Promissory Fraud, Constitutionalism and the Limits of Majoritarian Power

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Introduction

To understand what the *contractual* concept of promissory fraud might have to do with *constitutionalism,* how this might be important to understand constitution making in divided societies and the means by which majoritarian demands might be tempered through use thereof, it might behoove us to consider a hypothetical.

Let us presume a state X, which is highly divided as between a majority population A and a minority population B, is currently engaged in constitution making. There may or may not be other divisions within this highly divided society of X as well, some potentially severe, but for our purposes, we may focus exclusively on the divisions between A and B. For those falling within population A, it is of fundamental importance that a *particular, specific* state action be taken as the state is reconformed in accordance with any new constitution. This might include, for example, the repeal of a specific existing law that the majority community of A has long opposed. The problem, however, is that the minority community of B, significant enough in size that its broad support of the constitution is a *sine qua non* for a harmonious polity within state X, opposes the same (particular and specific) action with equal fervor.

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Such a hypothetical is hardly fanciful, even if it is not universally common. In fact, it summarizes (albeit in a reductive, one paragraph fashion) the debates that surrounded personal law in both Iraq and India during the making of their respective Constitutions currently in effect.[1] And yet existing theory has very few tools to deal with it, an absence which this Article hopes to begin to fill.

The solution, or at least a solution that seems to have been deployed, is to engage in *promissory fraud.* I borrow the term, obviously, from the common law tort that refers to a party that makes a promise in a contractual setting that *it has no intention of ever carrying out.*[2] A private party that engages in promissory fraud may be liable for damages in tort. Of course, translated into the constitutional setting, there is no claim that might be made as against drafters who make constitutional promises that they have no intention of carrying out, which makes resort to promissory fraud all the more palatable.

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1 Articles 41 of the Iraq Constitution and Article 44 of the Constitution of India both address personal law, and they are in many ways the mirror image of one other. Article 44 of the Constitution of India contemplates the enactment of a uniform personal law to govern all citizens, referring to such a law as a "Uniform Civil Code." INDIA CONST. art. 44. As a civil law state with its own existing and non-controversial Civil Code already in effect (which Civil Code specifically exempts matters of personal status from its scope, in broad keeping with praxis in Islamic states), Iraq refers to the same area of law as "personal status." Article 41 of Iraq's Constitution calls for the repeal of the already existing Personal Status Code, or at least the freedom of Iraqis to live by different personal law rules than those contemplated by the Personal Status Code if they so choose. DUSTUR JUMHURIY AT AL-IRAQ [THE CONSTITUTION OF THE REPUBLIC OF IRAQ] of 2005 art. 41. These provisions are discussed in greater detail throughout this Article.

2 *Lazar* v. *Superior Court*, 909 P.2d 981, 985 (Cal. 1996) ("'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud.")

Hence, for example, the drafters in State X might insert into the Constitution a provision that requires the legislators to take a certain, specific action in the future, leaving the details for the legislature to determine. Yet they do so *fraudulently,* with full awareness that the legislature will never take such an action for political reasons, indeed it could not without causing deep social unrest. Nor do the drafters expect that the courts will take such actions, given the deep sensitivities involved. (And even if they are concerned about judicial interventions, they can render the provisions non-justiciable to address this.)[3]

The term *promissory fraud* is obviously provocative, and yet still broadly accurate. One is acting with some level of deception, after all, when obliging a state to take an act that it could not possibly take. There is, nevertheless, justification for it. The reason to engage in

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[3] The Constitution of India does precisely this as to Article 44 of its Constitution, placing it in Part IV of the Constitution, entitled the "Directive Principles of State Policy", which are formally non-justiciable, INDIA CONST. arts. 37, 44. Indeed, the major debates during the India constitutional negotiations did not concern whether to call for the enactment of a uniform personal law, but rather whether to render the matter jusiticiable, HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 136 (2011).Yet it would be important not to emphasize the point of formal justiciability excessively when considering the matter of promissory fraud constitutionalism. In the first place, the Supreme Court of India does regard the Directive Principles of State Policy of Part IV to be coequal with the Fundamental Rights of Part III in constitutional adjudication, Abhishek Singhvi, *India's Constitution and Individual Rights: Diverse Perspectives*, 41 GEO. WASH. INT'L L. REV. 327, 351 (2009) (describing this as an "abiding constitutional principle"). Moreover, Iraq's constitution has no section relating to non-justiciabilty, and yet as Part III of this Article shows, the courts have effectively rendered Article 41 non-justiciable. The point, in the end, is not whether or not a particular provision promising a particular change is *formally* non-justiciable, but whether as a matter of practical effect the change so promised is likely to be realized, by legislature or court. When it is exceedingly unlikely, and when the drafters are aware of this from the start, then the matter is promissory fraud constitutionalism as herein described.

