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Citation

Goldenziel, Jill I. 2012. "Veiled Political Questions: Islamic Dress, Constitutionalism, and the Ascendancy of Courts." *American Journal of Comparative Law* 61 (1) (October 15): 1–50.
doi:10.5131/ajcl.2012.0015.

Published Version

10.5131/AJCL.2012.0015

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Veiled Political Questions: Islamic Dress, Constitutionalism, and the Ascendancy of Courts†

This Article explains how judicial independence can develop in regimes that are not fully democratic. Conventional wisdom holds that a strong legislature and political parties are necessary for the emergence of an independent judiciary. This Article challenges conventional wisdom by explaining how judicial independence may arise in the absence of these conditions. It presents a theory of how judicial independence emerges and why and when other political actors will respect it. It also explains why courts may be better poised than legislatures to counter executive power in non-democracies. The theory is developed through a discussion of cases involving Islamic headscarves and veils in Middle Eastern courts. These cases have broad political implications because of their significance to Islamists, who pose the biggest challenge to the power of traditional elites in majority-Muslim countries; they also have broad legal ramifications with respect to judicial power, individual rights, constitutional convergence, religious freedom, and the relationship between shari'a and state law. The Article also explains how national courts have interpreted Islamic law and challenges the notion that courts function to secularize state-sponsored religion. To the author's knowledge, this Article contributes the most complete discussion in the English-language academic literature of recent high court cases in Egypt, Kuwait, and Turkey, which were translated for this Article, thus contributing to the body of foreign constitutional case law available for comparative study.

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† DOI <http://dx.doi.org/10.5131/AJCL.2012.0015>

INTRODUCTION

An independent judiciary, insulated from other political branches, but with power to constrain their freedom of action, is commonly seen as a fundamental element of democracy.¹ Yet judges in the United States and other democracies² often act in accordance with the political interests that empowered them.³ Meanwhile, in non-democracies,⁴ judiciaries often act independently. Courts created to be agents of ruling elites quickly take on a life of their own, often acting to undermine the political interests of those who placed them in power.⁵

How do courts in non-democracies carve out judicial independence? After all, non-democracies historically have not been shy about punishing those who politically oppose them, which should limit judges' willingness to act independently. Despite formal, constitutional guarantees of judicial independence, non-democratic regimes generally have a greater variety of tools to control judiciaries and limit their independence than democratic leaders, including manipulating judicial selection, contracting jurisdictional authority, and—at an extreme—intimidating or using violence against judges.⁶

1. See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton).

2. For the purpose of this Article, I define democracy as a regime type that has the four procedurally minimum characteristics of 1) free, fair, competitive elections; 2) full adult suffrage; 3) basic civil liberties, including freedom of speech, press, and association; and 4) the absence of nonelected authorities such as militaries, monarchies, or religious bodies that limit the governing power of elected officials. See, ROBERT DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971). Political scientists have largely converged around Dahl's definition.

3. See, e.g., CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006); Richard Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997); RAN HIRSCHL, TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

4. As discussed below, I define the non-democracies that I discuss in this Article as hybrid regimes, "regimes with both democratic and authoritarian features." See generally Larry Diamond, *Thinking about Hybrid Regimes*, 13 J. DEMOCRACY 2 (2002).

5. See generally TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC JUSTICE IN EGYPT (2007) (discussing how the Supreme Constitutional Court in Egypt was created to advance Sadat's economic agenda but later defied the regime on press legalization and expansion of executive power); LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE (2007) (explaining how Chile's Constitutional Tribunal selectively stood up to Pinochet's military government on issues such as electoral standards while most of the judiciary remained faithful agents of the regime on core issues like military detentions and human rights issues).

6. See, e.g., STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR, at 166 (2010) (noting that the Peruvian Congress impeached the three members of the Peruvian Court who voted for Fujimori's impeachment in 1997); at 243 (discussing how war veterans under Mugabe's rule in Zimbabwe threatened to kill justices who would not resign in late 2000 after the Supreme Court declared the government's land reform illegal). See also ANNA POLITSKOVSKAYA, PUTIN'S RUSSIA (2004) (describing how judges who disobeyed regime orders were physically assaulted or removed from office); Jennifer Widner with Daniel Scher, *Building Judicial Independence in Semi-Democracies: Uganda and*

For these reasons, courts in non-democracies are commonly thought to uphold the positions of the interests that created the courts and appointed the individual justices on them.⁷ Focusing on the initial creation and composition of courts, however, fails to account for the incentives of individual judges and the role of courts as institutional actors within a political system. An opportunity for judicial independence arises from the very paradox inherent in the creation of courts: by delegating power to a court that can check its power, the executive undermines its own power in a classic principal-agent problem.⁸ Once created, courts in non-democracies can act to carve out institutional power vis-à-vis other political actors, similar to the institutional behavior of courts in democracies.

This Article challenges the prevailing notion that courts in non-democracies are merely pawns of the ruling regime. Instead, I argue that the development of electoral competition may allow courts to develop their own institutional interests and carve out judicial independence. Surprisingly, courts in non-democracies can receive a signal for action through the results of formalized electoral processes, even those not recognized as “free and fair.” Elections, even those not reflective of majoritarian will, provide important signals about the strength of the ruling regime. Success by regime opponents in electoral competition signals to a court that executive power is weakening, and that the court has the opportunity to act in a way that will increase its own independence. The court may then decide a case that carves out independence from the regime with respect to an issue of key importance to the opposition or the public.

I develop this theory in the context of cases involving the relationship between Islamic law and state law in Egypt, Kuwait, and Turkey, three legal systems that are under-studied in the comparative constitutional literature.⁹ I focus on highly controversial cases involving Islamic headscarves and face veils. While many constitutional observers are familiar with European and Canadian debates

Zimbabwe, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 238 (Tom Ginsburg & Tamir Moustafa eds., 2008) (noting that many Ugandan judges were jailed, were dismissed, or fled into exile after harassment under Idi Amin and Milton Obote).

7. See Tamir Moustafa & Tom Ginsburg, *Introduction: The Function of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES*, *supra* note 6, at 1 (noting that the assumption that courts in authoritarian regimes act as mere pawns has long been accepted in political science); see also C. Neal Tate & Stacia Haynie, *Authoritarianism and the Functions of Courts: A Time Series Analysis of the Philippine Supreme Court, 1961-1987*, 27 *LAW & SOC. REV.* 4, 707-40, 714 (1993).

8. Peter Solomon, *Courts in Authoritarian Regimes*, 60 *WORLD POL.* 1, 123 (2007).

9. See David Fontana, *Comparative Originalism*, 88 *TEX. L. REV.* 189 (2009) (noting that comparative legal scholars focus primarily on the same countries—Canada, New Zealand, Australia, the United Kingdom, South Africa, France, Germany, and India—neglecting others).

over banning headscarves, face veils, and other forms of Islamic dress, it is less well known that countries with majority-Muslim populations have also struggled with constitutional issues involving Islamic veils. Behind these cases are compelling stories about attempts to squelch rising Islamist power and conflict over the relationship between *shari'a* and state law. Close examination of these cases reveals each court's attempt to balance religious and secular interests along with constitutional rights within its unique national political context. My analysis is thus in keeping with the expressivist aims of comparative constitutional study, revealing how constitutionalism emerges out of the particular history and politics of individual states.¹⁰ Yet despite particularistic differences, the effects of judicial behavior in these countries are the same: courts are expanding their jurisdictions and power against other political actors.

This Article proceeds in five parts. In Part I, I briefly review the existing literature on judicial independence in the comparative constitutional context.¹¹ In Part II, I discuss the conditions under which courts in hybrid regimes may establish judicial independence. I define regimes as hybrids if they are not democratic but have developed some features of electoral competition.¹² I argue that courts in these regimes use openings in political competition to assert judicial independence, increase jurisdiction, and carve out new rights. In Part III, I explain why cases involving Islamic veils in majority-Muslim countries present an opportunity for courts to act. Cases involving headscarves and face veils symbolize a broader, intractable political conflict between Islamist and secularist political forces that incentivizes political opponents to use courts. In Part IV, I apply my theory

10. Mark Tushnet, *Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1261–85 (1999).

11. As Mary Bilder has noted, the full body of literature on judicial independence is more than “a mere mortal law professor” likely could read. Mary Bilder, *Expounding the Law*, 78 GEO. WASH. L. REV. 1129, 1130 (2010); see also Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605 (1996) (reviewing myriad definitions of judicial independence). I have endeavored to discuss the most prominent debates in the comparative legal academic literature.

12. See Diamond, *supra* note 4. A number of recent, important works in political science have examined the workings of these hybrid regimes. See, e.g., JASON BROWNLEE, *AUTHORITARIANISM IN AN AGE OF DEMOCRATIZATION* (2007); BEATRIZ MAGALONI, *VOTING FOR AUTOCRACY: HEGEMONIC PARTY SURVIVAL AND ITS DEMISE IN MEXICO* (2006); POLITICAL PARTICIPATION IN THE MIDDLE EAST (Ellen Lust-Okar & Saloua Zerhouni eds., 2008) [hereinafter *POLITICAL PARTICIPATION*]; LEVITSKY & WAY, *supra* note 6. This and other political science literature define different types of hybrid regimes, including democratizing regimes and competitive authoritarian regimes. The theory advanced in this Article deals with hybrid regimes more generally, per Diamond, *supra* note 4. Turkey claims to be a democracy in its constitution. See CONSTITUTION OF THE REPUBLIC OF TURKEY, pmbl. However, as explained below, this self-definition has been contested. Egypt, as of this writing, may be transitioning toward democracy. Kuwait defines itself as a constitutional monarchy. See CONSTITUTION OF THE ARAB REPUBLIC OF KUWAIT, art. 4.

to three majority-Muslim polities that have undergone significant political reform in recent decades: Egypt, Kuwait, and Turkey. After explaining the background of secular-Islamist political conflict in each of these countries, I conduct a within-country comparison of court cases involving Islamic dress before and after recent elections in which Islamists made significant political gains. After providing relevant political context, I present three court cases involving attempts to ban Islamic veils. English translations of these cases are not publicly available and were prepared for the purposes of this article.¹³ To my knowledge, this represents the first complete discussion of these cases in the English-language academic literature; thus, part of this Article's contribution is to present the cases in detail. In Part V, I discuss the implications of my findings for our understanding of the institutional development of courts in hybrid regimes and the relationship of Islam and state. I analyze why courts may be better situated than legislatures to counter executive power in hybrid regimes. I also explain why my analysis may be particularly useful for our understanding of the balance between political powers in the Islamic world. Finally, I explain how jurisprudence in the cases I discuss has converged with constitutional norms elsewhere. Similarly to Western courts in headscarf cases and other disputes involving issues of religion and state, courts in these majority-Muslim countries root their decisions in personal liberty rather than other constitutional rights. I then offer a brief conclusion and some suggestions for further research on the development of judicial independence and the relationship between *shari'a* and state law.

I. MODELS OF COURTS AS POLITICAL ACTORS

Traditional models of courts as institutional actors have largely been developed in the context of democracies and are not applicable to courts in hybrid regimes. Structural models posit the power of the judiciary as arising from the powers and interactions between legislators, courts, executives, and public opinion in a given polity and ask what political conditions allow courts to constrain state power. These models roughly fall into two categories: "bottom-up" models that in-

13. I sourced Case No. 3219/48/High Administrative Court, Chamber of Unification of Judicial Principles (Egypt) (June 9, 2007) [hereinafter *El-Zeiny v. American University of Cairo*] and Case no. 2008/2009/Administrative Court, (Seventh Circuit, Cairo) (*Samar Zadaa Hamdaan v. Pres. of Ain Shams Univ.*) decisions directly from the relevant Egyptian courts; these decisions were unavailable at the libraries of Harvard University or the American University of Cairo. I translated these cases and the Kuwaiti Constitutional Court Case, and *Contestation of the 2009 National Assembly Elections*, Kuwaiti Constitutional Court, Kuwait Al-Youm Gazette (Oct. 28, 2009) [hereinafter *Al Nashi v. Dashti*], with the assistance of Allison Hartnett of the Altair Institute of Arabic. Burak Eskici and the Translation Institute at Burada Law School in Turkey provided translation assistance on the Turkish case, E.2008/16, K. 2008/116, Turkish Constitutional Court (2008), at the author's request.

investigate the popular support structures that influence judicial power and “top-down” models that investigate the conditions that cause politicians to use courts.

Under “bottom-up” models, high courts make decisions that appear to contradict the desires of the legislature or the executive, and are able to do so because key interest groups or the public at large support the court in its efforts.¹⁴ Charles Epp’s influential work, for example, details how lawyers’ movements led to the empowerment of courts in the United States, Britain, Canada, and India. The analyses developed in the bottom-up literature, however, are not generalizable outside the context of democracies because they assume and depend on the existence of rights and freedoms that are often unavailable. All of these theories require the existence of informed, constitutionally conscious voters in a legal system transparent enough for them to understand, and powerful legislatures that are responsive to their will. Voters in these models express their pleasure or displeasure with courts by voting in free and fair elections for politicians who can then meaningfully grant authority to the courts or check their power via legislative enactments. In hybrid regimes, the conditions necessary for bottom-up majorities to empower courts are often weak or absent.

“Top-down” models of judicial independence explain how courts derive their power from the baseline condition of robust competition between strong political parties in the context of legislative elections. William Landes and Richard Posner’s top-down model of judicial independence, developed in 1975, has served as the basis for many of these structural models.¹⁵ Political elites who fear that they will lose power delegate some authority to courts as a form of “insurance” to protect their initiatives for the long term.¹⁶ These elite actors may be

14. See, e.g., CHARLES EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998). In the American context, recent scholarship on consensus and popular constitutionalism strives to understand how public opinion and actions affect the jurisprudence of the U.S. Supreme Court. Important studies in this area include BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2010); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); and MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). For a discussion of the relationship between popular sovereignty and judicial review more generally, see generally David Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723 (2009).

15. William Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 8 J.L. & ECON. 875 (1975).

16. See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003) (discussing why constitutional drafters in new democracies choose to include judicial review in constitutions); Landes & Posner, *supra* note 16; J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994); Matthew Stephenson, “*When the Devil Turns . . .*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003); JODI FINKEL, *JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU, AND MEXICO IN THE 1990S* (2008). The use of the term “insurance” to describe this delegation of power is borrowed from Tom Ginsburg.

legislators wishing to curry favor with interest groups,¹⁷ political parties,¹⁸ or the hegemonic elites who created the courts.¹⁹ In these accounts, political leaders are relatively certain that elections will repeat infinitely and that the alignment of players or political parties will remain stable over time, but that they are likely to lose power for some period. By delegating certain issues to courts through constitutions²⁰ or legislation, these actors can be assured that the courts will preserve their interests with respect to these issues. Highly salient or controversial political issues of key importance to one or both parties are particularly likely to be delegated to courts.²¹ Political elites respect these judgments, even when against their immediate interests, because they expect to use courts to preserve other interests in the future.

In “top-down” models, an independent judiciary is thus a function of competition between strong political parties in a competitive electoral system. Yet in many countries in which some form of electoral competition exists, the structural conditions assumed by this literature do not. The baseline conditions of durable political parties, robust legislatures, and free and fair elections do not exist or have not yet developed in much of the world. Even as some degree of formal electoral competition has become the norm,²² legislatures and judiciaries remain largely unable to check each other, and both are overwhelmed by the power of a strong executive. Where autocracy reigns or its specter still looms, elections cannot serve as a true check by the people on either executive or legislative power, as they are likely to be manipulated in favor of the regime and are thus unlikely to serve as an accurate mirror of public opinion. Elections may also be infrequent, since the executive often has the power to dissolve parliament at will and control the timing of elections. Moreover, legislatures are too weak to delegate authority over issue areas to courts. Interactions between interest groups, the judiciary, and the

17. Landes & Posner, *supra* note 15.

18. See Ramseyer, *supra* note 16; Stephenson, *supra* note 16.

19. See generally RAN HIRSCHL, *TOWARD JURISTOCRACY* (2004).

20. Elites may also preserve power through underhanded means that they simply call “constitutional,” particularly in new or developing democracies. See generally David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. J. INT’L L. 319, 327 (2010) (noting that political elites in Latin America often ignore or rewrite constitutional provisions that restrict their power); Hastings Winston Opinya Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY (Douglas Greenberg et al. eds., 1993) (noting that political elites in African countries that have adopted constitutions routinely ignore provisions that restrict their power); Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT’L L.J. 1, 5 (2006) (arguing that in Latin America, citizen behavior is conditioned on their knowledge that elites can easily change constitutional provisions).

