurists was strengthened and jurists became the basis of the most important apparatuses in the state: the Council of Experts, the Council of Guardians, and the Expediency Council.<sup>314</sup>

These developments comprised an important step in primarily conveying the idea of the repugnancy clause, which was that required law shall be reviewed to be in conformity with Islamic standards and the Constitution. The amendment of 1988 invoked another basis for review, the public interest.<sup>315</sup> It is clear from Khomeini's message that the pursuit of Islamic standards is no

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<sup>309</sup> Arjomand and Brown *supra* note 280 at 32 and Mohammadi, *supra* note 304 at 127.

<sup>310</sup> IRAN CONST. *supra* note 21 at art. 112.

<sup>311</sup> *Id.* arts 110,111,112,177.

<sup>312</sup> Mohammadi, *supra* note 304 at 127.

<sup>313</sup> IRAN CONST. *supra* note 21 at art.112.

<sup>314</sup> *Id.* art. 110.

<sup>315</sup> Schank, *supra* note 165 at 539.

longer essential when determining the constitutionality or Islamicity of laws. The basic criterion at this stage was the public interest (*Maslaha*).<sup>316</sup> Conceptually, the public interest is a form of jurist interpretation (or *ijtihad*) of Sharia that means “a cause or source of something good and beneficial” which is used by Islamic jurists to derive legal rules in the absence of clear texts.”<sup>317</sup> However, if the Islamic standards which were used by the 1979 Constitution were ambiguous and too general, the amendment made them even more ambiguous, rather than narrowing them. *Maslaha* is highly imprecise and the basis of determination is not clear within it.<sup>318</sup> This was also a point of contention with the Jafari school which does not consider the *Maslaha* as a source of Sharia.<sup>319</sup>

To legitimize their dominion over the review of laws and to undermine the role of the Council of Guardians, Hashemi-Rafsanja, who chaired the Expediency Council in 1993, asked the Council of Guardians to interpret Iran’s repugnancy clause in Article 4 under which “laws must be compatible with the “Islamic standards.” The Council of Guardians explained that "the enactments of the Expediency Council should conform either to the ‘primary’ or ‘secondary’ ordinances of the sharia." <sup>320</sup>This interpretation confirmed the view that there is no clear concept of Islamic standards. Instead, the new standard just opened the door to include, in addition to existing Islamic sources, the idea of public interest as well, making outcomes even less predictable and not based on repugnancy. In conclusion, this approach undermines the ideas behind the repugnancy clause and links the process with a floating concept which adheres to the same

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<sup>316</sup> SAMI ZUBAIDA, *LAW AND POWER IN THE ISLAMIC WORLD*’, ANONYMOUS TRANSLATOR, 211(2003).

<sup>317</sup> Al-Hakim *supra* note 59 at 381

<sup>318</sup> Fazlur Rahman, *Towards Reformulating the Methodology of Islamic Law: Sheikh Yamani on Public Interest in Islamic Law*, 12 N.Y.U. J. INT’L L. & POL. 219, 224 (1979).

<sup>319</sup> al-Hakim, *supra* note 59 at 389.

<sup>320</sup> Arjomand and Brown *supra* note 280 at 37 (Guardian Council II, 232– 36; Hāshemi 1996, 659).

ideology as the Supreme Leader or jurist. The Council abandoned its capacity for judicial review completely to the Expediency Council when it stated that “no legislative organ has the right to annul or rescind an enactment of the Expediency Council.”<sup>321</sup> The Council in the present decade has completely abandoned its capacity for review. Eventually, the Council had used the standards of the leader or jurist as a basis of repugnancy clause, not the Islamic standards. Clearly, this approach would not work with the diversity of the Iraqi people.

### 3.3.2 Egypt as a Sunni Method for Applying the Repugnancy Clause

Egypt, another relevant context, is worth considering because it represents a *Sunni* approach of applying repugnancy clause and Egypt’s clause is relatively recent. There was an increase in secularization in a pluralistic Egypt since the Royal Constitution of 1923.<sup>322</sup> The secular forces thus played a major role in the drafting of the Egyptian constitutions. In the early twentieth century, the constitution of 1923 did not stipulate a standard of repugnance. However, it referred to a general idea of a commitment to the Constitution that all powers shall be in accordance with the Constitution.<sup>323</sup> Religion hardly played a role, except in article 149 which provided that "Islam shall be the State’s religion and Arabic its official language."<sup>324</sup>

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<sup>321</sup> Arjomand and Brown *supra* note 280 at 4 . and John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 Am. J. Int’l L. 40, 63 (1996). According to Guardian Council constitutional interpretation, “no legislative organ has the right to annul or rescind an enactment of the Maslahat Council” (Guardian Council II, 232–36; Hāshemi 1996, 659).stating that laws considered to be contrary to the Shari’a had been repealed by Order of Ayatollah Khomeini and Circular of High Judicial Council.

<sup>322</sup> Mina E. Khalil, *Early Modern Constitutionalism in Egypt and Iran*, 15 UCLA J. ISLAMIC & NEAR E. L. 33, 51 (2016).

<sup>323</sup> EGYPT CONST. of 1923, art. 23, 41.

<sup>324</sup> *Id.* art. 149.

### A-The Root of the Repugnancy Clause

In fact, the idea of judicial review upon the provision of Sharia as-source of legislation was only established in the 1971 Constitution, which laid down an independent judicial body to review and interpret legislation. Article (25) of the Supreme Constitutional Court's (SCC) Law stipulated that:

The SCC has four main tasks: Determine the constitutionality of laws and regulations;

1-Decide on jurisdiction disputes between judicial bodies or authorities of judicial competence;

2-Decide on the disputes that might take place as a result of enforcing two final contradictory rulings issued by two different judicial entities; and

3-Interpret the laws issued by the Legislative Authority and the decrees issued by the Head of the State in case of any divergence with respect to their implementation.<sup>325</sup>

After the 2011 revolution, the court has not been abolished despite the suspension of the 1971 Constitution.<sup>326</sup> Distinctly, the constitution shapes the SCC's jurisdiction in the sense that the court was not competent to interpret the constitution, but rather to interpret only ordinary legislation. However, it curiously retained the power to ensure that ordinary legislation complied with the Constitution it was no longer permitted to interpret. In this context, the scope of repugnancy derived first from the 1971 constitution itself.<sup>327</sup> However, to extend the scope of repugnancy, the court relied on Article 2 of the Constitution, as amended in 1980, which stated that the principles of Sharia are the main, chief, or primary source of legislation.<sup>328</sup> The court

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<sup>325</sup> The Supreme Constitutional Court's Law No.48 of the Year 1979 art. 25(Egypt).

<sup>326</sup> Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amendment , 22 May 1980, 25 May 2005, Mar. 2007.

<sup>327</sup> *Id.* at art. 174 ,Article 175 states "The Supreme Constitutional Court has the exclusive competence to control the constitutionality of laws and regulations and to interpret the legislative texts in the manner prescribed by the law.", the constitution of 2012 art. 175 " It alone decides on the constitutionality of laws and regulations." and the constitution of 2014 art. 192 "The Supreme Constitutional Court shall be solely competent to decide on the constitutionality of laws and regulations, to interpret legislative provisions." hereafter SCC.

<sup>328</sup> Article 2 of the Constitutions of 1971,2012 and 2014. In constitution of 1963, Nasser's founded a Supreme Court whose task was to review legislation and contradictory judicial decisions in order to ease the introduction of revolutionary socialist policies to legal institutions. Thus, he clashed with the judiciary in a dispute that reached its



derived from this clause its right to review the conformity of the law to Sharia and the Constitution itself. The Supreme Constitutional Court in Egypt has failed to apply the repugnancy clause consistently because the court uses the classical interpretation of Islamic tradition jurists to determine whether a law is compatible with the principles of Sharia. The Court positioned itself as an Islamic jurist's interpreter of Sharia. The court thus, has not been able to find a successful way to examine the laws in a contemporary fashion that is in line with the current requirements.

### **B-The Practice of the Repugnancy Clause in the SCC**

After 1971, there was a significant shift in Egyptian political system. This shift has led legislatures to adopt a new source of law, the Principles of Sharia, as well as the European and American sources already rooted in the Egyptian legal system.<sup>329</sup> Article 2 of the Egyptian Constitution was amended to read that “the principles of the Islamic Sharia are the main source of legislation.” As Brown notes, this text “referred not specifically to the Islamic Sharia but to its ‘principles’, a particularly ambiguous term and difficult to apply.”<sup>330</sup> Thus, the court attempted to develop an interpretation to adjust the constitutional aspect of repugnancy clause, which is unlike the technical concept as Sanhuri drafted in Egyptian Civil Code of 1941.<sup>331</sup> On one hand, the court refrained from reviewing laws issued before the 1980 Amendment of the 1971 Constitution. On

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peak during the so-called “judges' massacre” of 1969 when he dismissed many judges opposing his policies. Adham Hashish, *The Egyptian Second Republic: The Future of Litigating Islam Before the Supreme Constitutional Court*, 5 BERK. J. MIDDLE E. & ISLAMIC L. 119, 164 (2012).

<sup>329</sup> Hamoudi, *supra* note 3 at, 430.

<sup>330</sup> Nathan J. Brown, *Egypt and Islamic Sharia: A Guide for the Perplexed*, Q&A, Carnegie Endowment for International Peace (May 15, 2012), see also, Arjomand and Brown *supra* note 280 at 236; Lombardi, *supra* note 156 at 82–83.

<sup>331</sup> Article 1 of this Code provides that “in the absence of any applicable legislation, the judge shall decide according to the custom and failing the custom, according to the principles of Islamic Shari'a. In the absence of these principles, the judge shall have recourse to natural law and the rules of equity.” Law No. 131 of 1948 (Civil Code), al-Waqai'al-Misriyah, vol. 180 bis (a), 29 july 1948(Egypt).

the other hand, even in the review of new laws, the court notably hesitated in its methods for determining what should be considered a Principle of Sharia.<sup>332</sup> In some cases, the court played the role of the jurist by engaging in interpretation of Sharia. Occasionally, the court referred to what traditional jurists had said in the same case hundreds of years ago. In both methods, however, the court remains in the framework of the traditional jurisprudence of Medieval jurists as we will see in the following cases.

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<sup>332</sup> Brown, *supra* note 330 at 427.

**a. Article 229 of Egyptian Civil Code case of 20-100/1985**<sup>333</sup>

In this case, the SCC ruled on Article 2 after the constitution amendment of 1980. Briefly, Al-azhar University challenged the constitutionality of Article 229 of the Egyptian Civil Code. This article provides for interest on overdue payments.<sup>334</sup> Al-azhar claimed that this article violated the principles of the Islamic sharia because Sharia prohibits *Riba*, or “unearned accretion such as interest charged on loans.” The facts of this case are: Al-azhar University, purchased medical equipment from Fouad Goudah for the price of about 592 EG. On the overdue payment, the Administrative Court held that the University had to pay for medical equipment and, in addition, 4% interest.<sup>335</sup> The plaintiff responded that this interest is a kind of *Riba*, which is prohibited by the Qur'an, *Sunna*, and the consensus of the Muslim Jurists.<sup>336</sup> Seemingly, Article 226 was at variance with Article 2 of the Constitution, which states the principles of Sharia are the chief source of legislation, since the prohibition on *Riba* is one of these principles.<sup>337</sup> The court declined this claim because the Egyptian Civil Code of 1948 was passed before the amendment of 1980. The amended Article 2 of the Constitution would affect only legislation issued after 1980. The court asserted that if the court considers the old legislations too, that will “lead to contradictions and confusion in the judicial process in a manner that would threaten stability.”<sup>338</sup> The SCC ceded control to parliament by asserting the Article 2 requirement that law must conform to the principles of Sharia, and the legislature must not violate the principles of the Sharia, which will lead to the violation of the Constitution itself. The court drew on the report of the General Committee of the Constitution’ amendment of 1980:

The departure from the present legal institutions of Egypt, which go back more than one hundred years, and their replacement in their entirety by Islamic law, requires patient efforts and careful practical considerations. Hence, legislation for changing economic and

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<sup>333</sup> al-Mahkamah al-Dusturiyah al-Ulya [Supreme Constitutional Court] case no. 20 of session of 16 May 1985, year 1.

social conditions that were not familiar and were not even known before, together with the innovations in our contemporary world and the requirements of our membership in the international community, as well as the evolution of our relationships and dealings with other nations - all these call for careful consideration and deserve special endeavors. Consequently, the change of the whole legal organization should not be contemplated without giving the lawmakers a chance and a reasonable period of time to collect all legal materials and amalgamate them into a complete system within the framework of the Qur'an, the *Sunna* and the opinions of learned Muslim jurists and the 'Ulama . . .<sup>339</sup>

This report confirms the need to review the previous laws of Parliament to ensure that they do not conflict with "the framework of the Qur'an, the *Sunnah* and the opinions of learned Muslim jurists and the 'Ulama."<sup>340</sup> However, this report did not specify the mechanism of this review. Also, it did not explain the role of the court in this area. Perhaps this is because the role of the court is limited to the interpretation of ordinary laws and to ensure the application of Article 2. Although judicial review does not give the court the power to interpret the meaning of the principles of the Islamic sharia, the court tried to guide legislators to the way that Sharia principles would be a check on the state legislative power. The SCC pursued "minimalism" in the American context by offering that "Article 2 does not apply retroactively to laws enacted prior to it" thus, the challenge was invalid. The court also avoided the substantive questions and relied on procedural devices.<sup>341</sup> Eventually, the court accepted the Al-Azhar claiming that Article 226 violated the

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<sup>334</sup> Egypt Civil Code states "If the obligation is in the amount of money and the amount known at the time of the request and the debtor's delay in fulfilling it was required to pay the creditor as compensation for the delay interest of 4 per cent in civil matters and 5 per cent in commercial matters." art. 5.

<sup>335</sup> Hamoudi, *supra* note 3 at 433.

<sup>336</sup> Case no. 20 *supra* note 352 at Id.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> Nimer Sultany, *Religion and Constitutionalism: Lessons from American and Islamic Constitutionalism*, 28 EMORY INT'L L. REV. 345, 386 (2014). As Hamoudi suggest that the SCC could have maintained that under the prevailing Sunni school of thought which historically prevailed in Egypt, the Hanafi, the prohibition as against the trading of items for delay and with gain (a common form of *riba* as per foundational text) did not apply to money, but only items measurable by weight or volume. Hence it was forbidden to trade 10 pounds of gold for 15 pounds in the future, but a trade of \$ 10 for \$ 15 in the future (i.e. money interest) was not intended to be covered. The SCC could have instead cited authority from a second school that permitted trades of copper coins for more coins in the future

principles of Sharia, but the court was unable to correct this violation because it occurred before the amendment of the constitution.

**b. The School dress code/ Decree of the Minister of Education 113/1994 case 8-17/1996**

In the case of school dress code, the role of the SCC was expanded. The Court entered deeper into the business of constitutional adjudication around issues of repugnancy clause. In this case, challenges were brought by the father of two girls who sought to strike down the decree of the Minister of Education about the school dress code<sup>342</sup> This decree provides that “At the parental permission, the student can wear a hair cover *hijab* that does not conceal the face.”<sup>343</sup> The plaintiff was surprised his daughters were to be expelled from school based on the decree of the Minister of Education which prevents the student who wore the *niqab* (full veil) from entering a school. The plaintiff argued that this decree violated the provisions of articles 2 and 41 of the Constitution.<sup>344</sup> Article 41 guarantee the safeguarding personal liberty and preventing prejudice to it. The administrative Justice Tribunal accepted the case and stopped the implementation of the contested decree of the Minister of Education that prevented the daughter of the plaintiff from entering their school.<sup>345</sup> This court asserts that to determine whether this decree violates the Constitution is within the jurisdiction of the Supreme Constitutional Court. The SCC ruled that this decree did not interfere with any fundamental requirement of constitutions and was constitutional. The court argued that there is no evidence of Quranic texts, nor of *Sunnah*, nor the traditional jurist’s schools that the dress of women should be a complete body cover, with nothing

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because that school, the Maliki, excluded from the forbidden trades metals that were not precious. Hamoudi, *supra* note 3 at 433.

<sup>342</sup> al-Mahkamah al-Dusturiyah al-Ulya [Supreme Constitutional Court] case no. 29 of session of 26 Mar. 1994, year 11.

<sup>343</sup> Article 1 of the Decree of the Minister of Education 113/1994.

<sup>344</sup> Case No. 29, *supra* note 361 at *Id*.

<sup>345</sup> *Id*.

visible except her eyes. The court asserts that this interpretation is not acceptable, and it is not part of the principles of Sharia, which should be connected to a certain scriptural text.<sup>346</sup> In support of this interpretation, the court played the role of the jurist by engaging in interpretation of Sharia. The court resorted to its own interpretation of Sharia that the Quran, along with the sayings of the Prophet, do not portray women as figures hidden under a screen, draped from the head, with no part of their bodies except their eyes revealed.<sup>347</sup> Also, the Islamic schools of *Fiqh* disagreed on whether women must wear the niqab. Therefore, relying on this disagreement, the court concluded that there were no principles of Sharia that require women to wear a *niqab*.<sup>348</sup>

In response to the issue of freedom of religion, under Article 41, the SCC ruled that the Minister of Education's decree was well within his right to regulate school uniforms and that it did not violate Article 46 of the Constitution. The court defended that decree, claiming it did not impair the freedom of belief, undermine its foundations, nor disrupt the rituals of its practice, and did not oppose the essence of religion in the fundamental principles on which it is based. The court, rather, held that this right is limited in the interest of the protection of public order.<sup>349</sup>

### **c. Article 6 of Marriage and Divorce Law No. 25 of 1929**

In 2016, the SCC heard a case challenging the constitutionality of Article 6 of Law No. 25 of 1929 provisions permitting women to file a divorce because the irreconcilable differences which achieved through the divorce for harm *khul'*. This Article stipulated "if the wife claims that husband has caused her harm rendering the resumption of conjugal relations impossible, she may sue for a separation, in which case the divorce is irrevocable, if the existence of harm is proven,

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<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

and reconciliation fails."<sup>350</sup> A special family law court grants judicial divorces to the Hanan Ahmed because she claimed that her husband treated her with harm, which make the resumption of conjugal relations impossible.<sup>351</sup> The husband challenged the law as contrary to articles 2, 3, 7, and 21 of the Constitution of 2014. In reviewing the constitutional challenge, the Court again applied its Article 2 method to a portion of the personal status law. The court articulated, without citation, substantial portions of traditional Hanafi teachings, but the court relied on various provisions of the Maliki School. The Court noted that this was a matter of interpretation because the Sharia is silent on the matter and because Sharia expert-jurists had disagreed on it. Thus, the court asserted their right to apply a classical Maliki law interpretation which allowed judges to use a judicial divorce, even if the husband has the exclusive right of divorce. Moreover, the court justified the constitutionality of this Article by their reading of the Qur'an texts on marriage and divorce, which refers to facilitate marriages built on compassion and amicable relations, but to allow for dissolution of marriage in cases of irreconcilable differences.<sup>352</sup>

### **C-Evaluating the theory of SCC**

In conclusion, a survey of the Egyptian Supreme Constitutional Court's prior judicial practice reveals a form of judicial review that activates the repugnancy clause. With regard to the operation of the repugnancy clause, the closer reading of cases in different eras (1985, 1994 and 2016) shows that the decisions are inconsistent for many reasons. First, the Court has judges of

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<sup>350</sup> Article 6 Law No. 25 of 1920 (Personal Status Law) al-Waqai al-Misriyah, vol. 27 25 Mar. 1939 (Egypt). The court used the same method divorce issues. For example, case 35, Judicial Year 9, 1 Judicial Year 16, 4 Judicial Year 16, 21 Judicial Year 13, 25 Judicial Year 9, 54 Judicial Year 13, 25 Judicial Year 15 ruled on 14 August 1994, 1 October 1994, and 5 November 1994, al-Mahkama al-Dusturiyya al-'Ulia, 6:331–357; case 37 Judicial Year 16, ruled 5 August 1995, al-Mahkama al-Dusturiyya al-'Ulia, 7:102–105.

