

# Constitutional Courts and Rule of Law in Islamic Law States: A Comparative Study

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## ABSTRACT

This article discusses the relationship between the rule of law and constitutional courts in 29 Islamic Law States (ILS), by focusing on constitutional language, and with particular reference to the cases of Kuwait, Bahrain, and Oman. We introduce 3 new variables that can be used to measure the presence of constitutional courts in the language of the constitution, and describe the implications of such constitutional language for the rule of law. Our data show that during the 2007-2017 timeframe, constitutional oversight in the Muslim milieu has increased. In 2017, 76 percent of ILS have a constitutional court or equivalent judicial organ. This number has increased from 66 percent in 2007. We suggest that this trend highlights the importance of understanding the relationship between the rule of law and constitutional courts in the Islamic context.

Keywords: *constitutional courts; judicial review; Islamic law; rule of law; domestic legal systems; comparative constitutional law*

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## INTRODUCTION

The institution of a constitutional court and the idea of judicial constitutional review more generally are inherent in Western legal traditions. In contrast, appeal to a higher judicial institution was largely absent in traditional Islamic law. Yet the spread of extremist interpretations of Islamic law has, to a large extent, been halted by jurisprudential activism of contemporary constitutional courts operating within some Islamic Law States (ILS) (Powell 2020).<sup>1</sup> More often than not, these courts tend to share a proclivity toward modernization and progressivism. Over the past six decades, constitutions of many Islamic law states have included references to constitutional courts, some fluctuation notwithstanding. Of course, there are valid arguments that these higher courts do not automatically improve the quality of these countries' good governance or rule of law, nor spread secularism. Indeed, constitutional courts or councils of higher justice can at times be tools for the ruling elite, and thus embrace a politicized, top-imposed interpretation of the Islamic legal tradition (Hirschl 2010).<sup>2</sup> However, a robust constitutional control over legislation, including people's ability to question constitutional legitimacy of the sub-constitutional laws in secular venues offers a vital point of connection between a country's domestic legal system, rule of law, and good governance. Secular constitutional courts can constitute a channel through which secular laws get enforced (Agrama 2012).<sup>3</sup> In other words, the presence of a constitutional court can exponentially increase secular law's de facto well-being in the context of a country's domestic legal system (Powell 2015, Agrama 2012, Asad 2003, Hussin 2016, Lapidus 1996).

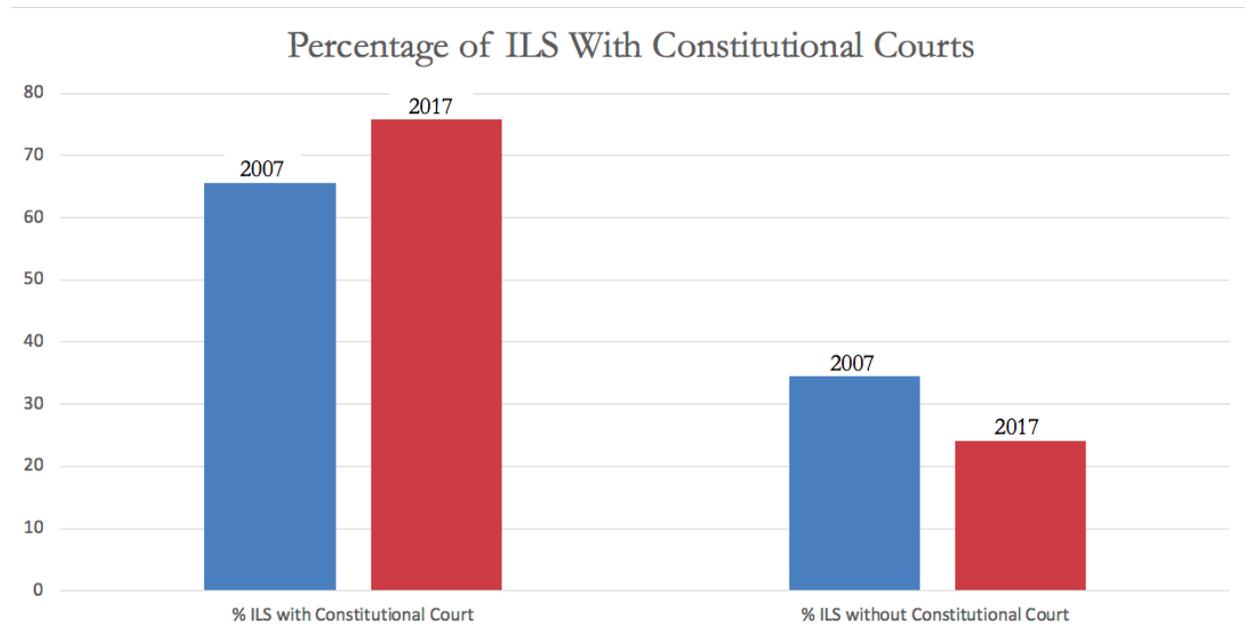
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<sup>1</sup> We define an Islamic law state as a state with an identifiable substantial segment of its legal system that is charged with obligatory implementation of Islamic law in personal, civil, commercial, or criminal law, and where Muslims constitute at least 50 percent of the population. This definition does not depend solely on the religious preferences of citizens, but rather fundamentally relies on the characteristics of the official legal system upheld by the state. For elaboration on this definition, see Powell 2020.