21. Stephenson, *supra* note 16.

22. See Diamond, *supra* note 4.

legislature in these regimes thus cannot follow the structural models proposed in the literature based on democracies.

Top-down models also allow little role for the public as a political actor. The role of public opinion and action that is the critical feature of bottom-up models is almost completely absent from top-down literature. Judicial independence in top-down models arises from the interactions of political elites and formal political institutions. Public opinion can only be expressed through formal mechanisms of electoral competition, under the assumption that voters' preferences accurately reflect their opinions on controversial political issues. While top-down models explain why elite actors choose to respect judicial opinions, they do not explain why the public will or will not do so. This Article addresses the gap between top-down and bottom-up models of judicial independence by offering a theory of court behavior that accounts for the interactions of both political elites and public actors.

II. BEHAVIOR OF COURTS IN HYBRID REGIMES

How do courts establish themselves as independent political actors in hybrid regimes? A brief, stylized sketch of the actors in these polities and their political incentives, as compared to those in democratic systems, will illuminate the function of courts in these countries.

Since the end of the Cold War, most non-democratic regimes, even autocracies, have adopted the trappings of democracy and developed at least the rudiments of electoral processes and court systems.²³ A growing body of literature now explains the workings of "hybrid regimes" that exist somewhere between democracy and autocracy.²⁴ Despite initial hopes that the establishment of these institutions would lead to a wave of democratization, many non-democratic regimes have persisted.²⁵ Western observers often dismiss these elections as shams because international observers do not deem them "free and fair." Yet some degree of electoral competition has opened in many of these systems, and the fact that they find it necessary to continue to devote resources to holding elections suggests that they serve a purpose. Indeed, a growing body of political science literature explains how these elections serve to test opposition strength and to allow rulers to identify whom to coopt.²⁶ Because electoral success by political opponents will signal to the public, and to foreign

23. *Id.*

24. See, e.g., BROWNLEE, *supra* note 12; MAGALONI, *supra* note 13; POLITICAL PARTICIPATION, *supra* note 12; LEVITSKY & WAY, *supra* note 6.

25. See generally LEVITSKY & WAY, *supra* note 6 (discussing why some regimes and not others democratized after the Cold War).

26. See, e.g., LISA BLAYDES, ELECTIONS AND DISTRIBUTIVE POLITICS IN MUBARAK'S EGYPT 42 (2011); JILLIAN SCHWEDLER, FAITH IN MODERATION: ISLAMIST PARTIES IN JOR-

interests, that the opposition is gaining strength, regimes often invest considerable efforts into rigging elections as well.

In a democratic system, electoral results are assumed to be a fairly accurate reflection of majoritarian interests. Elections thus provide a proper assessment of public opinion vis-à-vis the issues that candidates represent, and their victory is assumed to represent the preferences of the electorate. Elections also provide an assessment of the political strength of groups that oppose the ruling executive. At regular intervals, new elections will occur, and legislators of a given party can be voted out or reassume power. As a result, legislators are assumed to want to preserve their interests because they have uncertain electoral futures.

In hybrid regimes, the mechanisms of political competition are less transparent than in democracies. The balance of power is weighted toward a historic ruling elite—whether a monarch, a dictator, a military government, or a political party that now represents these interests. These hegemonic elites may exert structural dominance or outright manipulation over executive and legislative elections by rigging polls or intimidating opposition candidates or voters.²⁷ Elections thus do not mirror the true state of political opposition to a regime. Yet these elections do provide some measure of the strength of their political competitors.²⁸ If an opposition group gains any votes despite the regime's best efforts, this noisy signal of public opinion becomes a clear sign that the regime is losing at least some power. Historic elites in a non-democratic regime will thus feel threatened and act to preserve their own rule.

An executive that receives electoral signals that the opposition is gaining strength will seek to diffuse the power of its opponents. One way to do this is to delegate key political issues to agents such as courts.²⁹ By encouraging opposition groups to use courts as mechanisms for dispute resolution, authoritarian regimes can quell public protest and keep key issues out of the political arena. Regimes can also deflect blame for their own unpopular decisions onto courts. Yet in choosing to do so, a dominant executive gives away its own power to an alternative source. The regime must then enact controls on courts to ensure that they rule in a manner consistent with the regime's interests. Still, the regime must grant the court enough

DAN AND YEMEN (2007); Tarek Masoud, *Islamist Parties: Are They Democrats? Does It Matter?*, 19 J. DEMOCRACY, at 19 (July 2008).

27. See LEVITSKY & WAY, *supra* note 6.

28. See generally BLAYDES, *supra* note 26; Barbara Geddes, *Why Parties and Elections in Authoritarian Regimes?*, revised version of paper presented at the 2005 annual meeting of the American Political Science Association, Washington, D.C.; Ellen Lust-Okar, *Elections Under Authoritarianism: Preliminary Lessons from Jordan*, 13 DEMOCRATIZATION 456-71 (2006).

29. See GINSBURG, *supra* note 16. Many transitional regimes have created courts to expedite economic reforms. See Moustafa & Ginsburg, *supra* note 7, at 10.

independence to assure potential litigants that the court will guard their interests as well.³⁰ To preserve at least the appearance of judicial independence, regimes must therefore allow opposition groups some marginal victories in court cases that are not of core political importance to its power.³¹ Courts thus provide a sort of safety valve for opposition. However, because the regime wishes to present the appearance of judicial independence, its controls over the judiciary must be indirect.³² Regimes thus find themselves faced with a classic principal-agent problem. Indirect controls over courts are necessarily imperfect, allowing judges some leeway to stake out their own institutional interests.

Opposition groups in hybrid regimes will have an incentive to use courts. These opposition groups may be organized into formal political parties in regimes in which legislative elections are held. When members of the opposition are elected to the legislature in a hybrid regime, their electoral futures are even more uncertain than legislators in democracies. These political actors know that the executive may dissolve the legislature and redistrict or otherwise manipulate the process in a way that ensures they will never be reelected. Political opposition in hybrid regimes may also take more informal forms, such as social movements, religious bodies, or civil society actors, that have even less certainty of ever gaining formal political power. Recognizing that court decisions may be the only hope for political opponents of the regime to preserve their long-term interests, they also will be motivated to use courts.

Courts are thus agents of the regime, but have the capacity to decide in favor of some opposition demands. Courts can enhance the political strength of opposition groups by ruling in ways that bolster their political positions. Signals of the judiciary's actual ability to check executive power will make the opposition more likely to use courts as mechanisms for enhancing their political strength. Signs of the judiciary's independence from the regime, such as self-regulatory efforts by the judiciary, will also enhance credibility with opposition groups.

Of course, judges have incentives to avoid punishment by the regime. Regimes can control the composition of courts through tight supervision of judicial selection and dismissal of judges at will. Some

30. See Tate & Haynie, *supra* note 7, at 716 (finding that, in the Philippines, the authoritarian Marcos regime wished to maintain the illusion of constitutionality, allowing Philippine courts to continue their administrative function while increasing their role in social control over criminal activity).

31. See Moustafa & Ginsburg, *supra* note 7, at 10.

32. In McCubbins and Schwartz's classic parlance, courts may provide a "fire-alarm" function for the regime, an indirect way of monitoring opposition activities through indirect, decentralized judicial agency. See Matthew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols and Fire Alarms*, 28 AM. J. POL. SCI. 1, 165-79 (1984).

regimes have interfered in the judicial process, intimidating judges with violence.³³ The executive may also manipulate the timing of key judicial decisions to control political costs. In non-established democracies, or in regimes transitioning toward democracy, non-elected elites exert vestiges of control over the judiciary that similarly restrict judicial independence.³⁴ Most judges were likely appointed by these historic elites when they were in power, and these elites often establish mechanisms by which they continue to manipulate the judicial selection process.³⁵

Because judges wish to avoid punishment and keep their jobs, judges have the incentive to make decisions aligned with what the regime wants.³⁶ Yet judges also want to avoid being “punished” by the public. The public can reduce the institutional power of courts by choosing not to use them, deciding instead to address grievances via other avenues. The public can also choose not to respect judicial opinions, weakening the courts’ legitimacy. Judges are thus incentivized to send signals that they are independent institutions to encourage the public, especially regime opponents, to make use of the courts.

When courts see opposition groups succeed to any degree in elections, even by making marginal parliamentary gains, courts become aware that the regime is losing power. This signal is even more poignant where regimes have rigged elections. Actors that manage to succeed electorally when the cards are stacked against them likely have more political power than electoral results belie. To encourage the opposition to use the courts and to preserve their own institutional interests in case the ruling regime loses power, courts carefully begin to balance regime and opposition interests in their decisions.³⁷

33. See, e.g., MOUSTAFA, *supra* note 5; PETER H. SOLOMON JR. & TODD S. FOGELSONG, COURTS AND TRANSITION IN RUSSIA: THE CHALLENGE OF JUDICIAL REFORM (2000); Solomon, *supra* note 8, 122–45.

34. For discussion of this phenomenon in the context of democracies, see generally Hirschl, *supra* note 3.

35. These mechanisms may persist long after a country democratizes. Chile’s Constitutional Tribunal, for example, remains reluctant to declare laws unconstitutional, even after recent reforms specifically designed to increase judicial independence. See Royce Carroll & Lydia Tiede, *Judicial Behavior on the Chilean Constitutional Tribunal*, 4 J. EMPIRICAL LEGAL STUDIES 8, 856–77 (2011).

36. See Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANNU. REV. POLIT. SCI. 345–66, at 351 (2009) (noting the interests of judges in their own careers and also in principled legal decision making).

37. Gretchen Helmke outlines a theory of judicial independence in a regime transitioning between autocracy and democracy in *The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 2 (2002). Helmke argues that judges rule against the current government once it becomes likely that it will lose power in the short term, and that judges will do so in cases in which the government is a party or where a government decree is at issue. By contrast, the cases I discuss implicate government interests even when the government itself is not a party; in fact, I argue that judicial decisions that directly contradict government decrees are unlikely to be tolerated in non-democracies.

They may do this by taking conservative stances on issues of core importance to the regime while being activist on issues that matter less to the regime. In this way, the judiciary can signal independence and openness to accepting opposition positions with respect to some issues even as it supports regime interests in others.

Thus, when electoral competition is introduced into a political system, courts in hybrid regimes may start to act like they do in democracies: they can strike bargains between competing political interests and attempt to further their own institutional goals. Because power is weighted in favor of historic hegemonic elites in most hybrid regimes, courts do not reach the same degree of judicial independence as in democracies. It may be said that these players have not yet reached equilibrium of judicial independence. The incentive structure outlined above, however, suggests that courts in hybrid regimes may move progressively toward that equilibrium when electoral competition is introduced.³⁸ Since all political actors are incentivized to respect the judgment of courts because of their long-term political interests, judges can seize on cases reflecting salient political issues to assert institutional power. Even when they choose to protect their jobs by upholding the general interests of the ruling regime, courts can seize on controversial cases to strike out institutional independence in more subtle ways. Courts in hybrid regimes can carve out future jurisdiction for themselves and breathe life into latent constitutional rights provisions, opening the door for future judicial action.

Of course, real politics are more complicated than this stylized model suggests. The nature of prior authoritarian rule differs greatly between and among countries. Leaders in hybrid regimes, especially those in regimes transitioning from authoritarian rule to democracy, may choose to crack down on the judiciary at strategic times while using it as a safety valve to resolve contentious political issues at others. However, as Levitsky and Way argue, the costs of repression are greater now than they were when many of these courts were established. "Extensive penetration by international media, transnational human rights networks, and multilateral organiza-

Helmke's model depends on judges being nearly certain that power will change in two years or less, and is not concerned with the long-term institutional power of courts. In the cases I discuss, judges do not believe that the regime will lose power in the short term, but are acting to incrementally increase power for the judiciary as an institution over the long term.

38. Informal political competition, such as shifts in power by unelected tutelary authorities such as a military or monarchy or religious authorities, may also signal to courts that they have an opportunity to strike out judicial independence. The relationship of such informal political competition to judicial independence is beyond the scope of this paper and requires future research. In the cases I discuss, I suggest that formal political competition provides the signal that triggers courts to act to carve out independence for the judiciary.

tions,” combined with the ability for victims to disseminate news of their repression instantly via the Internet, have made it increasingly difficult for regimes to crack down on judiciaries without consequences for the regime.³⁹ Many democratic actors in these countries have links to the West, and the threat of sanctions or rebuke is likely to trigger strong political opposition against a regime. The cost of repression increases the likelihood that regimes will allow legal challenges, especially when they do not pose a direct threat to their power.

It is also important to recognize that there are two types of judicial independence. Full judicial independence involves the ability of a court to make decisions that directly challenge the power of the regime. Decisions on issues that would, for example, restrict a regime’s ability to extend its rule or that would declare its reforms illegal are likely to result in punishment of a court by a regime. A second type of judicial independence, which I call *constrained judicial independence*, involves decisions that do not directly challenge the power of the regime. Decisions contrary to the regime’s wishes on more minor issues, such as allowing limited expansion of individual freedoms, are marginal to the regime’s core interests and thus less likely to result in repression of the judiciary.⁴⁰ Indeed, the judiciary may simultaneously rubber-stamp core regime interests while carving out constrained judicial independence for itself only on issues that the regime does not perceive as threatening.

Still, over time, incremental reforms may—and have—added up to large changes in judicial autonomy and the balance of political powers in hybrid regimes. This is especially true if a challenge that the regime may perceive as marginal represents an issue of high political salience to the public and to opposition groups. My discussion below will show how the conditions under which judicial independence develops or will be repressed are similar in the diverse political contexts of Egypt, Kuwait, and Turkey.

III. ISLAMIC VEILS AS A SALIENT POLITICAL ISSUE

While the existing literature dealing with courts as institutional actors focuses on durable political parties in democratic regimes, a similar logic applies to less open political systems that have intractable political cleavages and stable interest groups. The Islamist-secular divide represents a vivid example.

39. LEVITSKY & WAY, *supra* note 6, at 70.

40. See Moustafa & Ginsburg, *supra* note 7, at 10; see also Jose J. Toharia, *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain* 9 LAW & SOC’Y REV. 475, at 486 (1975) (noting that judicial independence in Franco’s Spain was restricted to judicial control over a small fraction of legal cases that did not challenge the structure and functioning of government).

In states with majority-Muslim populations, the Islamist-secular divide has been a perpetual source of political conflict. Most scholars trace the notion that *shari'a* should be state law to the Prophet Mohammed's dual role as Islam's ultimate religious and political authority.⁴¹ Ever since secular rulers came to power in majority-Muslim polities, they have viewed Islamist groups as the biggest threat to their regimes. This is especially true in nation-states carved out of the Ottoman Empire, where the sultan, as head of state, also claimed the caliphate, the highest position in Islam. Since the dissolution of the empire, Sunni religious authority has become increasingly fractured. Regimes seeking to enforce the rule of secular law have thus had to contend with opposition from Islamist groups over the proper relationship between *shari'a* and state law.