<sup>351</sup> al-Mahkamah al-Dusturiyah al-Ulya [Supreme Constitutional Court] case no. 187 of session of 2 Feb. 2016, year 34.

<sup>352</sup> Rabb, *supra* note 50 at 532.

law, not of religious scholars, and the Court does not often apply religious rules on. Also, as some commenters asserted, the Constitution did not require the government to legislate in line with the ulama's interpretation of Islamic law.<sup>353</sup> The SCC sought to interpret Principles of Sharia to be equivalent to classical schools of *Fiqh* opinions or that they must conform to the broad acceptance by all Islamic jurists.<sup>354</sup> The court failed to set accurate definitions for the principles of Sharia, applying broad concepts instead of specific rules to best understand the differences in Islamic schools.<sup>355</sup> The court did not discuss the reason why the Islamic jurists held this rule nor did it look to the rule of other schools to see if there was agreement with the modern needs of the Egyptian society.<sup>356</sup> The SCC tried to apply Minimalism method by interpreting the Qur'an and *Sunnah* on the basis of plain meaning which is supported by the agreement of the Islamic schools.<sup>357</sup>

Although the court has always reiterated that it relies on the main sources of Sharia, as well as its interpretations and the goals of Sharia, it has succumbed to the interpretations of jurists thousands of years ago. In fact, the court has referred to the goals of Sharia several times, but they were a dictum.<sup>358</sup> The Court has not made its decisions based on these goals but has yielded to the traditional interpretations of Sharia as a basis for adjusting these cases. The court applied the goals or principles of classical schools of *Fiqh*, as a basis of repugnancy clause, not the Principles of Sharia. The Court, in some cases, tried to apply the modern legal literature but it still needed to

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<sup>353</sup> Lombardi, Constitutional Provisions Making Sharia, *supra* note 12 at 757

<sup>354</sup> *Id.* at 91.

<sup>355</sup> 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*, 21 AM. U. INT'L L. REV. 379, 419 (2006).

<sup>356</sup> Lombardi, *supra* note 12 at 104.

<sup>357</sup> *Id.* at 116.

<sup>358</sup> al-Mahkamah al-Dusturiyah al-Ulya [Supreme Constitutional Court] case no. 7, Judicial Year 8 (May. 15, 1993), Supreme Constitutional Court of Egypt, Case No. 35, Judicial Year 20 (May. 6, 2000), Supreme Constitutional Court of Egypt, Case No. 29, Judicial Year 11 (Mar. 26, 1994). Supreme Constitutional Court of Egypt, Case No. 12, Judicial Year 19 (Jan. 18, 1996), Supreme Constitutional Court of Egypt, Case No. 203, Judicial Year 20 (April. 14, 2002).



indicate that the meaning is confirmed by the interpretation of the classical juristic tradition.<sup>359</sup> In addition, the court was prevented from ruling in many cases on the grounds of the doctrine of non-retroactivity of Article 2. Thus, the repugnancy clause was emptied of its religious content by these interpretive techniques.<sup>360</sup> If the court applied its own understanding of the goals of Islam as a basis for judicial adjusting within the framework of the Constitution, its decisions would be more stable. The SCC adoption of the interpretations of the classical schools of *Fiqh* would not be functional in the operation of a repugnancy clause that required a broader and modern method of understanding the three components of the Iraqi repugnancy clause.

### **3.4 Repugnancy Clause Operation in the Federal Supreme Court of Iraq**

In Iraq's Constitution of 2005, more than 67 of its 144 articles include the language: "shall be regulated by law," referring to the most important laws, including the Federation Council Law, and the Oil and Gas Law. Aside from these laws, the Iraqi Parliament needs enact other laws as well. All of these essential laws are concentrated in the institutional structure of the country. The FSC of Iraq has to review all of these laws in case there is a challenge to their constitutionality. Before 2003, there was no judicial review in Iraq. Thus, this is a new method of legal scrutiny, and Article 2 was fundamental to establishing a judicial review mechanism in Iraq.<sup>361</sup> This Article also established the repugnancy clause, which stipulates that the Iraqi legislature cannot enact any law which is contrary to the Islamic settled rulings, democracy, and human rights. In practice, adding a religious component to the standard of judicial review may raise concerns about the influence of

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<sup>359</sup>Rabb *supra* note 50 at 96.

<sup>360</sup> Nimer Sultany, *supra* note 341 at 348.

<sup>361</sup> IRAQ CONST. *supra* note 7 at art. 2.

religion on the governance of a young democratic country, especially considering the fact that the Court's decisions would be superior and binding on other branches. Furthermore, the Court's decisions are often still controversial. For the purpose of this section, we will examine the implementation of the repugnancy clause in Iraq in both legislative and judicial branches. More broadly, this section will also examine the legislative process to determine if pre-legislative steps address the three components of the repugnancy clause.

### **A-The scope of the repugnancy clause**

This section seeks to assess the institutional role of the FSC in the context of the repugnancy clause. The most compelling point will be whether, and to what extent, the court, in an era of Iraqi new constitutionalism, uses judicial review to engage, balance, and resolve significant repugnancy issues, which relate to Islam's settled rulings, human rights, democracy or all three. When interpreting the repugnancy clause, courts have confronted two main problems: (1) developing a workable definition of Islam's settled rulings, democracy, and human rights, concepts that have been subject to widely divergent understandings over time and (2) determining the appropriate role for Sharia in judicial review. The next two sections will describe more precisely the meaning of Islam's Settled Rulings in theory, Iraqi judicial practice, and the intention of the Framers of the Iraqi Constitution.

### **a. The meaning of Islam's settled rulings in theory**

Classical Islamic jurists have defined the settled rulings: to be the determinants of necessary knowledge, a widely known list of rules or principles which a man can neither produce nor prove, and therefore he cannot doubt their existence nor can these rulings change with time. They are constant for all Muslims, at all times, in all places. In contrast, variable rulings change with time and are not settled with one case. They are based on jurisprudential consensus, and *fatwas*, which vary according to particular circumstances of individual and social life and only have advisory force.<sup>362</sup> Contemporary Islamic jurists define Islam's settled rulings as "elements that are stable, permanent, and unchanging, whereas their opposite, *mutaghayyirat*, are those things that are unstable and subject to change."<sup>363</sup>

The legal meaning of the settled rulings refers to "undisputed rules" or the "fixed elements" (*thawabit*) that would presumably be very general and fairly few in number.<sup>364</sup> In other words, for both *Sunnis* and *Shias*, *thawabit* means "invariable," "fixed," or "resolved," Other legal scholars refer to the settled ruling as juristic consensus, or *ijma*, and can be classified as *thawabit*.<sup>365</sup> Stronger legal connotations of settled rulings are workable as "judgments" as well as "principles."<sup>366</sup>

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<sup>362</sup> This definitions are according to some theologians such as al-Baghdadi, Usul, al-Jawaynl, Irshdd, The Ash'arites al-Baghdadi and al- Baqillani, the Mu'tazilite Mutakallim 'Abd al-Jabba . For more information, see Binyamin Abrahamov, Necessary Knowledge in Islamic Theology. British Journal of Middle Eastern Studies, (1993).

<sup>363</sup> Stilt *supra* note 65 at 756 (citing to Ali Gomaa, Ali Juma', Al-Thabit wa-l-Mutaghayyir fi al-Sharia al-Islamiya [The Permanent and the Impermanent in the Islamic Sharia], 7 Al-Manar al-Jadid [The New Minaret] 45 (1999).

<sup>364</sup> Nathan J. Brown, Carnegie Endowment for Int'l Peace, The Final Draft of the Iraqi Constitution: Analysis and Commentary (Sept. 16, 2005) available at [www.carnegieendowment.org/files/FinalDraftSept16.pdf](http://www.carnegieendowment.org/files/FinalDraftSept16.pdf). (last visit Agt. 6 2018).

<sup>365</sup> Rabb, *supra* note 50 at 539.

<sup>366</sup> Feldman & Martinez, *supra* note 41 at 903–04 and Timothy G. Burroughs, *Turning Away from Islam in Iraq: A Conjecture as to How the New Iraq Will Treat Muslim Apostates*, 37 HOFSTRA L. REV. 517, 583–84.(2008).

### **b. Islam's Settled Rulings according to the Framers of the Iraqi Constitution**

During constitutional negotiations, there were multiple proposals of Article 2, including “Islam’s confirmed rulings,” the universally agreed-upon tenets of Islam, and “tenets of Islamic provisions.”<sup>367</sup> After the Framers compromised and adopted “Islam settled rulings” as the wording they would use, they had a different understanding of settled rulings. Some thought that this wording would reflect a wide-ranging and voluminous field of Islamic jurisprudence, which meant the principles of Islamic classical school jurisprudence.<sup>368</sup> Others asserted that the word “rulings” could mean *fatwas* as a type of ruling.<sup>369</sup> Other commenters detected that the wording might be limited to “firmly established rules and practices as prayer, the pilgrimage to Mecca, fasting during the month of Ramadan, and purification rituals before prayer.”<sup>370</sup> In light of the interim Constitution, it is appropriate for the legal sphere to rely on the *travaux préparatoires* of the interim TAL to interpret the current Constitution. The founders of the current Constitution contributed to the drafting of the interim Constitution and were part of a government subject to this Constitution.<sup>371</sup> In fact, the Interim Constitution had given a helpful explanation for Islam's settled rulings by using the wording "the universally agreed upon tenets of Islam [*thawabit al-islam al-mujmu'a 'alayha*]." <sup>372</sup> This wording suggests that a consensus between the *Sunni* and *Shia* schools [*madhabs*] was needed to ensure the Islamicity of law.<sup>373</sup>

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<sup>367</sup> Deeks & Burton, *supra* note 8 at 13.

<sup>368</sup> *Id.* at 14.

<sup>369</sup> *Id.*

<sup>370</sup> See Stilt, *supra* note 65 at 744.

<sup>371</sup> The provisional government--including the Iraqi Governing Council (IGC). See, Democracy in Iraq: Representation Through Ratification, 119 HARV. L. REV. 1201, 1203 (2006). Also see Feldman & Martinez, *supra* note 41 at 904.

<sup>372</sup> TAL *supra* note 132 at Article 7

<sup>373</sup> Stilt, *supra* note 65, at 743-45.

## **B-The repugnancy clause in the pre-legislative steps**

Currently, there are two levels of the pre-legislative scrutiny of bills that are carried out by the State Council and Iraqi Council of Representatives.<sup>374</sup> The role of the Council focuses on reviewing whether primary and secondary legislation is compliant with existing supreme law. For example, a regulation is compliant with existing Codes. It also considers if legislation contradicts other texts and, if the texts of the legislation are not contradictory, whether its terms are clear under existing legal definitions. Departmental consultations will focus on a bill's technical details. The FSC asserts that the interpretation of ordinary law is within the power of Shura Council, not the FSC.<sup>375</sup> Do these provisions allow this council to check the constitutionality of bills? The Shura Council may implicitly review the law for constitutionality as long as its role is just to give a non-binding consultation. However, there are no specific steps for the executive branch to initiate the review of the constitutionality of a bill. After this consultation, the Shura Council submits its notes on the bill to the General Secretariat of the Council, which presents it to the Council of Ministers after being studied by the legal department and of the Council of Ministers of the Legal Committee. However, this role is not particularly useful as a model for constitutional judicial review for compatibility with the repugnancy clause.

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<sup>374</sup>The Shura Council is a venerable Iraqi Institution, which dates back to the British mandate when British legal advisors were assigned to the ministries. Its' legal basis is dating back to 1933 and can now be found under law 65 of 1979 as amended by law No. 17 of 2013. Shura Council is comparable with the Conseil D'Etat in France . It and has a number of functions including:

1. Acting as an administrative court;
2. Vetting of draft primary legislation to ensure constitutionality and avoid contradictions with the Iraqi legal system prior to the draft being passed to the Council of Representatives;
3. Vetting of secondary legislation issued by the various Ministries. In 2017, the IRC enacted the law of State Council which changed the name of this council from The State Consultative Council to State Council .but still has same functions. For more information, see The State Consultative Council Law No. 65/1979.

<sup>375</sup> Al-Mahkama Al-'itihadya al-'ulya [Federal Supreme Court], [FSC} Decision No. 52 of 2009, available at [http:// www.iraqja.iq/view.738/](http://www.iraqja.iq/view.738/).(Arabic).

The second body that has power to check a law is the Iraqi Council of Representatives. The Bylaws of Iraqi Council of Representatives address the issue of proposing a law but do not provide any specific process to deal with the repugnancy clause. Thus, Chapter XIV of the Bylaw entitles ten members of the Council to introduce laws to the speaker of the Council of Representatives that must include the reasoning behind the proposal. After this step, the speaker refers the law to the Legal Committee that examines the proposal in terms of its legal drafting and then submits its opinion, which can reject or support this proposal. In addition, the speaker may release a written statement indicating that the proposal is unconstitutional.<sup>376</sup> Thus far, the speaker has not exercised this right, but he frequently refers drafts to legislative counselors and they provide editorial and objective observations, including what they view as violations of the Constitution and then return it to the President.<sup>377</sup> There is currently no pre-legislative mechanism to review drafts for compatibility with Article 2.

There is also a spectrum of varied and uncertain understanding of the content of Islamic settled rulings.<sup>378</sup> It is clear, however, that faction, secularists, or Islamists could abuse this clause when taking control of the judiciary. These two facts impact how the court interprets the repugnancy clause in the judicial review of laws as we will see in the next section.

### **C-Practicing the Repugnancy Clause in the FSC in Iraq**

Recent decisions reveal some problems that can arise when one attempts to put the repugnancy clause into practice. First, the FSC has not yet fully explained how its melding of the

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<sup>376</sup> The Bylaw of Iraqi Council of Representatives, Rules of Procedure Article (31) Available at <http://gipi.org/wp-content/uploads/2009/01/iraqi20parliament20bylaws.pdf> (last visited 16 Apr. 2017).

<sup>377</sup> E-mail from Ali Al Dulaimi, legal consultant of the speaker of the Council of Representatives to Oday Mahmood (April 23 2017).

<sup>378</sup> Hamoudi, *supra* note 20 at 699.

repugnancy clause with constitutional theory fits into the role of religion in the Iraqi legal system. Second, in identifying and applying the repugnancy clause, the FSC has been forced to rely on subjective judgments. The FSC in Iraq has addressed several cases that applied the repugnancy clause. Most of these cases strike down some articles of the Personal Status Law No. 188 of 1959, which regulates the compensation for arbitrary divorce and child custody. Recently, the court has examined some cases applying other elements of the repugnancy clause: human rights and principles of democracy.

#### **a. Challenging Islamic settled rulings**

The court has attempted to avoid issuing certain rules in personal status by relying on Article 41 of the Iraqi Constitution, which stipulates: “Iraqis are free in their commitment to their personal status according to their religion, sects, beliefs, or choices, and these shall be regulated by law.”<sup>379</sup> This article means that all laws regulating personal status are pending until the activation of this article by enacting these laws.<sup>380</sup> Indeed, the court should consider matters of personal status, because otherwise, rulings would be controversial and could cause political conflict.

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<sup>379</sup> IRAQ CONST. *supra* note 7 at art. 41.

<sup>380</sup> Hamoudi juxtaposes this with the court's unwillingness to enter into the purview of the *marja'iya* because FSC would risk the wrath of powerful Islamist groups and Najaf for taking a radical step in favor of secularizing the state. Hamoudi, *supra* note 139 at 408–09.

-Article 77 of the Law of Evidence No. 107 of 1979

In this case, the plaintiff sought to prove an oral contract between himself and another party by oral testimony instead of producing a written document.<sup>381</sup> Article 77 of the Law of Evidence requires the existence of a contract involving over fifty dinars or an unknown amount proved by means of a written document. The plaintiffs contended that a written contract to satisfy evidentiary requirements is a violation of Article 2. The Court's basis for upholding this was that Article 77 does not contradict a “settled ruling” of Islam. The court invoked some verses of the Qur'an to ensure that requiring a written contract was consistent with Islam. It ignored the juristic conclusions that oral contracts were at the very least Islamically recommended, if not required.<sup>382</sup>

- Article 3/39 of the Personal Status Law No. 188 of 1959/ compensation for abusive divorce

In many cases<sup>383</sup> concerning compensation for arbitrary divorce, the husband seeks to strike down Article 3/39 of the personal status law. This article states that if a man divorces his wife without reason, he will need to provide compensation as well as the alimony. The plaintiff often justifies his claim by saying that unilateral divorce is one of a husband's rights according to Sharia, and this law grants a husband the right to terminate a marriage. Thus, it is unconstitutional to punish a man because he exercises this right. The Court replied that compensation does not conflict with Islamic settled rulings because it compensates for the damage the wife sustained. In cases of compensation for abusive divorce, the court avoided discussing the meaning of Article 2

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<sup>381</sup> Al-Mahkama Al-'itihadya al-'ulya [Federal Supreme Court],[FSC] Decision No. 60 of 2010, available in Arabic at [http:// www.iraqja.iq/view.738/](http://www.iraqja.iq/view.738/).

<sup>382</sup> Hamoudi, *supra* note 20 at, 699.

<sup>383</sup> Al-Mahkama Al-'itihadya al-'ulya [Federal Supreme Court],[FSC] Decision No. 95 of 2014, available in Arabic at <http:// www.iraqja.iq/view.738/>. and Decision No. 113 of 2014, available in Arabic at <http:// www.iraqja.iq/view.738/>.



of the Iraqi Constitution and relied on the principles of justice to justify the constitutionality of Article 3/39.

- Article 57 of the Personal Status Law No. 188 of 1959 Child Custody

The plaintiff in this case challenged Article 57 of the Personal Status Law No. 188 of 1959 as being contrary to Article 2 of the Constitution as well as Article 41, which considers Iraqis free to follow personal status according to their religion or doctrine. Article 57 states that a mother is entitled to the custody of the child and his upbringing both during the marriage and after divorce unless the child was harmed by this custody.<sup>384</sup> This article is repugnant to the Jafari School, which grants the mother custody of her son until his second year and of her daughter until her seventh year. After this, the children have to live with their father. The court justified the validity of this article asserting that it was enacted for the benefit of the child, but it did not make clear what this benefit was. The Court, however, dismissed this challenge and concluded that Article 41 of the Constitution suspended all personal status laws until a new personal status law is enacted, which is solely up to Iraqi legislators to determine.<sup>385</sup>

- Decree of The Iraqi Revolutionary Command Council No. 1014/1982 case 8-17/1996

The plaintiff claimed that the decree of the Revolutionary Command Council No. 1014 /1982 is void because it is contrary to Islamic settled rulings and the right of inheritance which is guaranteed by the Constitution. This decree prevents the distribution of inheritance if the wife of the deceased resided in the home that is subject to the dispute. The court ruled that this decree is consistent with the Constitution. The court relied on the **jurist's rule**, which states that: avoiding

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<sup>384</sup> Al-Mahkama Al-'itihadya al-'ulya [Federal Supreme Court],[FSC] Decision No. 80 of 2015, available in Arabic at [http:// www.iraqja.iq/view.738/](http://www.iraqja.iq/view.738/).. and Decision No. 98 of 2017. In this case the court relied on the rule of Fiqh avoiding evil has priority over bringing benefits.