<sup>2</sup> For instance, the Guardian Council, consisting of Muslim theologians and jurists, is the most powerful body in Iran and has been endowed with the power to approve or veto all bills passed by the Iranian legislature on the grounds of consistency or inconsistency with Islamic principles. It is often described as a "de facto" constitutional court, though there is no appeal to a secular body for concordance with constitutional principles.

<sup>3</sup> We do recognize that a juxtaposition of Islamic law as a religious law against secular law constitutes an oversimplification. Some aspects of Islamic law are from a practical standpoint ipso facto secular, because they do not involve much, if any, reference to religious texts or doctrines. Also, many "secular" institutions or legal principles—perhaps counterintuitively to the popular view—have been historically part of sharia. Consequently, we use the term "secular" to designate specific legal features to emphasize these laws' common presence in the West and Muslim-majority countries.

This paper discusses the relationship between the presence of constitutional courts and rule of law in 29 Islamic Law States by focusing on constitutional language. We present original data on the inclusion of constitutional courts in these constitutions, and three illustrative cases. Our data show that during the 2007-2017 timeframe, constitutional oversight in the Muslim milieu has increased. As illustrated by Figure 1 below, in 2017, 76 percent of ILS have a constitutional court or equivalent judicial organ.<sup>4</sup> This number has increased from 66 percent in 2007.



**Figure 1: Percentage of ILS With Constitutional Courts**

We argue that an empirical shift toward measuring constitutional oversight can remedy the existing scholarship's limitations by assessing the degree to which constitutional courts within a country are actually able to influence the quality of domestic legal systems in societies with distinctively Islamic institutions. The main insight of this paper is that only strong constitutional courts, anchored in explicit constitutional language, can effectively impact a country's rule of law.

<sup>4</sup> These countries include: Afghanistan, Algeria, Bangladesh, Bahrain, Brunei, Comoros, Egypt, Gambia, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Maldives, Mauritania, Morocco, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen. See Powell 2015 and Powell 2020 for additional description of the country selection.

## CONSTITUTIONAL COURTS AND THE RULE OF LAW

The institution of constitutional review has become a norm of democratic constitutional design. Out of 191 constitutional systems, 158 include some formal provision for constitutional review, 79 of which have designated bodies called “constitutional courts” or councils (Ginsburg ad Moustafa 2008). However, the dominant Anglo-American and continental European models of constitutional courts differ from one another.<sup>5</sup> The continental legal systems typically include a special institution charged with overseeing the constitutionality of laws (see e.g. Garlicki 2007, Ferreres Comella 2009). As Garlicki states, in continental Europe, separate, centralized constitutional courts are “one of the most typical features of Continental constitutionalism.” (Garlicki 2007, 45). In many ways, these courts are considered to be a successful improvement on the traditional parliament-oriented conception of democracy and the rule of law (Garlicki 2007, La Porta et al 2004).<sup>6</sup> However, there are often tensions between constitutional courts and ordinary courts. These tensions emerge out of questions about the distribution of power between higher courts, particularly vis à vis criminal and civil supreme courts (Garlicki 2007). Ordinary courts’ judges are sometimes resistant to the constitutional court’s decisions, particularly where the constitutional court’s decisions contradict their own. In the Anglo-American model, review of laws of lower status falls under the purview of the judicial system rather than a separate, parallel institution. This form of judicial review originates in the natural law overtones in the common law tradition; the notion that judges are the guardians of a higher law. The Anglo-American model is, as Ginsburg characterizes it, an “expression of Anglo-American natural law tradition in an age of positive legislation.” (Ginsburg 2008). The highest court, typically called the High Court or Supreme Court is the highest judge for cases involving constitutional questions. Importantly, constitutional courts function as veto players and often as facilitators or consolidators of democracy (Brouard and Hönnige 2017). These courts, along with the broad notion of judicial review are an important component of democratic institutions (Scheppelle 2005, Skach 2011). In fact, some scholars argue that innovations of institutional design in former communist states

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<sup>5</sup> This binary is contested by some scholars who emphasize that in practice, there are in fact many hybrid models. See Afonso da Silva 2018 for elaboration on this perspective.

<sup>6</sup> La Porta et al (2004) find that the Anglo-American judicial tradition that enshrines judicial independence and constitutional review in constitutions is correlated with greater economic and political freedom.

render strong constitutional courts more democratic than elected parliaments and executives (Scheppele 2005). Different historical trajectories produce different democratic institutions, and in the post-communist context, the role of the court is to compel the government to uphold the will of the voters.

Furthermore, constitutional courts, if embedded in a high-quality domestic legal system—one that is fully committed to the principle of rule of law—also help contribute to democratic stability. In particular, a constitutional court can transform political debates into pure issues of constitutional law: constitutional review has a “neutralizing function” particularly in new democracies (Sólyom 2007, 297). When a constitutional court has a “neutralizing function,” political debates are transformed into issues of constitutional law and decided in legal terms as a form of conflict resolution. It is also important to consider that the specifics of a state’s political institutional context may fundamentally shape the way the court governs. At times, particularly, where political institutions have weak ties with society, the court may appropriate some of the governance roles of the legislature or executive (Landau 2010). Alternatively, a constitutional court may become a useful tool for the governing elite, speaking on constitutional issues only in a way that is endorsed by those in power. Thus, mere presence of a constitutional court does not necessarily indicate that a domestic legal system as a whole is committed to embracing the principle of rule of law.