Islamist movements exist in nearly all countries with Muslim majority populations.⁴² The "Islamist" label has been applied broadly to any group that fuses Islam and politics, whether supportive of constitutional democracy or violent fundamentalism. In some cases, extremist Islamist groups have used violent means to pose an actual threat to a sitting regime.⁴³ Most prominently, they assassinated Egypt's president Anwar Sadat in 1981, spurring Egypt and other regimes to crack down on Islamists. Secular regimes view Islamist political actors as a threat to their power, evidenced by their continual attempts to ban these movements. The Egyptian Muslim Brotherhood was officially banned after the Egyptian Revolution of 1952, and subsequent heads of state repeatedly cracked down on the organization as it illegally persisted and continued to wield influence in public life. State actors in Turkey have succeeded in banning Islamist political parties in the past, and attempted to ban the currently ruling AKP.

In recent years, as many of these regimes have opened themselves to electoral participation, these Islamist social movements have formed political parties and participated in elections. The threat these movements pose to secular regimes has been thrown into sharp relief by their electoral success. Even before the Arab Spring, Islamists achieved remarkable electoral success even when elections were manipulated or rigged outright by secular ruling elites. In 2002, the AKP scored an electoral victory in Turkey, despite repeated at-

41. See, e.g., ABDULLAH AHMED AN-NA'IM, *ISLAM AND THE SECULAR STATE* 53 (2008).

42. Prominent examples include the AKP in Turkey, Adl wal Ihsan in Morocco, the FIS in Algeria, the Muslim Brotherhood in Egypt, and the IAF in Jordan. For discussion of some of these groups and their participation in politics, see BLAYDES, *supra* note 26; JANINE A. CLARK, *ISLAM, CHARITY, AND ACTIVISM: MIDDLE-CLASS NETWORKS AND SOCIAL WELFARE IN EGYPT, JORDAN, AND YEMEN* (2004); SCHWEDLER, *supra* note 26; Masoud, *supra* note 26.

43. See Quinn Meham, *Why Do Islamist Groups Become Transnational and Violent?*, AUDIT OF THE CONVENTIONAL WISDOM (MIT Ctr. for Int'l Stud.), Aug. 2006.

tempts by state actors to ban Islamist parties from political participation. In Egypt's 2005 parliamentary election, Muslim Brotherhood candidates won 88 out of the 444 contested seats.⁴⁴ The Brotherhood outperformed candidates of Mubarak's National Democratic Party at a rate of seven to three in those elections in which it fielded candidates.⁴⁵ In Jordan in 2007, the Muslim Brotherhood-affiliated Islamic Action Front won six seats, the only opposition party in the country to win any representation.⁴⁶

Regimes permit varying degrees of political participation by Islamist groups. Some countries, like Jordan, allow participation by political parties that are explicitly Islamist in orientation. In others, like Egypt, parties with explicit religious orientations are banned by the constitution. In Kuwait, all political parties are banned, but the public is well aware of which candidates are affiliated with Islamist groups. Islamist parties may also differ from country to country depending on the diversity of Islam within a given state. In post-Saddam Iraq, most prominently, Sunni and Shi'a parties have participated in elections. In Kuwait, as discussed below, Sunni and Shi'a political factions align on some political issues and not others.

Yet regardless of the exact nature of Islamist political participation in these states, the salient issue cleavage remains the same: secularists want less convergence between Islamic law and the law of the modern nation-state, while Islamists want greater visibility for Islamic symbols and greater congruence between *shari'a* and state law. Islamist groups have consistently placed issues involving women's dress at the center of their political demands.⁴⁷ For example, in one highly publicized incident in 2006, the Muslim Brotherhood called for the resignation of the Egyptian Minister of Culture after he termed the rising number of Egyptian women wearing headscarves a sign of social "regression."⁴⁸ The Brotherhood's demands were echoed in street protests by thousands of Egyptians. In Algeria, where most women wear headscarves, Islamist parties publicly protested the secular government's 2010 decision to require women to remove their headscarves in passport photos.⁴⁹ Whatever the country, political debate over women's dress between Islamists and secularists remains intractable, with nothing short of national identity at stake.

44. See NATHAN J. BROWN & AMR HAMZAWY, *BETWEEN RELIGION AND POLITICS* (2005) (Kindle version).

45. *Id.*

46. Electoral Data available at Inter-Parliamentary Union, <http://www.ipu.org/>.

47. See generally SCHWEDLER, *supra* note 26; see generally LEILA AHMED, *A QUIET REVOLUTION: THE VEIL'S RESURGENCE, FROM THE MIDDLE EAST TO AMERICA* (2011).

48. See Adam Morrow, *Headscarves Dispute Travels to Egypt*, IPSNEWS.NET, Dec. 1, 2006, <http://ipsnews.net/news.asp?idnews=35687>.

49. Lamine Chikhli, *Headscarf Row Re-Opens Old Wounds for Algerians*, REUTERS, Apr. 13, 2010, available at <http://www.reuters.com/article/2010/04/13/us-algeria-religion-passports-idUSTRE63C2ZE20100413>.

Egypt, Kuwait, and Turkey present excellent examples of how the relationship between Islam and the state has played out in the courts.⁵⁰ All three of these countries have majority Muslim populations, have seen Islamists gain since electoral competition has been introduced in the past decade, and can be classified as hybrid regimes. Even before the Egyptian “revolution” of 2011, political competition in Egypt had increased in the past decade. Although election results were, of course, heavily biased toward Mubarak and his ruling National Democratic Party, the opposition made some notable gains. After the Supreme Constitutional Court of Egypt mandated judicial supervision of parliamentary elections, Muslim Brotherhood-affiliated candidates and other opposition parties made an impressive showing in 2000 and 2005. While Mubarak easily won victory when direct presidential elections were introduced in 2005, the ability of opposition candidates to win 11.4% of the vote in a rigged election surprised many observers and revealed that the opposition was gaining strength. After dissolving parliament in 1999, the Emir of Kuwait held new parliamentary elections in 2003, 2006, 2008, and 2009; offering increased and repeated opportunities for political competition in that decade. Kuwaitis considered these elections largely free and fair.⁵¹ Women were permitted to vote for the first time in 2005, which dramatically increased voting participation and moved Kuwait closer to meeting the minimum procedural criteria for democracy. In Turkey, electoral institutions are much stronger than in Egypt and Kuwait. The sweeping victory of the AKP in the 2002 parliamentary elections brought major political change to Turkey, producing Turkey’s first single-party government since 1987 and its first two-party parliament in forty-eight years. However, the specter of military rule in Turkey, and severe violations of civil liberties have prevented full democracy in Turkey from taking root.

IV. VEIL POLITICS IN MAJORITY-MUSLIM COUNTRIES: CASES IN CONTEXT

A. *Egypt*

The dramatic fall of the Mubarak regime in January 2011 and subsequent electoral victories by Islamists in parliamentary and presidential elections have been prominently featured in recent headlines. The clash between secular Egyptian rulers and Islamist opposition, however, is older than the republic itself. In 1948, after the first Arab-Israeli war, a member of the Muslim Brotherhood assassinated the Egyptian prime minister. In turn, the founder of the

50. On case selection in comparative law, see Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005).

51. Arab Barometer, Kuwait Country Report, available at <http://www.arabbarometer.org> (last visited July 22, 2011).

Brotherhood, Hassan Al-Banna, was assassinated weeks later. Following the Egyptian Revolution of 1952, which led to the foundation of the modern Arab Republic of Egypt, the military banned and repressed the Brotherhood. Despite repeated crackdowns, the Brotherhood developed into the most organized political opposition in Egypt.

When Anwar Sadat took control of an Egypt reeling from military defeat and economic hardship in 1970, he reached out to Islamists for help in rebuilding the country. Sadat went as far as to engage in what Clark Lombardi calls an “executive-sponsored program of moderate Islamization.”⁵² To gain support for other constitutional amendments related to economic reforms, Sadat sponsored the amendment of Article 2 of the Egyptian Constitution to make *shari’a* “the principal source of legislation” rather than merely “a principal source.”⁵³ The revised constitution, adopted in 1980, signaled to the Islamists that the regime wanted to negotiate and create a consensus about the role of Islam in the modern nation-state.⁵⁴ Following this, the Islamic legal scholars (*‘ulama*) of Al-Azhar University tried to reassert their traditional role as a religious check on executive authority,⁵⁵ drafting a new code of Islamic jurisprudence (*fiqh*)⁵⁶ and setting up a committee to propose legislative reforms in accordance with their interpretation of *shari’a*.

While entrenching Islamic law within the law of the modern nation-state, Sadat concurrently sponsored reforms that modernized and granted independence to the secular Egyptian judiciary.⁵⁷ The patchwork of *shari’a*, specialized, and foreigner courts that had developed under Ottoman rule had been consolidated into a national court system in 1949. Sadat’s reforms streamlined the courts and moved them farther away from their roots as arbiters of Islamic law. Responding to pressure from the bar association, the primary source of organized popular opposition to his policies,⁵⁸ Sadat reinvented the Supreme Court established by Nasser in 1969. The new court, known

52. CLARK B. LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI’A LAW INTO EGYPTIAN CONSTITUTIONAL LAW* 123 (2006).

53. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Sept. 11, 1971, *as amended*, May 22, 1980. For comparative discussion of how another centralized regime has used constitutional reforms regarding religion and state to preserve its own authority, see Jill Goldenziel, *Sanctioning Faith: Religion, Politics, and U.S.-Cuban Relations*, 25 J.L. & POL. 179 (2009).

54. LOMBARDI, *supra* note 52, at 123.

55. *Id.*, at 126. For a discussion of the traditional role of the *‘ulama* as a check on executive power, see generally NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* (2008).

56. See Chibli Mallat, *From Islamic to Middle Eastern Law: A Restatement of The Field (Part II)*, 52 AM. J. COMP. L. 209 (2004).

57. See MOUSTAFA, *supra* note 5.

58. Mona El-Ghobashy, *Constitutionalist Contention in Contemporary Egypt*, 51 AM. BEHAV. SCI. 1590, 1592 (2008); see also MOUSTAFA, *supra* note 5.

as the Supreme Constitutional Court (SCC), had already been envisioned in the 1971 Egyptian constitution. Sadat then delayed the enabling legislation that established the court for eight years, as he determined how to appear to liberalize the court while actually controlling it.⁵⁹ The law establishing the SCC in 1979 represented a compromise between Sadat and prominent legal activists who maintained pressure on the regime for an independent judiciary. At the time Sadat established the SCC, Egypt already had both a judicial council, which was largely controlled by executive cronies, and a Judges' Club, which serves as a sort of judicial union run by the judges themselves. From the 1960s through the present, the Judges' Club has vocally opposed the regime on specific issues related to executive control over the judiciary. Because the judiciary historically has been one of the few political actors willing to oppose the executive, these disputes took on greater political significance in the public eye.⁶⁰

Yet the new SCC quickly established more independence for itself than Sadat had intended. According to Nathan Brown, this change occurred because of the long-term effects of giving justices of the prior Supreme Court significant power to choose new justices who could counter Sadat's appointees.⁶¹ While achieving Sadat's intent of striking down Nasser-era economic controls and supporting core regime interests on security issues,⁶² the SCC slowly breathed life into the latent rights provisions of the Egyptian constitution, allowing greater press freedoms, striking down undemocratic electoral laws, and appointing judges to supervise electoral processes.⁶³ The SCC became known as an outlet by which liberal ends could be achieved despite the constraints of an autocratic regime, and a vibrant civil society began to develop in support of the SCC.⁶⁴

After Islamists assassinated Sadat in 1981, Hosni Mubarak abandoned this program of Islamization, and instead began to systematically outlaw and suppress Islamist opposition. Article 2 was

59. See Mona El-Ghobashy, Book Review, 41 INT'L J. MIDDLE E. STUD. 520, 522 (2009) (reviewing MOUSTAFA, *supra* note 5); on the creation of the Supreme Constitutional Court, see also NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD (2002).

60. Nathan J. Brown, *Reining in the Executive: What Can The Judiciary Do?*, in JUDGES AND POLITICAL REFORM IN EGYPT 133-49, at 139 (Nathalie Bernard-Maugiron ed., 2008).

61. *Id.*

62. *Id.*, at 142.

63. See MOUSTAFA, *supra* note 5. While discussing the jurisprudence of the Egyptian Supreme Constitutional Court in the 1970s and 1980s lies outside the scope of this article, the court's use of cases involving Sadat's economic reforms supports the overall theory that the court used openings in political competition to establish new rights. Noting that Sadat was reaching out to Islamists through the establishment of Article 2 and other programs, the Court likely noted the regime's threatened political position and used the opportunity to establish independence for itself.

64. See MOUSTAFA, *supra* note 5.

never revised, probably because it would be more politically difficult to do so than it was to keep it. As the political avenue for Islamization was blocked, Islamists began to file increasing numbers of cases challenging legislation on the grounds that it violated Article 2.⁶⁵ The SCC initially abstained from interpreting the provision, hoping to avoid political controversy. Islamists then forced the issue in the 1984 parliamentary electoral campaigns, causing Islamist student leaders to call for mandatory “Islamic dress” for women at all major Egyptian universities. When the *‘ulama* of Al-Azhar began to demand Islamization in compliance with Article 2, the SCC had to act to preserve its own legitimacy.⁶⁶

The SCC responded by drastically limiting the scope of Article 2. In May 1985, the SCC declared the 1980 amendment to be non-retroactive: only legislation passed after the date of this amendment could be challenged.⁶⁷ This decision preserved regime interests from being undermined by Article 2 challenges to all of its previous legislation. Despite this restriction on the implementation of Article 2, the Egyptian judiciary began to review new challenges to new legislation on the grounds that it contradicted *shari’a*. Although Nathan Brown describes such challenges as “nearly continuous,” only one law was ever struck down on these grounds: a decade-long challenge to housing rights after a divorce where personal status law violated the *shari’a*.⁶⁸ Article 2 has been cited elsewhere by Egyptian courts only as a secondary basis for its decisions in which they also emphasize the personal rights provisions of the constitution.⁶⁹ Brown notes that the law has had the effect of increasing the symbolic importance of the *shari’a*, thereby pacifying Islamist groups, but has not really been used to limit the authority of other legislation. By contrast, rulings of the SCC have actually authorized the executive and legislative branches to develop binding interpretations of *shari’a*.⁷⁰

In its Article 2 decisions, the SCC began to use techniques of Islamic jurisprudence to reconcile state law with the *shari’a*. In their rulings, Egyptian courts have consistently distinguished between those provisions of *shari’a* that are definitive in their meaning and those that are subject to a process of individual interpretation, or *ij-*

65. LOMBARDI, *supra* note 52, at 139.

66. LOMBARDI, *supra* note 52, at 163.

67. See Case No. 20/1985/Constitutional Court SCC Vol. III, 209–24; LOMBARDI, *supra* note 52, at 167; see also Saba Habachy, *Commentary on the Decision of the Supreme Court of Egypt Given 4 May 1985 Concerning the Legitimacy of Interest and the Constitutionality of Article 226 of the New Egyptian Civil Code of 1948*, 1 ARAB L.Q. 239 (1986), Ran Hirschl, *Constitutional Courts v. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEXAS L. REV. 1819, at 1825 (2004).