promissory fraud in State X is two-fold. First, as to the majority community A, it will find anything other than a constitutional *promise* to be unsatisfactory, in particular given its majority status. In the evangelizing democratic ethos that permeates our global governance discourse, it is not hard to see why population A might feel that it is entitled to impose its will on a recalcitrant minority. The making of the promise demanded by A fulfills a core demand. Per the constitutional text, A has won the debate over the future course of the state. The state is obligated to undertake the action A demands, with the only concession being a temporal release to the defeated forces of B, so as to allow them to reconcile themselves to the new reality.

And yet the promise must be *fraudulent* because B will not accept the new order if the promise is actually carried out, and surely the drafters representing populations both A and B are aware of this, whether or not they wish to admit it, even to themselves. It is simply not reasonable, for example, to assume that nationalist forces committed to preserving a single, uniform Personal Status Code in constitutional negotiations will vigorously oppose repeal of that code in the constitutional setting but not in later legislative sessions.[4] That substantial majorities of Muslims might at some point not regard it as important to be governed by *shari'a* in a non-Muslim majority state as to personal law matters seems rather fanciful as well. Or at least this must be true if Muslim representatives had fought so hard to ensure the continuation of *shari'a* rules during constitutional negotiations in the first place, as a symbol of Muslim autonomy in a pluralistic state.[5]

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4 Part II of this Article describes the extent and fervor of opposition to Personal Status Code repeal among nationalist forces in the specific context of Iraq.

5 Respecting broad (but not universal) Muslim opposition to a uniform civil code in India, and its relationship to autonomy for the Muslim community, *see* notes 41-42 *infra* and accompanying text.

Promissory fraud in constitution making provides a means, perhaps the *only* means, to navigate the divide that does not result in widespread violence. Those involved in the negotiations from population A can make the plausible case that they have won the debate, given the obligatory formulation in the constitution that a particular action be taken. They have not obtained the action, they might maintain, but they have obtained the *promise* to undertake it. Similarly, those representatives from population B can point out to their constituents that in fact nothing has been done as of yet, nor will they permit it to be done at future legislative sessions. Both populations might therefore support the constitution, with the ultimate reality, perfectly obvious to anyone paying attention, being that the promise over the divisive issue will remain unfulfilled.

The purpose of this Article is to explore in greater depth the reasons for the phenomenon of promissory fraud in constitution making, and the conditions under which it comes to exist, with particular and specific reference to the Iraqi example, as informed by the earlier case of India. First, it explains why the existing theory does not adequately address the circumstances that give rise to the phenomenon of promissory constitutionalism. It then turns to the specific circumstances of Iraq. It lays out how the particular forces in Iraq were arrayed on the question of personal law and compares this to the situation in India during its constitution making to demonstrate significant overlapping similarities. Further, it shows how the ultimate formulations came to be adopted, and the manner in which they embrace the principle of promissory fraud constitutionalism—a *promise,* that is, to make a change that will lie forever unfulfilled. Finally, the conclusion highlights how the promissory fraud approach can be and has been adapted by courts seeking to forestall seemingly inevitable legal changes demanded by powerful political forces, with

particular reference to the Supreme Constitutional Court of Egypt. The conclusion notes some qualifications respecting the use of a contractual term "promissory fraud" to the constitutional phenomena herein described.

Constitution Making and Bridging Divides: Theoretical Considerations

Returning to the hypothetical set out in the Introduction, the problem discussed therein relates to a type of dispute that is *discrete and specific.* This means that it renders inapplicable notions such as Balkin's "framework originalism",[6] whereby the drafters of a constitution set forth a framework onto which future state actors construct much constitutionalism through the political process. This might very well work for highly generalized divisive matters such as the extent of federalism in a given society. In that context, drafters could of course create a capacious (and perhaps even contradictory) framework, and later actors could construct praxis thereon over time.[7]Indeed, the advantages of such an approach appear rather

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[6] JACK BALKIN, LIVING ORIGINALISM 21-22 (2011). Balkin thus maintains, for example, that the reason that the drafters of the Fourteenth Amendment to the United States Constitution used capacious phrasing such as "due process" and "equal protection" was because they knew that successive generations might understand the terms differently and thus adapt them to meet their own particular needs, Jack Balkin, *Framework Originalism and the Living Constitution,* 103 N.W.U. L. REV. 549, 555-56 (2009).