Institutions can indeed become empty shells in terms of their ability to foster democratization. Constitutional courts can potentially temper religious extremism and threats to religious freedom. This function is particularly important in the context of societies where religion or religious arguments play a significant role in political, economic, and social life. ILS constitute prime examples of such societies. Indeed, to some extent, many ILS’ citizens, as adherents to the Muslim faith, are committed to tenets of Islam and one or another school of interpretation.<sup>7</sup> Additionally, in many ILS, Islamic law constitutes an important part of the domestic legal systems, repositioning secular legal institutions in state governance (Hirschl 2010). Hirschl suggests that constitutional courts actually serve as secularizing forces within society (Hirschl 2004). In Egypt, for instance, constitutional reforms in 1979 expanded the authority of the constitutional court and ensured the Court’s independence. This establishment of the court’s judicial review, argues Hirschl, has

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<sup>7</sup> We are keenly aware that sharia cannot be reduced to a system of laws.

effectively curtailed the scope of the 1980 amendment that enshrines shari'a as the principle source of legislation (Hirschl 2004).

## CASE STUDIES: KUWAIT, BAHRAIN, AND OMAN

The literature suggests that constitutional courts are important for the rule of law, good governance, and the overall well-being of democracy. What do constitutional courts look like in the Middle Eastern context? In this section, we examine the examples of Kuwait, Bahrain, and Oman to illustrate the potential benefits of constitutional courts. We selected these examples for their variation in our variables of interest – whether and how the Constitution includes a constitutional court. As the ILS category is quite diverse, we also select three Gulf countries for comparability along other factors such as language and geography. Moreover, Kuwait and Bahrain, the two cases where a Constitutional Court has been established, exhibit variation in how the Constitutional Court manages challenges to laws of lower status. These brief, albeit informative cases demonstrate the type of comparative information that we capture in the subsequent section of this paper, that presents new, descriptive data on constitutional language and constitutional courts. Furthermore, by referencing examples of Constitutional Courts' jurisprudence, these case examples illustrate the association between constitutional language and other outcomes of interest, such as the activities of Constitutional Courts and review of legislation for constitutionality.

### *Kuwait*

Article 173 of Kuwait's 1962 Constitution declares:

A law shall specify the judicial body competent to decide upon disputes relating to the constitutionality of laws and regulations and shall determine its jurisdiction and procedure. A 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.<sup>8</sup>

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<sup>8</sup> Kuwait Const. ch. 5, art. 173, 1962.

This article clearly establishes the need for a judicial organ that carries out the function of constitutional review. The Kuwaiti Constitutional Court, which has exclusive jurisdiction to interpret the constitutionality of legislation, was established by Law No. 14 of 1973 (Khedr 2016). Legislative acts are often accompanied by Explanatory Notes that provide the court with the stated intentions of the legislature (Khedr 2016). These notes elaborate on the background of the law or amendment and the legislature's rationale for legislative action.

The jurisprudence of the court has meaningfully impacted the way that the Kuwaiti legal system functions on a day-to-day basis. In fact, the Court's jurisprudence has shaped the way that secular institutions interact with Islam-based norms and institutions. Interestingly, the court's recent rulings have been welcomed by a substantial part of Kuwait's citizenry. Importantly for our argument, Kuwaiti citizens seem to perceive these rulings as furthering the well-being of democracy and rule of law. For example, in 2009, the Constitutional Court ruled that the Passport Law, which required women to obtain their husbands' permission to obtain a passport was unconstitutional.<sup>9</sup> Lulwa al-Mulla of the Women Social Cultural Society commented that this decision "pleases everyone and not just Kuwaiti women, because...it is democracy that won this time" (Reuters 2009). The same year the court also ruled that female members of the Kuwaiti parliament were not required to wear a hijab, headscarf, in parliament on the grounds that failure to do so violated rules of Islamic dress.<sup>10</sup> Although the constitution states that sharia is a main source of law, the Court asserted the constitution's guarantees to personal freedom and freedom of religion (Calderwood 2009, BBC 2009, Eagle Tribune 2009). According to Aseel al Awadhi, a female member of the Kuwaiti parliament who does not wear hijab, the hijab law "was formulated in such broad terms that it could be interpreted in various ways and – it goes against the core principles in the constitution, mainly individual freedom" (quoted in Calderwood 2009).

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<sup>9</sup> Law No. 11/1962 Regarding Passports, art. 15. Repealed by Constitutional Court of Kuwait, Decision of Oct. 20, 2009 (women's right to apply for a passport without male guardian permission). This ruling allowed married women to obtain a passport without their husband's signature.

<sup>10</sup> Constitutional Court of Kuwait, Decision of Oct. 28, 2009 (women's duty to wear Islamic attire in order to vote or serve in parliament).

More recently, on October 5, 2017, the Constitutional Court struck down a 2015 law that required Kuwaiti citizens, residents, and visitors to provide DNA samples to the authorities.<sup>11</sup> This required that all citizens, residents, and temporary visitors to Kuwait provide DNA samples to the government. DNA samples would be collected as saliva and blood drop samples and stored in a lab at the General Department of Criminal Evidence in Dajeej. The Interior Ministry would also maintain a database of the DNA samples (Lee 2016). The government asserted that the database would be used to fight terrorism and crime. However, citizens and observers expressed concern that the law violated individual privacy and that personal information could potentially be used for other purposes, such as to test individuals' parentage in adultery cases or to deny individuals citizenship. In 2016, several citizens filed two direct constitutional petitions demanding cancellation of the law (Arab Time 2017). Ultimately, the Court found that this law violated Articles 30 and 31 of the Kuwaiti constitution, both of which guarantee the rights of personal liberty and privacy (Human Rights Watch 2017).<sup>12</sup> The Kuwaiti population supported the Court's ruling to overturn the law, as it was largely unpopular from the time of promulgation. Media reports noted that the government anticipated 250,000 citizens to refuse to take the tests even though such refusal could result in jail time or a \$33,000 fine (Taylor 2016). The Kuwaiti case highlights ways in which a secular constitutional court may intervene to interpret and assess the constitutionality of laws. The Kuwaiti Constitutional Court contributed immensely to defining what Kuwaiti law says on an issue. The court has shaped the practice of law. Most importantly, the Court defined the precise balance between Islam-based rules and more secular institutions.