68. BROWN, *supra* note 59, at 184; see also LOMBARDI, *supra* note 52, at 170, (explaining this case).

69. BROWN, *supra* note 59, at 183.

70. *Id.*, at 182.

tihad.⁷¹ *Ijtihad* is forbidden for rules based on the *Quran* and rules for which there is no divergence of opinion among the most prominent schools of Islamic legal thought. In Egypt, *ijtihad* is the task of the judicial, legislative, or executive branches, and these branches are never required to consult experts in *fiqh*, or Islamic jurisprudence, when making these decisions.⁷² As Clark Lombardi has documented, the SCC interpreted Article 2 using a “pastiche” of Islamic and secular legal techniques. According to Lombardi and Brown, in the 1980s and 1990s, the SCC chose instead to interpret *shari’a* as representing general welfare aims that were easily reconcilable with state law.⁷³

The SCC’s only case involving Islamic dress reflected this pragmatic approach as well as the overall interests of the Mubarak regime. In 1994, the Minister of Education issued an edict establishing a standard dress code for public school children, which effectively prohibited girls from wearing the *hijab* (headscarf), or *niqab* (face veil). Following a public firestorm, the Minister issued a “clarifying” edict permitting the wearing of *hijab* for those children who brought in written parental authorization, but leaving the *niqab* ban in effect. The Minister noted that the edicts were designed to ensure that Egypt’s schools do not “become a well of extremism and terrorism.”⁷⁴

Islamists balked. One Islamist father whose children were suspended from school for wearing the *niqab* challenged the edict in the administrative courts, which referred the case to the SCC. In its 1996 ruling, the SCC rejected the father’s claims, effectively upholding a ban on *niqab* in Egyptian public schools. After noting that the *Quran* and *hadith* do not specify what type of clothing women should wear, the court concluded that *shari’a* did not explicitly require the wearing of *niqab*. The SCC reasoned that the overall goal of the regulations was modesty in dress, which also comported with the aims of the *shari’a*. As a result, the universal goals of the *shari’a* were not violated by the ministerial regulations, and the SCC found the ban to be constitutional under Article 2 of the Constitution. The SCC thus interpreted religious law to pragmatically reconcile *shari’a* with the aims of the Mubarak regime.

71. Debate over the nature of *ijtihad*, and why, when, and by whom it may occur, is ongoing. For a contemporary discussion, see Shaista P. Ali-Karamali & Fiona Dunne, *The Ijtihad Controversy*, 9 ARAB L.Q. 238 (1994); Nazeem M.I. Goolam, *Ijtihad and Its Significance for Islamic Legal Interpretation*, 2006 MICH. STATE L. REV. 1443; Mallat, *supra* note 56, at 264–65.

72. BROWN, *supra* note 59, at 184. Contrast this to the Iranian judicial system, where the ‘ulama have the power to legislate.

73. Clark Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari’a Threaten Human Rights? How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT’L L. REV. 379 (2006).

74. LOMBARDI, *supra* note 52, at 244.

Since the SCC generally supported his efforts, Mubarak largely left the SCC alone until it issued a major challenge to his power. In 2000, the court reshaped political life in Egypt by issuing a ruling requiring far-reaching judicial supervision of elections. This struck a blow to the Mubarak regime's initiatives to squelch rising opposition from the Muslim Brotherhood.⁷⁵ Beginning in 2001, Mubarak exacted his revenge on the SCC. He began to exercise unprecedented control over judicial selection, appointing a crony to lead the court.⁷⁶ The new Chief Justice, in turn, increased the number of justices on the SCC and selected the five new judges himself.⁷⁷ In 2003, Mubarak rammed through parliament a restrictive associations law designed to stop human rights activism. Mubarak then used the SCC to rein in reformist judges and civic opposition, referring cases to the SCC that restricted independent judges from supervising electoral processes.⁷⁸ Despite this assault on all forms of opposition and repeated crackdowns on the Muslim Brotherhood itself, the Brotherhood continued to gain electoral power, capturing 88 out of 444 contested seats in the 2005 parliamentary elections.

With the SCC captured by the regime in the early 2000s, Egyptians turned to the administrative courts to address their grievances. While the SCC would only hear cases upon referral, or upon its own decision to directly address a constitutional issue, private citizens could more easily access the administrative courts. Egypt's administrative courts review disputes between branches of government and challenges by private citizens to administrative actions or laws passed by the legislature, including review of the constitutionality of these provisions.⁷⁹ As in other centralized regimes,⁸⁰ the administrative court system is the primary venue for citizens to file claims against the state. Citizens have used these courts to contest government actions with increasing frequency, especially as Mubarak's

75. The Mubarak regime later diffused the effects of this decision through a 2007 constitutional amendment that permitted lower-level bureaucrats and others, rather than bench judges, to supervise polling stations. See BLAYDES, *supra* note 26, at 42.

76. See Tamir Moustafa, *The Political Role of the Supreme Constitutional Court*, in JUDGES AND POLITICAL REFORM IN EGYPT 91-109, at 103 (Nathalie Bernard-Maugiron ed., 2008).

77. *Id.*, at 104.

78. *Id.*, at 105.

79. LOMBARDI, *supra* note 52, at 142.

80. China, Mexico, and Indonesia, like Egypt, have seen sharp rises in the use of their administrative courts in recent years as activists have used them to challenge the regime's political control. For discussion of these cases, see MOUSTAFA, *supra* note 5, at 21-32.

manipulations of the SCC became apparent.⁸¹ Filings in the administrative courts dramatically increased in the early 2000s.⁸²

The High Administrative Court (HAC) began to release a series of seemingly conflicting rulings in cases involving Islamic dress. In a series of cases in the 1990s, the HAC had held that an absolute ban on the *niqab* was prohibited by the Egyptian constitution's guarantee of personal freedom.⁸³ Yet on December 2, 1999, the HAC upheld Mansoura University's requirement that female students wear identical uniforms, effectively permitting a de facto *niqab* ban. This reopened the issue of whether universities were permitted to ban the *niqab*.

1. Critical Case: *El-Zeiny v. American University of Cairo*

These conflicts between religion and state in Egyptian universities reached the administrative courts again in 2001. In January of that year, the Council of Deans of the American University of Cairo (AUC) banned the *niqab* on campus "as an issue of personal safety and security."⁸⁴ In addition to "the basic right" of all members of the AUC community "to know with whom they are dealing," AUC officials further expressed that use of the *niqab* contradicted the ideals of a liberal arts education by inhibiting "dialogue and intellectual interaction with colleagues and other members of the university community."⁸⁵ AUC is an American-style university that was founded in 1919 by Protestant missionaries and subsequently has been funded heavily by the U.S. government. English is the official language of instruction, and the institution is known for training regional elites.⁸⁶

81. Political scientist Mona El-Ghobashy documents a 520% increase in administrative court actions between 1993 and 2005. El-Ghobashy, *supra* note 59, at 1598.

82. See MOUSTAFA, *supra* note 5, at 81 (arguing that the power of administrative courts expanded when government gave them "substantial" control over appointments, promotions, and internal discipline"); El-Ghobashy, *supra* note 59, at 1598.

83. See, e.g., Case no. 2106/1999/High Administrative Court (Egypt); Case no. 4142/1999/High Administrative Court; Case no. 4238/1993/High Administrative Court; Case no. 4237/1993/High Administrative Court; Case no. 4236/1993/High Administrative Court; Case no. 4235/1993/Supreme Administrative Court; Case no. 4234/1993/High Administrative Court.

84. Zvika Krieger, *Egyptian Court Overrules American University in Cairo's Limits on Religious Garb*, 53 CHRONICLE OF HIGHER EDUCATION A42 (June 2007). AUC was then located in the heart of downtown Cairo, making unveiled students visible to the public.

85. *Id.*

86. For a discussion of the soft power of the American University of Cairo in Egypt, see Rasmus Bertelsen, *American- and French-Affiliated Universities in the Middle East as "Information and Resource Bridges" to the West* (Dubai Initiative, Belfer Cent. for Sci. & Int'l Aff., Harv. Kennedy Sch., 2009), available at http://belfercenter.ksg.harvard.edu/files/Bertelsen_-_Working_Paper_-_FINAL.pdf; see also Rasmus Bertelsen, *The Politics and Soft Power of American, British, and French Universities in the Middle East* (Dubai Initiative, Belfer Cent. for Sci. & Int'l Aff., Harv.

Iman Taha Mohammed El-Zeiny had been a member and frequent patron of the AUC library for thirteen years. Beginning in January 2001, El-Zeiny was barred from entering the library while wearing a *niqab*. The Ministry of Higher Education initially upheld the AUC's *niqab* ban.⁸⁷ On August 8, 2001, El-Zeiny filed suit in administrative court against the University, arguing that the inability to wear the *niqab* in the library deprived her of her doctoral research and negatively impacted her academic future. The Second Circuit of the Administrative Court in Cairo originally ruled in favor of El-Zeiny on December 12, 2001.⁸⁸ AUC appealed to the HAC.

The case took six years to find a home in the Egyptian court system, likely due to both the sensitive religio-political content of the case and the issue of whether AUC fell under the purview of Egypt's administrative court system. As a private university, AUC contested being characterized as a public institution subject to the jurisdiction of the HAC. The Board of State Commissioners intervened in the case, accepting the appeal, but rejecting the notion that AUC was a private legal entity. The case was then heard before the Department of Unification of Judicial Principles, a tribunal of eleven judges established specifically to hear appeals that would potentially abandon previous decisions of the HAC.⁸⁹ Following subsequent hearings,⁹⁰ the case was transferred to another special tribunal within the court because of the controversy over precedent dealing with the *niqab*.⁹¹

At long last, on September 9, 2007, the HAC announced its decision and the vast expansion of its own jurisdiction. By holding that it had jurisdiction over AUC, the court potentially expanded its power over other private entities in Egypt. The court maintained that its jurisdiction was proper because the court oversees and arbitrates dis-

Kennedy Sch., 2007), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/2/1/1/4/2/p211427_index.html.

87. El-Zeiny v. Am. Univ. of Cairo, *supra* note 13, at 2.

88. Case no. 10566/2001/Administrative Court (Second Circuit, Cairo).

89. See Law No. 47 of 1972 (Amended by Law No. 136 of 1984), (Egypt). The law provides for the creation of a special tribunal comprised of eleven judges from the relevant division of the administrative court, under the chairmanship of the Court President or its most senior member.

90. The Registrar of the High Administrative Court filed a report of appeal on January 29, 2002. The Board of State Commissioners intervened and scheduled a hearing for consideration of appeal before the First Circuit High Court on December 1, 2003. The case was then referred to the Trial Chamber and then the Chamber of Unification of Judicial Principles. The announcement of the verdict was then delayed from February 10, 2007 until September.

91. The High Administrative Court is one of two highest civil law courts in Egypt's system. No appeal may be taken from a decision of the High Administrative Court although these courts may refer cases to the Supreme Constitutional Court. The Egyptian legal system is modeled on the French system. The High Administrative Court is one of two courts authorized to appeal decisions to Egypt's Constitutional Court. As of this writing, appeal has not been made to the Constitutional Court. See MOUSTAFA, *supra* note 5, at 80.

putes involving national institutions, including all educational ones, private and public.⁹²

The court proceeded to rule on the constitutionality of AUC's *niqab* ban. While affirming *shari'a* as Egypt's main source of legislation as established by Article 2 of the Constitution, the court concluded that wearing the *niqab* is not obligatory according to Islamic law. The court explained that *shari'a* requires the clothing of Muslim women to cover the entire body except for the face and hands, per verse 33:59 of the *Quran*.⁹³ However, it also noted, that Islamic scholars, from Salafis to modernists, have interpreted the *Quran* to read that women are not required to cover their faces and hands, pursuant to verses 24:30⁹⁴ and 24:31⁹⁵ of the *Quran*. Thus, the court held, because "the *niqab* is neither prohibited nor forbidden," it may not be subject to an absolute ban.⁹⁶ The court noted that in balancing the grounds of *shari'a* against the public interest,⁹⁷ a woman's decision to show her face or hands will depend on her "individual circumstances and needs for leaving the house for external matters or for work, and dealing with all aspects of life."⁹⁸

The court then held that wearing the *niqab* is a matter of personal freedom guaranteed by the Egyptian Constitution. It cited various articles of the Constitution that provide a "protective fence" around personal liberty, rights, and public freedoms, including the

92. The court held that private universities in Egypt are still in effect public institutions and therefore do not have status as private legal persons. The court cited the agreement of May 21, 1962 between the United Arab Republic and the United States establishing the American University of Cairo. Article I(D) of that agreement provides that "centers and cultural institutions" fall under conditions agreed in each case "in accordance with the laws and systems in the country." The court then cited Resolution No. 146 of 1976 affirming AUC's status as a cultural institute. Because the Egyptian government, and specifically its Ministry of Higher Education, provides oversight to AUC in various matters relating to faculty and administrative appointments, conferment of academic degrees, and university expansion, AUC properly falls under the purview of the HAC.

93. "O Prophet, tell your wives, your daughters, and women believers to make their outer garments hang low over them so as to be recognized and not insulted: God is most forgiving, most merciful." THE QUR'AN 271 (M.A.S. Abdel Haleem trans., Oxford World's Classics).

94. The court refers to verse 24:31 of the *Quran*: "And tell believing women that they should lower their glances, guard their private parts, and not display their charms beyond [what is acceptable] to reveal; they should let their headscarves fall to cover their necklines and not reveal their charms except to their husbands, their fathers, their husband's fathers, their sons, their husband's sons, their brothers, their brothers' sons, their sisters' sons, their womenfolk, their slaves, such men as attend them who have no sexual desire, or children who are not yet aware of women's nakedness; they should not stamp their feet so as to draw attention to any hidden charms. Believers, all of you, turn to God so that you may prosper." *Id.*, at 222.

95. Full verse: "Prophet, tell believing men to lower their glances and guard their private parts: that is purer for them. God is well aware of everything they do." *Id.*, at 222.

96. El-Zeiny, *supra* note 13, at 6.

97. *Id.*

98. *Id.*

right to education,⁹⁹ the guarantee of equality and non-discrimination before the law,¹⁰⁰ personal freedom,¹⁰¹ freedom of religion and religious practice,¹⁰² and criminalization of any assault on personal liberty, freedom of life of citizens, and other public rights and freedoms guaranteed by the constitution and the law.¹⁰³ For Muslim women, wearing the *niqab* or any other uniform that they feel preserves their modesty is “one of the manifestations of this freedom.” Thus, any absolute ban on the *niqab* violates constitutional guarantees of personal liberty.

Further delineating the concept of personal liberty, the court explained that this right is not violated by security checks or generally applicable dress codes. The court explicitly stated that requiring removal of the *niqab* for a security check might be constitutionally permissible.¹⁰⁴ By noting that the Egyptian judiciary will supervise disputes arising from such verifications, the court left the door open for itself to define the boundary between personal liberty and national security in future cases. The court also said that constitutional freedoms are not necessarily violated by dress code policies “established by an administrative body” that require uniforms. As the court explained, “. . . their clothes are uniform, of the same kind, appropriate for them, an indication of who they are, so that they are known, . . . as would be the case for the armed forces, police, hospitals, and others.” The court thus suggested that a Muslim woman who chooses to wear *niqab* may be legally compelled to wear a uniform required by all members of a certain group. Thus, the court struck down AUC’s *niqab* ban, but specified narrow circumstances under which future bans might be permitted.

2. Political Impact

The long-awaited court decision had immediate ramifications for AUC and larger implications for the treatment of cases involving Islamic dress in Egyptian courts. In response to the ruling, the AUC promptly revised its policies to allow wearing of the *niqab* on campus. In 2009, a lower administrative court relied on the AUC case to strike down a security-related *niqab* ban in the dormitories at Ain Shams

99. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, Sept., 11 1971, art. 18, as amended Mar. 26, 2007.

100. *Id.*, art. 40.

101. *Id.*, art. 41.

102. *Id.*, art. 46.

103. *Id.*, art. 57.

104. The court noted that “when necessary and the common good requires it,” it is permissible “to verify the identity of a woman according to the requirements of public security or to receive education and various services, or for other considerations required by contemporary everyday life” The court further noted that another female or an appointed male specialist must conduct any such verification. El-Zeiny, *supra* note 13, at 8.

University, again holding that banning the *niqab* violated the right to personal freedom and that a more narrowly tailored security check could have been undertaken.¹⁰⁵ In the winter of 2009–10, a lower administrative court in Egypt struck down a ban on face-covering garments in the dormitories at the state-run Cairo University. While holding that a complete ban on the *niqab* in all university exams imposed by the Ministry of Education was unconstitutional,¹⁰⁶ the HAC in April 2011 upheld a *niqab* ban in exams at state-run universities, stating that the decision to ban the veil for such security reasons is up to each individual university.¹⁰⁷

Yet the AUC case potentially has much broader effects than were immediately realized. By not openly contesting the decision, the Mubarak regime signaled to the public its unwillingness to punish the court for its decision. Public opinion was unlikely to tolerate a regime crackdown on a court that likely supported majoritarian interests. Rather than risk public dissent, the Mubarak regime let the decision stand.