[7] Spain offers an excellent example of how this might be done, specifically in the context of federalism. Upon Franco's death, Spain was divided between identitarian communities such as the Catalans and the Basques that sought a broadly confederal state within which any given identitarian community could enjoy substantial autonomy; strongly centralist elements attached to the Madrid-driven policies of the former regime; and elements that lay somewhere between these two poles. Similarly, there were those who had more faith in the military as an institution designed to keep order, and those who viewed the military as inherently oppressive. There were Communists who operated as an arm of the

obvious, as the approach enables future actors to address highly contentious points of dispute piecemeal and incrementally rather than in a single drafting session.[8] Yet if the question is to retain a personal law or to discard it, there is little by way of broad framework to create, only a decision to be made, and in a manner that one or the other of the respective populations of A and B will find deeply unsatisfactory.

Indeed, the same might be said as to the deployment of ambiguous phrasing generally, whether or not intended as broad framework text. Social forces with different commitments over the proper role of religion over law might come to agreement over constitutional formulations such as the inclusion of a requirement that a law not contradict the "settled rulings of Islam."[9] This is because of the inherent ambiguity over what such a phrase might mean, and the near certainty that it means something different to the different social forces in question. By contrast, any attempt to create ambiguity over a narrow and specific demand will prove inadequate to any social force deeply committed to the realization of that demand, and it will meet

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Soviet Union and Far-Right Falangists as well. ANDREA BONIME-BLANC, SPAIN'S TRANSITION TO DEMOCRACY: THE POLITICS OF CONSTITUTION MAKING 27-31 (1987). Given strong Catalan and Basque desires for federalism, equally strong demands for a unified central authority by centralist elements, and internal division on the subject among the leftists, the drafters of Spain's Constitution fell back on contradiction to manage the intractable dispute. BONIME-BLANC, *supra* at 37. They inserted a constitutional provision that both declared "the indissoluble unity of the Spanish nation" and referred to rights of autonomy to be granted to the "nationalities and regions." CONSTITUCIÓN ESPAÑOLA arts. 2, Dec. 29, 1978.

8 *See* Lerner, *supra*. n. 3 at 6 (describing use of approach in various nations so as to avoid exacerbating conflict over contentious matters).

9 *See* Dustur Jumhuriyat al-Iraq [The Constitution of the Republic of Iraq] of 2005 art.2 (containing such a requirement); Haider Ala Hamoudi, *Notes in Defense of the Iraq Constitution*, 33 U. PA. J. INT'L L. 1117, 1122-23 (2012) (describing elasticity of this phrasing).

with similarly vociferous resistance from any social force deeply opposed to the same demand. The differences between A and B, it seems, can hardly be resolved through ambiguous, contradictory or broad framework text in the hypothetical provided.

Lerner refers to another possibility that deserves exploration. This is the use of constitutional phrasing that by its terms defers a highly contentious matter for later, legislative determination through the enactment of a subsequent law. An example, Lerner indicates, is Article 44 of the Constitution of India.[10]In other words, rather than the Constitution settling the question, it delegates to subsequent political actors the power to do so. It is important to note how the use of this technique might be different than Balkin's framework originalism. The constitution in this context is not providing any sort of "framework" on which to construct later praxis. Nor is there any ambiguity in the text. There is no guidance at all, even vague guidance, as to potentially conducive actions that might be taken through the political process. Rather, the entire affair is deferred, to be decided at a later time, by later actors, more or less unconstrained by constitutional text, except as ordinary sense and reason might constrain them.

Hence, for example, a constitutional provision that indicates that a legislature "should" consider a potentially divisive law in the future would be an example of deferring to future legislative action as per Lerner's description. The same would be true of a constitutional provision that indicates that the number of seats in a legislature is to be set by an electoral law, to the extent the precise number proved divisive.[11]Neither of these is promissory fraud, however, as drafters

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10 Lerner, *supra.* n. 3 at 141-42.