### *Bahrain*

Unlike the Kuwaiti constitution, the 2002 Bahraini Constitution expressly refers to the constitutional court. Article 106 of the constitution states:

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<sup>11</sup> Law No. 78/2015 regarding DNA samples, passed by Kuwait's National Assembly on July 2, 2015. Repealed by Constitutional Court of Kuwait Decision of Oct. 4, 2017.

<sup>12</sup> Per the Kuwait Const. ch. 3, art 30, 1962: "Personal liberty is guaranteed." and Kuwait Const. ch. 3, art 31, 1962: "No person may be arrested, imprisoned, searched, have his residence restricted or be restrained in liberty of residence or of movement save in conformity with the provisions of the Law. No person shall be subjected to torture or ignominious treatment."

A Constitutional Court shall be established, and shall comprise a President and six members, all of whom are appointed by a Royal Order for a period specified by the law. The court's area of competence is to watch over the constitutionality of laws and statutes"<sup>13</sup>

The Constitutional Court was established by Law No. 27 of 2002, which provided details with regards to the Court's procedure, jurisprudence, and structure. Some provisions were amended in 2012, most notably, provisions regarding term limits for appointed justices (Sadek 2012). The amendment stipulates that the Court's members are appointed by the King for five-year terms, and that a member's term may only be renewed once.<sup>14</sup>

As in the case of Kuwait, the Bahraini Constitutional Court has, through its jurisprudence, contributed significantly to the development of the Bahraini legal system. For example, in 2014 the court ruled that Article 20 of the 2014 Traffic Law contravened the constitutional right to equality under the law through its restriction of movement for foreign nationals.<sup>15</sup> This article had prevented residents of Bahrain who were neither Bahraini nor Gulf Cooperation Council citizens from obtaining a driving license or using a personal vehicle unless their job required it (Toumi 2014). Before the law had even passed it received criticism; Minister of State and Information Affairs, Sameera Rajab referred to draft legislation as "constitutionally questionable" (Thomas 2014). When the Traffic Law came into force in 2015, this unconstitutional article was omitted. In other cases, the Court struck down constitutional challenges to existing laws. In 2003 for example, Mansour Al-Jamry, Editor-in-Chief of the newspaper *Al-Wasat* challenged the constitutionality of three laws that allegedly restricted the freedom of the press (U.S. Department of State 2007). Al-Jamry was fined and sentenced for purportedly publishing sensitive information about an investigation into a local terrorist cell.<sup>16</sup> The laws he challenged address judicial authority,

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<sup>13</sup> Bahrain Const. section 4, art. 106, 2002.

<sup>14</sup> The Constitutional Court's members consist of a chief justice, deputy chief, and five additional justices.

<sup>15</sup> Provision of the Bahrain Constitutional Court No 2014/3/D of year 12 judicial, in the Official Gazette issue 3199, on 5/3/2015, referenced in Almodares Working Paper.

<sup>16</sup> Freedom House and the United States Department of State both suggest that *Al Wasat* is the most independent newspaper in Bahrain, where the government has significant control over the media.

criminal procedure, and the press (U.S. Department of State 2007).<sup>17</sup> The Constitutional Court upheld these laws as constitutional and referred the case back to the High Criminal Court. Additionally, in 2012, the Court rejected a challenge to the constitutionality of several provisions of the National Safety Law of 2011.<sup>18</sup> This law granted authority to the commander-in-chief of the Bahrain Defense Force to “take all necessary measures to protect the safety of the country and its citizens” (Toumi 2012). Critics alleged that this law violated freedom of assembly and peaceful protest (Human Rights Watch 2013). Nadim Houry, Deputy Middle East Director for Human Rights Watch commented that “Bahrain has spent the last two years cracking down on peaceful protest, violating people’s rights from start to finish...now it’s planning a whole new set of draconian restrictions, effectively creating a state of emergency...” (Human Rights Watch 2013). Critics were concerned that the law would be misused to jail peaceful protesters. The Court held, however, that the law was constitutional because it did not suspend political societies or freeze sessions of parliament (Toumi 2012). In April 2017, King Hamad ratified a constitutional amendment that enables military courts to try civilians. This amendment is designed for those accused of acts of terrorism, but Amnesty International and other non-governmental organizations worry that the scope may be extended to government critics (BBC 2017).

### *Oman*

The 1996 Basic Statute of the State, which is the effective constitution of Oman does not explicitly provide for the establishment of a constitutional court.<sup>19</sup> Instead, it delegates the establishment of such a court to subsequent legislation. Article 70 of the Basic Statute of the State declares:

The Law shall define the judicial body entrusted with the settlement of disputes pertaining to the extent of conformity of laws and regulations with the Basic Statute of the State and that the said laws and regulations do not contradict with its provisions. The Law shall also specify the powers of such judicial body and the procedure which it shall follow.<sup>20</sup>

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<sup>17</sup> Al-Jamry challenged laws 42, 46, and 47.