<sup>385</sup> *Id.*

evil has priority over bringing benefits. This law was enacted to protect the Iraqi family and particularly, the wife and her children which has priority over the right of inheritance.<sup>386</sup>

### **b. Protecting the Principles of Democracy**

In two cases, plaintiffs claimed that a certain law is against the principles of democracy. The first case sought to strike down Law No. 48 of 2017. This law restricted the right of the nominee for the presidency of the Iraqi Bar Association to no more than two terms.<sup>387</sup> The plaintiff, who was the previous president of the association, argued that this restriction undermined one of the two democratic values: freedom of nomination and freedom of expression. The court did not discuss this claim for a procedural reason. The court dismissed the case because the plaintiff had no legal standing as he was not the board president of the Iraqi Bar Association at the time this case was reviewed.<sup>388</sup> Ironically, he lost this position because of this new law but the court avoided this point and rejected the claim.

In another case, the court struck down Article 87/4 of The Law of Lawyers No. 173 of 1965.<sup>389</sup> This law granted the Iraqi Bar Association the right to appoint representatives for all Iraqi regions to the council of the Iraqi Bar Association.<sup>390</sup> This means that lawyers in all regions have no right to elect their representatives to the council of the Bar Association. The plaintiff argued that this law is contrary to Article 2 of the Iraqi Constitution, which states that no law can be enacted against the principles of democracy. These regions have at least one thousand lawyers and these lawyers have lost their right to choose their representatives to the council of the Iraqi

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<sup>386</sup> Al-Mahkama Al-'itihadya al-'ulya [Federal Supreme Court],[FSC] Decision No. 29 of 2018, available in Arabic at [http:// www.iraqja.iq/view.738/](http://www.iraqja.iq/view.738/).

<sup>387</sup> Al-Mahkama Al-'itihadya al-'ulya [Federal Supreme Court],[FSC] Decision No. 13 of 2017, available in Arabic at [http:// www.iraqja.iq/view.738/](http://www.iraqja.iq/view.738/).

<sup>388</sup> *Id.*

<sup>389</sup> Al-Mahkama Al-'itihadya al-'ulya [Federal Supreme Court],[FSC] , Decision No. 45 of 2017, available in Arabic at [http:// www.iraqja.iq/view.738/](http://www.iraqja.iq/view.738/).

<sup>390</sup> Article 87/4 of The Law of Lawyers No. 173 of 1965. available at <http://www.iraq-lg-law.org/en/content/law-lawyers-no-173-1965-all-its-amendments>.

Bar Association. The council responded that the main function of these representatives is just to be a link between the council and lawyers in all Iraqi regions. Thus, the representatives do not have any power to make decisions. The plaintiff asserted that the administrative function of the representatives will grant the power to make substantive decisions that will affect the rights of lawyers in these regions. The court demonstrated that this article undermines the core value of democracy: freedom of expression. The court asserted that one of the most important tools to exercise this freedom is choosing representatives in a way that is consistent with Article 2 of the Constitution. The court upheld that Article 87/4 conflicts with Article 2 of the Iraqi Constitution.<sup>391</sup>

If one looks at the role the new constitutional courts have rapidly assumed, what emerges immediately is the lack of hesitation in adjudicating what might elsewhere be termed a political question. Instances of ambiguity, even on important issues, such as the role of Islam or the structure of the Supreme Court, in fact, enable the FSC to move forward productively within the bounds of the Constitution. The same issue can be seen in light of protecting democracy. For example, in the FSC of Iraq, there is a weakness in the development of the application of democracy as a component of the repugnancy clause because the remedies for cases which deal with democracy are interpreted in two ways. The first way is when there is a political question which does not fall within the jurisdiction of the court and is, therefore, not justiciable. The second way is when a case involves voting rights. It is usually not based on the democracy component of protecting the electoral right as part of the democratic system, but on other constitutional justifications.

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<sup>391</sup> *Id.*

### **c. Protecting Human Rights**

The right to employment and the rights of prisoners both addresses protecting human rights. In case No. 57 of 2017, the plaintiff sought to invalidate the decree of Revolutionary Command Council No. 120/1994. This decree states that a person who has served a prison sentence for the crime of misappropriation of public funds cannot be released before paying the entire amount that he embezzled. This decree is a way to prolong the detention associated with his completed prison sentence. The plaintiff asserted this decree violates Article 2 of the Constitution of Iraq, which states that no law can be enacted contrary to human rights.<sup>392</sup> Also, he asserted that the prison sentence should be equivalent to the gravity of the crime. The respondents, who were the speaker of the Iraqi Parliament and the Iraqi Prime Minister declared that the goal of this decree is to protect public funds. The court reject this justification of two government branch because this decree could render a prison sentence endless, especially when the offender has no money. Thus, this decree would be against the freedoms of the Constitution, particularly, Article 37, which states: “The liberty and dignity of man shall be protected.”

In another case, the issue was whether Article 10/9 of the Law of the Independent High Electoral Commission No. 11/2007 is consistent with Article 2 of the Iraqi Constitution, particularly the human rights element.<sup>393</sup> This article stipulates that “Representation of the components of the Iraqi society shall be put into consideration in the formation of the Independent High Electoral Commission in accordance with the rules and regulations.” The plaintiff argued that the Iraqi political parties exploited this article to appoint their supporters without examining their eligibility. This will impact the rights of ordinary people who do not work for or are not

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<sup>392</sup> Al-Mahkama Al-’itihadya al-’ulya [Federal Supreme Court],[FSC], Decision No. 57 of 2017, available in Arabic at [http:// www.iraqja.iq/view.738/](http://www.iraqja.iq/view.738/).

<sup>393</sup> FAI-Mahkama Al-’itihadya al-’ulya [Federal Supreme Court],[FSC], Decision No. 2 of 2016, available in Arabic at <http:// www.iraqja.iq/view.738/>.

enrolled in these parties. The court held that this article is consistent with the Iraqi Constitution. The Constitution's goal is to protect the diversity of the Iraqi community in light of its religions and doctrines, to ensure the representation of all Iraqi people in the building of state institutions according to their capacity. The court asserted that, even if this article is misapplied, this does not mean the article is unconstitutional. Although there is a claim that the Constitution has been violated, the federal court refused to rule on it and dismissed the case, leaving the constitutional question to be resolved in the political process. The Court delayed the remedy to provide parliament time to enact the new law in a manner consistent with the Constitution.

Unfortunately, in these cases, the court does not seem eager to solve the tensions inherent in Article 2<sup>394</sup> and also, does not establish clear tests or principles to apply these components. These cases show, at first glance, that the court avoids the concept of the repugnancy clause. Hamoudi, in his comment on Decision No 61 of 2011 of the FSC about the interpretation of Article 2, said: “ will transform the question of how Islamic to make the code from a constitutional question into a highly politicized one whose outcome will be determined by elected legislators, not judges or jurists.”<sup>395</sup>

### 3.5 Conclusion

As argued at the beginning of this chapter, there is a problem with implementing the repugnancy clause. This chapter provides a practical framework for applying the repugnancy clause in two different ways. First, this chapter helps develop the boundaries of the key phases of

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<sup>394</sup> Hamoudi, *supra* note 139 at 408.

<sup>395</sup> *Id.* at 387.

the problem in the Iraqi court. Second, it gives the basic assumptions and premises of the argument in many countries. The above discussion shows that the courts are divided on the question of the adaptability of this clause. The civil law and common law systems choose different methods, as do the *Shia* and the *Sunni* methods.

The problem lies in the scope of the application of the repugnancy clause, which is categorized as being in the public interest, and complying with natural law, and the principles of justice. These experiences and practical ideas of the repugnancy clause, whether in the United States, Iran, or Egypt, do not provide effective solutions that the Constitutional Court of Iraq can apply to implement this item effectively. In Iraq, no specific scope for the application of the repugnancy clause exists because there is no reasoning process that the court must follow. The real conflict created by Article 2 of the Constitution is between an Islamic knowledge framework of spatial and temporal views (*Fiqh*) and contemporary social change that classical jurisprudence cannot support. Clearly, no question arises when the court addresses human rights and democracy issues separate from Islamic settled rulings. When it comes to assimilating the three elements together, there are questions about how to operate them, as we will see in the issues of women's rights, religious freedoms and the role of clergy in the democratic system.

This leads us to the core argument in this thesis: the FSC needs to develop a method that can better apply the repugnancy clause. Thus, the next chapter will describe a way that can help the court interpret “Islam's Settled Rulings” in a satisfactory and convincing method. As Hamoudi suggested “what ‘repugnancy’ to shari'a might mean..., a ‘core’ of the shari'a could be found, by letter or by spirit, the legislation could not be in stark violation of it.”<sup>396</sup> This would assist in finding a practical and clear concept of the Sharia. As I argue in this work, *Maqasid*, once again, should

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<sup>396</sup> Hamoudi, *supra* note 3 at 432.

be adapted using by the Federal Supreme Court in Iraq in the interpretation of Article 2 of the Constitution.

## 4.0 THIRD CHAPTER: LEGAL THEORY OF *MAQASID* FROM CLASSICAL AND CONTEMPORARY PERSPECTIVES

### 4.1 Introduction

As we have already seen, applying traditional *Fiqh* in the constitutional realm is not an appropriate method to check the constitutionality and the Islamicity of laws. Additionally, in the thoughts of the Framers of the Iraqi Constitution, and in the practice of the FSC in Iraq, the wording “Islamic settled rulings” is confusing and vague. As has been previously explained, the Iraqi judge has a legal background that follows the civil law system and, therefore, requires a clear method to apply the repugnancy clause. The chapter’s driving question is: What is the proper method for FSC in Iraq to shape its own concept of *Maqasid* to serve as the basis of judicial review? In this context, this chapter will look at an approach that turns away from Islamic jurists' controversies, as well as from the letter of the scriptural text, and instead focuses on the spirit of the text.

The purpose of this dissertation is undertaken in the context of judicial review which cannot be separated from its focus on spirit of Sharia rather than the historical interpretation of *Fiqh*. The Constitution has made Islamic settled rulings that must rely on scriptural text rather than minute jurisprudential controversies the basis for judicial review. However, the traditional schools of thought cannot be completely ignored in this sense. Instead, Islamic jurists, as members of FSC, and legislators can invoke the tools of traditional schools of thought to understand the text, but not as the core source of law. This dissertation proposes that the Court should rely on the spirit of the scriptural text through a contemporary understanding of it. Thus, this part seeks to separate the



Islamic values from the historical understandings that carried varying interpretations, which are not related to judicial function.

Ultimately, this chapter illustrates *Maqasid*, not as an Islamic philosophy but in a more limited fashion, as an approach for understanding and practicing Islamic settled rulings as a core component of the Iraqi repugnancy clause. In this sense, this chapter will avoid the forms and themes that accompany the idea of *Maqasid* and focus on a method to invoke *Maqasid* in a manner that enables the judge to determine the compatibility of the law to the repugnancy clause. The *Maqasid* approach allows the court to maintain Islamic legitimacy while evolving from being jurisprudential-oriented to judicial-oriented and thereby respond to the needs and aspirations of the Iraqi people. This chapter will proceed in four parts. First, this chapter will touch on the tools of interpreting, which jurists created to respond to social needs. These tools contributed to producing the idea of *Maqasid*. The second section illustrates what *Maqasid* means as both a classic and modern concept, how the weighing of *Maqasid* works, and how Islamic jurists operate this weighing. All these steps will help the court apply a *Maqasid* method when checking the constitutionality of the law.

## **4.2 On the Path to the Idea of Maqasid**

This dissertation asserted earlier that *Fiqh* interpretations are difficult to apply in the constitutional realm. However, we do not have the luxury to ignore them since they are necessary to understand the circumstances of the development of the *Maqasid* method. Legal studies must address the fundamental connection between *Fiqh* tools and Islamic law—not as a byproduct, but as causes and reflection of legal events. Understanding this connection begins with a question from

the past: How could *ijtihad*, which jurists use every day to make rules, somehow lead to the development of *Maqasid* to avoid the detailed juristic debates of earlier jurists?

After the death of the Prophet Muhammad,<sup>397</sup> new needs appeared which had not been addressed by Quran and *Sunnah*. Therefore, a question arose: how would Sharia be practiced?<sup>398</sup> The prevailing view was that *Ijtihad* was an effective way to derive the rules from Sharia in order for it to be comprehended by independent reasoning; and intellectual exertion, and to be the suitable basis for both theory and practice, while staying as close to the text as possible.<sup>399</sup> In filling this gap, Al-jabri asserts that the Islamic civilization is the civilization of jurisprudence. This jurisprudence has accumulated significantly and jurists' knowledge of Sharia gives them dominant authority over the interpretation of Sharia.<sup>400</sup> This opened the door to a multiplicity of sources that were used in the process of deriving Islamic rules. This diversity of sources, based on the repetition of multiplicity of thoughts, led to minute jurisprudential controversies, which were often not in the spirit of the text. These methods, in general, established the path for the emergence and verification of the idea of *Maqasid*. In other words, Ijtihad led to a variety of rulings derived from different sources, which the idea of *Maqasid* arose, as a means to provide a broader purpose to those varied rules.<sup>401</sup>

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<sup>397</sup> SAWS (hereinafter the Prophet).

<sup>398</sup> Louay Safi, *the Maqasid approach and rethinking political rights in modern society*, INTELLECTUAL DISCOURSE, 213 (07/2010). See also, Auda, *supra* note 27 at 16.

<sup>399</sup> Ahsan & Nyazee, *supra* note 61 at 208. Some have claimed that the "gate of ijtihad" (reasoning) was closed in the ninth century, which means that new interpretations of Islamic law are not allowed. Therefore, they asserted to keep applying the traditional rule of the Islamic schools. Hallaq rejecting this idea and arguing that Islamic legal theory has continued to apply reasoning in interpreting Islamic law. Wael B. Hallaq, Was the Gate of Ijtihad Closed?, 16 INT'L J. MIDDLE E. STUD. 3, 4 (1984).

<sup>400</sup> MOHAMMED ABED AL-JABRI. THE FORMATION OF ARAB REASON: TEXT, TRADITION AND THE CONSTRUCTION OF MODERNITY IN THE ARAB WORLD, 96 (2002)(Arabic) Also, KHALED ABOU EL FADL, ISLAM AND THE CHALLENGE OF DEMOCRACY, 15( Joshua Cohen & Deborah Chasman eds., 2004).

<sup>401</sup> I don't prefer this kind of comparing between jurists and the judges because the functions of both of them are different but there might similar methods of interpretation between judges of Supreme Court and the Islamic jurists for more details about this topic see Quraishi, *supra* note 80 at 74.

The first method was consensus, which implied that adopting what a collective of jurists said was a source for the interpretation of Sharia. In the *Sunni* school, consensus means the agreement of a few scholars in a certain locality and issue. In the *Shia* school, consensus originally referred to agreement of the Imams. Some argue that the Imams' opinions are not consensus because their reports are *Akhbar* and treated as equivalents to the *Sunnah* of the Prophet.<sup>402</sup> If the jurists agreed on a particular interpretation of a scriptural text, this consensus was binding. The consensus was still in the context of a temporal and spatial understanding of the text, and it required change when circumstances changed. The most important criticism of the consensus has been the difficulty in achieving it because of the diversity and multiplicity of schools of thought and sectarians in the Islamic world. Due to this difficulty, it will not be able to fulfill society's daily needs.<sup>403</sup>

The other method which attempts to extrapolate from the text is the analogy method, *qiyas*. The analogy method provides the cause, *ratio legis*, of Sharia's provisions to apply to a new incident, connected through a common cause.<sup>404</sup> For example, in the Quran, drinking wine is forbidden (rule) because it causes intoxication (common cause or *ratio legis*); thereby all intoxicants, whether liquid or solid, like drugs (new incident), are forbidden, based on this analogy with alcohol. The analogy is still close to the text but does not look at the text itself. It looks at the cause, *ratio legis*, of the text. The analogy method has been criticized because it calls to use causes, which were revealed under certain circumstances to apply in different cases. Hence, it creates a

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<sup>402</sup> ROBERT GLEAVE, *SCRIPTURALIST ISLAM: THE HISTORY AND DOCTRINES OF THE AKHBĀRĪ SHĪ'Ī SCHOOL*, Boston: BRILL, 217-219( 2007).

<sup>403</sup> Later, attempts were made to establish Fiqh precepts (qawā'id), which are brief rules derived from the corpus of legal rulings summarizing a particular school of jurists to facilitate teaching and memorizing. These precepts were used by the legal system in the Ottoman empire and it reached its culmination in the *Mejelle* to a practical way to make authoritative statements of Islamic legal doctrine.

<sup>404</sup> Ahsan & Nyazee, *supra* note 61 at 161.

non-deterministic probable rule because it depends on the jurists' understanding of the text and its meaning, which distances it from the spirit of the text since the ratio is an intellectual operation that is not textual.<sup>405</sup>

Using these tools, the power of Islamic jurists continued over centuries. Perhaps the methods of consensus and analogy opened the door to moving away from the scriptural texts' particularities, when there was a lack of textual evidence. A method known as *Maslaha* appeared to fill the gap left by silence in the scriptural sources of Sharia.<sup>406</sup> *Maslaha* was used either to justify the validity of rulings or to decide individual cases, not as an abstract ideal to which Sharia ought to strive, nor as an independent source of Sharia.<sup>407</sup> Al-ghazali is one of the most important classical thinkers of *maslaha*, explained that *Maslaha* is God's intention in seeking something useful for humankind or averting something harmful for it.<sup>408</sup> Considering the above example, drinking alcohol will lead its victim into misbehavior that will harm him/her as well as their community. However, attaining *Maslaha* may be used to set aside the scriptural texts to represent subjective utilitarian thinking.<sup>409</sup> Thus, instead of just ignoring the text, most of those who use *Maslaha* without determinants try to interpret the text in a way that serves their interests.<sup>410</sup>

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<sup>405</sup> Hallaq, *Supra* note 63 at 6.

<sup>406</sup> literally, *maslaha* means a cause or source of something good and beneficial. In English it is frequently rendered as "public interest,"<sup>3</sup> although it is much closer in meaning to well-being, welfare, and social. Felicitas Opwis, *Maslaha in Contemporary Islamic Legal Theory*, 12 ISLAMIC L. & SOC'Y 182, 188 (2005).

<sup>407</sup> FELICITAS META MARIA OPWIS, *MASLAHA AND THE PURPOSE OF THE LAW : ISLAMIC DISCOURSE ON LEGAL CHANGE FROM THE 4TH/10TH TO 8TH/14TH CENTURY*, 12-14(BRILL, 2010).

<sup>408</sup> Ghazali defines Masalha as: "In its essential meaning, it is an expression for seeking something useful (manfaa) or removing something harmful (madarra). GHAZALI, *AL-MUSTASFA MINLM AL-USFFL*, Vol. I 286-87(Baghdad: Muthanna, 1970).

<sup>409</sup> Adi Setia, *Freeing Maqasid and Maslaha from surreptitious utilitarianism*, ISLAMIC SCIENCES, 127 (Winter 2016). and Fazlur Rahman, *Towards Reformulating the Methodology of Islamic Law: Sheikh Yamani on Public Interest in Islamic Law*, 12 N.Y.U. J. INT'L L. & POL. 219, 224 (1979).