While resolving this proxy battle between Islamists and secularists, the HAC established new institutional powers for itself. The court's establishment of jurisdiction over a private university in Egypt potentially allows it to hear challenges to any private entity tangentially supervised by an arm of the Egyptian state. Given the pervasiveness of the Egyptian bureaucratic apparatus, nearly any private entity could arguably fall under the purview of the administrative courts. The decision thus established precedent upon which the court could continue to build its institutional power.

Moreover, the High Administrative Court may have set itself up for conflict with the Supreme Constitutional Court. The ruling appears to contradict the SCC's 1996 upholding of a *niqab* ban in Egyptian public schools. The HAC did not reference the SCC's decision at all, and it applied its own unique interpretation of Article 2 and relevant Islamic jurisprudence in making its decision. As of this writing, the HAC has not referred the case to the SCC for clarification of either its interpretation of Article 2 or the *niqab* issue. At least in the short-term, the HAC appears to have made a decision that defies both the reasoning and the outcome of a SCC decision, asserting its own institutional independence and its stature as a political actor.

Finally, the HAC's judgment in the AUC case appears to contradict the past interests of the Mubarak regime in opposing Islamist

105. Case no. 2008/2009/Administrative Court, (Seventh Circuit, Cairo) (Samar Zadaa Hamdaan v. Pres. of Ain Shams Univ.).

106. Dina Zayed, *Administrative Court Overturns Ban on Full Veils in Exams*, available at <http://uk.reuters.com/article/2010/01/20/us-egypt-niqab-idUKTRE60J4P020100120> (last visited Aug. 8, 2011).

107. "Supreme Administrative Court Upholds Niqab Ban in Exams," available at <http://www.almasryalyoum.com/en/node/410335> (last visited Aug. 8, 2011).

influence in society. Instead of providing a secularizing influence, the court granted a political victory to Islamists. The court signaled that secular interests could not trump the desires of those wishing to wear the religious garb favored by Islamists—not even when those secular interests were aligned with private, American ones. The court's delaying of its opinion until after the Muslim Brotherhood's strong showing in the 2005 parliamentary elections probably was not a coincidence. By asserting constrained judicial independence, the court also signaled to Islamists that they could continue to make political gains by using the courts.

B. Kuwait

The Kuwaiti Constitutional Court (KCC) has also recently asserted a constrained judicial independence. As in Egypt and Turkey, Islamists provide the primary source of opposition to the historic ruling elites in Kuwait. When Kuwait declared its independence in 1961, the authoritarian Al-Sabah regime quickly moved to draft a constitution and establish a legislature. These moves emphasized Kuwait's sovereignty both against European colonial powers and Iraq.¹⁰⁸ Kuwait recruited Egyptian legal experts to help draft its constitution, which resembles the Egyptian model in many respects, including Article 2. As in Egypt, Islamists demanded that the constitutional text establish Islam as “the” rather than “a” source of legislation in Kuwait. The parliament passed the provision according to Islamist demands, but the Emir quickly vetoed this action, and Islam became only “a” source of legislation in the Kuwaiti Constitution. Islamists accepted this decision, but not willingly, and the issue is still periodically debated in Parliament.

Since the United States-led coalition ended Iraq's occupation of Kuwait in 1991, Kuwait has been touted as the best hope for democracy among Gulf States.¹⁰⁹ While the country remains under authoritarian control, the political system has undergone some liberalizing reforms in the past twenty years. In 1991, the Amir reinstated the previously suspended parliament along with elections for its membership. The Kuwaiti branch of the Muslim Brotherhood immediately formed the Islamist Constitution Movement (ICM, or *Hadas*), and began to participate.¹¹⁰ Since then, the newly re-established parliament has developed into a lively, if relatively weak, source of opposition. Parliament frustrates the regime through regular public interpellations of ministers and by blocking some ministerial ap-

108. BROWN, *supra* note 59, at 55.

109. See generally James Yahya Sadowski, *Prospects for Democracy in the Middle East: The Case of Kuwait*, 21-SPG FLETCHER F. WORLD AFFAIRS 57 (1997); see also BROWN, *supra* note 59, at 54 (citing Kuwait as a potential model for other Gulf States).

110. BROWN & HAMZAWY, *supra* note 44.

pointments.¹¹¹ In 2006, parliament won some electoral reforms designed to improve democratic representation.¹¹² Parliament has been unable to provide a true check on the regime, however, because the Amir shuts it down whenever it begins to tread on his power. After these so-called democratizing reforms, the Amir dissolved parliament and called new elections in 2003, 2006, 2008, 2009, and 2011, redistricting each time to manipulate the composition of parliament in his favor.

While the Al-Sabah regime does not participate directly in parliament, it tightly controls the composition of the Kuwaiti Constitutional Court (KCC). The regime selects KCC members through a council comprised primarily of officials who are appointed directly by the executive. The regime has used the threat of constitutional litigation to intimidate parliamentary opposition members, who know well that the court will support regime interests.¹¹³ The country has a well-respected law school and a bar with liberal political leanings,¹¹⁴ and public trust in the judiciary as a whole is very high.¹¹⁵ However, this has not yet translated into a Constitutional Court that has been able to check the power of the authoritarian executive by striking down its enactments. In cases involving major political issues such as press censorship, female suffrage, suspension of parliament, and the structure and procedures of the judiciary, the KCC has been notably timid.¹¹⁶ The court has been known to sidestep key political questions by dismissing cases on technicalities or carefully narrowing its holdings.¹¹⁷ In 2000 and 2001, for example, the KCC rejected five highly publicized cases that would have had the effect of granting women's suffrage, claiming they were improperly filed.¹¹⁸

The Al-Sabah family has skillfully retained its power through a series of transient pacts with its opposition.¹¹⁹ When the regime can-

111. *Id.*

112. *Id.*

113. NATHAN J. BROWN, *THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF* 178–79 (1997) (discussing the 1995 constitutional crisis over Article 71 legislation, where the government asked the Supreme Court to decide the validity of decree-laws that were issued while parliament was suspended). Parliament did not want the Court to decide this question, since the Court was likely to rule in favor of the regime. Under pressure from parliament, the government withdrew the request for constitutional review, leaving the matter unresolved.

114. *Id.*, at 185.

115. Arab Barometer, *supra* note 51. The Kuwaiti Judiciary also received the lowest corruption score of any public institutions in Kuwait, according to the Global Corruption Barometer. See Sawsan Kazak, *Kuwait Corruption Levels on the Rise*, June 4, 2009, available at <http://www.zawya.com>.

116. BROWN, *supra* note 59, at 151.

117. BROWN, *supra* note 113, at 178.

118. *High Court Rejects 4 Suffrage Cases*, L.A. TIMES, July 5, 2000.

119. See Sean L. Yom, *Iron Fists in Silk Gloves: Building Political Regimes in the Middle East* (2009) (unpublished Ph.D. dissertation).

not coopt the opposition, it seeks to divide it. Political parties are illegal in Kuwait, but Islamist, liberal, and other voting blocs have emerged that have provided some consistency to the regime's opposition. Islamists were internally divided, however, on the question of whether women could run for office. The ICM opposed the 2005 bill granting full political rights to women, and ultimately chose to support women's suffrage but not office-holding. Meanwhile, Salafi politicians remain staunchly opposed to women's political participation. In May 2005, when the parliament seemed on the brink of rejecting a bill to give women full political rights, the regime abruptly reversed its opposition to women's suffrage and issued an order of urgency that forced the bill through parliament in a single session.¹²⁰ The ICM was only able to add the qualification that women would participate according to *shari'a*.¹²¹ The government won support from independents, tribal representatives, and Shi'a for its initiative, by agreeing to increase pension payments and salaries for government workers.¹²² In this way, the Al-Sabah regime used the inclusion of women in parliament as a way to fragment growing parliamentary opposition. The regime's carefully calculated support for women's rights divided the liberal parliamentary blocs, who supported women's suffrage, from conservative Islamist parliamentary members, who remained opposed to women's participation in politics.¹²³

In 2006, the Amir of Kuwait died, leading to a complicated succession struggle and an opportunity for political change.¹²⁴ The general public and a unified parliamentary opposition supported re-districting the Kuwaiti electorate to make the parliament more representative. The new Amir responded by dissolving parliament and forcing an election according to the old rules. Paradoxically, this attempt to quash the opposition caused Islamists to gain power. The ICM won six parliamentary seats, forming a larger Islamist bloc with Salafis and independent Islamists. To break up this bloc of blocs, the Amir dissolved parliament again in 2008 and 2009 and skewed the electoral rules in his favor. The ICM did increasingly worse in each subsequent election, but other Islamist sects increased their representation, and the overall size of the opposition remained stable.

120. Mary Ann Tetreault, *Women's Rights in the Middle East: A Longitudinal Study of Kuwait*, 3 INT'L POL. SOC. 218, 232 (2009).

121. *Id.*

122. *Id.*

123. Brown, *supra* note 60, at 131. See also Mary Ann Tetreault & Doron Shulnitzer, *How Democratization is Won in Non-Democratic Regimes: Emotion, Psychology and Agency in the Kuwaiti Women's Rights Movement*, paper presented at the Annual Meeting of the American Political Science Association, Washington, D.C., Aug. 30, 2008.

124. See BROWN & HAMZAWY, *supra* note 44.

In the elections held on May 16, 2009, Kuwaiti women won political office for the first time.¹²⁵ Two of the four women elected, activist Rola Abdullah Hajih Dashti and professor Aseel Al-Awahdi,¹²⁶ do not wear *hijab*, which angered Islamist members and their supporters. Islamists immediately began mounting challenges to the women's seating under both Islamic and secular law.

The Islamist opposition's first contested the election results through the Ministry of the *Awqaf*—the government agency charged with distributing land and other endowments for religious purposes. Muhammad Hayef, an Islamist member of parliament, first sought a *fatwa* from the Ministry's Bureau of Legal Advice.¹²⁷ The Salafi-dominated Ministry of the *Awqaf*, which had never before intervened in political questions over women's rights in Kuwait, issued a *fatwa* stipulating that the *shari'a* required women, including female parliamentarians, to wear the *hijab*. Islamist politicians relied on the *fatwa* to argue that it was thus necessary to deny the women their parliamentary seats. One Islamist member of parliament (MP), Jama'an Al-Harbesh, publicly expressed surprise that there was any disagreement with the *fatwa*, saying it was a sign of something abnormal in Kuwaiti society.

The liberal bloc quickly responded in support of the female candidates. It released a united statement that the *fatwa* embodied illegal practices and endangered constitutional integrity.¹²⁸ MP-elect Dashti filed a proposal to amend the electoral law requiring that female candidates comply with *shari'a*, arguing that the law violated the Kuwaiti constitutional guarantee of equality of the sexes before the law.¹²⁹

1. Critical Case: *Al-Nashi v. Dashti*

The Islamist bloc knew that a Constitutional Court opinion, unlike the *fatwa*, would be legally binding on the female MPs.¹³⁰ Recourse to the KCC is a rare political tactic. The Court decided only

125. Election of women to the Kuwaiti parliament was permitted pursuant to Article 1 of the Law of Parliamentary Elections No. 35 of 1962 as amended by Law 17 of 2005.

126. See, e.g., About Board of Directors, KUWAIT ECONOMIC SOCIETY (providing Dashit's biography and noting that she was "listed among the world's 100 most powerful Arabs" in 2007), <http://www.kesoc.org/kes/bod/>.

127. *Hijab Al-Na'bat Yadad B'Azma Siyasiyya Jedida [Veiling of Representatives Threatens a New Political Crisis]* AL-AKBAR, Oct. 15, 2009, available at <http://www.al-akhbar.com/ar/node161260>.

128. *Id.*

129. *Id.*

130. Ahmad Aysa, *El-Kuwait: El-Mahkama el-Dustouriya Tarfaz el-Zâm el-Nâ'bat wa-El-Wazyrât Artdâ' el-Hijâb [Kuwait: The Constitutional Court Refused to Require MPs and Ministers to Wear the Hijab]*, ASHARQ AL-AWSAT, Oct. 29, 2009, available at <http://www.aawsat.com/details.asp?section=4&article=542089&issueno=11293>.

thirty cases between its establishment on June 4, 1973 and 1996.¹³¹ The Kuwaiti Constitution's provision for individual standing before the KCC appears quite liberal and unique in the Arab world, but it is rarely invoked.¹³²

With the help of a lawyer affiliated with the Islamist groups, Hamad Abdulaziz Ibrahim al-Nashi sued the two women directly in his capacity as a voter and a parliamentary candidate pursuant to the individual standing provision. He also sued the Minister of the Interior and the Secretary General of the National Assembly and the Minister of Justice in their official capacities to invalidate Dashti's and Al-Awahdi's election and membership in Parliament. Al-Nashi's brief relied primarily on two *fatwas* by the Ministry of the *Awqaf* relating to acceptable women's clothing. He argued that it is well established by the *Quran*, the *Sunnah*,¹³³ and consensus of the imams that women must wear the *hijab* and modest clothing around men who are not their immediate relatives,¹³⁴ and therefore this should be part of Kuwaiti law pursuant to Article 2 of the Kuwaiti Constitution.

The court chose to rule on the merits, despite the opportunity to dismiss the case on technicalities, as it had done with prior contentious cases. Both defendants and the Administration of *Fatwa* and Religious Legislation had filed motions for dismissal based on filing errors.¹³⁵ The court did dismiss the case against Dashti on the grounds that the court could not constitutionally rule on a matter that fell under the purview of Parliament, namely the validation of the election process and procedures.

131. Khalifah Al-Hamidah, *Constitutional Court of Kuwait: A Comparative Study* 74 (1997) (unpublished LLM thesis, Harvard Law School).

132. Article 173 of the Kuwaiti Constitution lays the foundations for a constitutional court:

Law shall specify the judicial body competent to decide upon disputes relating to the constitutionality of laws and regulations and shall determine its jurisdiction [sic] and procedure. Law shall ensure the right of both the government and the interested parties to challenge the constitutionality of laws and regulations before the said body. If the said body decides that a law or regulation is unconstitutional, it shall be considered null and void.

CONSTITUTION OF THE STATE OF KUWAIT, June 1961.

133. *Sunnah* refers to the customs kept by the Prophet Mohammed and his companions, which Muslims strive to emulate.

134. The word used is "*mahram*," which refers to relatives with whom sexual intercourse would be considered incestuous. See THE QURAN (al-Baqara trans.) 2:221; MUHAMMAD SAED ABDUL-RAHMAN, ISLAM: QUESTIONS AND ANSWERS—JURISPRUDENCE AND ISLAMIC RULINGS 22–23 (2007).

135. Defendants argued that the court lacked jurisdiction to rule on beyond technical matters of electoral processes and procedures, and not preliminary stages of the electoral process or requests to nullify membership in parliament. The court ruled that the parliament's authority only deals with its members after the validation of the election processes and procedures; thus they had jurisdiction to rule on this issue. The court also rejected the defendants' argument that the appeal was invalid due to improper supporting documentation in the court filings.