<sup>18</sup> Royal Decree No. 18 of 2011 on the Declaration of a State of National Safety in Bahrain.

<sup>19</sup> *The Basic Statute of the State*, Ministry of Foreign Affairs of Oman, (Sept. 22., 2013), available at <<https://www.mofa.gov.om/?p=794&lang=en>>.

<sup>20</sup> Oman Basic Statute of the State, ch. 6, art. 70 1996 with 2011 amendments.

However, a law that would establish this judicial body has not yet been passed despite the fact that the Basic Statutes calls for authorities to establish the relevant laws within two years. In 2012 the legal committee of the State Council discussed the viability of establishing a constitutional court or a separate department within the Omani supreme court as provided by the law (Khaleej Times 2012).<sup>21</sup>

Constitutional courts that are created by a future law are not necessarily less active than those that are established explicitly in the constitution. As noted above, the Constitutional Court of Kuwait has ruled on several noteworthy cases that uphold the protections that the constitution guarantees. However, where the constitution relegates this responsibility to legislation, there is a danger that the court may not be created for a number of years or at all. In the case of Kuwait, it took over a decade for the parliament to pass the legislation that established the constitutional court. In the case of Oman, there is still no constitutional court as called for by the constitution. These cases highlight that within the ILS category there can be meaningful variation in both formal institutions and in practice (Powell 2020, Powell 2015).

## PATTERNS OF CONSTITUTIONAL OVERSIGHT

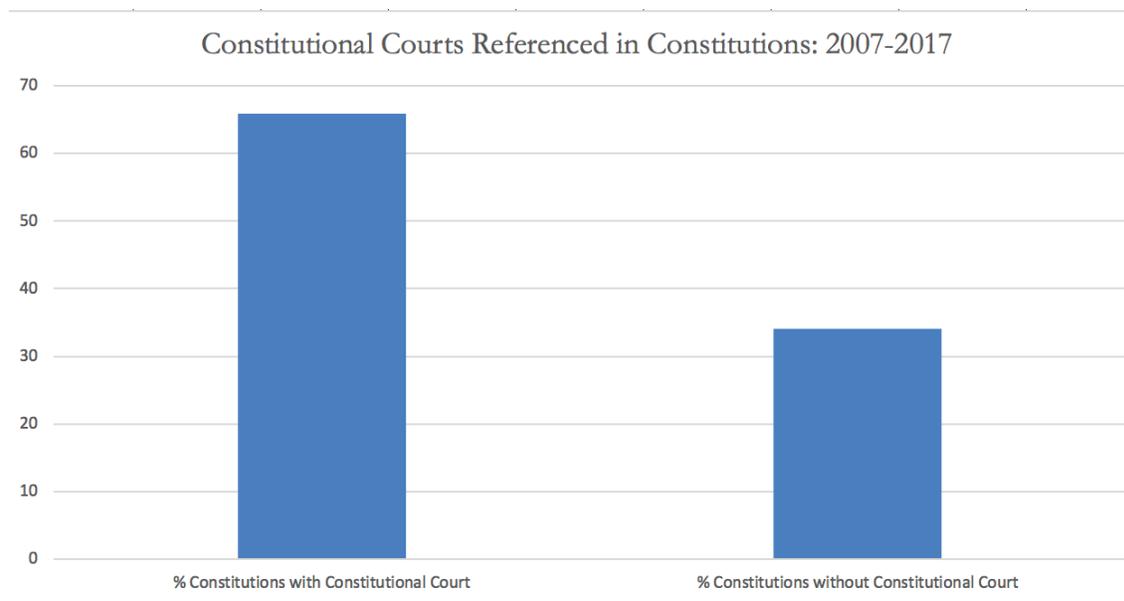
In order to evaluate the patterns of constitutional oversight, we have collected data on constitutional courts for 29 Islamic Law States. These data include all constitutions in effect during the time period 2007-2017. This period includes 44 constitutions and major constitutional amendments. Our variables capture the constitutional presence or absence of a constitutional court, and the prevalence of constitutional language devoted to such court. As such, we include 2 variables in addition to the simple presence or absence of a constitutional court in the constitution. The *Constitutional Court* variable (coded 0,1) captures whether a constitution references a constitutional court or another judicial organ charged with checking the constitutionality of laws of lower status (Powell and Powell 2018).<sup>22</sup> Where the constitution stipulates that a judicial organ is to

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<sup>21</sup> The State Council is the upper chamber of parliament. *Oman debates constitutional court proposal*, KHALEEJ TIMES (Jan. 12, 2012) available at < <https://www.khaleejtimes.com/article/20120111/ARTICLE/301119893/1016>>.

<sup>22</sup> We are aware that coding constitutional courts formally does not capture all aspects of judicial review in practice. We suggest, however, that formalizing constitutional oversight in the constitution is a way to signal the drafters' commitment to supremacy

be created by a future law, we code this variable as 0 until the year in which that law is promulgated.<sup>23</sup> For example, as noted above, Kuwait’s constitutional court was established by Law No. 14 of 1973, over a decade after the 1962 constitution. For the time period of our study, 66 percent of all constitutions contain references to a constitutional court or similar judicial organ. Figure 2 provide graphical representations of this distribution.