<sup>410</sup> Dr. M. SA'ID RAMADAN AL-BUTI, *DAWDBIT AL-MASLAHA FI L-SHANA AL-ISLDMIYYA*[INTEREST RESTRICTIONS IN ISLAMIC LAW], 202- 21 (1965) (Arabic).

Historically, there have been other methods of interpretation which were not always agreed upon, depending on the school which accepted or created these methods.<sup>411</sup>

At the same time, the resistance method emphasized the authority of the text by dealing directly with the texts of Sharia. For instance, *Zahiri* and *Akhbaris* schools emphasized that a revelation text exists for a specific reason, and therefore any interpretation beyond or behind them “would irretrievably insert personal subjectivity and whim into the law.”<sup>412</sup> They, therefore, rejected all interpretative methods produced by the other schools, including not only open-ended *Maslaha*, but even analogy (*qiyas*) and consensus, except the consensus of the companions of the Prophet. When these companions died, it was impossible to have any acceptable consensus.<sup>413</sup> As noted above, these tools led to a multiplicity of rulings as a means to provide a broader purpose to those varied rules, which were derived through different methods.

In fact, all of these tools and the debates surrounding them have not achieved the appropriate balance between the scriptural text; and the needs of society and the need for judicial development. This is not to suggest that using these tools outside the constitutional realm is wrong. Jurists have always had these tools, but these tools created a gap: the gap of asserting abstract ideals. *Fiqh* is a diversity of opinions among scholars on various matters and focuses on individual cases not an abstract ideal that the court ought to fulfill; therefore, these historical understandings should not be the final factor in deciding the meaning of Sharia. In addition, the high level of

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<sup>411</sup> For example, *Istihsan*, “legal equity” (or “preferential choice”), *istishab* (presumption of continuity), *maslaha mursala* (social welfare not mentioned in the texts, very similar to the earlier method, *istilah*), or its counterpart, *sadd al-dharat* (“closing the gate to evil”), *urf* (custom), *shat man qablan?* (laws of monotheists “before us”), *madhhab al-sahab* (the school, or juridical method of the Companions). See for more information see Ahsan & Nyazee, *supra* note 61 at 235.

<sup>412</sup> Anwar G. Chejne, *Ibn Hazm of Cordova on Logic*, 104 JOURNAL OF THE AMERICAN ORIENTAL SOCIETY 57(1984) also, For information about *Akhbaris* See, Gleave, *supra* note 402 at 98(2007).

<sup>413</sup> Chejne, *supra* note 412 at 61.

determinants renders these tools as rigid molds, which cannot produce a new jurisprudence when responding to the needs of society.<sup>414</sup>

Thus, the need arose to reshape Sharia using a new approach to extract the Islamic rules that are relevant to social needs. This is what *Maqasid* achieves. It is an inductive, value based approach to derive rule directly from a particular conception Islamic values without relying upon complex jurisprudential debates that do not concern themselves with the spirit of Sharia. The need for *Maqasid* today is reflected in the same circumstances where the Muslim world is suffering from confusion in understanding the values of Islam, which produces an Islamic superficiality. As al-Shatibi says: “If the body of Sharia is without spirit, its formalism will remain devoid of reality unless the real nature of *Fiqh* theory is investigated.”<sup>415</sup>

### 4.3 The Identification of the Proposed approach and inference to Maqasid

Linguistically, the term ‘*maqsid, maqsad, maqsud, qasd*’ refers to “a purpose, objective, principle, intent, goal, or end”<sup>416</sup> behind Islamic rules. Islamic theorists include more details to define the meaning of *Maqasid*, to conclude that *Maqasid* is the spirit of Sharia.<sup>417</sup> In fact, it is not easy to comprehend the idea of *Maqasid* unless the historical concerns which produced it are reviewed.

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<sup>414</sup> HASSAN AL-TURABI, TAJDID USUL AL-FIQH AL-ISLAMI [RENEWING THE ASSETS OF ISLAMIC JURISPRUDENCE] 36-37 (1980) (Arabic).

<sup>415</sup> IBRĀHĪM IBN MŪSĀ ABŪ IŞĤĀQ AL-SĤĀṬIBĪ, AL-MUWĀFAQĀT FĪ UŞŪL AL-SĤARĪ‘A [THE RECONCILIATION OF THE FUNDAMENTALS OF SHARIA] Vol. I, 22(1997) (Arabic).

<sup>416</sup> Auda, *supra* note 29 at 20.

<sup>417</sup> *Id.* at 27.

Historically, the idea of the *Maqasid* was built on a theory of Imam al-Juwaini (d. 1085 A.D.), which lost support because it was built on a controversial presupposition. His assumption was that *Fiqh* was controlled and exploited politically by some kings and caliphs in order to legitimize their power. Al-Juwaini asserted that the absence of independent jurisprudence would leave a huge gap in applying Sharia<sup>418</sup> and the resulting gap should be filled by resorting to *Maslaha* of Sharia directly, which is the explicit way to understand Sharia. He suggested five levels of *Maslaha*: necessities, public needs, moral behavior, recommendations, and what cannot be attributed under a specific reason. Al-Juwaini considered these purposes to be self-evident, derived from the Sharia's principles and principles of jurisprudence.<sup>419</sup> This concept was the cornerstone of the idea of *Maqasid* and provided a way to avoid getting lost in the details of *Fiqh*.

The representative of the *Maqasid* approach in the *Shia* school was *Ibn Babawayh al-Qummi* (d. 991 A.D.) who became known because of his monograph dedicated to *Maqasid*. This book *Ilal al-sharaye* discussed the reasons behind the rulings, which include the rational bases of religious obligations such as prayer and fasting, and core theological beliefs such as believing in God.<sup>420</sup> *Al Qummi* emphasized that the causes and reasons of all Sharia's commands are explained rationally, which means that nothing is without reason. He also declared that the *Maqasid* method is one of the elements of rationality, so it must be considered by Islamic jurists.<sup>421</sup>

These attempts were preliminary efforts aimed at grasping the broader notion of the *Maqasid*. These efforts were advanced considerably by the impressive and highly influential work

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<sup>418</sup> Al-shatibi supra note 415 at 28 and 163.

<sup>419</sup> ABDUL MAJEED AL-SAGHIR, THE ORIGINAL THOUGHT AND THE PROBLEMATIC AUTHORITY, 372 (1994)(Arabic).

<sup>420</sup> Auda, supra note 27 at 16, ABŪ JA'FAR MUḤAMMAD B. 'ALĪ B. AL-ḤUSAYN B. MŪSĀ AL-QUMMĪ, ILAL AL-SHARĀYI', 'ILAL AL-SHARA'I' WA AL-'AHKAM WA AL-'ASBAB[REASONS OF THE RULINGS] 2 Vols (1989).

<sup>421</sup> al-Hakim, supra note 59 at 403.

of Abu Hamid al-Ghazali (d.1111 A.D.), who was a pupil of *Imam al-Juwaini*. He elaborated Juwaini's ideas of *Maqasid*, which through Ghazali ultimately gained near universal consensus in the world of Islamic jurisprudence.<sup>422</sup> Ultimately, the classification of al-Ghazali remained the basis of *Maqasid's* theory. Although he remained faithful to the previous methods, he laid down a new method that proved far more flexible and complex than the other methods. *Ghazali* asserted that Sharia was basically established to attain humankind's interests (*Maslaha*) as demonstrated very clearly by the Quran, as well as by the teachings of the Prophet Muhammad. Ghazali explains that if one were to conduct an inductive approach of the substantive rules of Islamic law, one would discover that it protects five universal categories of well-being. These interests are based on the fulfillment of the hierarchical classification consisting of three levels of *Maslaha*, which he calls, respectively, essentials or necessities (*daruriyyat*), needs (*hajiyyat*), and luxuries or improvements (*tahsin, tawsi'a*). Necessities are people's basic requirements for life. If they are not attended to, this will lead to unbearable hardship in this life, or punishment in the next.<sup>423</sup> Also, necessities guarantee the preservation of the five objectives of humankind. These objectives should be protected as a matter of absolute priority because they constitute the overarching purposes of the revealed texts: (1) Protection of life or self; (2) Protection of posterity or family or progeny; (3) Protection of intellect or mind; (4) Protection of religions of faith; and (5) Protection of wealth or property. Hence, as an illustration, using the above example of the prohibition of drinking alcohol, the necessities (*daruriyyat*) of this prohibition are to protect the intellect or mind. Thus, every Islamic rule can be connected to the preservation of at least one of these purposes.<sup>424</sup> These five objectives are foundational and integrative; thus, they are also generative of all possible means and

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<sup>422</sup> Ahsan & Nyazee, *supra* note 61 at 205.

<sup>423</sup> Al ghazali, *supra* note 408 at 290.

<sup>424</sup> AHMAD AL-RAYSUNI, NAZARIAT AL'IMAM ALSHATIBII FI AL'AHDAF ALEULYA LILSHARIEAT AL'IISLAMIA [IMAM AL SHATIBI'S THEORY OF THE HIGHER OBJECTIVES AND INTENTS OF ISLAMIC LAW ], 254 (2005) (Arabic).



intermediate objectives insofar as such intermediate objectives can be found to be compatible with, and facilitative of, the attainment, enhancement and refinement of the five *daruri* (necessary) objectives.<sup>425</sup>

The second level of *Maslaha* is known as *hajiyyat* or the “needful benefits,” which are to protect and promote the first level of necessities interests when there is a secondary harm. In other words, the people need these matters to remove restrictions and difficulties in applying the five necessities. By addressing needs, scholars seek to attain the goals of Sharia rulings with ease and without extreme hardship that do not pose a threat to life.<sup>426</sup> Sometimes an Islamic ruling can be changed due to certain conditions such as sickness, travel, exceptional circumstances, or coercion. For instance, the punishment for theft is suspended if there is a famine because this will neither align with the purpose of the legislation of this punishment, nor be proportionate with the hardship to which society is subjected.<sup>427</sup> Therefore, when there are needs, such as sickness, travel, exceptional circumstances, or coercion, the rule will be changed in accordance with these needs.

The last level according to Ghazali classification is improvements (*tahsin, tawsi‘a*) which aim to attain the highest standards of moral conduct but they are not necessary or distinctively needed. This class involves the means that lead to the achievement of *Maqasid*. For example, as simplified by *Attia*, who is a modern specialist in the methodology of *Maqasid*, housing is Necessities (*daruriyyat*): Base level ‘housing’ is achieved with the availability of any place that preserves the life from any dangers, such as a tent. Needful benefits (*hajiyyat*): Housing needs

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<sup>425</sup> Setia, *supra* note 409 at 155.

<sup>426</sup> Kamali *supra* note 447 at 196.

<sup>427</sup> Al-Raysuni, *supra* note 424 at 170.

shall be met if the dwelling is provided with basic services. Improvements (*tahsin, tawsi'a*): Improvement is attained if this house has, for example, an entertainment system and a garden.<sup>428</sup>

Although, Ghazali's contributions are immense, this method lacks precision in determining the *Maqasid* an inductive method. He did not explain exactly who can extrapolate *Maqasid* from the scriptural text by examining the Sharia step by step. Furthermore, it only focuses on individual needs, not on public needs. Ghazali refused to take social needs into consideration, because he deduced rules from Sharia directly, not from the general intent of the rules.<sup>429</sup> Finally, although this method seems to encompass all individual actions and is consistent with their needs, it needs more scrutiny and classification because of the expansion of needs over time.<sup>430</sup> As Opwis asserted: "Such lack of precision in definition can allow for flexible and changing application or lead to authoritarian abuse in the name of God's intentions by state institutions or vigilante groups."<sup>431</sup> Therefore, as already asserted, this chapter will adopt *Maqasid* for its purposes as a method of judicial review, not for its form as a philosophy. The next step is to discuss a new method of *Maqasid*, drawing on modern needs and derived from core Islamic values, which moves beyond an individual to societal level. This method can help court to be more rigorous when examining the conformity of the law with the repugnancy clause.

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<sup>428</sup> GAMAL EDIN ATTIA, TOWARDS REALIZATION OF THE HIGHER INTENTS OF ISLAMIC LAW: MAQAŞID AL-SHARIA: A FUNCTIONAL APPROACH,38 (Nancy Roberts trans.,2007).

<sup>429</sup> Masud *supra* note 58 at 262.

<sup>430</sup> Al-Raysuni, *supra* note 424at 405.

<sup>431</sup> Opwis, *supra* note 406 at 24.

### 4.3.1 Extension of the Maqasid to the Societal Level

The significant shift in the idea of *Maqasid* was introduced by *Abu Ishaq al-Shatibi* (d. 1388), a Spanish Maliki jurist, who established a new way of attaining *Maqasid* also based on an inductive approach but within more accuracy. Shatibi asserted: "I extrapolated Sharia texts and I discovered that the purpose of Sharia is to attain the greatest benefit for people. [...] The placement of the Sharia is for the interests of people, in both the present and future together."<sup>432</sup> Even though he used the same terms and classifications that were established by Ghazali, he designed an explicit method for extrapolating *Maqasid* from the text and focused on it as a means of attaining societal well-being rather than individual well-being.<sup>433</sup>

It is not surprising then that the use of this method of purposive reasoning relied on the empirical rules concerning natural and social needs rather than a solely traditional interpretation of the scriptural text. Shatibi labored to prove that social change has a huge impact on the Islamic rulings and, thus, *Maqasid* must find a way to sustain the pace with social development and needs. As Arkoun claimed, Shatibi wanted to reconcile the need to preserve the essence of Sharia on the one hand and the possibility of accommodating social and historical change on the other.<sup>434</sup> In Shatibi's method, Sharia is a universal language for those who have the natural ability to understand the common Arabic discourse in general. If this language was beyond their comprehension, the divine command to obey the Sharia would be impossible to fulfill which will lead people to a duty they clearly cannot understand.<sup>435</sup> Thus, he concluded that human minds are

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<sup>432</sup> *Id.* at 2.

<sup>433</sup> Al-Raysuni, *supra* note 424 at 37.

<sup>434</sup> Arkoun, *supra* note 46 at 170.

<sup>435</sup> See, e.g., al-Baqara, 2:220 ("Had He wished, He could have burdened you") and al-Hajj, 22:78 ("He has made no hardship for you in religion"). Instead, it is human beings who give effect to Sharia according to their limited personal judgments and opinions and this can avoid the "dogmatic superficiality of proclamations of God's dominion

able to discern good from bad and know what is in their interest (*maslaha*) and what is harmful to them (*mafsadd*).<sup>436</sup>

The other point that was reflected by social impact was *Shatibi's* assertion that the knowledge of customs and linguistic conventions were prevalent among Arabs during the age of revelation.<sup>437</sup> The *Shatibi* method was more focused on the worldly aspects of *Maqasid*. In a bold step, *Shatibi* excluded worship, to separate the legal transactional rules from those devoted to ritual. Thus, he concentrated on the fields of customary practices and interpersonal dealings/transactions because *Maqasid* was inscribed from the very texture of life.<sup>438</sup> Since all transactional rules have intentional interests, these social interests can be discerned rationally, or in reference to the prevailing custom, because humans, by virtue of their intellectual endowment can discern good things from a bad.<sup>439</sup> The main objective of the *Shatibi* method was to establish the authority of law on a rational basis, in addition to the already established principle of authority of law derived from revelatory sources.<sup>440</sup> These purposes are categorical and binding because they are derived from the *Sharia* text directly.<sup>441</sup> *Shatibi* insisted on liberating the Islamic legal theory from the domination of the traditional conception of jurists, in order to be interpreted as a step towards the social understanding of *Sharia*.

To promote his new method of extrapolation of the text, *Shatibi* relied directly on the revealed texts, as an integral whole, to derive a new basis for his theory.<sup>442</sup> *Shatibi* further calls for

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or sovereignty in order to legitimate and empower what are fundamentally human determinations.”.Rabb, *supra* note 50 at 565.

<sup>436</sup> Al-Raysuni, *supra* note 424 at 254.

<sup>437</sup> *Id.* 73.

<sup>438</sup> Al-Raysuni, *supra* note 424 at 201.

<sup>439</sup> Al-Shatibi, *supra* note 415 at Vol. 2, 62.

<sup>440</sup> Masud *supra* note 58 at 226-27.

<sup>441</sup> Auda, *supra* note 27 at 21 and Opwis, *supra* note 406 at 196.

<sup>442</sup> Wael B. Hallaq & Donald P. Little, *The Primacy of the Quran in Shatibi's Legal Theory*, E.J. BRILL 1991,71 (1991)

scrutinizing all verses which have the same subject when extracting the rule of any Sharia text and addressing novel questions that are not answered in the revealed texts. For example, one or more verses may explain another verse that is not clear.<sup>443</sup> The correct understanding of part of the Qur'anic text may depend on the understanding of another part.<sup>444</sup> He extrapolated Sharia to indicate that the Sharia contains two kinds of provisions, the universal rulings, and partial rulings. The universal rulings which come from the *Meccan Suras*, seek to achieve the purposes of Sharia, thus, should be complied with when extracting the rulings.<sup>445</sup> Indeed, the inductive method developed by Shatibi is significant for its opposition to the prevailing other methods associated with scriptural texts which had come to dominate most of the interpretive theory. Shatibi derives the rule in the manner most consistent with *Maqasid*. For example, *Shatibi* permitted the partnership for the production of cheese, which violated the rules of *Riba* about the prohibition of the exchange of certain commodity foodstuffs. He asserted that this prohibition would reduce wealth, thus, this partnership should be permitted.<sup>446</sup> Al-shatibi's theory has opened the way to contemporary jurisprudence that has developed the idea of *Maqasid* in a way that is consistent with the needs of the times.

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<sup>443</sup> Al-Shatibi, *supra* note 415 at Vol.2, 8-9.

<sup>444</sup> Id. at Vol. 3, 279.

<sup>445</sup> The Meccan suras are the chronologically earlier chapters of the Qur'an that were, according to Islamic tradition, revealed anytime before the migration of the Islamic prophet Muhammed and his followers from Mecca to Medina. In contrast, The Madaniy Suras or Madaniy chapters of the Quran are the latest 24 Surahs that, according to Islamic tradition, were revealed at Medina after Muhammad's hijra from Mecca. These surahs were revealed by Allah when the Muslim community was larger and more developed, as opposed to their minority position in Mecca. Ahsan & Nyazee *supra* note 61 at 33.

<sup>446</sup> Mohammad Fadle, *The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21, 30-42 CANADIAN J. L. & JURISPRUDENCE 57 (2008).

### 4.3.2 Maqasid in Modernity

In the modern era, *Maqasid* theory has developed in several areas such as political, economical and social.<sup>447</sup> In the 19th century, Egyptian reformers *Muhammad Abduh* (d.1905) and *Rashid Riḍa* (d.1935) revived the *Maqasid* method. After these two scholars read *Shatibi's* books, they applied *Maqasid* Method in their *fatwas*.<sup>448</sup> Their *fatwas* made a qualitative leap in the field of jurisprudence. For instance, *Riḍa* legitimizes using drug medications designed for alcoholics, based on the principle of necessity since one of the primary legal aims of *Sharia* is to preserve life.<sup>449</sup>

*Abduh* and *Riḍa* sought to evaluate and review the *Shatibi* method to make it more relevant to modern needs. This evaluation focused on the terminology of *Maqasid* but did not include the *Maqasid* method of extrapolation by *Al-shatibi*. For example, they proposed to extend the protection of life to human rights by including rulings that relate to the application of criminal justice, the prevention of suicide, the fight against epidemics that destroy the health of people and their safety, the end of wars, and the establishment of lasting peace. In addition, *Abduh* and *Riḍa* sought to include rulings that relate to human dignity, gender equality, freedom, and justice. Still other scholars proposed to expand the protection of the mind to include the right of education and protecting property by the elimination of corruption.<sup>450</sup> Others suggested adding new goals derived

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<sup>447</sup> See for example, *Anwar Ibrahim, Universal Values and Muslim Democracy*, 17 J. DEMOCRACY 7 (July 2006), *Halim Rane, The Relevance of A Maqasid Approach for Political Islam Post Arab Revolutions*, 28 J.L. & Religion 489, 520 (2013) and *MOHAMMAD HASHIM KAMALI, MAQASID AL-SHARIAH: THE OBJECTIVES OF ISLAMIC LAW*, ISLAMIC STUDIES, 38 (1999).