Regarding the other candidate, the court's discussion focused on the interpretation of Law 17 of 2005 that required women "in their candidacy and after election" to comply with the rules and provisions recognized in *shari'a*.¹³⁶ The court interpreted this restriction broadly to "include all the provisions of religion, and those relating to faith and morals and actions of those obligated [i.e., Muslims] and their actions as contained in the *Quran* and *Sunnah* and discovered based on evidence from other legitimate sources." The KCC explained that the phrase "recognized in Islamic law" includes recognition of interpretations derived from *ijtihad*. Thus, Islamic Law that is part of Kuwaiti law encompasses various, divergent, personal interpretations, and not just one rigid meaning. The KCC then discussed how conflicts of laws are handled in Kuwaiti legal interpretation.¹³⁷ Under Kuwaiti doctrine, if a text has more than one potential meaning, the meaning that is more in line with higher legislation is binding. For these reasons, the court noted that the Kuwaiti Constitution does not present a monolithic interpretation of Islamic law as the sole source of legislation:

The point is that the Kuwaiti Constitution does not render Islamic Law—in the sense of "Islamic Jurisprudence"—as the only source of legislation or prohibit the legislature from taking from other sources in deference to the circumstances of the people and the affairs of the subjects in a manner that guarantees their legitimate interests.

The court thus held that the legislature may consider sources besides *shari'a* when deciding what is in the public interest.

The court then discussed the constitutional values that should also be considered when making state law. The Constitution guarantees personal freedom, freedom of expression, and freedom of religion.¹³⁸ Taking these together, the KCC held that Kuwaiti law does not permit distinctions to be made between the rights and duties of citizens on the grounds of religion or sex.

Finally, the court held that the precepts of Islamic law do not have the force of legal norms in Kuwait unless a precept of *shari'a* is specifically enacted as state law by the legislature. *Shari'a* is not equal to secular state law, including the constitution, which stands on its own as a separate source of law. Although the appellant cited a *fatwa* from the Ministry of the *Awqaf*, the text of the election law should be read in accordance with the content of the Islamic founda-

136. *Al-Nashi v. Dashti*, *supra* note 13, at 3.

137. *Id.*, at 4.

138. Articles 30 and 35 of the Kuwaiti Constitution guarantee freedom of religion and belief. The court decision refers only to general principles and does not cite specific articles of the constitution.

tional texts. The *fatwa* itself cannot be described as an objective source of Islamic law, and thus cannot be a binding source of Kuwaiti law. The KCC considered it inconceivable that the legislature would have intended to leave individuals in charge of the application and implementation of rules and provisions that were subject to interpretation. Doing so might lead to “disorder and contradiction” between these provisions due to the variety of permissible interpretations of Islamic law. The legislature would specifically have to write *shari’a* into its legislation for *shari’a* to become state law.¹³⁹ Thus, the court rejected the appeal because the defendant did not violate the constitution.

2. Political Impact

The KCC thus decided this battle in the war between secularists and Islamists in Kuwait. The decision was largely respected, despite Islamists’ grumbles. Dashti and Al-Nashi were seated in parliament, and quickly became vocal forces within it. In upholding the female parliamentarians’ right to be seated regardless of their dress, the court extended its power to rule broadly on substantive questions involving elections. While claiming that it was ruling only on the form of elections, the court gave itself the power to decide who would actually get seated in parliament. The court thus set itself up as the ultimate arbiter of future electoral competition.

The broad language of the opinion was quite surprising for a court that is known to make the narrowest possible rulings in political cases or dismiss them on technicalities. Dismissing the case would have fulfilled the regime’s wishes, and the effect could have been the same—the women would still have been seated in parliament. Yet, since the regime was not a party in this case, the KCC could assert constrained judicial independence without ruling directly against it. The KCC likely also wished to signal to the public that the rarely-used individual right of standing was an acceptable way to bring cases before the court. True to the ideology of the regime that ap-

139. The point is also that the precepts of Islamic Law do not have the enforceability of secular legal rules, unless the legislature becomes involved and uses legislative procedure to write it into law. Islamic Law does not have the power of self-directed implementation, but should be informed by specific legislative texts and the contents of a legislative framework, which can be implemented, applied, and adhered to by all audiences. It is not possible, therefore, that Islamic Law can be administered in the same manner as secular legal rulings. Secular legal texts can stand alone and depend on the provisions contained within the given law. Consequently, [the Ministry of the *Awqaf’s fatwa*] . . . cannot be described as a having clearly defined secular provisions, rather this text is considered in accordance with the content of the Islamic foundational texts. While these texts are a source of direction and guidance, that does not mean that they are legally binding and obligatory. . . .

Id., at 4.

pointed them, the judges did make a decision in line with the regime's short-term political interests in upholding women's rights and splitting the Islamist parliamentary bloc. Yet in doing so, the KCC expanded its own powers along with the notions of personal and religious freedoms in Kuwaiti jurisprudence.

The KCC's opinion was also striking in its nationalization of *shari'a*.¹⁴⁰ The KCC specified that *shari'a* would *only* become state law through explicit legislation. This effectively declared the legislature—and not the Ministry of the *Awqaf*—to be the governmental body to decide if and how *shari'a* would be incorporated into Kuwaiti law. Egyptian high courts, by contrast, never went this far in nationalizing the *shari'a* in their Article 2 jurisprudence. They never explicitly specified that *only* state institutions have the power to define the relationship between *shari'a* and state law. The effect of the KCC's opinion was to weaken the power of certain actors and institutions, including individual *'ulama* and the Salafi-dominated Ministry of the *Awqaf* to decide how *shari'a* relates to Kuwaiti law. Instead, the court turned the nationalization of *shari'a* back to the parliament, giving Islamist parliamentarians explicit instructions on how to incorporate *shari'a* into Kuwaiti law. Of course, the KCC also carved out a future political role for itself by giving itself power of review over any conflict between Kuwaiti national law and *shari'a*.

C. Turkey

Issues of religious dress have been at the forefront of Turkish politics since the fall of the Ottoman Empire.¹⁴¹ Upon its independence, Turkey made secularism the official ideology of the state and enshrined secularism in Article 2 of its Constitution. The framers of Turkey's original constitution saw secularism as the hallmark of Turkey's status as a modern nation and as a way to abolish the fundamentalist vestiges of an empire governed by *shari'a*. Several early laws dealing with clothing in Turkey expanded the meaning of secularism and modernism in Turkey, including the Law on the Wearing of the Hat, which banned the wearing of the fez, and a law prohibiting religious officials from wearing religious garments in the public sphere.

Unlike Egypt and Kuwait, Turkey's system of government is often characterized as democratic because of its long tradition of electoral politics. Turkish democracy remains weak, however, due to the

140. I am grateful to Nathan Brown for calling this point to my attention.

141. See Hootan Shambayati, *Courts in Semi-Democratic/Authoritarian Regimes: The Judicialization of Turkish (and Iranian) Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES*, *supra* note 6, at 297 (noting the prominence of the headscarf issue in Turkish politics).

specter of military rule.¹⁴² The Venice Commission, the Council of Europe's advisory body on constitutional issues, has characterized Turkey as a "tutelary democracy," a system based on democratic principles but in which democratically elected institutions are controlled by the military, high bureaucracy, and high courts.¹⁴³ While Turkey has had relatively free electoral competition since 1950, military coups in 1960, 1971, 1980, and 1997 have prevented full democracy from taking root. In its civil liberties rankings, Freedom House has consistently described Turkey as only "partly free," giving it a score comparable to Russia's.¹⁴⁴ In recent years, both scholars and Obama administration officials have noted increasing civil liberties violations in Turkey stemming from the regime's *Ergenekon* investigation and Sledgehammer case. These have included raids on and indefinite detentions of Turkish citizens without trial, stifling of press freedoms, and the indictment or conviction of hundreds of former army generals and other suspected regime opponents on questionable evidence.¹⁴⁵ While no one would mistake Turkey for a fully authoritarian regime, its democratic credentials are at least questionable.¹⁴⁶

The Turkish Constitutional Court (CCT) was established in 1961 by allies of the Republican People's Party (RPP) that had ruled Turkey since its independence in 1923 through the transition to a multiparty regime from 1946-1950. A brief period in which the Democratic Party gained power over Turkey and declared martial law ended with a military coup in 1960. The RPP-backed military regime

142. See *id.*, at 283 (noting that Turkey's political system has "authoritarian tendencies" largely due to the military's continued influence over politics).

143. Ergun Ozbudun, *European Commission for Democracy Through Law (Venice Commission), Civilian Control of the Military: Why and What?* (2007), available at [http://www.venice.coe.int/docs/2007/CDL-DEM\(2007\)005-e.pdf](http://www.venice.coe.int/docs/2007/CDL-DEM(2007)005-e.pdf). Tutelary authorities include unelected authorities, monarchs, the military, and religious authorities, that limit the power of elected officials to govern. See LEVITSKY & WAY, *supra* note 6, at 6; c.f. ALFRED STEPAN, *RETHINKING MILITARY POLITICS: BRAZIL AND THE SOUTHERN CONE* (1988) (discussing Brazil's tutelary democracy as a result of military influence).

144. Freedom House, "Freedom in the World 2012," available at <http://www.freedomhouse.org> (accessed Mar. 20, 2012). Turkey receives a civil liberties score of 3.82 while Russia receives a score of 3.31.

145. Gareth H. Jenkins, *Between Fact and Fantasy: Turkey's Ergenekon Investigation*, Central Asia-Caucasus Institute Silk Road Studies Program, Johns Hopkins University, Aug. 2009; Merve Buzra Ozturk, *Press Freedom and Jailings*, TODAY'S ZAMAN, Mar. 14, 2012 (citing Clinton's call for the release of journalists); Dexter Filkins, *The Deep State*, THE NEW YORKER, Mar. 12, 2012, available at http://www.newyorker.com/reporting/2012/03/12/120312fa_fact_filkins?currentPage=all (last visited Mar. 19, 2012); Sebnem Arsu, *Turkish Court Convicts 330 from Military in Coup Case*, N.Y. TIMES, Sept. 21, 2012, available at <http://www.nytimes.com/2012/09/22/world/europe/turkish-court-convicts-330-military-officers-in-coup-plot-trial.html> (last visited Sept. 25, 2012).

146. See also Osman Can, *The Turkish Constitutional Court as Defender of the Raison d'Etat*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES 276 (Rainer Grote & Tilmann J. Roder eds., 2011) (arguing, as a reporting judge of the Turkish Constitutional Court, that the Turkish legal system is "undemocratic").

rewrote the Constitution in 1961 and established the CCT as a counter-majoritarian institution to safeguard its interests—especially secularism—in the event that the party lost power in the future. Thus, the establishment of the CCT occurred in accordance with Ran Hirschl's hegemonic preservation thesis.¹⁴⁷

As the CCT has increased its jurisdiction, the court and Parliament have sparred repeatedly over the scope of the CCT's power. In 1970 and 1971, the CCT invalidated amendments for reasons of both form and substance, holding that Parliament did not have the authority to change fundamental principles of the constitution relating to secularism.¹⁴⁸ Parliament responded by amending the Turkish Constitution in 1971 to say that the CCT could review constitutional amendments only as to "form" but not substance, though it left the meaning of "form" unclear.¹⁴⁹ In 1975, the CCT held that it did have the power to review amendments for substance based on Article 9 of the constitution, which states that Parliament cannot amend, or propose to amend, Turkey's republican form of government.¹⁵⁰ Parliament moved next by amending the constitution in 1982 to explicitly restrict the CCT's review of constitutional amendments to "form," which it defined as the "consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with."¹⁵¹ After the constitution was ratified by public referendum, the CCT seemed to back down. In 1987, the CCT held that it lacked jurisdiction to decide a challenge to a constitutional amendment on the grounds that the challenge did not meet the requirements expressly provided by the constitution.¹⁵²

Yet the CCT has also established itself as a powerful, independent actor capable of checking executive and legislative power. The CCT struck down more than half of the statutes referred to it between 1962 and 1999.¹⁵³ While opposing the government on some issues, the CCT has been reluctant to challenge the government in areas involving human rights, including religious freedoms.¹⁵⁴ During the 1990s, the CCT was notably restrictive of civil rights and civil liberties in Turkey, in accordance with military demands.¹⁵⁵ How-

147. Hootan Shambayati, *The Guardian of the Regime: The Turkish Constitutional Court in Comparative Perspective*, in CONSTITUTIONAL POLITICS IN THE MIDDLE EAST 99, 118 (Said Amir Arjomand ed., 2008). For discussion of the 1961 constitution-making process, see Ceren Belge, *Selective Activism of the Constitutional Court of Turkey*, L. & SOC'Y REV. 653, 661 (2006).

148. See Decision No. 1971/37 (Turk. Const. Ct. 1971); Decision No. 1970/31.

149. TURKISH CONSTITUTION OF 1971, art. 147.

150. Decision No. 1975/87.

151. TURKISH CONSTITUTION of 1982, art. 148.

152. Decision No. 1987/15 (Turk. Const. Ct. 1987).

153. Belge, *supra* note 147, at 654.

154. *Id.*

155. *Id.*

ever, these restrictions did not diminish overall public trust in the judiciary, which has increased steadily since the 1990s.¹⁵⁶ According to the World Values Survey, in 2007, 73.2% of Turks expressed “a great deal” or “quite a lot” of confidence in the judicial system as a whole.¹⁵⁷

True to the interests of the military and the Republican elites who established it, the CCT has relentlessly guarded the secular character of the state. The court has gone so far as to dissolve political parties with Islamist orientations, asserting fears that these parties planned to overthrow the secular republic.¹⁵⁸ The conflict over secularist and Islamist forces has come to a head in cases involving headscarves. Branches of the tutelary bureaucracy, continually influenced by military rule, have passed multiple administrative bans on headscarves in state buildings. These bans, such as a 1982 Higher Education Council circular banning headscarves in university lectures, have had the effect of forcing women who wear headscarves to seek education abroad.¹⁵⁹ Recognizing the beliefs of the overwhelming majority of the Turkish population, and the importance of the education of women to the modernization of the country, the Turkish parliament has consistently sought to overturn administratively imposed headscarf bans. In 1988, parliament passed a law allowing headscarves in universities, which the President immediately appealed to the CCT. In 1989, the CCT struck down the law in a 10-1 decision, holding that it violated the secularism provisions of the Turkish constitution along with equality before the law and freedom of religion. The court held that the original intent of the secularism provisions was to prohibit the wearing of Islamic headscarves.¹⁶⁰ Drawing on the Law on the Wearing of the Hat and the law banning religious garments in the public sphere, the court held that the framers of Article 2 considered the implementation of modern clothing to be important for both genders.¹⁶¹

In response to this decision, in 1990, Parliament passed another law to allow headscarves in universities. This time, the law was facially neutral, stating that “Choice of Dress shall be free in higher-education institutions, provided that it does not contravene the laws

156. See World Values Survey, http://www.worldvaluessurvey.org/index_html.

157. *Id.*

158. *Id.*; Gunes M. Tezcur, *Judicial Activism in Perilous Times: The Turkey Case*, L. & SOC'Y REV. 305 (2009).

159. This was a major issue presented by the plaintiff in *Leyla Sahin v. Turkey*, App. No. 44774/98 (Eur. Ct. H.R. Nov. 10, 2005) (Grand Chamber).

160. Decision No. 1989/12 (Turk. Const. Ct. 1989), available at <http://www.anayasa.gov.tr>.

161. See Ozan Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L., 1239, at 1276-77 (2011).

in force.”¹⁶² The CCT upheld the constitutionality of this legislation, but interpreted it to mean that headscarves were still impermissible in universities.

The headscarf issue has become increasingly controversial as Turkey persists in its bid to join the European Union. The European Court of Human Rights (ECtHR) has ruled against Turkey more than any other country in human rights cases, forcing the Turkish judiciary to comply with European demands on other rights and freedoms, while allowing the headscarf ban to persist.¹⁶³ In 2004, a medical student who wished to wear the *hijab* in Turkish universities brought her case before the ECtHR, generating intense publicity over the plight of women wearing headscarves in Turkey. The plaintiff, Layla Sahin, appealed a ruling from Turkey’s High Administrative Court upholding the headscarf ban, on the grounds that it violated Article 9 of the European Convention on Human Rights, which guarantees freedom of religion and conscience. In a decision surprising to many observers, the ECtHR upheld the ban in a 10-1 decision.¹⁶⁴ The ECtHR deferred to the Turkish courts’ interpretation of the headscarf as a fundamentalist religious symbol, and held that in the Turkish context, the state’s interest in public order trumped the individual plaintiff’s right to wear the headscarf.