**Figure 2: Constitutional Courts Referenced in Constitutions: 2007-2017**

Table 1 below lists all ILS that constitutionally mention or do not mention a constitutional court as of 2017. The table lists all ILS and notes whether there is currently a constitutionally-grounded constitutional court or equivalent judicial organ. During the time frame of our study, there is a substantial increase in constitutional presence of constitutional courts. The number of ILS that include a constitutional court provision in their constitution has increased from 19 in 2007 to 22 in 2017, a 10 percent increase.<sup>24</sup> Of the countries that do not mention a constitutional court in their current constitution, 83 percent (5 of 6 countries) specifically state that Islam or sharia is the

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of law. Some, but not all, Supreme Courts fit this definition of a constitutional court or functionally equivalent institution based on the constitutional language.

<sup>23</sup> In our data there are 7 such constitutions: Bahrain 2002, Jordan 2011, Kuwait 1962, Lebanon 1990, Oman 1996, Oman 2011, and Qatar 2004. We located the law that ultimately created the court for all except Oman.

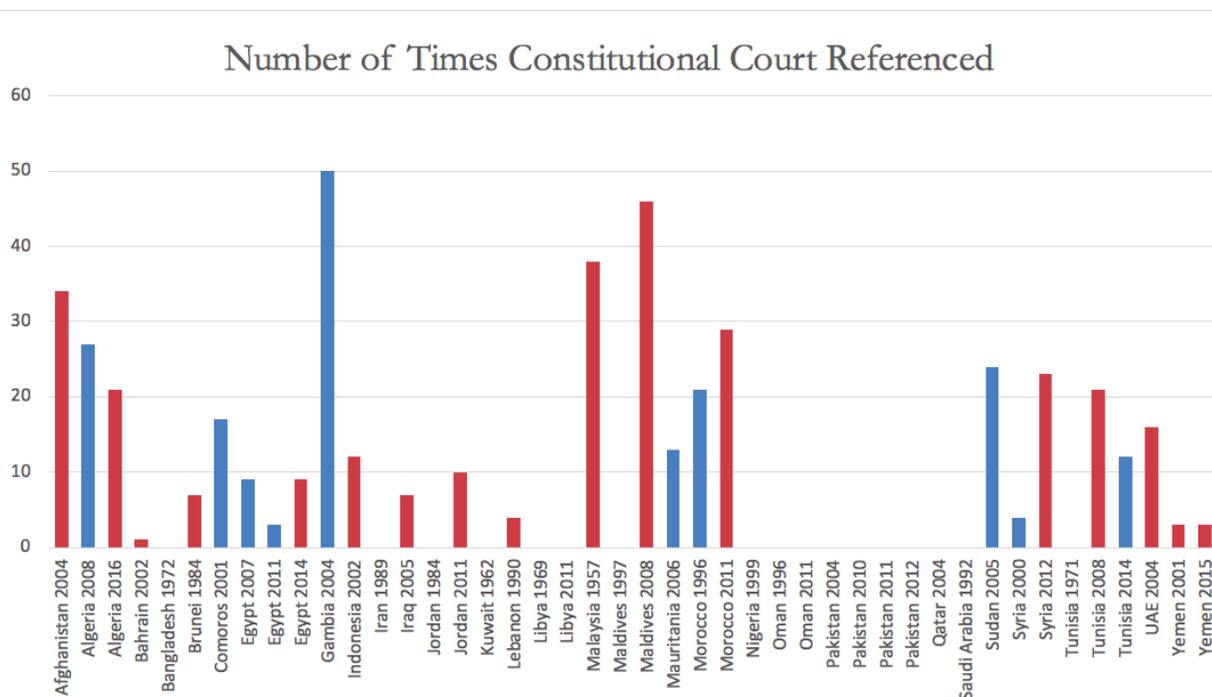
<sup>24</sup> Nine states established at least one new constitution or major constitutional amendments during this period, and six of these states currently have a constitutional court that is referenced in the constitution. Of those six, 50 percent did not reference a constitutional court in the constitution in 2007. Egypt, Jordan, Maldives, Morocco, Syria, and Tunisia’s constitutions contain reference to a constitutional court or similar judicial organ. Jordan, Maldives, and Tunisia have added references to a constitutional court since 2007.

state religion. Of the countries that do mention a constitutional court, 84 percent specifically state that Islam or sharia is the state religion. Yet the diversity of these states is illustrated not just by references to Islam in the constitution, but by the subnational domestic legal system. The ILS category is a spectrum, and each state embraces a unique relationship between secular and religious laws (Powell 2013a, Powell 2015, Powell 2016, Powell 2018, Powell 2020). Interestingly, some of the states that have the strongest presence of Islamic legal tradition in the legal system such as Iran, Pakistan, and Saudi Arabia do not have a constitutional court.