<sup>448</sup> *Yasir S. Ibrahim, Rashīd Riḍā and Maqāṣid Al-Sharī'a*, STUDIA ISLAMICA, 157-98 (2006) and *Yasir S Ibrahim, The Spirit of Islamic Law and Modern Religious Reform: Maqāṣid Al -sharī'a in Muhammad 'Abduh and Rashīd Riḍa's Legal Thought* (2004) (Ph.D. dissertation, Princeton University) (Available at ProQuest Dissertations and Theses Global <https://www.proquest.com/products-services/dissertations/>).

<sup>449</sup> *Id.* at 187.

<sup>450</sup> *Id.*

from *Fiqh* rules such as “freedom, equality, brotherhood, economic cooperation (*tak<sup>-</sup>aful*) and human rights.”<sup>451</sup>

The modern *Shia* school remained hesitant to promote the idea of *Maqasid*, for many reasons, including the idea of connecting *Maqasid* to *Maslaha*, which not definitive source of law.<sup>452</sup> The other reason was political, since the Jaafari jurisprudence was persecuted and could not interact and produce new ideas as readily. If not for these factors, the *Shia* school could have been one of the first adopters of the idea of *Maqasid* as some modern scholars asserted because of the primacy of reason in Shi'i jurisprudence, as it was in Shatibi's. *Maqasid* also, reinforces the *Shia* view on the development of the idea of public interest in Iran after the Islamic Revolution, which gave the opportunity for *Shia* thought to evolve and keep pace with the times.<sup>453</sup>

There are exceptions to the reluctance. A number of scholars accept pieces of *Maqasid* but have thoughts on revisions that would be necessary. Grand Ayatollah Mohammad Hussein Fadlallah is one *Shia* scholar who strongly supports the idea of *Maqasid* but would require that it be connected to Sharia text because the written evidence is the basis and argument hindered by the speculation of Islamic rules. Like Shatibi, he also emphasizes that the idea of the *Maqasid* focused on rules relating to transactions (*mu'amalat*) rather than worship (*'ibadat*). For Fadlallah's adoption of *Maqasid*, the last requirement is that the *Maqasid* should be used only for the issues on which the text is silent.<sup>454</sup> Al-Mehrizi also, supports the idea of expanding the five rounds of purpose to include other necessities that may be needed by people at different times. Similarly,

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<sup>451</sup>Attai *supra* note 428at 180.

<sup>452</sup>Yahia Mohammed, *The Theory of Maqasid and the Reality*, CONTEMPORARY ISLAMIC ISSUES JOURNAL, No. 8, 141(1999)(Arabic).

<sup>453</sup>Muhammad Mahdi Mehrizi, *muqasid alshryet fi madrasat 'ahl albayti*, [*Maqasid Al Shariah in the Ahl al-Bayt School*], CONTEMPORARY ISLAMIC ISSUES JURNAL, No. 13, 244 (2000)(Arabic). See also, *supra* section 3.3.1 B, c.

<sup>454</sup>Muhammad Hussein Fadlallah, *Maqasied Al Shariah*, CONTEMPORARY ISLAMIC ISSUES JOURNAL, No. 8, 11(1999).

Yahya Mohammed proposes the idea of adding legal interest, which is often referred to as the vindication of the Shari'a, such as the deposing of the despotic ruler, and the interest of the individual affected by the crime. He also proposed two new divisions of *Maqasid*: the divine interests, which relates to the purposes of obedience and the interests of the people, which concern the rights of people.<sup>455</sup>

These new proposals, which call towards axiological open-endedness, may undermine the basic idea of *Maqasid* because then any means can be a goal so long as it comports with the priority of people. As Quraishi noted, many *Maslahas* conceptions can be connected to a *maqasid*, even if not a specific text.<sup>456</sup> This means a potential, perpetual debate over ever-elusive values and objectives.<sup>457</sup> Therefore, one of the modern suggestions to restore *Maqasid* as offered by Shatibi. Attia calls for implementing the method of *Shatibi* by keeping the main goals of Sharia as the founding' scholars classifying and approving all new *Maslaha* in light of these goals. If assumed that the Shari'a came to protect these purposes, this way would constitute the general framework using modern, progressive understandings of what values Islam seeks to vindicate. These include protecting life and all necessary means to achieve this purpose, such as healthcare and drug prohibition; protecting the mind and all related to it, such as education and freedom of thought and expression; protecting the progeny, including the necessities of family formation, property protection, and the rights which extend from these (both economic and social); as well as protecting

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<sup>455</sup> Mohammed, *supra* note 452 at 147.

<sup>456</sup> Quraishi, *supra* note 80 at 119.

<sup>457</sup> Setia, *supra* note 409 at 140. He asserted that the legal theorists and scholars of the past saw no reason for an open-ended list of objectives, interests, goods, or benefits, for they knew that open-endedness would lead to never-endedness, and this would seduce the Umma into a tragic, futile life of perpetual un-attainment chasing after ever-emergent, ever-receding, ever-shifting, and ever-elusive values and objectives: (109) the West is currently facing and suffering. The current call amongst many *maslahawi* thinkers and theorists for axiological open-endedness would, in spite of their well-meaningness, open the Pandorian boxes of progress, change, growth, development, science, and technology in the face of an already long-suffering Umma, and lead the latter to personal, familial, communal, and civilizational self-destruction.



religion and its associated religious freedom.<sup>458</sup> The next step is to examine the precise determination of *Maqasid* which can help the court to be more rigorous when they examine the conformity of the law. This examination into precision is necessary because of the several interpretations and conclusions of *Maqasid*. If we are to develop a progressive understanding of *Maqasid* that operates on the basis of modern needs and values, and is faithful to the work of luminaries such as Abduh, Ridha, Al-Alwani, and others, then to gain legitimacy it must be rigorous and thorough. Otherwise, the approach might be dismissed as not truly grounded in Islamic thought. This is a criticism that rigor and depth will help to ward off.

#### 4.4 Maqasid in Practice

The level of necessities, needs, and improvements can be determined through two criteria. The formalistic criterion depends on the level of Sharia rulings. The practicalities of individual conduct are evaluated on a scale of five values: obligatory, recommended, permissible, reprehensible, and forbidden.<sup>459</sup> If the conduct is a type of obligation or prohibition, then the interest of this conduct is necessary. Beneath that is one of the needs or improvements.<sup>460</sup> The other criterion is an objective criterion relating to the interest itself. If the interest is highly significant then it belongs to the necessities; if not, then it is on the level of needs or improvements.<sup>461</sup> Simply, some scholars only connected *Maqasid* with prescribed punishments.

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<sup>458</sup> Attia, *supra* note 428 at 109.

<sup>459</sup> The Islamic Fiqh classified the acts of people to the five decisions” (*al-aḥkām al-khamsa*): mandatory (*farḍ or wājib*), recommended (*mandūb or mustaḥabb*), neutral (*mubāḥ*), reprehensible (*makrūh*), and forbidden (*ḥarām*).[6][11] It is a sin or a crime to perform a forbidden action or not to perform a mandatory action. see Ahsan & Nyazee, *supra* note 61 at 69.

<sup>460</sup> Attia, *supra* note 428 at 37.

<sup>461</sup> *Id.*

These punishments include punishing a person who commits actions that endanger the five necessities instead of contemplation of the social consequences of that objective's nonexistence in any society. For example, when a murderer is punished, this indicates the necessity of such a punitive response, and such a method of protection of life becomes one of the purposes of Sharia.<sup>462</sup>

However, there is no consensus among the Islamic jurists about the ranking of these objectives.<sup>463</sup> Some scholars attempted to give one of the objectives higher or lower priority over another, but their justification was not subject to universal agreement. Some have given preference to the protection of life over the protection of religion on the grounds that if life is endangered, the need for the preservation of other purposes will cease.<sup>464</sup> For example, according to Sharia, if a Muslim is coerced to utter a word of disbelief in God, a Muslim is permitted to say such words of disbelief in order to save his or her life.<sup>465</sup> Other scholars pointed out that the protection of religion is the principal integrating all lower objectives because these other objectives must embody the religion and serve it.<sup>466</sup>

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<sup>462</sup> Ibrahim, *The Spirit of Islamic Law*, *supra* note 448 at 161.

<sup>463</sup> Attia, *supra* note 428 at 18.

<sup>464</sup> ALI JUM' A, TARTIB AL-MAQAS.ID AL-SHAR'IYYA [THE ARRANGEMENT OF THE OBJECTIVES OF ISLAMIC LAW], 22nd Conference of the Supreme Council of Islamic Affairs 9 (2010).

<sup>465</sup> Other example, timely performance of certain ritually specified prayers, even if obligatory, should be interrupted to save a human life because saving life is a primary interest whereas discharging the obligation to pray at a specific time is only secondary interest, and thus must give way to the primary interest. Al-Buti, *supra* note 410 at 233.

<sup>466</sup> *Id.*

#### 4.4.1 Precise Determination of Maqasid

Initially, in the classical thought of *Maqasid*, the Islamic jurists relied on *Maslaha* as the embodiment of the purpose of Sharia or as equivalent meaning. For example, previously, Ghazali refused to apply *Maslaha* as the only source of law unless if it was supported by *Maqasid*. He also did not view it on par with the scriptural texts, but compatible with the preservation of the purpose of the Law.<sup>467</sup> Similarly, the Shafi'i school supported the idea that *Maslaha* must rely on either *Maqasid* or to a specific, revealed text.<sup>468</sup> The problem is how to determine the validity of *Maslaha*. In other words, the question is whether it is possible for the human intellect to discern *Maslaha* without concrete indication from the scriptural sources of the law.<sup>469</sup> Ghazali argued that *Maslaha* should be derived from Sharia' sources, otherwise it will be an illusory source.<sup>470</sup> *Maslaha* required inferences from revealed sources to be considered. Thus, for *Maslaha* to be used, the specific interest to be vindicated must be located within the text itself. *Shatibi* asserted that human reason can discover *Maslaha*: through inductive approach of the Sharia sources.<sup>471</sup> Apparently, *Shatibi* advocated that the *Maslaha* is determined by the needs of society which should be based on *Maqasid* to examine whether they agree with or oppose Sharia. This is contrary to Al-

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<sup>467</sup> Attia, *supra* note 428 at 120 ;Auda , *supra* note 27 at 2. and Opwis, *supra* note 406at 188.

<sup>468</sup> Wael B. Hallaq, *The Origins and Evolution of Islamic Law*, 145 (Cambridge University Press, Cambridge, UK; New York 2004-2005). also see, Al-Raysuni, *supra* note 424 at 210.

<sup>469</sup> The Mu'tazili school of theology, held that acts are inherently good or bad and that the human intellect is able to know their value without the aid of revelation. The goodness or badness of an act is tied primarily to its beneficence or harm, assessable by the human intellect. With regard to the derivation of legal rulings this position implies that a ruling is correct and legitimate when it permits a beneficial act or prohibits something harmful. The other position, espoused by the Ash'ari school of theology, was characterized by theistic subjectivism. This school of thought emphasized that the human intellect is incapable of arriving at moral knowledge independent from the divine revelation. Its adherents held that something is good only because God commands it and bad only because He prohibits it. A legal ruling is thus only legitimate when derived from the revealed law. Opwis, *supra* note 406at 189.

<sup>470</sup> Al-Raysuni, *supra* note 424 at 270.

<sup>471</sup> Opwis, *supra* note 407at 194.

ghazali, who called for the interest to be determined by the Shari'a, from the beginning, and after that if there is an interest in Sharia then it should be examine by *Maqasid*.

Another suggestion for deriving *Maslaha* is by using the rational method, or *`aql*. In this method, jurists are free from the text entirely when they want to determine the *Maslaha*. As Sulayman Najm al-Din al-Tufi (d. 1316 A.D.) said, “wherever one finds *Maslaha*, there lies God’s legislation.”<sup>472</sup> *Al-Tufi* argued that a ruling entailing *Maslaha* should receive priority over a contradictory ruling, be it scriptural or not, because the Sharia is not an abstract text, but it is related to those who have received it.<sup>473</sup> Thereby, he considered *Maslaha* as an independent source of Sharia and it should be the standard for legitimacy of all legal rulings.<sup>474</sup> The view of Al-Tufi was criticized because it prioritized *Maslaha* over the scripture, which can lead to subjectivity and human speculation, and his approach did not gain traction within the *Sunni* tradition.

Al Qummi also supports the idea of conceptualizing human interests as part of the Islamic provisions even if no specific text would support these interests.<sup>475</sup> He adopted a compromise method by asserting that there is no question of priority between reason and revelation text, since both are complementary, not contradictory, to each other.<sup>476</sup>

However, the *Shia* jurisprudence and some other *Sunni* scholars refused to rely on the *Maslaha* method to reach the *Maqasid* because attaining *Maslaha* is probable and personal. They replaced it with the discipline of reason method as *Al Shatibi* pointed out.<sup>477</sup> On the other hand,

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<sup>472</sup> Al saghir, *supra* note 47 at 71.

<sup>473</sup> Auda, *supra* note 27 at 122.

<sup>474</sup> Kamali, *supra* note 447 at 194.

<sup>475</sup> Wahid Akhtar, Introduction to Imamiyyah Scholars: Al-Shaykh al-Saduq and His Works Al-Islam.org, [https://www.al-islam.org/al-tawhid/vol-3-n-1/introduction-imamiyyah-scholars-al-shaykh-al-saduq-and-his-works-wahid-akhtar-0#f\\_5faf3a3e\\_48](https://www.al-islam.org/al-tawhid/vol-3-n-1/introduction-imamiyyah-scholars-al-shaykh-al-saduq-and-his-works-wahid-akhtar-0#f_5faf3a3e_48). (last visited Nov 21, 2018).

<sup>476</sup> *Id.*

<sup>477</sup> Mahrizi, *supra* note 471 at 226. In fact, the majority of those who deny the idea that the Sharia has a purpose is because they have a concern about some of who want to take these purposes as an abstract rule without

Zahiris scholars, who focus only on the strict literal meaning of the scriptural texts, denied the idea of *Maqasid* unless it is identified and cleared by the apparent text without pondering over its objective and meaning.<sup>478</sup> They argue that divine actions do not need justifications.<sup>479</sup> At the end of the day, *Maqasid* are broader than the *Maslaha* because God's intention may have a general meaning, such as worship, piety, or facilitation or other meanings that go beyond the idea of interest, in the sense of utility.

Building on the modern and contemporary sources, *Maqasid* is a comprehensive method for understanding the Sharia texts and not itself an independent source or scriptural texts. This method depends on the Sharia text directly. *Maqasid* is a rational method of understanding the text rather than using other methods, such as analogy and consensus. *Maqasid* cannot be identified as a method based on relative empowerment of reason over revelation<sup>480</sup> because, at least according to most Sunni scholars, the role of reason within *Maqasid* is to discover the purpose specified by the text itself. Instead, *Maqasid* seeks to separate the text from traditional interpretations and to find contemporary interpretations that correspond to the new needs of society. As Johnston asserts, *Maqasid* is "a step toward granting human reason more latitude in interpreting and applying the general edicts."<sup>481</sup> Specifically, *Maqasid* respond to the need for flexible interpretations for the court that are in line with the needs of the generations and necessary to preserve the spirit of the text.

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examining them by the Quran and hadith, not because of the absence of purposes itself..Ahmad Al-Raysuni, *supra* note 424 at 20.

<sup>478</sup> Kamali *supra* note 447 at 204.

<sup>479</sup> Al-Raysuni, *supra* note 424 at 230, and Opwis, *supra* note 406 at 189.

<sup>480</sup> David L. Johnston, *supra* note 28 at 149-187.

<sup>481</sup> Id. at 186.

Some may argue that the *Maqasid* methodology may produce "a recipe for turning the text into an idol, divorced from its original historical context and cut off from its present community of interpretation."<sup>482</sup> In addition, as Hallaq assumes, the *Maqasid* method might face challenges under modern conditions, such as national citizens versus religious loyalty (protection of religion), homicide as a private wrong versus the function of state (protection of life), and religious morality versus the rights of women (protection of offspring).<sup>483</sup> These possibilities require that the role of the judge is to correct the equation based on the purpose of Sharia that he/she draws from the text, as well as the facts of the case in question, rather than minute jurisprudential controversies or a historical experience.<sup>484</sup>

## 4.5 Conclusion

This chapter seeks to provide a solution for the application of repugnancy in Iraq, in a workable way, by outlining a clear method for integration of religion in a legal context that judges would be able to easily refer to when they examine the constitutionality of laws. This chapter refers to the limitations of traditional *Fiqh*, and the need to identify the above-mentioned spirit, rather than relying on the atomistic collections of rules that commonly constitute *Fiqh* collections. This chapter proposes the *Maqasid* as a guide to the efficient application of the Iraqi repugnancy clause. In the judicial realm, *Maqasid* needs to be defined in a comprehensive manner to include other judicial purposes, justice and deterrence, for example, by interpreting the text through the five

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<sup>482</sup> Id. 182.

<sup>483</sup> Hallaq, *supra* note 63 at 10-17.

<sup>484</sup> MOHAMED S. EL-AWA, THE ROLE OF THE PURPOSES OF ISLAMIC LAW IN CONTEMPORARY LEGISLATION, 47 (2006) (Arabic).

objectives which derive from necessities, public needs, and improvements of the society. *Maqasid* must serve as a basis for a precise theory that can help undergird the values of individual rights and democracy in the in the Iraqi courts.

## **5.0 FOURTH CHAPTER: APPLYING THE *MAQASID* METHOD IN THE FSC TO OPERATE THE REPUGNANCY CLAUSE**

### **5.1 Introduction**

Candidly, in theory, the *Maqasid* method might give legal decision makers to simply decide questions in whatever way seems reasonable to them? And if social welfare is the main criterion for a decision, how is the Court's implementation of the repugnancy clause a matter of law tied to objective text and not subjective policymaking? These are not easy questions to answer. In brief, obviously, the entire purpose of the *Maqasid* approach is to avoid detailed fiqh debates and replacing them instead with an approach that is more responsive to modern social needs and modern understandings of Islamic value, in the vein of thinkers like Abduh and Rida. This approach is also consistent with the Iraqi constitution which presupposes compatibility as between Islam's settled rulings, human rights, and democracy. However, the fact that there are value judgments of this sort undergirding the approach is different from suggesting that *Maqasid* are completely open-ended and are nothing but a form of completely open-ended policy making on the part of a judge.