Frustrated by the CCT and the ECtHR’s decisions, pro-headscarf activists changed the venue of contestation back to parliament, just as Islamist forces began to make tremendous electoral gains. In 2002, the *Adelt ve Kalkinma Partisi* (AKP) won two-thirds of the seats in parliament, an astounding margin of victory in a country that had been ruled by weak coalition governments since 1991. Although the AKP does not have an explicitly Islamist platform and rejects the Islamist label, the AKP is widely recognized as having Islamist leanings. Many of the same politicians who were involved in the previously-banned Refah and Welfare parties are members of the AKP.

The AKP has consistently sought to overturn the headscarf ban since its ascent to power in 2002.¹⁶⁵ After receiving an even higher percentage of the vote in the 2007 national elections, the AKP supported passage of constitutional amendments that would have the

162. See Adrien K. Wing & Ozan O. Varol, *Is Secularism Possible in a Majority-Muslim Country?: The Turkish Example*, 42 TEX. INT’L L.J. 1, at 40 (2006) (quoting transitional section 17 of Law no. 2547).

163. Turkey is one of five states against which most actions are lodged within the ECtHR. See Filtering Section, Progress Report, July 21, 2011, available at http://www.echr.coe.int/echr/homepage_EN (last visited Aug. 8, 2011).

164. Sahin v. Turkey, *supra* note 159; See also Cindy Skach, *International Decisions, Sahin v. Turkey; “Teacher Headscarf” Case: ECHR and German Constitutional Court decisions on wearing Islamic head-scarves*, 100 AM. J. INT’L L. 186 (2003).

165. See Shambayati, *supra* note 147, at 296 (noting the importance of the headscarf issue to the AKP and the judiciary’s continued insistence that the headscarf ban is crucial to secularism).

effect of lifting the headscarf ban, which passed on February 9, 2008 as Law No. 5735. Under the amendments, text would be added to Article 10 of the Turkish Constitution to read “state organs and administrative authorities shall act in compliance with the principle of equality before the law in all of their procedures *and in using all forms of public service*.”¹⁶⁶ An additional paragraph would be added to Article 42 to read, “No one shall be deprived of the right to higher education for any reason not explicitly written in the law.”¹⁶⁷ In the wake of the ECtHR’s decision in *Sahin v. Turkey*, the drafters of these amendments deliberately kept references to the headscarf out of the constitutional text.

Nonetheless, it was clear that the intent of the amendments was to lift the ban on headscarves in Turkish universities. Law 5735 was popularly known as the “Turban Amendment” and generated intense political debate in Turkey.¹⁶⁸ In response, the Chief Public Prosecutor’s Office in Turkey filed an indictment before the CCT on March 17, 2008, requesting the AKP’s dissolution for violating the principles of secularism.

1. Critical Case: E.2008/16, K. 2008/116 (“The Turban Case”)

While the AKP’s fate was pending before the CCT, the opposition attacked on another front. One hundred and ten parliamentary deputies asked the CCT to review the constitutionality of the Turban Amendment. The applicants argued that the amendment contradicted the principle of secularism as established by Article 2 and made irrevocable by Article 4 of the Turkish Constitution. They further argued that the Turkish parliament has no power to amend the substance of Article 2 through other legislative enactments or amendments. Respondents argued that Article 148 of the Turkish Constitution, which provides that “Constitutional amendments shall be examined and verified only with regard to their form,”¹⁶⁹ barred the suit because the CCT could not rule on the amendment’s substance.¹⁷⁰

On June 5, 2008, the court struck down the amendment, upholding the headscarf ban.¹⁷¹ The court held that Article 148 permitted them to review whether the requisite majority was obtained, and

166. Proposed Amendment to CONSTITUTION OF THE REPUBLIC OF TURKEY, 7 Nov. 1982, art. 10 (emphasis mine).

167. Proposed Amendment to *id.*, art. 42.

168. Mehmet C. Uzun, *The Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education*, 28 PA. STATE INT’L L. REV. 383, 384–87 (2010).

169. CONSTITUTION OF THE REPUBLIC OF TURKEY, 7 Nov. 1982, art. 148.

170. See Uzun, *supra* note 168, at 416.

171. E.2008/16, K. 2008/116, *supra* note 13 [hereinafter Turban Case]. Official summary available from the Constitutional Court of the Republic of Turkey, at <http://www.anayasa.gov.tr/> (last visited Feb. 17, 2011).

whether that majority was sufficiently competent to propose a constitutional amendment. Because Article 4 of the Turkish Constitution prohibits amendments to the first three constitutional articles, parliament had no power to amend the unamendable provisions of the constitution through the Turban Amendment.

The CCT could have stopped here and achieved the goal of keeping headscarves out of universities. But it proceeded to give a more far-reaching ruling, once again expanding its own jurisdiction over the substance of democratically enacted constitutional amendments. The court also decided that it had jurisdiction to determine whether a constitutional amendment violated the irrevocable articles of the constitution, permitting it to rule on the substance of the amendment itself. The CCT noted that the aim of the legislation was clear from parliamentary debate and legislative history: "[t]he primary aim is the recognition of the freedom to cover for religious reasons to those who enjoy the right to higher education as a public service."¹⁷² The method of adopting the amendment itself compromised democratic values by "excluding democratic conciliation methods" and "embracing defiance or imposition as a method."¹⁷³ Furthermore, the CCT held that the amendments violated third party rights by preventing administrative authorities from placing any limits on access to higher education, and by preventing future legal restrictions on religious dress or other religious symbols in situations where their use might be seen as coercive.¹⁷⁴ The court cited its prior jurisprudence, noting that "[i]t cannot be considered that religion, which requires sincerity and simplicity, and which should be the resource of purity, love, and respect, needs an indicator for show off"¹⁷⁵ Using strong language, the court reaffirmed its prior position that the complete separation of religion from the political realm is necessary for democracy.¹⁷⁶

The CCT also took the unusual step of referring to the ECtHR opinions in *Sahin v. Turkey* and *Dahlab v. Switzerland*¹⁷⁷ at length. The court emphasized that these two decisions reinforce the principle that European states have broad discretion to regulate the use of re-

172. Uzun, *supra* note 168, at 418 (translation).

173. *Id.*, at 420 (translation).

174. *Id.* (translation).

175. Turban Case, at 6.

176. According to [secularism], which is the common value of contemporary democracies, political and legal structures are based on national preference which is the outcome of participatory democracy. Participatory democracy is purified from dogma and relies on rationalism and scientific methods Contemporary democracies reject the claims of absolute truth, stand against the dogma with rationalism . . . and by separation of religion and state affairs, they do not let religion be politicized and become a tool for ruling

Id., at 15.

177. *Dahlab v. Switzerland*, European Court of Human Rights Appl. Nr. Appl. Nr. 42393/98 (Jan. 15, 2001).

ligious symbols in the public sphere. The *Sahin* decision held that the “headscarf ban is a necessary precaution in a democratic society in terms of ‘the protection of the rights and freedom of others’ and ‘providing the public order and security.’”¹⁷⁸ The CCT cited *Dahlab*, in which the ECtHR upheld the rejection of a job application by a hijab-wearing Swiss primary school teacher, as support for its assertion that the headscarf may be seen as a symbol of coercion and antithetical to gender equality.¹⁷⁹ Thus, the CCT held that banning the headscarf was in the public interest.¹⁸⁰

Previously, the CCT had been criticized for not considering ECtHR decisions at all, particularly those dealing with Turkey’s treatment of its Kurdish minority, and for failing to discuss those decisions at length on the rare occasions that it mentioned them.¹⁸¹ But on the headscarf issue, the CCT and the ECtHR are in complete agreement that the Turkish historical context warrants a strong secularist stance against the vestiges of Ottoman Islamic fundamentalism, and that the wearing of headscarves has the potential to generate coercion in the university context. Thus, where headscarves are concerned, the state’s interest in protecting the rights of others trumps the right to religious freedom. The CCT likely saw the headscarf issue as an the opportunity to deflect the expected controversy over its ruling by claiming its decision was in line with the wishes of the ECtHR, and by implication, the EU, which the Turkish public overwhelmingly wishes to join.

Thus, the court ruled that lifting the headscarf ban is contrary to the principles of secularism, so the Turban Amendment violates Articles 4 and 148 of the Constitution. In doing so, the CCT asserted wide-reaching new powers for itself. While the concept of *stare decisis* is foreign to Turkish law, the CCT usually cites and gives deference to its prior opinions. Yet the CCT made no mention of its 2007 decision upholding narrow grounds for its review of constitutional amendments. By interpreting Article 148 broadly, the court opened the door to extensive review of legislative actions in a manner that could eventually resemble the U.S. Supreme Court’s substantive due process jurisprudence. But the court’s rationale in striking down the amendment because of the lack of competence of those who passed it is potentially even more troubling. By establishing itself as the arbiter of whether any law is based in democratic values, the court

178. Turban Case, *supra* note 13, at 16.

179. *Id.*

180. *Id.*

181. See Esin Orucu, *The Turkish Experience with Judicial Comparativism in Human Rights Cases*, in JUDICIAL COMPARATIVISM IN HUMAN RIGHTS CASES 134–37, 140–41 (Esin Orucu ed., 2003). For a comparative perspective on this resistance to transnational law, confer VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010).

established precedent that could potentially allow it to strike down any constitutional amendment passed by the legislature or by public referendum.¹⁸²

2. Political Impact

The Turban Case reveals what happens when a court acts outside the constrained realm in which judicial independence is permitted. The AKP had not previously tried to influence the court's composition, but in the Turban Case, the CCT attacked an issue core to regime interests, and thus went too far. The AKP and Prime Minister Erdogan quickly stated that the court had overstepped its political authority by usurping parliamentary power. The dissenting justices noted the potential for chilling effects on Turkish democracy, remarking that the court's unprecedented decision to review the substance of the amendment meant that "parliament will never even propose or even think of proposing or drafting constitutional amendments, fearing that the court might differ in its interpretation."¹⁸³

Shortly thereafter, on July 30, 2008, the CCT ruled on the dissolution case against the AKP. In the face of the AKP's overwhelming public mandate, the court found itself unable to ban the party, but managed to censure it. A majority of the CCT voted to ban the AKP, but the prosecutor fell one vote short of the supermajority needed for a ban.¹⁸⁴ The CCT noted that it found no evidence that the party planned to overthrow the secular republic, but it used the AKP's support of the headscarf amendment as an excuse to slash the party's public funding by half and to issue a stern warning to the party to conform to the principles of the secular republic.¹⁸⁵

The day after it won the dissolution case, the AKP announced its plan for revenge on the CCT. The AKP would amend the 1982 Constitution, ostensibly to bring the Turkish judiciary into line with EU demands for judicial reform. On August 24, 2009, the AKP specified that its constitutional reforms would increase the number of CCT justices from eleven to seventeen and change procedures to ensure that it would control the new appointments.

The AKP realized that it might not get public support for this court-packing plan. The majority of Turks held the CCT in esteem and valued the court's willingness to check other governmental branches. The AKP knew, however, that public support for EU accession was strong. The AKP thus chose to combine the court-packing

182. Uzun notes that Turkish law does not use "precedent per se," but that the Turkish judiciary has always relied on prior decisions when constructing legal rationale, particularly when interpreting constitutional norms. Uzun, *supra* note 171, at 425–26.

183. See E.2008/16, K. 2008/116 at 17; see also HIRSCHL, *supra* note 19, at 159.

184. Tezcur, *supra* note 158, at 310.

185. *Id.*

plan within a set of twenty-seven constitutional amendments designed to appeal to the public. The proposed amendments expanded individual freedoms, such as a right to privacy, children's rights, freedom to organize labor unions, and freedom of movement. These increased freedoms would also comply with the European Union's demands for constitutional reform. The AKP's cause was helped by the Secretary-General of the Venice Commission, the European Council's advisory body on constitutional affairs, who voiced public support for the reforms.¹⁸⁶ He expressed hope that the increased number of judges would reduce the CCT's backlog of cases, and that a reformed CCT could provide a screening mechanism to keep Turkish cases out of the ECtHR. The amendment package did not receive enough parliamentary votes for it to immediately become law, and was thus subjected to a public referendum. On September 12, 2010, fifty-eight percent of Turks voted to pass the amendment package. As of this writing, the proposed legislation was still pending before the Constitution Committee in the Turkish parliament.¹⁸⁷

Although the amendments were non-severable and included many legal reforms, the popular vote was perceived by many as a strike against the CCT. The vote emboldened the Turkish Higher Education Authority to issue a circular to university rectors stating that students should not be barred from class on account of their dress. Most Turkish academics have complied, defying the CCT and supporting the goals of the ruling party.¹⁸⁸

Thus, the Turkish case reveals how judicial independence can be constrained in a hybrid regime. When an activist court goes too far in opposing the interests of the ruling party, it is likely to be punished or packed. In Egypt and Kuwait, the headscarf issue is of high political salience, but it was not important enough to the regime for it to punish the courts for their decisions. By defying public opinion and the wishes of the ruling party, the AKP, the CCT found its legitimacy undermined and its ruling defied by the public. Public backlash against the headscarf decision motivated the AKP to actually dilute the power of the judges on the court through the extreme measure of a court-packing plan. Presuming the plan succeeds, packing the court is likely to make the CCT friendlier to the AKP in the short term, and limit judicial independence in Turkey.¹⁸⁹

186. *Venice Commission supports reshaping Turkish high judiciary*, TODAY'S ZAMAN, Jan. 27, 2011.

187. Ozan Varol, *Further Changes Proposed to the Turkish Constitutional Court*, available at <http://www.comparativeconstitutions.org/2011/01/further-changes-proposed-to-turkish.html> (last visited Aug. 8, 2011).

188. Jacques N. Couvas, *Headscarf Returns to Trouble Turkey*, IPSNEWS.NET, Jan. 31, 2011, <http://ipsnews.net/news.asp?idnews=54292>.

189. Of course, it remains to be seen whether the AKP's court-packing plan will translate into a court that will safeguard the AKP's interests in the long term. The administrative bodies that will appoint the new judges are currently friendly to the

In a move stunning to both the Turkish public and outside observers, top Turkish military officials resigned *en masse* on July 29, 2011, removing a major tutelary obstacle to Turkish democracy.¹⁹⁰ It appears that the military realized that it could no longer overthrow the government by a coup because the AKP had gained majority support unparalleled by any party in Turkish history. While many Turks support civilian control over the military because that is another prerequisite for Turkey's EU membership, others fear creeping authoritarianism by Erdogan and his AKP with no political actor able to challenge them.¹⁹¹ As of this writing, the future of both secularism and democracy in Turkey remain unclear.

V. APPLICATIONS

A. *Implications for the Role of Courts in Hybrid Regimes*

This analysis suggests that constrained judicial independence can occur even when majoritarian political institutions such as parties and legislatures are weak. Increased political competition, especially electoral competition, can signal to courts that the opposition is gaining power. Courts then have the opportunity to expand their own institutional authority and strike out their independence vis-à-vis the executive and the legislature. Courts will then make a decision that does not directly challenge regime power but gives political opponents the incentive to use courts in the future. Courts thus establish themselves as mediators of salient political interests and use this position to expand their own jurisdiction and power. As the public continues to use and support these courts, their power becomes entrenched. Only if a court goes too far and makes a decision that directly challenges the power of the regime, as the SCC did under Mubarak, or the ability of the regime to enact a key component of its political platform, as the CCT did under the AKP in Turkey, will the court then be punished or packed.