<b>ILS</b>	<b>Constitution References Constitutional Court</b>
Afghanistan	YES
Algeria	YES
Bahrain	YES
<b>Bangladesh</b>	<b>NO</b>
Brunei	YES
Comoros	YES
Egypt	YES
Gambia	YES
Indonesia	YES
<b>Iran</b>	<b>NO</b>
Iraq	YES
Jordan	YES
Kuwait	YES
Lebanon	YES
<b>Libya</b>	<b>NO</b>
Malaysia	YES
Maldives	YES
Mauritania	YES
Morocco	YES
<b>Nigeria</b>	<b>NO</b>
<b>Oman</b>	<b>NO</b>
<b>Pakistan</b>	<b>NO</b>
Qatar	YES
<b>Saudi Arabia</b>	<b>NO</b>
Sudan	YES
Syria	YES
Tunisia	YES
UAE	YES
Yemen	YES
<b>Total: 29</b>	<b>22 YES 7 NO</b>

**Table 1: Constitutional Courts in Current Constitutions**

To paint a fuller picture of constitutional presence of courts, we delve deeper into the specifics of constitutional language. The *References to Court* variable is a count of the number of times the constitutional court or similar judicial organ is referenced in the entire constitution, excluding headers and tables of contents. The average number of references is 15, although this figure also includes several constitutions that do not mention the court at all and as such have a value of 0. These constitutions, such as Kuwait’s, include a clause that states explicitly that a future law will specify the relevant judicial body. Several constitutions in which the court is created by a future law name the constitutional court explicitly, such as the 2011 amendments to Jordan’s constitution. Figure 3 below depicts the number of references for all 44 constitutions.



**Figure 3: Number of Times Constitutional Courts Referenced**

Two countries, Gambia and Maldives are outliers in that they have the two highest number of references to the court, 50 and 46, respectively. This high count is a product of their unique constitutional systems. In these states, the jurisdiction to review the constitutionality of laws of lower status is shared between a Supreme Court and a High Court. As such, we counted references to both pertinent courts.

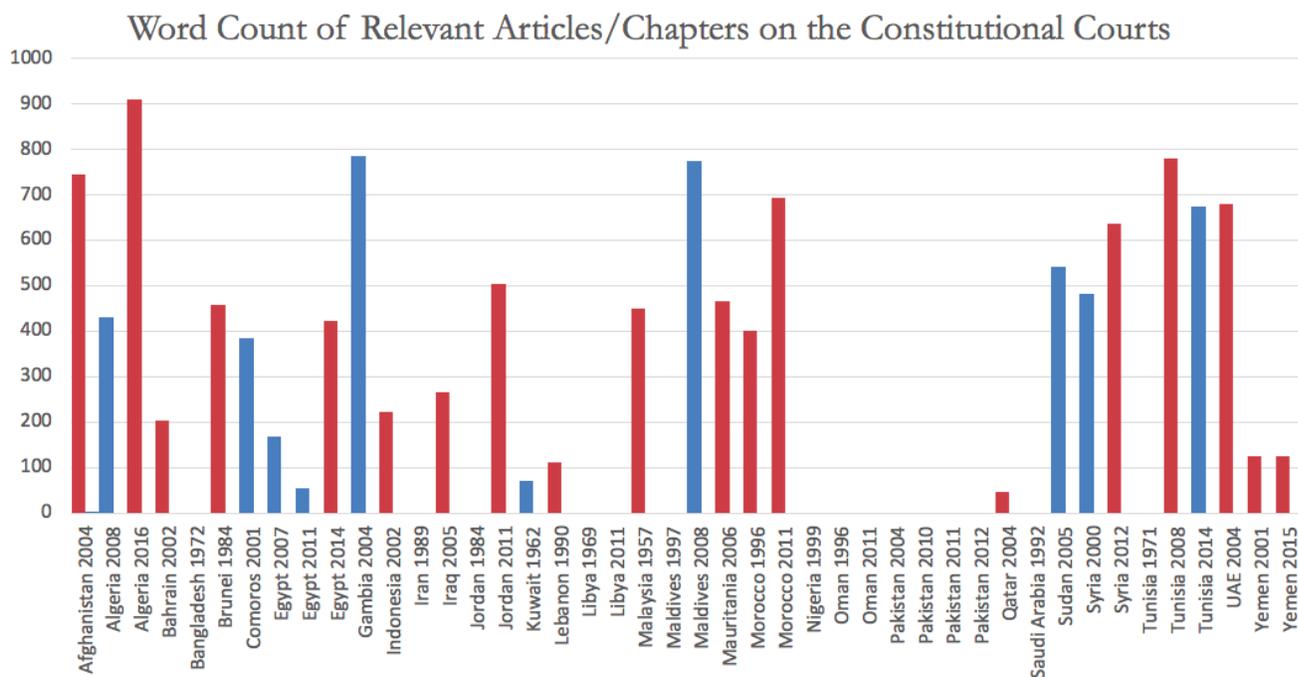
The constitutional language for establishing a constitutional court also varies greatly. Some constitutions use a more detailed language than other. 76 percent of constitutions that reference a constitutional court or equivalent judicial organ establish the court explicitly in the constitution, whereas 24 percent delegate the establishment of the court to a future law. For instance, the 2014 Constitution of Tunisia goes into great detail, addressing not only the court's jurisdiction, but also a variety of its institutional features such as the appointment of members, the procedure for filling vacancies, and administrative procedures for decisions of the Court. Other constitutions, including the 2004 Qatar constitution use much broader language. This constitution, for example, simply declares that the law:

The law shall specify the competent judicial body for settling of disputes pertaining to the constitutionality of laws and regulations, define its powers and method of challenging and procedures to be followed before the said body. It shall also specify the consequences of judgment regarding unconstitutionality<sup>25</sup>

The *Word Count* variable is a word count of the relevant section of the constitution that is dedicated to the constitutional court. Where there is another judicial organ within the judiciary that serves this interpretive function, only the articles that explicitly address this court are included in the word count. Whereas the *References to Court* variable captures the prevalence of the constitutional court in the entire constitution, this variable depicts the robustness of the constitution's attention to the structure and functions of the constitutional court. The average word count for this section is 402 words. This variable includes constitutional articles that relegate the establishment of the constitutional court to another law. Figure 4 depicts the word count total for all 44 constitutions.