This chapter shows the elements that the judge must invoke when relying on *Maqasid* method. These elements will determine the role of the judge in a specific manner. This chapter focuses on constitutional implementation and seeks to test the method of *Maqasid* and its validity to operate vis-à-vis the trilogy of the settled rulings, democracy, and human rights, which constrain legislation under the Iraqi Constitution. This chapter will not engage in the philosophical differences that allegedly arise from Islam-liberalism dichotomy or the relationship between Islam



and human rights values on one hand and Islam and democracy on the other hand. As Rabb states, “the dichotomy among Islam (a religion) to democracy (a form of governance) or Human rights (a human values), may be misleading.”<sup>485</sup> This chapter will instead base its analysis on the values of the Constitution only, which, as noted above, presupposes the consistency of the relationship among these components of the repugnancy clause. The Constitution, in other words, draws a modern vision of this relationship, a vision that accepts human rights, democracy, and settled rulings of Islam within one package based on societal need.<sup>486</sup> Any law regarding Sharia would have to satisfy both the human rights and the democratic requirements before it could be passed.

Unequivocally, the impact on future legislation is completely dependent on how this article is interpreted by the FSC, and this interpretation is not necessarily dependent on the substance of premodern law when the *Maqasid* approach is used. Thus, the decisions of the court in judicial review must be inclusive, consistent, and clear in dealing with the repugnancy clause. As previously stated, the court still has not been able to activate the repugnancy clause. By calling for the implementation of the method of *Maqasid*, this chapter will address the most important challenges facing the repugnancy clause operation, as mentioned earlier, in the hope of mapping out a principled approach to find ways to interpret Islamic settled rulings flexibly and in keeping with the spirit of the times, so as to conform to principles of modern legislation through the *Maqasid* method. The *Maqasid* approach will manage to navigate among the three different competing values in a way that will give meaning to all three.

This chapter will first present the mechanism of the implementation of *Maqasid*, then, the challenges of protecting human rights and democracy, which are enshrined in the Constitution,

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<sup>485</sup> Rabb, *supra* note 50 at 556.

<sup>486</sup> For example, The Iranian constitution only provided protections for the Twelver Ja'fari school, making the legislature's only concern the rights of Muslims.

and finally how *Maqasid* deals with significant challenges of human rights and democracy. The section of human rights challenges will concentrate on the most important challenges, which are religious freedoms and women's rights. The section of democracy challenges will review the challenges facing the operation of democracy, as outlined in the Constitution, and seek solutions through the *Maqasid* method. One of the significant challenges facing the operation of democracy is the role of Islamic jurists in the democratic system.

## **5.2 Developing a New Interpretation Method in the FSC to Apply the Interpretation of the Repugnancy Clause**

For the purpose of this chapter, the best method for the court to derive and apply the *Maqasid* is Al-Shatibi approach via the induction of the Sharia text in light of social needs. As discussed in Chapter 3, *Shatibi* designed the features of the theory of *Maqasid* of Sharia, which are responsive to social needs and utilize reasoning more understandable for courts and judges.<sup>487</sup> Relying on Islamic settled rulings means the exclusion of the details of various jurisprudential opinions whether *fatwas* or *Fiqh*. In this case, the court acts as an examiner and interpreter of law, not as legislator, needs to incorporate some broad standards that can be applied to check the constitutionality of any law while ignoring the minutiae and details in which jurists are trained. The *Maqasid* is the best way to help them to do so,<sup>488</sup> as it assumes that the nature of the question is different in legal issues and *Fiqh* issues. This dissertation looks to outline a contemporary role

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<sup>487</sup> See *supra* section 4.3.1

<sup>488</sup> For instance, drinking alcohol was a Scriptural Crime across the schools and the sects but, in 22 October 2016 Iraq's parliament has passed a law imposing a fine of up to 25m Iraqi dinars (\$17,000) for anyone importing, producing or selling alcoholic beverages. Thus, the parliament did not ban alcohol directly even if drinking alcohol is a crime in the consensus of Islamic jurisprudence.

of interpretations and rules of understanding the text, which varied depending on the intellectual and political circumstances as well as to reduce the role of traditional *Fiqh* as a main source for interpretation of Sharia.

Courts must thus invoke social needs as noted in U.S method, as well as the substantive meaning and material contents.<sup>489</sup> Therefore, I suggest that the revelation and implementation of *Maqasid* need to be through the judicial mechanism not as jurisprudential mechanism, based on the assumption that the judge has a fundamental obligation to commend right and avoid wrong and to honor the sacred text.<sup>490</sup> The judicial mechanism should evoke the societal needs with a rational understanding of the spirit of the scriptural text and exclude the aspect of worship. Moreover, the court should not pretend to embody divine sovereignty and majesty when making a ruling. The Court can determine whether an act corresponds to or contradicts with the *Maqasid* only. Additionally, I argue that Islam's Settled Rulings mean overall principles that do not depend on details of Islamic doctrines laid out by the classical schools of thought in the form of *Fiqh*. Thus, the court will not need to create detailed explanations of particular historical Islamic rules. In other words, the court has to focus on the goals of Islam rather than the detailed explanations of Islamic *Fiqh* which were set out in specific environments and times.

However, because achieving *Maslaha* is the final goal of all rulings, as *Shatibi* asserted, which are tied to worldly matters of all sorts, whether legal or not, it is rationally discernible, with the exception of rulings concerning ritual worship, which as noted, a Court need not concern itself with.<sup>491</sup> *Maslaha* is the preservation of *Maqasid* which consists of five things: preservation of religion, of life, or reason, of descendants and property. The *Maslaha* is significant in this process

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<sup>489</sup> Hallaq, *supra* note 63 at 27

<sup>490</sup> Abou El Fadl, *supra* note 400 at 6-25.

<sup>491</sup> Opwis, *supra* note 407 at 203.

because *Maslaha* undermined the view that *Maqasid* is open-endedness. Linking the *Maqasid* with the (*Maslaha*) leads to a theory that is simultaneously needs-based and ends-based.<sup>492</sup> Thus, as part of the judicial branch, there is an urgent need for specialists in all fields, such as economic, engineering, legal, and judicial, to determine their social interests.<sup>493</sup> The determination of interests by specialists rather than jurists is a fundamental point in this process, which will reduce the role of the jurists.

In this case, the judge has two options. One the judge can determine the *Maslaha* for refusing or supporting a law, then match this *Maslaha* to protect purpose of Sharia. The court can rely directly on the spirit of Sharia. In other words, the judge must decide which purpose of Sharia is needed to protect in this case, which could be part of human rights and democratic values, in order to indicate their compatibility with the law. In this case, the judges, who are supposed to have a knowledge of understanding the purposes of Sharia, anticipate following *Maqasid* when determine the *Maslaha* and not adhering to the form of the Sharia' interpretations as having several meanings by the Islamic jurists. This method is more flexible since the *Maslaha* is changeable, based on modern needs but in light of the institutional determination of the specialist's group who work with the Court.

The second option is the court can rely on the advice of consultants to determine the purpose of Sharia which needs protection. In this case, the law can be presented to the jurists experts first in order to demonstrate the Islamic ruling via scrutinizing the universal rulings of Sharia. Since Sharia has intentional interests, judges have to understand the relevant rule for each case. Then, according to jurists' determination, judges can invoke this purpose (*Maqasid*) to reject

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<sup>492</sup> Jason Morgan-Foster, *Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 8 YALE HUM. RTS. & DEV. L.J. 67, 75 (2005)

<sup>493</sup> This is unlike the Iranian application of *Maslaha* standard which is ambiguous and too general as we have pointed out at supra section 3.3.1.

or support a law. In this option, also the court can rely on the specialists to determine the interest of society. Even though the jurist decides the abstract Islamic rule, the judge's function is to examine the facts, the temporal and spatial circumstances of the case, and then decide whether to apply this ruling or not.

One can argue that this is equivalent to giving judges the power to strike down legislation based on their own subjective understanding of the public interest? In fact, the method that I suggest prompts a large role of a judge to best applying of the repugnancy clause, but the judge has to involve the public interest in light of *Maqasid* which is a reflection of the will of people, rather than values followed by judge only or the traditional thought of the Islamic schools. This method will avoid the danger in permitting a judge to just throw out a law the judge does not like on the theory that it does not serve the people which will be somewhat anti-democratic. To require the judge to make a statement of the compelling interest, which rely on the social need and *Maqasid* will prevent the judge to rely on purely subjective values.

Given that there is an absence of a specific judicially discernible and manageable standards in the law for applying the repugnancy clause, the judges must rely upon *Maqasid* to discover whether the law is consistent with the Sharia. The court could reason that the law either rationally complies or conflicts with the objectives of Islam. In any event, the court should support their decision either by the inductive approach of Sharia text or by the rational method.

There are exceptions to apply *Maqasid* method in the court. First is worship, as *Shatibi* determined, which usually does not have clear goals and the Court should not engage with it. This area includes Islam and other religions as well. The other exception is if the Council of Representatives of Iraq (i.e. its national legislature) enacts a law that includes a textually demonstrable commitment, which is mentioned clearly in the text of the *Quran or Sunnah*, with

explicit goals, then, in this case, the judges should apply this goal to assure that the law is consistent with the repugnancy clause. For instance, if a law is related to inheritance rules which appear in primary source material (Quran or *Sunnah*), the inheritance rules are rigid and not subject to power of testamentary disposition, since they are based on rules directly taken from the text of the Qur'an.<sup>494</sup> The court must set clear standards when there is a clear text that will not leave room for confused interpretations. For example, texts cannot accept more than one interpretation or contain specific numbers that do not accept interpretation as in the case of inheritance verses.

To undertake this method and deploy these mechanisms, the court must take several steps. First, the court has to lay down an intensive training program for FSC judges to exercise judicial review in light of *Maqasid*.<sup>495</sup> It is an important element to guarantee that judges are able to enforce this understanding of *Maqasid*.<sup>496</sup> The second step is that the FSC has to adopt an interpretation of Islam's Settled Rulings as equivalent to the objectives of Islamic *Maqasid*. This is better than seeking clarification in constitutional amendments because the Constitution of Iraq is very hard to amend by its terms.<sup>497</sup> This sort of approach is not unprecedented. For example, the Supreme Constitutional Court of Egypt has referred, in dicta, to the *Maqasid* Al-Sharia method to invoke the principles of Islamic Sharia in interpreting its own repugnancy clause.<sup>498</sup>

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<sup>494</sup> The following verses from the Qur'an explain the concept of the sources of inheritance rule in Islam: "M[en shall] have a share in what parents and kinfolk leave behind, and women shall have a share in what parents and kinfolk leave behind, whether it be little or much--a share ordained [by God]." Qur'an, sura an-Nisa 4:7 (second alteration in original). "[A]nd they who are [thus] closely related have the highest claim on one another in [accordance with] God's decree." Id. sura al-Anfal 8:75 (second and third alterations in original) (footnote omitted). For general information.

<sup>495</sup> Also, it would be helpful to place study of *Maqasid* as part of law school and Judicial Institute curriculums

<sup>496</sup> Similarly, Afghan judges received a "significant specialized Sharia training" to teach them how to interpret Islamic law. See Lombardi, Constitutional Provisions Making Sharia, *supra* note 12 at 628.

<sup>497</sup> IRAQ CONST. art. 174(2) state: The fundamental principles mentioned in Section One and the rights and liberties mentioned in Section Two of the Constitution may not be amended except after two successive electoral terms, with the approval of two-thirds of the members of the Council of Representatives, the approval of the people in a general referendum, and the ratification by the President of the Republic within seven days.

<sup>498</sup> For instance, in case no. 35/2000, the court concluded that *ijtihad* is "tolerated in controversial issues whose judgments shall not be rigid leading them to conflict with the perfection and flexibility of Sharia. This is so

In sum, looking at debates about how best to enforce Islamic values, in the young democracy of Iraq and looking also at the experience of Muslim countries that have tried to enforce the Repugnancy Clause in keeping with a broadly acceptable, generally modern interpretation of Islamic values, this proposal makes suggestions for countries which intend to enforce their fundamental principles of democracy and human rights through Islamic review, which comports with the *Maqasid* of Islam. This should be a suitable method for the accomplishment of this goal.

### 5.3 Human rights of the repugnancy clause Through Maqasid method

The Iraqi Constitution has more than 52 enumerated rights, which makes this the Constitution in the Arab world with the highest number of rights; the previous constitution does not have this many rights.<sup>499</sup> The first section of the rights lists civil and political rights which include, but are not limited to, the right to equality before the law, the right to equal opportunity, the right to life, the right to be free from slavery, the right to freedom of speech, the right to

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long as it complies with the frame of the universal principles of Sharia without the least violation, is derived from the textual and the rational legal indications of the Sharia and guarantees the *Maqasid* of Sharia".al-Mahkamah al-Dusturiah al-Ulya [Supreme Constitutional Court], case no.35,session of 6 May 2000,year 20. See also, case no.7,session of 15 May 1993,year 8 and case no.203,session of 14 April 2002 year 20.

<sup>499</sup> These freedoms and guarantees indicate that Iraqi constitutional founders followed the moderate cultural relativism school which accepts a core set of universal rights as necessarily and valid for all cultures, but does not accept that all rights apply to all cultures. The Constitution also, close the door over these debates by saying that Article 2 protects the rights guaranteed in the Constitution only. In fact, there are three main schools of thought regarding human rights: "**universalism**," which argues that all human rights must be applied to all cultures and thus Shari'a law and religious authorities should not be allowed to dictate and subsequently curtail human rights; "**strict cultural relativism**," which advocates that cultures are so vastly different and beliefs so irreconcilable that there can be no set of values universally applied; therefore, countries should be at liberty to set their own standards (religious or otherwise); and "**moderate cultural relativism**," which accepts a core set of universal rights that are necessarily valid for all cultures, but disagrees that all rights apply to all cultures.<sup>104</sup> None of these categories can adequately capture the dilemma the international community faces when dealing with Islam, Shari'a, and human (particularly women's) rights.Katherine M. Weaver, Women's Rights and Shari'a Law: *A Workable Reality? An Examination of Possible International Human Rights Approaches Through the Continuing Reform of the Pakistani Hudood Ordinance*, 17 DUKE J. COMP. & INT'L L. 483, 497 (2007) See Morgan-Foster, supra note 492 at 70.

assembly, the right to freedom of movement, the right to asylum for a non-Iraqi, the right to privacy, the right to nationality, the right to access to justice, the right to political participation, and the right to freedom from inhumane treatment.<sup>500</sup> In addition and separately, this Constitution also provides economic, social, and cultural rights which include the right to work, the right to form unions, the right to private property, the right to free trade, the right to raise a family, the right to health, the right to environment, the right to education, and the right to social security.<sup>501</sup> Moreover, the constitution guarantees the full religious rights to freedom of religious belief and practice of all individuals, such as Christians, Yazidis, and Mandeans, as well as adherence to their personal status law in accordance with their own religion sect and belief, and the right to freedom of religion, the right to freedom from political and religious coercion.<sup>502</sup> Article 45 provides that the State shall, "prohibit the tribal traditions that are in contradiction with human rights."<sup>503</sup>

All of these rights and freedoms are assumed to be in conflict with the Islamic component of the repugnancy clause. Causing more confusion, as noted above, there are different schools of Islamic jurisprudence which led to the instability of the role of religion in the constitutional system of Iraq.<sup>504</sup>

In fact, however, a *Maqasid* approach consistent with the international human rights movement because it protects the basic needs of human beings, which are common goals of the global human rights movement. Applying *Maqasid* as a complementary model to operate the

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<sup>500</sup> Iraqi Constitution, *supra* note 7 at Arts 14,15,16,17,18,19,20,21,39,37,38,41,43,44,132.

<sup>501</sup> Id. arts, 22,23,24,27,25,29,30,31,33,34.

<sup>502</sup> Id. Arts 2 s 2, 41,42,43.

<sup>503</sup> IRAQ CONST. art. 37, §2 ("The State shall guarantee protection of the individual from intellectual, political, and religious coercion [ikrah]."); see also id. at art. 37, §1, cl. C ("All forms of psychological and physical torture and inhumane treatment are prohibited. Any confession made under force [bi-al-ikrah], threat, or torture shall not be relied on....").

<sup>504</sup> See *supra* section 2.2.4.



repugnancy clause would combine the strengths of other components. In this way, *Maqasid* "can serve as a necessary complement to an otherwise incomplete rights perspective, the latter having a comparative advantage in some areas, such as equality, and the former having a comparative advantage in other areas, such as social welfare."<sup>505</sup> This will develop common concepts between the local and global values, for example, one of the purposes of the Sharia is the welfare of the human being and protection from harm. This is one of the basic goals of international human rights conventions as well. Linking human rights to a protected interest under Sharia will further strengthen the role of human rights in society and makes them more acceptable. Two important issues may yet prove contentious: the freedom of religion and women rights. In this section, we will focus on the challenges facing the first of these, and the next section deals with the second.

### **5.3.1 The Freedom of Religion Through Maqasid method**

Examining the religious freedoms approved by the Constitution raises many questions that we will try to answer in light of the *Maqasid* method. Will religious freedom conflict with the religious identity of the country and the Islamic settled rulings as confirmed by Article 2 of the Constitution? How will the FSC treat the question of apostasy from Islam, which many Islamic jurists believe is incompatible with a human rights perspective and should be punished? If this occurs, is there a way to resolve said contradiction? Finally, can the court rely on public order and ethics to restrict religious freedoms?

Apostasy, as a politically and legally salient topic, may engage the court in different ways. First, by laws that may allow people leaving Islam, which could be deemed by some to be contrary

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<sup>505</sup> Morgan-Foster, *supra* note 492 at 75 and MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 40 (2003).

to the Islamic identity of the state or with Islamic settled rulings, approved by Article 2. Or, conversely, through the application of previous laws or the enacting of new laws which punish apostates.<sup>506</sup> These laws also counter the religious freedoms approved by the Constitution. To solve the challenge of apostasy, the court must address important questions, such as: Is the punishment of apostasy one of the Islamic settled rulings and how will *Maqasid* contribute to solving this challenge?

#### **a.Apostasy and the Islamic settled rulings**

This section argues that the punishment of apostasy is not one of the Islamic settled rulings and therefore cannot be used to violate human rights. Of course, this will not end the controversy that would occur if the legislature passed a law punishing apostasy.<sup>507</sup> The Court would be in a critical situation if it did not find a solution consistent with the three components of the contradiction clause. Even if the court applied the consensus of the Islamic schools test, which Burroughs suggests, this would not be workable because there is no consensus in these schools about the criminality the apostasy, at least if the views of modern scholars are considered.<sup>508</sup> These scholars argue that historical sources confirm that the punishment of apostasy is of a purely political nature, used to exclude opponents of some caliphs. Some jurists, to gain religious cover, interpret the text in a manner consistent with the desire of the Caliph.<sup>509</sup>

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<sup>506</sup> Burroughs, *supra* note 366 at 518.

<sup>507</sup> Indeed, Burroughs provided an extensive study on the issue of apostasy, the likelihood of occurrence in Iraq and how the judicial authorities should address it. To do so, he invoked an ancient jurisprudential solution with some contemporary theories such as the consensus of the Islamic schools as a test. He called for the liberalism of the judiciary, as happened in Egypt, to resolve this crisis. But the solutions there were not effective and he stressed that there was a high possibility of igniting the crisis at any time. Moreover, he ignored the solutions that come from within, from inside Sharia itself and from within the court, through the use of *Maqasid*, for example. Burroughs, *supra* note 366 at 517-33. See also, Dr. Jonathan S. Brown, *The Issue of Apostasy in Islam*, Yaqeen Institute for Islamic Research, 5 (2017).

<sup>508</sup> Burroughs, *supra* note 366 at 520.

<sup>509</sup> Alalwani, *supra* note 37 at 55-56.