11 France has such a provision in its constitution.1958 CONST. art. 25 (France) It also calls for the terms of the houses to be determined by law. These provisions

could perfectly well have expected that future legislators *would* fulfill the undertakings delegated to them. Indeed, something would be terribly wrong in a state where an electoral law setting the number of legislators in a national assembly could not be passed at all because of existing social divides.

Promissory fraud constitutionalism is therefore a largely undiscussed subset of Lerner's incremental constitutional toolkit. For promissory fraud constitutionalism to lie, there must be a promise to take an action which is simply impossible to imagine being fulfilled given existing political and demographic divides. The goal is not to *defer* so much as to *defraud,* to pretend a future action is taken and to hope that the promise to do so proves sufficient to moderate passions in favor of and in opposition to that promise.

Thus, while Lerner's incremental constitutionalism might very well prove a useful guide, there is a need for more consideration of the more narrow type of constitutionalism that engages in *promissory fraud,* given the unique and in many ways troublesome nature of the technique. This Article takes a modest step in that direction. The next section demonstrates promissory fraud at work in the constitutional setting in the particular context of Iraq, and to a lesser extent, India.

The Iraqi Personal Status Code and the Genesis of Article 41

In popular accounts, the Iraqi Personal Status Code is inaccurately portrayed as a secular document that religious forces were seeking to overturn and replace with *shari'a.*[12] In fact, in this

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do not appear to manage social divides, but to give legislators some level of flexibility to adapt to evolving needs.

12 *See, e.g.,* Maureen Dowd, *Reformer Without Results,* N.Y. TIMES A11 (August 13, 2005); Vivian Stromberg, *Protecting Women's Rights in Iraq,* DET. FREE PRESS

overwhelmingly Muslim country, the substance of the Personal Status Code derives largely from *shari'a.* It permits a husband to take more than one wife[13] and to divorce his wife unilaterally.[14] It grants female relatives inheritance shares that are half of those of similarly situated males.[15] More generally, the law requires the courts applying the law to be guided by *fiqh,* or the interpretations of Muslim sacred texts undertaken by authoritative jurists of various schools of thought.[16] Where *shari'a* might be thought of as, and certainly for the purposes of this Article is intended to refer to, the *corpus in toto* of the norms and rules derived by Muslim jurists from Islamic revelatory text,[17] *fiqh*

(Aug. 10, 2005); Brooke D. Rodgers-Miller, *Seminar Papers On Women And Islamic Law: Out Of Jahiliyya: Historic And Modern Incarnations Of Polygamy In The Islamic World,* 11 Wm. & M. J. Wom. & L. 541, 561 (2005); Pamela Constable, *Iraqi Women Fear Push For Sharia Law*, CHI. TRIB. A2 (Jan. 21, 2004);Charles Clover and Nicolas Pelham, *Iraqi Plan for Shari'a Law a 'Sop' to Clerics, Women Say*, FIN. TIM. A11 (Jan. 15, 2004).

13 PERSONAL STATUS CODE OF IRAQ, No. 188 of 1959, art. 3(4).

14 *Id.* at Art. 37.

15 *Id.* at Arts. 89-90.

16 *Id.* at Art. 1(3).

17 Hence, I use the term *shari'a* herein to refer to the corpus of extensive, overlapping and oft-conflicting rules developed by Muslim jurists, medieval and modern, from Islam's sacred foundational texts, the Qur'an, as revealed word of God, and the *Hadith,* or statements, utterances and actions of the Prophet Muhammad. I am intelligently and thoughtfully criticized for often defining this vast and contradictory body of norms and rules developed by medieval jurists as *shari'a*. *See, e.g.,* Patrick S. O'Donnell, *Divine Law (Shari'ah) and Jurisprudence (Fiqh) in Islam, Ratio Juris: Law, Politics, Philosophy*, Ratio Juris Blog (June 26, 2009, 10:58 AM), available at http:// ratiojuris.blogspot.com/2009/06/divine-law-shariah-jurisprudence-fiqh.html. It is true, as these critics suggest, that the *shari'a* conveys a more idealistic sensibility than that which can be conveyed by the substantive rules of *fiqh* even considered as a whole. *See, e.g.,* Asifa Quraishi, *What if Shari'a Weren't the Enemy: Rethinking International Women's Rights Advocacy on Islamic Law*, 22 COLUM. J. GENDER & L. 173, 203 (2011) (distinguishing between shari'a as the immutable Divine Law and *fiqh* as human efforts to capture that law through scholarly interpretation). The problem is that if *shari'a* refers to nothing beyond a perfect and immutable Divine Law separate and apart from any human effort to understand that law, then almost as a matter