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<sup>25</sup> Qatar Constitution, ch. 5, art. 140., 2004.



**Figure 4: Word Count of Relevant Articles/Chapters on the Constitutional Courts**

Gambia and Maldives are again outliers. Both of these states devote a considerable portion of their constitution to a constitutional court. Similar to the coding for the *References to Court* variable, we include language that discusses both the Supreme Court and High Court for these two countries’ constitutions. The constitution with the highest *Word Count* value, however, is Algeria’s 2016 Constitution, in which the section that discusses the constitutional council is 908 words. In nearly all cases where a new constitution or significant amendment was promulgated in the 2007-2017 period, the word count of the newer constitution is larger.<sup>26</sup> For example, Algeria’s 2008 amended constitution has a *Word Count* of 430, which is close to the average *Word Count*, whereas the 2016 constitution has a *Word Count* of 908 (Powell, Rothkopf, and Shang 2018). Table 2 provides a summary of the descriptive statistics for the 3 variables depicted above.

<sup>26</sup> One exception to this trend the transition from the 1971 Egyptian Constitution with 2007 to the 2011 Constitutional Declaration. A comparison of the 1971/2007 Constitution and the Egyptian Constitution of 2014 shows an identical number of references to the court and a 250%-word count increase. The other exception to this trend is Tunisia’s 2014 constitution, which has a lower word count and number of references from the 1959 constitution with 2008 amendments.

<i>Variable</i>	<i>Distribution</i>	<i>Mean</i>	<i>Std. Dev.</i>
Constitutional Court	No: 34% Yes: 66%	0.66	0.48
References to Court <sup>1</sup>	Minimum: 0 Maximum: 50	15.00	13.41
Word Count <sup>2</sup>	Minimum: 46 Maximum: 908	402	248.92

<sup>1,2</sup> Only constitutions with “yes” for constitutional court

**Table 2: Constitutional Court Variables**

## CONCLUSION

Constitutional courts are on the rise in Islamic Law States. Between 2007 and 2017 alone, three of 29 ILS amended their constitutions or passed new constitutions that called for a constitutional court with the ability to review laws of lower status, where such a court had not previously existed. Our data illustrate that these courts are becoming ever more present in ILS. Interestingly, we find that states where Islamic law, however interpreted, is most deeply integrated into the domestic legal system, there is no constitutional court. This finding raises the following question: what does it mean for an ILS to embrace secular constitutional oversight in the context of the Islamic legal tradition? Where the constitution states that sharia is the constitution, such as in the Kingdom of Saudi Arabia’s Basic Law of Governance, a constitutional court and the notion of constitutional review could potentially be considered as underlying the source of state legitimacy.<sup>27</sup> Yet as we emphasize throughout this paper, there is considerable variation among ILS regarding how the Islamic legal tradition is understood, interpreted, and incorporated into the state fabric (Hefner 2016, Otto 2010, Weiss 2006). It is also crucial to recognize that mere presence of a constitutional court does not necessarily indicate that a country is moving towards democratization, nor that a country is committed to embracing rule of law across all aspects of governance. Indeed, a constitutional court may be created as a tool for the governing elite. Alternatively, a constitutional

<sup>27</sup> Kingdom of Saudi Arabia Basic Law of Governance, part 1, art. 1, 1992.

court may overtime weaken in its ability to generate rulings in a fully independent and unbiased way.

A constitutional court's oversight can be seen as a form of appeal: the constitutional court's review of legislation is an appeal of legislation with regard to constitutional matters. In Western legal systems, the right to appeal the verdict of a first instance court is widespread. In both civil and common legal traditions, higher courts provide a degree of standardization that guide future verdicts of the lower courts (Powell and Mitchell 2011). Appeal and the uniformity it provides is, according to one scholar, "a legal phenomenon that Westerners tend to accept without question" (Shapiro 1980). However, the Islamic legal tradition treats the notion of appeal quite differently. Qadi, judges in sharia courts, must work with legal rules provided by the Koran (Hallaq 2009, Vikør 2005). Sharia, the law of God, cannot be known with certainty (Fadel 2016, Abou El Fadl 2001). The standardization afforded by the pronouncement of principles and interpretations may be, to an extent, deemed unnecessary. Moreover, generalization and standardization of law is not a characteristic of the classical Islamic legal culture: as such, there is no need to generate broad laws and reinterpret existing law (Powell and Mitchell 2011). This rejection of generalization derives from a historically pluralistic legal culture (Quraishi-Landes 2015). Today, many ILS allow for appeal within the standard judiciary, and constitutional courts have the power to appeal a body of rules through their review of laws of lower status. The presence of a secular constitutional court does not necessarily contradict Islamic law, and in the context of legal pluralism or layers of law, it can serve as one of several legitimate sources of authority.

Constitutional references to a constitutional court do not guarantee that the court will ultimately be established, as is the case in Oman. Nor does a constitutional court always unequivocally support challenges to laws' constitutionality, as in Bahrain. However, the potential for these courts to uphold the rule of law and constitutional protections is not limited to the secular arena, as recent rulings by Kuwait's Constitutional Court demonstrate. Religious and secular authority can work in tandem to assure good governance and rule of law (Powell 2013b). Future research will extend the scope of our data to all ILS constitutions from 1945-2017. This extension will allow us to examine the proliferation of constitutional courts and the language in which they are entrenched, over time.

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