In fact, after the fourth caliph, most Muslim jurists considered apostasy as worthy of capital (Hudud) punishment based on literal interpretations of the texts.<sup>510</sup> This is because it is "rebellion against Islam, its traditions, laws and regulations."<sup>511</sup> These schools differed on how to justify the punishment of apostasy, quarreling between individual behavior and treason as reasons. Also, they were based on incorrect evidence. For example, to justify their position, traditionalists often rely on the hadith: "kill him who changes his religion. "The hadith in question: "kill him who changes his religion." According to progressive critics, if this Hadith is authentic, the interpretation of this hadith would mean that converts to Islam should also be killed).<sup>512</sup> Many jurists in the *Shi'a* school considered to be a Tazir where punishment is discretionary. The *Hanafis* likewise held that punishment of female apostates was a matter of discretion.<sup>513</sup>

Traditional criminalization of apostasy has been rejected by other modern Islamic scholars. They asserted that criminalization of apostasy is "fundamentally inconsistent with Islam's commitment to free acceptance of religious truth based on a rational conviction."<sup>514</sup> Sheikh *Mahmoud Shaltout*, the former *Al-Azhar* institution declares: "The apostate should not be killed,

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<sup>510</sup> Hudud crimes is the highest echelon of offense in Islamic law and include *zina* (unlawful sexual intercourse), unfounded accusations of *zina*, drinking alcohol, highway robbery, and some forms of theft. Ahsan & Nyazee, *supra* note 61 at 132.

<sup>511</sup> All schools of Islamic jurisprudence have concluded that apostasy is a punishable offense, and their only divergence lies in how they classify it within their respective penal schemes. However, they did not explain the basis for these opinions. See ABDULLAH SAEED & HASSAN SAEED, FREEDOM OF RELIGION, APOSTASY AND ISLAM, 56 (2004).

<sup>512</sup> *Id.* at 56.

<sup>513</sup> The Shia cleric, Grand Ayatollah Sayyid al-Khoei has given the following opinion: "Question: What is the understanding of apostasy [al-ridda wa al-irtidad] in Islam? Answer: Apostasy [al-irtidad] is a Muslim's leaving Islam, by rejecting either the essentials of Islam, or one of its pronounced obligations to the point that it is a denial of God or the Prophet." SAYYID ABU AL-QASIM AL-KHOEI, MUNHAJ ALSALHIN - TAKMILAT MUNHAJ ALSAALIHIN [THE PLATFORM OF THE RIGHTEOUS - A PLATFORM FOR THE RIGHTEOUS ] 52-57 (1989)(Arabic). The ta'zir offenses are those for which punishment is left to the judge's discretion, rather than being prescribed by the Quran as in the case of the hudu. Ahsan & Nyazee, *supra* note 61 at 143.

<sup>514</sup> Also, see MOHAMMAD HASHIM KAMALI, FREEDOM OF EXPRESSION IN ISLAM 93-96 (1997).

Quran speaks only of punishment in the afterlife.”<sup>515</sup> He insists that blasphemy itself is not justified for killing, but it might be permissible if the blasphemies attack Islamic society, inspire aggressive acts against them, and try to spread sedition in Islamic society. He added that many verses of the Quran refuse coercion in religion. Also, the *Hadith* above can be understood as a warning to only those who leave Islam.<sup>516</sup>

Clearly, jurists have differed as to whether apostasy from Islam is Hudud crimes, which means it would not be one of the constants of the Islamic settled rulings.<sup>517</sup> This also supports the previous call that the court cannot rely on traditional jurisprudence which has temporal and spatial circumstances. The court can rely only on the spirit of Islamic values as *Maqasid*, informed by modern social needs and necessities.

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<sup>515</sup> MAHMOUD SHALTOUT, AL'ISLAM EAQIDAT WASHRIE[ ISLAM IS A BELIEVE AND A SHARY'A,] 130 (2001) (Arabic)

<sup>516</sup> Id.

<sup>517</sup> For example, as reaction of the difference among the Islamic schools some of Malaysia's states have enacted their own approaches to dealing with apostasy. In the Malaysian state of Malacca, apostasy earns one up to 180 days of detention for rehabilitation. The Malaysian state of Negeri Sembilan has taken another approach: those who want to leave Islam apply for permission. After they have been interviewed to determine their seriousness, and counseled to try to convince them otherwise, they are allowed to apostatize (between 1998-2013, 17% of applications were accepted). Azweed Mohamad, *Discourse Analysis on Newspaper reports of Apostasy Cases*, Journal for the Study of Religions and Ideologies, 96 (2017)

### **b.Apostasy in the Maqasid Method**

Using Al-shatbi's approach, the Iraqi-American scholar *Al-Alwani* stressed that he examined Sharia and found that freedom of choice is a fundamental purpose in Islam. Therefore, Sharia cannot punish a person for his freedom of choice which was granted by Sharia, nor can anyone be compelled to convert to Islam since belief exists in the heart and this cannot be discovered by humans.<sup>518</sup> *Al-Alwani* extrapolates this from more than 200 verses in the Quran which refer to the punishment of those who left Islam. This punishment exists only in the Hereafter, not as an earthly punishment,<sup>519</sup> because faith is a relationship between a person and God, and no one can know it nor use it to punish him or her. Al-alwani examined the *Sunnah* and confirmed that there was no evidence that the Prophet had killed apostates.<sup>520</sup> He also discovered that there is no evidence that one of the fourth caliphs have punished an individual for their act of leaving Islam.<sup>521</sup> For example, the first caliph, after the prophet died, was Abu Bakr and he did have the Ridda wars but he justified this war because there were more than one tribes attempted to leave Islam and there was a potential danger to the Muslim community.

This turbulence in the statement of the rule of apostasy reinforces the idea of relying on the purposes of Sharia instead of delving into doctrinal interpretations. The most important purpose to be observed in this area is freedom of religion is a fundamental purpose of Islam. On this basis,

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<sup>518</sup> Al-alwani, *supra* note 37 at 148-149. The Quran guarantees religious freedom, basing this conclusion on the following verses: “[u]nto you your religion, and unto me my religion”; Quran, Al-kafiroon, 30:6. “[t]hen whosoever will, let him believe, and whosoever will, let him disbelieve” Quran Al-Kahef 15:29. and “[t]here is no compulsion in religion.” Quran, Al-Baqara ,2:256.

<sup>519</sup> “Lo! those who disbelieve, and die while they are disbelievers; on them is the curse of Allah and of angels and men combined....” Quran, Al-Baqara 2:161. “As for those who disbelieve, lo! if all that is in the earth were theirs, and as much again therewith, to ransom them from the doom on the Day of Resurrection, it would not be accepted from them. Theirs will be a painful doom.” Quran, Al-māidah 5:36.

<sup>520</sup> Al-alwani, *supra* note 37 at 125.

<sup>521</sup> Al-alwani, *supra* note 37 at 140. And Saeed & Saeed, *supra* note 511 at 56.

the FSC should base its decision on the grounds that there is no compulsion in religion in keeping with the *Maqasid* based ideas as developed by Alwani, Kemali, and others.

### **c.Apostasy in the Iraqi legal system**

The other question is whether the provisions of the Constitution allow the adoption of the apostate's punishment. The Constitution has a lot of guarantees to the freedom of religion which indicate that it is highly difficult to accept this punishment. The repugnancy clause stipulated that the law should be examined through the three components which include human rights as set forth in the Constitution. These human rights in the Constitution guarantee the freedom of religious practice and beliefs. Any Iraqi law that violates the rights guaranteed by the constitution is void. For instance, the Iraqi Constitution has set down more than one guarantee regarding the freedom of religion. These include Article 2, which refers to “the full religious rights to freedom of religious belief and practice of all individuals,” Article 42, which holds that “[e]ach individual shall have the freedom of thought, conscience, and belief,” Article 38, which grants freedom of expression, and Article 41, which guarantees the freedom to practice religious rites.<sup>522</sup> They also include Article 7 which prohibits *Takfir*, or which accusing others of apostasy which usually is used to accuse others of atonement because of their beliefs.<sup>523</sup> Article 37 which guarantees Iraqi citizens protection from religious coercion, an imperative which would, at first blush, preclude the Iraqi state from penalizing individuals for leaving Islam.<sup>524</sup> Under these constitutional protections of religious freedom, it is inconceivable to allow the apostate's punishment. Although some lower

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<sup>522</sup> IRAQ CONST. art. 2, §2, 38,42,41.

<sup>523</sup> IRAQ CONST. . art.7.

<sup>524</sup> IRAQ CONST. art. 37, §2 (“The State shall guarantee protection of the individual from intellectual, political, and religious coercion [ikrah].”); see also id. at art. 37, §1, cl. C (“All forms of psychological and physical torture and inhumane treatment are prohibited. Any confession made under force [bi-al-ikrah], threat, or torture shall not be relied on....”).

courts attempt to apply the religious freedom guaranteed by the Constitution, rather than the traditional *Fiqh*, the FSC and some lower courts are still hesitant to decide in light of the constitutional rights only which guarantee religious freedom.<sup>525</sup> For example, look at the most remarkable case in the Kurdistan Court of Cassation, the case of the Christian child whose parents had separated. His father remained Christian and had custody of the child, but his mother converted to Islam. The child wants to register as a Christian when he becomes an adult, despite his mother's conversion. The Court reasoned that according to 2004 Transitional Administrative Law (“TAL”) there are broad rights of religious exercise. In addition, this law prevented passing any law conflicted with the rights and freedoms of Iraqis. The court affirmed the freedom of choice, as a goal of Sharia, and asserted that the son had not ‘rejected’ Islam by ‘converting’ to Christianity, given the tenuous relationship he had to his mother at the time. The court also implicitly referenced that traditional jurist views deserved re-thinking. Citing a verse of the Qur'an that specifically declares “there shall be no compulsion in religion.” The Court indicated that compelling this individual to be a Muslim was itself contrary to Islam.<sup>526</sup> In contrast, other courts have continued to deny religious freedoms as they concern conversion from Islam. For example, in 2008, the Court of Cassation denied the son sought to register himself as a Christian because his father, who was Iraqi Christian, converted to Islam and effectively converted his 16-year-old son as well. The court referred to the Saddam-era case law to deny this case.<sup>527</sup> These Courts are better able to

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<sup>525</sup> In another case, Iraqi Personal Status Court stated that the Iraqi Constitution recognizes the plurality of religions, protecting individuals from any religious compulsion and providing explicitly for the right of religious faith. The court characterized a request for a return to the marital home for disobedience as a form of violence against women, an abuse of rights, and a breach of the marriage contract, which is based on love, affection, and respect, according to the court. Baghdad Court of Appeals, Rusafa, Case no. 52, 31 May 2009 (Iraq).

<sup>526</sup> [Court of Cassation for the Region of Kurdistan], unnumbered decision of Dec. 25, 2004 (Iraq), reprinted in 45 A Summary of Judicial Implementation in the Courts and Centers of Justice 25 (J. Abdullah Ali Sherfani ed., 2006). cited by Hamoudi, *supra* note 139 at 409.

<sup>527</sup> [Iraq Court of Cassation], decision No. 285 of Dec. 31, 2008, reprinted in 2 A Selection of Cases from the Federal Court of Cassation: Cases on Personal Status 424 (J. Razzaq Jabbar Ilwan ed., 2011).cited by Hamoudi, *supra* note 139 at 408.

address these cases if they invoke the *Maqasid* approach by referring to the purpose of protecting the family, which must preserve the family structure by recognizing the freedom of choice granted by the Sharia. If the child chooses to stay with his father and this will support the stability of the family, this would be better than protecting any hypothetical interest of an absent mother.



#### **d.Apostasy and Islamic identity, public order and ethics**

Perhaps some will argue that the adoption of non-punishment of apostasy will conflict with the Islamic identity and reference to Islam as a basis for legislation, which was approved by the Iraqi constitution.<sup>528</sup> In fact, that provision is a “symbolic gesture, honoring the central importance of Islam to the lives of many Iraqis. It is descriptive rather than prescriptive.”<sup>529</sup> The court cannot rely upon this symbolic provision because it has a clear provision of the repugnancy clause that imposes actual obligations on the court and this clause explains the meaning of Islam as a source of legislation. In light of the *Maqasid* approach, the court can respond to this argument by explaining that the issue is whether this form of Islamic identity is part of necessities (*daruriyyat*), needs (*hajiyyat*), or luxuries or improvements (*tahsin, tawsi‘a*)? Certainly, the symbolism of the identity of Islam can be placed on the level of needs or improvements, which can only be violated in exchange for protection of life, when necessary. The protection of life, assuming that the Iraqi parliament passes the capital punishment for apostasy, is preferable over protecting the Islamic symbolism which the constitution presupposes.<sup>530</sup> Life is the basis for other purposes. Without life, protection of posterity or family, protection of intellect or mind, protection of religions, of faith, and protection of wealth or property cannot be imagined. Also, it is not clear that apostasy criminalization protects Islamic identity at all. After all, to punish people if they do not follow the Islamic rules will generate counter-reactions to Islam, as happened when ISIS control some Iraqi cities, who has made Muslims, alienated them, and thus diminished respect for Islamic values.<sup>531</sup>

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<sup>528</sup> Burroughs, *supra* note 262 at 525.

<sup>529</sup> See Deeks & Burton, *supra* note 8 at 10

<sup>530</sup> Auda, *supra* note 27 at 62. Auda also asserts that the protection of religion, within the framework of the Maqasid approach, refers to the protection of all religions, not just the Islamic religion.

<sup>531</sup> Dr. Jonathan S. Brown, *supra* note 507 at 26.

Another challenge concerns whether the court may rely on public order and ethics to restrict religious freedoms, which leads to punishment of the apostate, as happened in courts in other Islamic countries.<sup>532</sup> In response to this claim, the articles of the Iraqi Constitution, which guaranteed the freedom of religion, did not provide any exception to this protection,<sup>533</sup> unlike other articles which stipulated certain freedoms should not directly be encumbered by “public order and morality.” The role of *Maqasid* approach will close the door on these limiting interpretations of freedom because the relationship of an apostasy law to public order is more removed and it is a direct restriction on freedom of religion. That a main purpose of Sharia and the relationship is direct and obvious. In addition, this *Maqasid* method requires the legislator and the judge to rely on a particular purpose when trying to restrict any right or freedom approved by the constitution.

In sum, the criminalization of apostasy is one of the controversial topics in the traditional *Fiqh*, and it is not in accordance with Sharia. The basic principle of Sharia is that there is no compulsory religion, and there is no provision in the Sharia that says that apostasy is criminal. Therefore, when examining a case of apostasy, the court must take into account the *Maqasid* approach, in this area freedom of religion is a fundamental purpose of Islam, as well as, the interest in the legislation and the social facts to reach a decision on the extent of conformity or violation of the law to the repugnancy clause.

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<sup>532</sup> EGYPT CONST. art. 46.

<sup>533</sup> IRAQ CONST. *supra* note 7 at Art 42 “each individual shall have the freedom of thought, conscience, and belief.”

### 5.3.2 Women's Rights through the Maqasid method

The Iraqi Constitution emphasizes women's rights in several articles, which one commentator described as a “major advance in Arab constitutions.”<sup>534</sup> For example, Article 14 requires equality and prohibits discrimination against women.<sup>535</sup> Article 18 was also a critical component of the women's rights agenda in Iraq, addressing issues such as Iraqi mothers' ability to grant her child Iraqi citizenship even if the father is not Iraqi. Article 20 provides for equality in political rights, such as participating in public affairs, voting, and running for political office.<sup>536</sup> The Constitution also prohibits trafficking of women and children. Also, other provisions of the Iraqi Constitution make reference to the role of women in the family and oblige the Iraqi government to protect “motherhood” and prohibit domestic abuse.

These rights enshrined in the Constitution authorize the Iraqi lower courts to protect women's rights in many cases, but the FSC needs more steps to advance women's rights. For instance, an Iraqi Appellate Court relied on the right to freedom of movement to hold that “the husband did not have a right to prevent his wife from traveling because this would violate her right to freedom of movement, as provided in Article 42 of the Iraqi Constitution of 2005.”<sup>537</sup> As is well known, the husband's consent to travel is a recognized opinion in Islamic *Fiqh*, but the court was acted boldly by enforcing the standards of human rights over the common juristic view. Unfortunately, the FSC was not as forward-thinking in similar cases. Maybe that is because, as Hamoudi reported: “If FSC were to reverse the Court of Cassation's ruling, it would risk the wrath

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<sup>534</sup> Carolyn A. Dubay, *Beyond Critical Mass: A Comparative Perspective on Judicial Design and Gender Equality in Iraq and Afghanistan*, 24 FLA. J. INT'L L. 163, 191 (2012)

<sup>535</sup> IRAQ CONST. *supra* note 7 at art. 18

<sup>536</sup> IRAQ CONST. *supra* note 7 at art. 20

<sup>537</sup> High Judicial Council/Appellate Court, decision of June 27, 2011 (Iraq).

of powerful Islamist groups and Najaf for taking a radical step in favor of secularizing the state.”

<sup>538</sup> The implementation of the *Maqasid* approach will combat this, by giving the court a wide space to move within the framework of the repugnancy clause to protect women's rights while still operating within an authoritative and legitimate Islamic framework.

Challenges to women's rights can come to the FSC when legislative changes or executive decisions attempt to undermine the guarantees of the constitution, adopted within the patriarchal culture and labeled as religious rules.<sup>539</sup> These include domestic violence, the age of marriage, polygamy.<sup>540</sup>

The *Maqasid* method is relevant to the reform of the rights of women, as suggested in this section. The promotion of the purposes of protecting the family and women is an important step because Sharia did not provide many details of this protection.<sup>541</sup> Sharia established the basic values for protecting the women then stressed that the protection of women and family should be among these values and objectives.<sup>542</sup> On the other hand, Islamic history shows that there was a tendency to “incorporate and assimilate the social customs of the various regions and

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<sup>538</sup> Hamoudi, Religious Minorities *supra* note 139 at 408–09.

<sup>539</sup> Dubay, *supra* note 534 at 197.

<sup>540</sup> For more details about the violence of women rights see for example, AYESHA S. CHAUDHRY, DOMESTIC VIOLENCE AND THE ISLAMIC TRADITION: ETHICS, LAW AND THE MUSLIM DISCOURSE ON GENDER (Oxford University Press, First ed, 2013) She explores the complexity and diversity of the Muslim intellectual tradition on the topic of marital violence. Nor was patriarchy unique to Islam; all living religious traditions rooted in a patriarchal social and historical context must find a way to reconcile gender egalitarian values with religious traditions that primarily served the interests of men.

<sup>541</sup> In actuality, the Prophet Muhammad enhanced the rights of Islamic women during his time. Before the spread of Islam across the Arabian peninsula, women had no legal status and could be sold into marriage at any time against their will. The Prophet implemented what were, at the time, revolutionary reforms to protect women's status and inheritance rights. Katherine M. Weaver, Women's Rights and Shari'a Law: A Workable Reality? An Examination of Possible International Human Rights Approaches *Through the Continuing Reform of the Pakistani Hudood Ordinance*, 17 DUKE J. COMP. & INT'L L. 483, 505 (2007).

<sup>542</sup> DR. ZAINAB ALWANI, ALUSRA FI MAQASID AL SHARIA: QIRA' FI QADAYA AL ZAWAJ WALTALAQ FI AMRIKA [THE OBJECTIVES OF SHARIA AND THE FAMILY: CRITICAL READING IN MARRIAGE AND DIVORCE IN AMERICAN MUSLIM FAMILY] 73 (2013) (Arabic).

communities.”<sup>543</sup> Women in the context of *Maqasid* have many advantages, such as a special goal associated with protection of family as part of community protection. Under the *Maqasid* approach, all claims that Islam is hostile to women and women's rights disappear, including the lack of equality between men and women under the guise of an egalitarian-authoritative approach. Women are equal with men under *Maqasid*; their lives, religion, wealth, offspring and thought are protected the same as men; all are under the umbrella of justice.<sup>544</sup> Therefore, by applying the *Maqasid* method, the court can successfully define Sharia as a protective device for its women rather than a persecutory one.