refers instead to a more individualized interpretation, either by a single jurist or often by a particular school of thought. In overwhelmingly Sunni states, there are four historic Sunni schools of thought whose rules of *fiqh* might be taken into consideration when interpreting or applying Islamic law—the Hanafi, Hanbali, Shafi'i and Maliki.[18] In the context of Iraq, however, the primary Shi'i school, the Ja'fari, is taken into account as well not only in the context of the Personal Status Code, but also whenever reference to *fiqh* or *shari'a* is made in legislation.[19]

That said, the Personal Status Code is more progressive than the rules of any single school of thought, Sunni or Shi'i, primarily because it liberally adopts *fiqh* rules from a variety of different schools of thought, putting into legislation the most progressive rule among them in any given context.[20] It also contains certain modest

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of epistemological necessity it means precisely nothing that is knowable and therefore of value to lawyers. Moreover, if *shari'a* were truly divorced from human understanding of Divine Law, it would render clauses like the one contained in Article 2 of the Egyptian constitution declaring the principles of the *shari'a* to be "the principal source of legislation" entirely baffling. *See* Jill I. Goldenziel, *Veiled Political Questions: Islamic Dress, Constitutionalism and the Ascendance of Courts,* 61 AM. J. COMP. L. 1, 17(2013) (respecting content of Article 2). Hence I find my definition, while contestable, more appropriate under the circumstances.

18 *See* Kristen Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System,* 36 GEO. WASH. INTL. L. REV. 695, 721 (2004).

19 *Id.* at 747-48.

20 *Id.* at 749. Hence, for example, the Shi'a have a rule of inheritance which permits a daughter or daughters of a decedent who has no sons, parents or spouse to inherit the entirety of her parent's estate. GRAND AYATOLLAH ALI SISTANI, MINHAJ AL-SALIHEEN 3: ¶991. The Sunni schools, by contrast, grant the daughter only half the estate so long as there are any male agnatic relatives of the decedent alive, such as a brother or paternal cousin of the decedent. DAVID PEARL, A TEXTBOOK ON MUSLIM PERSONAL LAW 175 (2d ed. 1987). The Code adopts the more progressive Shi'i formulation. Personal Status Code, *supra.* n. 13 at Art. 91(2). By contrast, the law permits a woman to seek a judicial dissolution

innovations.[21] As such, nationalist parties, and the Kurds, who tended to be more secular overall, certainly preferred it to the traditional rules.[22]

Yet when the law was enacted, the reasons offered for its passage did not centrally relate to its quite limited progressive elements. Rather, the purpose was to *unify* the personal status law. The drafters quite explicitly indicated that the system that had existed before, where Sunnis and Shi'a were governed by different rules, invited a series of problems that the Personal Status Code sought to eliminate.[23] The implicit suggestion was that uniform law not only created clarity and permitted individuals to know their legal rights and

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of her marriage from her husband under a comparatively broad set of circumstances which include the infliction of significant emotional or physical harm, failure to support, and abandonment of the marital home for two years. Personal Status Code, *supra.* n. 13 at arts. 40, 43.These bases for judicially ordered marital dissolution at the request of the spouse are recognized by the Maliki Sunni school primarily. Pearl, *supra.* at 130.They are not recognized by the Shi'a, nor by the Hanafis. Pearl, *supra* at 130.Interestingly, Iraq's Sunni Arab population is overwhelmingly Hanafi, and its Kurdish population Shafi'i. ALI ALLAWI, THE OCCUPATION OF IRAQ: WINNING THE WAR, LOSING THE PEACE 33 (2007).Effectively, this means that the drafters of the Personal Status Code adopted a rule from an Islamic school of thought to which almost no Iraqis generally adhered.

21 For example, a man who arbitrarily divorces his wife may be liable for up to two years of spousal maintenance. Personal Status Code, *supra.* n. 13 at Art. 39(3).This is not a rule recognized among any of the primary Sunni or Shi'i sects, and indeed when a similar rule was proposed in Egypt, it caused a great deal of controversy. CLARK B. LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE *SHARI'A* INTO EGYPTIAN CONSTITUTIONAL LAW 170 (2006).