As courts in hybrid regimes expand their power, they may be better positioned than legislatures to balance executive dominance. While legislatures can be easily dissolved, as they have been in Kuwait, or their election processes easily manipulated, as in Egypt, courts have managed to gain some degree of independent authority

AKP. However, It is unclear whether the institutions in charge of judicial appointments will always be under the control of the ruling party. Moreover, the judicial reform package includes a twelve-year term limit on CCT judges, reducing the ability of any party to fully pack the court with appointees who will safeguard their interests for the long term. As my analysis shows, court-packing plans are not guaranteed to succeed because judicial appointees may also not behave as their appointers expect.

190. Gul Tuysuz & Sabrina Tavernise, *Top Generals Quit in Group, Stunning Turks*, N.Y. TIMES, July 29, 2011.

191. Anthony Shadid, *Turks Question Power of Prime Minister*, N.Y. TIMES, Aug. 1, 2011.

that provides a real check on other governmental branches. Top-down and bottom-up processes interact to make courts powerful and durable institutions. Legislatures in Egypt, Kuwait, and elsewhere in the Arab world have not actually been able to check executive power in these countries because the ruler has dissolved them whenever they begin to challenge executive authority. Try as they might to manipulate and control judges, executives are unable to similarly shut courts down.

Why are courts tougher nuts than legislatures for authoritarians to crack? Several factors explain this puzzle. First, scholars have recently demonstrated a strong association between having a national legislature and the persistence of authoritarian regimes.¹⁹² These scholars advance a “cooptation theory” by which the authoritarian executive is easily able to manipulate the parliament to shore up its own rule. Through parliamentary elections, the authoritarian executive identifies its potential opposition, and then gives its members limited authority over policy making or distributes rents to them to ensure that they do not challenge authoritarian rule. Thus co-opted, legislatures cannot counter executive authority.

So why are courts less subject to cooptation? Simply put, these societies can function without legislatures, but cannot live without courts. Courts provide important venues for dispute resolution, which are needed by both the executive and the opposition. At a basic level, without courts to decide disputes, society would turn to more disruptive, even violent mechanisms for resolving conflicts. The public keeps using courts, aided by public standing provisions. With each case filed, the public increases the legitimacy and durability of the courts as law-making institutions. And with each decision, judges can incrementally move out from under executive control and exert their own authority. In Egypt and Kuwait, the public would not stand for shutting down the courts because of their function as institutions that serve societal needs. When the courts uphold public opinion on key political issues, their public legitimacy becomes even more entrenched, raising the cost of punishing courts.

A second reason that regimes are less likely to punish courts is that courts often do promote the interests of the ruling regime on matters related to its core interests. Courts may uphold key interests, as the Egyptian SCC under Sadat did by overhauling Nasser’s economic programs, while carving out constrained judicial independence

192. See generally JENNIFER GANDHI, *POLITICAL INSTITUTIONS UNDER DICTATORSHIP* (2009); Jennifer Gandhi & Adam Przeworski, *Cooperation, Cooptation and Rebellion under Dictatorships*, *ECONOMICS AND POLITICS* 18,1-26 (2007); 2009, Barbara Geddes, *Why Parties and Elections in Authoritarian Regimes*, revised version of paper presented at the 2005 annual meeting of the American Political Science Association, Washington, D.C.; Ellen Lust-Okar, *Elections Under Authoritarianism: Preliminary Lessons from Jordan* 13 *DEMOCRATIZATION* 456-71 (2006).

regarding issues of popular importance that the regime considers only marginal. Regimes remain unwilling to punish courts until these courts make decisions that directly challenge regime power. Cases involving Islamic veils are particularly ripe for establishing constrained judicial independence precisely because they are not as marginal as they may appear. A court may make a decision in a way that does not directly threaten the power of the ruling regime. But by allowing Islamist forces any degree of victory, it advances the opposition cause in a way that may threaten the power of the regime in the future. Thus, neither the Egyptian Supreme Administrative Court nor the Kuwaiti Constitutional Court was punished for expanding their jurisdiction or for their interpretations of Islamic law. When the Egyptian SCC went too far by requiring judicial supervision of elections under Mubarak, and the Turkish CCT used secularist grounds to oppose the AKP's stated goal of overturning the headscarf ban, these courts overplayed their hands.

A third reason that regimes may be unwilling to repress courts is the increased cost of repression since the time the courts were created. Dissolving a legislature is a simple matter of electoral fiat that carries few repercussions, especially when new elections are promised. Repression of judiciaries—particularly violent repression—is much harder. As described above, mass media and communication technologies now cause near-instant reverberations in the West that rulers could not have anticipated at the time they created these courts. The establishment of transnational judicial networks in recent years may make repression of the judiciary even less likely to go unnoticed.¹⁹³ Judges whose independence is not as respected as that of their colleagues in other countries may be more likely to speak out, while similar networks among parliamentarians with short terms in office are less robust or do not exist.

B. Implications for the Muslim World

The ability of courts, rather than legislatures, to serve as a check on the ruling executive may be even more powerful in the countries I discuss for reasons specific to states transitioning from authoritarianism in the Muslim world. Historically, Islamic legal scholars have played a crucial role in checking the power of executive rulers. As Noah Feldman argues, Islamists are powerful precisely because they invoke popular nostalgia for a state in which Islam, which signifies justice and the rule of law to its adherents, mitigates the harsh power of the ruling executive.¹⁹⁴ Both authoritarians and Islamists are dan-

193. See generally Anne-Marie Slaughter, *Judicial Globalization*, 40 VIRGINIA J. INT'L L. 1103 (2000).

194. See generally FELDMAN, *supra* note 55; Asifa Quaraishi, *The Separation of Powers in the Tradition of Muslim Government*, in CONSTITUTIONALISM IN ISLAMIC

gerous, in Feldman's view, because the state they envision does not provide for a balance of power. Just as the dominance of the authoritarian executive is unchecked by any governmental institution, the Islamist vision of the state does not provide for any institution to mitigate the often harsh dictates of *shari'a* or to interpret it for the modern world.

In majority-Muslim states, courts may provide the critical counterweight to executive power necessary for the rule of law to flourish. Those schooled in the law have historically played this role in majority-Muslim polities, which may imbue judges with the necessary legitimacy to do the same in the modern state. While, as Feldman notes, secular jurists in these states do not have the same legitimacy as Islamic legal scholars,¹⁹⁵ the secular judges described here have interpreted *shari'a* in a way that signifies respect for Islamic legal traditions by using techniques of Islamic legal interpretation to resolve tensions between *shari'a* and state law. By interpreting Islam as "the" or "a" source of state law in a way that neither mandates nor prohibits various forms of Islamic dress, courts permit many different interpretations of Islam to flourish within the state. In doing so, they create a "constitutionalized *shari'a*"¹⁹⁶ that is compatible with democratic freedoms. In Egypt and Kuwait, these rulings are respected, perhaps because they create an appropriate synthesis of Islamic norms and state law. In Turkey, the CCT's ruling in the Turban Case has not been respected, largely because the court offended a Muslim public by refusing to engage with the Islamic legal tradition.

Courts in majority-Muslim countries do more than just play a secularizing role when issues involving religion and state arise. In his 2010 book, Ran Hirschl terms Egypt, Kuwait, and other countries where Islam is "the" or "a" source of legislation "constitutional theocracies."¹⁹⁷ Hirschl argues that courts in all of these polities serve as secularizing agents, protecting the secular nation-state from the pervasive influence of religion by striking a compromise between secular and religious interests. Yet, as explained above, courts use religious methods of interpretation to create new law for secular nation-states. In determining what matters cannot be interpreted by secular courts

COUNTRIES (Rainer Grote & Tilmann J. Röder eds., 2011) (noting the classical Muslim balance of powers between government and the *'ulama*); MUHAMMAD QASIM ZAMAN, *THE ULAMA IN CONTEMPORARY ISLAM: CUSTODIANS OF CHANGE* (2002).

195. FELDMAN, *supra* note 55, at 123.

196. *Id.*, at 121 (coining the term).

197. Hirschl defines constitutional theocracies as having four characteristics: 1) adherence to at least some elements of modern constitutionalism, including formal separation between religious and state authorities and some form of judicial review; 2) a single, state-endorsed religion; 3) the constitutional establishment of that religion as "the" or "a" main source of legislation; and 4) religious tribunals that have both symbolic and official powers on some level. See RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 3 (2010).

and what matters are subject to *ijtihad*, courts in Egypt and Kuwait create a synthesis between Islamic principles and democratic law. They pay homage to the Islamic heritage of their legal systems and use language and constructs that appeal to Islamist and secular interests alike. They also carefully address the personal freedoms involved in the cases, holding them to be paramount legal interests. In this way, courts in Egypt and Kuwait establish their own institutional legitimacy before both Islamist and secular political actors. The Turkish court, by contrast, does not reference Islamic methods of legal interpretation or the right of religious expression, instead using the principle of secularism to trump other constitutional rights.

C. *Implications for Constitutional Convergence on Issues of Religion and State*

Issues involving religion and state, which by their nature implicate the fabric of national identity in the sovereign nation-state, may be particularly ripe for assertion of judicial independence. My discussion of cases involving Islamic dress in Egypt, Kuwait, and Turkey contributes to functionalist analysis of the appropriate relationship of religion and secularism in other nation-states as well.¹⁹⁸ In the past decade, issues involving Islamic symbols have reached the political fore throughout the world. France banned the *hijab* and other “conspicuous” religious apparel from its public schools in 2004, and banned the *niqab* from public places in 2011.¹⁹⁹ Belgium also banned the *niqab* and *burqa* in 2011, and the Netherlands plans a *burqa* ban for 2013. In 2010, Quebec banned wearing the *niqab* in schools and when applying for public services. Courts in these countries, along with the ECtHR, are increasingly considering the conflict between religious symbols and state interests.²⁰⁰ Most prominently, the French Conseil Constitutionnel pre-approved the constitutionality of the Sarkozy government’s ban on wearing the *niqab* in public. Cases involving Islamic dress have also begun to appear before the U.S. courts, usually pertaining to prohibitions of veils in the employment context.²⁰¹ Politically, veil bans have been justified on grounds of

198. See Mark Tushnet, *Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1261–85 (1999).

199. Loi 2004-22 du 15 mars 2004 de projet de loi encadret, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans l’écoles, collèges et lycées publics [Law 2004-22 of Mar. 15, 2004, pursuant to the Principle of Secularism, on Wearing of Signs or Behaviors Expressing Religious Membership in the Schools, Colleges, and Public Schools], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE].

200. See, e.g., Bundesverfassungsgericht [BGH] [Federal Constitutional Court] Sept. 24, 2003, ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFG] (Ger.) (“Teacher Headscarf Case”); *Sahin v. Turkey*, *supra* note 159, *Case of Lautsi and Others v. Italy*, App. No. 30814/06 (Eur. Ct. H.R. March 18, 2011) (Grand Chamber); see also Skach, *supra* note 164.

201. See, e.g., *EEOC v. GEO Group, Inc.*, 616 F.3d 265 (3d Cir. 2010).

state interests ranging from promoting national policies of secularism, national security, personal freedoms, and equality before the law. Yet when faced with issues involving Islamic dress, all of these courts characterize the issue in terms of the same individual rights and freedoms. In the Middle East, as in the West, personal liberty and freedom from coercion, rather than religious freedom, are the words of the day.²⁰² Regarding the functionalist question of the appropriate relationship between religion and state, my analysis suggests that constitutional convergence is appearing in rights jurisprudence, beyond similarities in constitutional texts.²⁰³ Full discussion of constitutional convergence in this area lies beyond the scope of this Article, but is a ripe area for further research.

CONCLUSION

This Article contributes to a growing body of literature on the institutional powers of courts, particularly courts in hybrid regimes. The Article exposes flaws in two prevailing views: that national courts are mere agents of the elites who established them, and that courts act to neutralize religious influences over state law. Instead, courts in these hybrid regimes take advantage of the advent of political competition to establish constrained judicial independence, and do so by invoking methods of Islamic legal interpretation.

More research is needed to explore the concept of constrained judicial independence and to tease out the mechanisms of judicial authority in hybrid regimes. Other research suggests that my thesis may be generalizable. Epstein, Knight, and Shevtsova found that the First Russian Constitutional Court was punished after it operated outside the overlapping "tolerance intervals" of elected political actors, while the Second Court more successfully built legitimacy by deciding less controversial cases.²⁰⁴ C. Neal Tate, in his studies of the Philippine Supreme Court, has also shown that a court that was seen as a pawn of the Marcos regime took more controversial cases as

202. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 598, (1992); Case No. 2BvR 1436/02 (Bundesverfassungsgericht [BVerfG; Constitutional Court] Sept. 24, 2003). The Constitutional Court describes the case as *Lehrerin mit Kipftuch* (Teacher with Headscarf). Press Release No. 71/2003 (Sept. 24, 2003), available at <http://www.bverfg.de/cgi-bin/link.pl-?presse>. The latter case is discussed in detail in Skach, *supra* note 164.

203. Important discussions of constitutional convergence include Rosalind Dixon & Eric Posner, *The Limits of Constitutional Convergence*, 11 CHI. J. INT'L L. 399 (2011); David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277 (2008); Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985 (2009).

204. Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Governance*, LAW & SOC. REV. 1, 117-64 (2001).

Marcos' power began to wane.²⁰⁵ Similarly, openings in political competition have allowed courts in the Ukraine, Slovenia, Serbia, and Iraq to check the power of other political actors.²⁰⁶

Other factors may affect the development of judicial independence. While my analysis focuses on signals revealed by electoral competition, informal mechanisms of political competition may also indicate that courts have an opening to develop their own power. The internal cohesion of the bar and the existence of independent professional organizations, such as the Judges' Club in Egypt, also may affect the ability of the judiciary to act independently.²⁰⁷ This Article is necessarily limited by the difficulty and costs of obtaining and translating cases in these countries, where decisions may be handwritten and unavailable except from the courts themselves. Even if all decisions were readily available, the ability of a court to select its own cases, or of an executive to remove cases from a court's jurisdiction raises the possibility of selection bias. Despite these data limitations, this article provides a foundation for our understanding of the development of judicial power in these regimes and elsewhere.

While scholars may believe that judicial independence is fundamental to the democratic rule of law, we do not understand how best to achieve it. In the hybrid regimes of Egypt, Kuwait, and Turkey, we see judicial behavior that we would not expect. Judicial independence appears to be more than a mere function of appointments processes, top-down interactions between political elites, or bottom-up support of activists. My analysis reveals that the roots of judicial independence are more complicated than previous models suggest, and that judicial independence may be possible outside of the democratic context. Under certain conditions, democratic form may take on democratic substance.

205. C. Neal Tate, *Courts and the Breakdown and Re-Creation of Philippine Democracy: Evidence from the Supreme Court's Agenda*, 49 INTERNATIONAL SOCIAL SCIENCE JOURNAL 152, 279-91 (1997); c.f., Tate & Haynie, *supra* note 7, at 707-40 (finding that when the Philippines transitioned from democracy to autocracy under Marcos the courts became increasingly used as a vehicle for social control).

206. See LEVITSKY & WAY, *supra* note 6 (noting that the Ukrainian Constitutional Court held that President Kuchma's referendum to reduce the powers of the legislature was not binding; the Slovakian Constitutional Court held that Meeiar's government could not deny the opposition parliamentary seats in 1994; and that a Serbian High Court affirmed the validity of local opposition electoral victories in 1996). On Iraq, see Haider Ala Hamoudi, *The Will of the (Iraqi) People*, 2011 UTAH L. REV. 45, at 50-52 (arguing that the Iraqi Federal Supreme Court, while working to establish its legitimacy, avoids certain contentious political issues of core interest to the executive while deciding matters against executive interests in other contexts).

207. For more on this point in the Egyptian context, see Tamir Moustafa, *The Role of the Judge's Club in Enhancing the Independence of the Judiciary and Spurring Political Reform*, in JUDGES AND POLITICAL REFORM IN EGYPT (Nathalie Bernard-Maugiron ed., 2008).