How does the *Maqasid* method engage with concerns of polygamous marriages, a common argument used to indicate that Sharia is incompatible with women's rights? Applying the *Maqasid* method, Muhammad Abduh restricted polygamy by looking at Qur’anic verses that mention the aims of marriage and also the requirement of justice that is associated with the permission of polygamous marriages. One of the famous *fatwas* that applied the *Maqasid* method to protect women’s rights permitted judges to prevent Egyptian men from practicing polygamy based on Abduh’s conception that marriage should achieve the religious objective of “justice” and that in most contemporary polygamous marriages in Egypt at the time, justice within the family was not served. This ruling was made despite the traditional juristic view, based on a Quranic verse, that the practice of polygamy itself is religiously permitted.<sup>545</sup> Again, the Courts did not enter into the *Fiqh* debates but approached *maqasid* flexibly, in the context of the times, and found it deeply problematic.

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<sup>543</sup> Abdullahi An-Na’im, Ph.D., *The Rights of Women and International Law in the Muslim Context*, 9 Whittier L. Rev. 491, 493 (1987) Also. see Laura A. Weingartner, Family Law & Reform in Morocco-the Mudawana: Modernist Islam and Women's Rights in the Code of Personal Status, 82 U. DET. MERCY L. REV. 687, 692–93 (2005).

<sup>544</sup> Id. at 102 . and Mahmoud Shaltout, Id. at As Justice Bradley stated, “[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.”Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

<sup>545</sup> Yasir S. Ibrahim, Rashīd Riḍā and Maqāṣid Al-Sharī’a. *supra* note 448 at 73.

The Iraqi Personal Status law provides a broad protection for women in light of polygamy. For instance, the Article prohibits marrying more than one wife unless one receives permission from a judge. Such permission is contingent upon the husband having financial ability to maintain more than one wife and after proof of a ‘legitimate interest,’ which it does not define.’ In addition, Article 3(5) does not allow polygamy if there is fear that the husband will not be just among his wives. Article 40(5) states that a wife is entitled to ask for judicial divorce in the event her husband marries a second wife without the permission of the court.<sup>546</sup> Even if the Iraqi Personal Status restricts polygamy, the court can rely on the *Maqasid* method to support the protection of family under the value of justice. For example, in deciding what a “legitimate interest” is, the court must not look at the financial eligibility of the husband for a second marriage, since the man is under classical fiqh, as an obligation for marriage, not as a condition to enter into it, he has to sponsor his wife and provide for her needs.<sup>547</sup> The court must consider the purposes of polygamy within Sharia, which are to protect the family and preserve justice.<sup>548</sup> Also, the *Maslaha* of the Iraqi society display facts to the court and prove that most of the second marriages in Iraq threaten the foundation of the family because of the absence of justice, which is a fundamental purpose of the Sharia.

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<sup>546</sup> Law No. 188 *supra* note 123 at art. 3(4,5) 40(5).

<sup>547</sup> The Qur'an states, “men are in charge of women, because God has made the one of them to excel the other, and because they spend of their property [for the support of women].” Qur'an ,An-Nisa, 4:34

<sup>548</sup> The Qur'an states, “[i]f you fear being unfair, marry only one woman,” Qur'an ,An-Nisa,4.

## 5.4 Democracy of the repugnancy clause Through Maqasid method

This section deals with whether the FSC could contribute to the transition to and the consolidation of democracy and could be legitimized as a guardian of democracy normatively from the point of *Maqasid*. In fact, in accordance with procedural forms of democracy, democracy can be conceived of as a procedural mechanism for state administration and access to power.<sup>549</sup> This concept of democracy would not raise a conflict between Sharia and democracy. For example, the religious parties have accepted the democratic approach as a means of governance. Specifically, Sistani has openly stated more than once that he supports democratic values. He has always called for people to participate in elections and does not support one party over another. In contrast, in light of substantive democratic values, one of the fundamental issues raised in the democratic realm is: since the Iraqi constitution enshrined Islam as the official religion and the source of legislation, which cannot be contravened by social policies, what is the role of Islamic jurists in the democratic system, given their historical role in interpreting Sharia?

### 5.4.1 The role of Islamic jurists in the democratic system

The most important powers of the FSC are overseeing the constitutionality of laws and regulations in effect, in light of the repugnancy clause, and interpreting the provisions of the Constitution generally, not encompassing the entire knowledge of Sharia.<sup>550</sup> As noted above, the

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<sup>549</sup> Rabb, *supra* note 50 at 556.

<sup>550</sup> IRAQ CONST. art. 93 (1-2).

In addition to these function the FSC in Iraq has also:

Third: Settling matters that arise from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The law shall guarantee the right of direct appeal to the Court to the Council of Ministers, those concerned individuals, and others.

legislators and the judges of the FSC are not able to understand and determine the content of Islamic Jurisprudence in all its complex detail. In fact, it would be controversial for them to even try to apply Islamic jurisprudence in its traditional form. For instance, most *Shias* believe that the interpretation of Sharia requires a specialized training that most Iraqi judges lack.<sup>551</sup> This is why Article 92 (2) sets out that “[T]he FSC shall be made up of a number of the judges, experts in Islamic jurisprudence, and legal scholars.” This implies that the interpretation of these Islamic rules would be on the basis of Islamic jurisprudence. However, increasing the roles of Islamic jurists in the legal process might impose juristic limitations on democratizing the country, when sanctifying their knowledge authority and acquiescing to this authority in a way that “does not comport with the democratic processes for legislation.”<sup>552</sup> Thus, this proposal for the Court to use *Maqasid* as the basis of repugnancy seeks to limit the contemporary role for Islamic jurists, not overstep the role of judge.

Additionally, the embodiment of *Fiqh* or Sharia will open the door to more roles of jurists in the constitutional realm. To protect human rights and democratic values through Islamic settled rulings, it is important to focus on the design and structure of the court which will interpret the repugnancy clause rather than the clause itself. Thus, it is important to draw a clear role for the

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Fourth: Settling disputes that arise between the federal government and the governments of the regions and governorates, municipalities, and local administrations.

Fifth: Settling disputes that arise between the governments of the regions and governments of the governorates.

Sixth: Settling accusations directed against the President, the Prime Minister and the Ministers, and this shall be regulated by law.

Seventh: Ratifying the final results of the general elections for membership in the Council of Representatives.

Eight: A. Settling competency disputes between the federal judiciary and the judicial institutions of the regions and governorates that are not organized in a region.

B. Settling competency disputes between judicial institutions of the regions or governorates that are not organized in a region. Id. arts. 93. Also art 52 (2) set down that “The decision of the Council of Representatives may be appealed before the Federal Supreme Court within thirty days from the date of its issuance.”

<sup>551</sup> Mallat, *supra* note 70 at 31.

<sup>552</sup> Rabb, *supra* note 50 at 552.



*Fiqh* experts in the court, who should have knowledge in the *Maqasid*, as well as tools of *Fiqh* to derive rules, from Sharia.

*Maqasid* can resolve potential tensions between democratic and religious accommodation concerns, if we use the Shatibi approach, which recognizes that humans can distinguish between good and evil, and that Sharia is placed within the ability of humans to understand and apply. This application and understanding depends on the interest of humanity and these interests depend on the *Maqasid*. This will support the idea that humans influence how courts and government bodies interpret legislation and conduct judicial review.

There are two ways that jurists role could work within a system designed to operate the repugnancy clauses. They should be nominated from all *madhabs*, or schools of jurisprudence because a pluralistic Iraq cannot subscribe to a single *madhab*, to derive a common rule for a plurality of the Islamic schools.<sup>553</sup> They can be consultative to the judges rather than equivalent to them, which is suitable for jurists in this context. In this vein, the *Fiqh* experts can use *Maqasid* method to ensure the Islamicity of law rather than fealty to the classical Islamic school's opinions thousands of years ago or any other authorized to issue a *fatwa*.<sup>554</sup> This would not ignore the role of the *Marja`iyya*,<sup>555</sup> because the Iraqi *Marja`iyya* intends to remain independent of the Iraqi

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<sup>553</sup> Burroughs, *supra* note 366 at 584.

<sup>554</sup> The court would mimic the way that the US courts treat to foreign law by looking at the interpretation which Islamic scholars have propounded and only evaluating the strength of consensus. For instance, the court in *Nat'l Group v. Lucent Tech* ascertained the content of Saudi Arabian contract law, which is almost entirely derived from the Sharia, through the study of treatises and the testimony of expert witnesses. 331 F. Supp. 2d 290 (D.N.J. 2004) see also *People v. Jones*, 697 N.E.2d 457 (Ill. App. Ct. 1988).

<sup>555</sup> This is the group of jurists whom Iraq's Shia majority holds to be the sole body capable of distilling Sharia.

government, unlike the Iranian clerics who formed the government.<sup>556</sup> The *Marja'iyah* can contribute to an approach of nominating the *Fiqh* experts.<sup>557</sup>

As we have noted previously, there is no doubt that there is a tension between the Faqih' function and the judge function when proposing a contemporary formulation of the role of religion in judicial review and this is unavoidable. This will require solutions that illustrate the role of the jurist in judicial review. If the assumption that the judges cannot rule on matters of Sharia is correct, then the court can apply the second suggestion which is determine the role of the jurist by the parties to the case, especially if the claim contains an element related to the Islam's Settled Rulings. Once anyone requests, the court should agree even if this goes against the other party's wishes, because this would be part of the court's procedures. In this case, one of the parties may request that the vote of the experts in Islamic jurisprudence be considered equal to the vote of judge. Then the majority required to approve the decision shall be applied by including the vote of the jurist. In both cases, the court must use specialists to determine the social interest. . In addition, the jurists must make a commitment to interpret Sharia in the manner of *Maqasid* in the investigation of Sharia to determine whether or not a law is based on the Constitution.

## 5.5 Conclusion

This chapter is designed to offer a potential means of operating the repugnancy clause. This method evoked a more complete concept of judicial review through the comparative method and

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<sup>556</sup> Burroughs, *supra* note 262 at 575.

<sup>557</sup> For instance, in 2005 Sistani's called for the Iraqi Constitutional Committee to be elected by the Iraqi people in a free and fair election, and not selected by Bremer. Also, Ayatollah Sistani has promised to be less active in politics than Ayatollah Khomeini. Hannibal Travis, Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq, 3 NW. U. J. INT'L HUM. RTS. 4, 110 (2005).

the spirit of Sharia. From the American model, this chapter suggests a broad role of the judge in light of interpreting the constitution, but by considering the Iraqi legal circumstances. Moreover, this chapter adopts the idea of the principles of Sharia, which were applied by the Egyptian Constitutional Court, but in a more precise way, based on the *Maqasid*, not on the views of the traditional jurisprudential schools. From the Iranian model, we took the idea of *Maslaha*, but with restricting the role of jurists and proposing a new role for specialists in the fields of life to determine the social interest rather than the jurists. All of these comparative ways must work through the *Maqasid* method to operate the repugnancy clause. The mechanisms that must be adopted by the judge when reviewing a law are based on Islamic settled rulings. At the same time, these may conflict with human rights or values of democracy approved by the Constitution. The best solution is to invoke *Maqasid* to resolve this conflict. Two of the most serious issues raised in the regard of Human rights are apostasy and the protection of women's rights. *Maqasid* can serve as a necessary complement to an otherwise rights perspective in this context. As for democratic values, granting a broad role to Muslim jurists in the judicial review, given their epistemic authority, may undermine democracy. The role of jurists in the court must be confined within the framework of *Maqasid* and even then to present the meaning of Sharia and abandons the traditional tools which make them the only one who can understand Sharia. This chapter presents key concepts necessary to a successful operation of the repugnancy clause through practical legal remedies, not one simple solution to a complex issue.

## 6.0 CONCLUSION OF THE DISSERTATION

Since I started this dissertation I keep observing the news of Iraqi Council of Representatives because the new bill of FSC still under discussion since 2007. Press reports indicate that there are continue to be huge debates about the base of judicial review in Iraq. This motivated me to achieve this dissertation because I still have time to apply the recommendations proposed in this dissertation when I come back to my country.

As a new step in Iraq, the founders of the 2005 constitution adopted the idea of judicial review. The repugnancy clause has divided the scope of judicial review into three frameworks, which are the Islamic settled rulings, democracy, and human rights. This is a unique structure, which no constitution in the Islamic world has ever adopted. Thus, the fundamental question in this dissertation was how these three components could be work together? It was necessary to examine the role of Islam in the Iraqi legal system to understand the true role of Islam in order to draw a new way to apply the repugnancy clause.

The first chapter examined the role of Islam in the legal system by first clarifying the terms used in the legal system as an expression of Islam. These terms were Sharia and *Fiqh*, as well as, the distinction between the legal and *Fiqh* mechanism in dealing with these terms. Subsequently, this usage was assessed and found that role of Islam in the Iraqi legal context has been confused between Sharia and *Fiqh*. *Fiqh*, which is an attempt to interpret Sharia is dominant in conceptualizing the legal role of Sharia in the legal system. The dominance of *Fiqh* leads to the disruption of the role of Sharia in the field of judicial review because *Fiqh* has varied interpretations of Sharia which were subject of time and place. *Fiqh* cannot be required for the present time and applied in the realm of judicial review. These traditional interpretations confused

the judges, lawyers, and politicians. In addition, the role of Sharia, which is a public demand, has declined in importance. Consequently, there are calls to apply the spirit of Sharia and away from these traditional interpretations in light of the operation the repugnancy clause. This suggestion is very broad and vague, so it has not helped the constitutional courts in the Islamic world create an ideal way to operate this clause.

In this context, there must be a look at a legal solution that evokes an accurate understanding of the spirit of the text in accordance with modern needs. In the second chapter, it was necessary to look at global experiences that give the judge a broad role to interpret the text and absorb social needs, so the experience of judicial review was studied in the United States. The U.S. Supreme Court has created broad ways to interpret the text that Iraq can apply, but in limited ways because of the disparate circumstances of both countries. And this chapter also explained the operation of this clause in two Islamic countries which are Iran as a *Shia* method and Egypt as a *Sunni* method, since they represent the common modern schools in the Islamic world. The examination of the Iranian and Egyptian models shows that there is confusion and inconsistency in the operation of the repugnancy clause. In Egypt, this is because of invoking the principles of the traditional jurisprudence schools as equal to Sharia. In Iran, there was a control of jurists over the judicial decision and they apply the *Maslaha* method to achieve the political ideologies. The Iranian method are incompatible with the nature of judicial review which leads ignoring the spirit of Sharia. In the final section of this chapter I examined the method of the Supreme Federal Court of Iraq in dealing with the repugnancy clause. The court attempted to interpret Sharia directly without necessary reliance on the *Fiqh* opinion. Sometimes, the court invoked the traditional interpretations of *Fiqh* only, but in other cases, they ignored it completely. Finally, in still other

cases, the court attempted to avoid going into these interpretations and sent the ball in the playground of legislators.

Because of these challenges in operating the repugnancy clause, this dissertation sought to propose a method for operating the clause relying on a clear method to help the court activate this clause. Chapter Three proposes a method of *Maqasid*. *Maqasid* is the real expression of the spirit of Sharia but in a precise and clear manner that relies on modern understandings and modern social needs, as articulated from modern jurists from FAbduh and Rida to Alwani and Shaltut. Even if *Maqasid* is a traditional method, but the dissertation emphasized that it only calls for the method and not the historical applications of the *Maqasid*. The concept of *Maqasid* underwent many evolutions in order to obtain a clear way to understand the Sharia. *Maqasid* was one of the solutions to overcome the complexities of traditional *Fiqh*. The *Maqasid* method is simply that Sharia comes to protect the interests of people and these interests lie in three levels of necessities which include the protection of all self, religion, thought, family and property. This chapter ultimately justified the adoption of the method of Shatibi in the derivation of the *Maqasid*. This method is based on two parts. The first is the extrapolation of the texts of the Sharia, namely, Quran and *Sunnah*, to extract the *Maqasid* which must be, second, accompanied by the social interest. Some modern scholars have also developed the idea of *Maqasid* to accommodate new social changes. They add some new necessities such as freedom and justice. Others adopted the idea of human rights as an equivalent to *Maqasid*. This flexibility in the implementation of *Maqasid* will help the Court operate the repugnancy clause through the Court's interpretation of the Islamic settled rulings as equivalent to the *Maqasid* and mandate the Supreme Court to invoke the *Maqasid* and social needs when examining the constitutionality of the law.

Looking at the historical background of the role of religion in the Iraqi legal system and the operations of the repugnancy Clause in comparative perspective through the *Maqasid* method; all of these elements contribute to drawing a new implementation for Iraq to operate the repugnancy Clause in a proper way. Therefore, chapter four presented a proposed way to apply the *Maqasid* method in operating the repugnancy clause. This method is summarized by the fact that when the judge challenges a law, the judge seeks to extrapolate the texts of a law to clarify the purposes of Sharia which link to the social interest. The court can ask the experts of *Fiqh* to explain the purpose of the Sharia which related to the social interest. In addition, the court can use the experts specialized for example, in economics, and sociology to determine the social interest. This chapter also clarifies the role of *Fiqh* experts, who are stipulated by the Constitution as part of the members of the Court, as an advisory role based on the desire of the case parties or the need of the Court. Their role is confined to the statement of the purposes of Shari'a in the case in question. Finally, this chapter presents models for solutions that have been used to protect human rights, such as the protection of religious freedom and the protection of women's rights. Ironically, the use of the *Maqasid* method in these examples was contrary to traditional *Fiqh*. For example, the traditional *Fiqh* was complex to punish the apostate, but by using the method of *Maqasid*, it can be established in a legitimate and authoritative fashion liberated from the details of traditional *Fiqh* that there is no penalty for the apostate.

To activate this proposal, we need to deal with the legislative authority to expedite the issuance of a new law of the court in line with the current constitution. This law must clarify what is meant by Article 92 of the Constitution and provide a clear role for experts of jurisprudence and law in addition to the role of the judge. This is necessary to avoid tension and overlap between the function of the jurist and the judge when applying this proposal which is inevitable. The new law

should specifically define the role of the jurist in judicial review. This will not be easy, but it must be done. However, it should be recognized here that this overlap and expansion of the role of the schools of jurisprudence and the methods of interpretation will be a factor of tension when adopting any new mechanism for the role of religion in the Judicial review.

The second body which must be involved in this proposal is the FSC, which will need multiple efforts and several decisions to formulate principles and provisions that interpret Article 2 in a harmonious manner that responds to the immediate needs of society based on modern understandings of Islam. In addition, there is an urgent need for concerted efforts of many institutions, such as schools of law, the Supreme Judicial Council and the Judicial Institute. In practice, through these institutions, this proposal could be launched.

This dissertation opened the door to many points that need clarification and activation in order to adopt a judicial review that responds to the needs of society. We will need to look more closely at the neutral role of the jurist. given that the jurist's role may be a popular demand. We will need to clarify more court methods of interpreting and adapting judgments by expanding more in various ways of interpretation available in the Common law system. This would support a strong role for the Iraqi constitutional judge to find an interpretive theory that helps to harmonize among the three components of the Iraqi repugnancy clause.



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