22 Ashley S. Deeks and Matthew D. Barton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INTERNATIONAL LAW JOURNAL 1, 22-23 (2007).

23 Personal Status Code, *supra.* n. 13 at Reasons for Enactment. ("It was discovered that the multiplicity of sources for decisions and the differences in rulings rendered family life unstable, and the rights of individuals insecure. This was a motivation to consider the creation of a law that would combine the most important agreed upon rulings of the *shari'a*. . . .).

obligations, but it was also central to the establishment of a national identity. Hence the law indicates in its reasons for passage that the desire for legal uniformity was "the first goal" of the state "ever since the glorious revolution of 1958 erupted."[24] Such a law, moreover, is expected to be "a basis for the establishment of the Iraqi family in its new era, and it will ensure the stability" of the state. The principle that uniformity creates stability and inspires national identity is not difficult to discern from this.

The primary goal was therefore to forge a uniform national identity from Iraq's diverse elements. This had been a core normative commitment of Iraq's Sunni dominated political and social elite from the time of formation of the Iraqi state, just after the British mandate. Hence, for example, the architect of Iraq's modern education system, Sati al-Husri, a very strong Arab nationalist, envisaged using public education as means of creating a national, political and cultural identity to which regional interests would be subordinated.[25]As such, Husri opposed the spreading of secondary education and teacher training institutes to the provinces as a threat to national unity, precisely because the majority of those trained and training in such provincial institutions would belong to individual sectarian communities, thereby diluting the cultural and technical hegemony that Sunni-dominated Baghdad sought over the matter of education.[26] In Husri's view, permitting Hilla to train its own teachers, and Mosul to train its teachers, would be a strengthening of sectarianism rather than an affirmation of a commitment to a national identity. Naturally, these measures, along with accompanying efforts to reduce the use of colloquial Arabic used in some parts of Iraq and not others, generated

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24 *Id.*

25 LIORA LUKITZ, IRAQ: THE SEARCH FOR NATIONAL IDENTITY 110-11 (1995).

26 *Id.* at 111-12.

resentment in subnational communities. This was especially the case among the Kurds and the Shi'a, both of whom had strong particularist, subnational identities to which they were already committed and which they were loath to relinquish.[27]

The effort to create national consciousness through suppression of subnational sectarian and ethnic commitments was not limited to education alone. Yasin al-Hashimi, the "Ataturk of Iraq", was intent on banning the specifically Shi'i Husseini rituals throughout Iraq's south for similar reasons.[28] The enactment of the Personal Status Code must therefore be understood not as an isolated attempt to create a single law where none had existed before. Rather, it was another means to expand an effort to foster national identity that was being conducted on a variety of fronts.

But of course just as Iraq's Sunni dominated elite sought to expand national consciousness at the expense of subnational loyalties, so Iraq's Shi'a, while certainly nationalist and seeking to participate in affairs of the state,[29] also sought to retain their own unique identity to which they were quite committed. This is amply demonstrated by the zeal with which they pursued Shi'i rituals once given the freedom to do so after the fall of Saddam Hussein.[30] Their sectarian commitments also often manifested themselves in their loyalties to the jurists of the holy city of Najaf.[31] Thus, when the Personal Status Code effectively supplanted Najaf's jurists as the source of rulemaking in the vital area

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27 *Id.* at 115.

28 YITZHAK NAKASH, THE SHI'IS OF IRAQ 161 (1994).

29 *Id.* at 277.

30 Allawi, *supra*. n. 20 at 138; PATRICK COCKBURN, MUQTADA: MUQTADA AL-SADR, THE SHIA REVIVAL AND THE STRUGGLE FOR IRAQ 23 (2008).

31 Cockburn, *supra*. n. 30 at 25-26.

of personal law, the objections from Shi'i leaders were swift and immediate.[32]

They also recurred repeatedly over the course of decades. Hence, in 1963, a junior cleric at the time, Muhammad Bahr ul-Ulum, published a pamphlet opposing the Personal Status Code that has achieved a canonical status of sorts among Iraqi Islamist Shi'a.[33] Though the Shi'i resistance to the Code at that time as exemplified by the Bahr ul-Ulum pamphlet did not lead to its repeal, the Shi'a never reconciled themselves to the Code. Nothing else was nor could be done during the totalitarian rule of the Ba'ath, but the Shi'a took the first opportunity availability to them to repeal the Personal Status Code following the removal of Saddam Hussein from power by the

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[32] Stilt, *supra.* n. 18 at 751.

[33] MUHAMMAD BAHR AL-'ULUM, ADWA' 'ALA QANUN AL-AHWAL AL-SHAKHSIYA (1963). That the actual, substantive rules of the Personal Status Code were hardly problematic is further amply demonstrated by even a cursory review of the objections in the Bahr ul-Ulum pamphlet. Bahr ul-Ulum points out that under the Personal Status Code a Sunni man could not divorce his wife while drunk. This is a right available to him under Sunni Hanafi rules but not the Personal Status Code, which adopts the narrower Shi'i rules that require sobriety. Bahr ul Ulum, *supra* at 26; *see also* Stilt, *supra.* n.19 at 752. While clever in its political correctness (suggesting that it is just as unfair to apply Shi'i rules to Sunnis as it is unfair to apply Sunni rules to the Shi'a), it is hard to imagine how this presents any practical impediment to divorce for any serious person. Similar examples often offered by the Shi'a in discussions during constitutional negotiations are equally silly. For example, as I was told by one Shi'i cleric, the Personal Status Code requires two witnesses to a marriage (in accordance with Sunni rules), while the Shi'a require only the two contracting parties themselves. Should a man and a woman find themselves alone together in irrepressible need of sex, the Personal Status Code would deny them an opportunity to marry where their religion clearly would permit them to marry. To believe the dispute is over rules of substance rather than the source of rulemaking, we would have to believe that concerns such as the presence of a man and a woman with outsized libidos trapped in a desert wishing to marry, or a drunk man unable to divorce until sober, were somehow important on their own in the context of constitutional negotiations.

United States. Hence, in 2003, fully forty four years after the passage of the Personal Status Code, and shortly after the United States created an advisory group of handpicked Iraqis known as the Iraq Governing Council to advise it on legislation and governance, that council (which included the same Bahr ul-Ulum in its membership) voted to repeal the Personal Status Code in Governing Council Decision 137.[34] The effort failed, largely because the United States refused to support it,[35] but the attempt was nevertheless remarkable. It demonstrates well the depth of the Shi'i hostility to the law when a move to repeal it was one of the first legislative moves the Shi'a Islamists attempted upon being given an opportunity to meaningfully participate in governance.

Unsurprisingly, then, during constitutional negotiations just a few years later, at a time when United States influence was steadily waning, the Shi'a Islamists tried again. This time their proposal, which ultimately became Article 41, was a provision of the Constitution that would repeal the Personal Status Code. It was framed in the form of an individual freedom and contained in the section of the Constitution addressing rights and freedoms. It obligated the state to grant Iraqis the ability to abide by their own rules of religion and sect if they so chose. Nothing was said about the Personal Status Code as it existed, hence the proposal did not so much call for its repeal as permit anyone to exempt themselves from its purview if they wished to do so. This pluralist proposal, of course, was precisely the type of legal Balkanization that Iraqi nationalists had spent decades opposing, and

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[34] LARRY DIAMOND, SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ 131 (2005).

[35] L. PAUL BREMER III, MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE 292 (2006).

they opposed it with particular force when raised during the drafting negotiations.[36]

The analogy to India's constitutional experience is admittedly not perfect. In particular, it is hardly fair to compare the efforts of the drafters of the Indian Constitution to create a singular Indian identity with that of Iraq's Sati al-Husri or Yasin al-Hashimi. Where the Iraqi centralists sought to create a nation by squelching any particularist sentiment, the Indian drafters embraced a cultural pluralism of sorts that was far more tolerant of loyalties beyond those owed the state but that certainly included nationalism within it.[37] Hence Jawaharlal Nehru indicates, for example, that within the unity of the Indian identity, "the widest tolerance of belief and custom was practiced and every variety acknowledged and even encouraged."[38] The distinction as between this model of nationhood and that of Iraq, which included

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[36] I spent nearly a year in Iraq working with a committee delegated by Iraq's legislature to develop a set of critical amendments to the Iraq constitution. These meetings were held in the offices of the Chair of the Constitutional Review Committee, Sheikh Humam Hamoudi (in full disclosure, my paternal uncle).The consultation was part of a larger project organized and run by the University of Utah S.J. Quinney College of Law entitled: "Global Justice Project Iraq." The project was funded by the U.S. Embassy's Constitutional and Legislative Affairs Office and operated in Baghdad from the fall of 2008 through March of 2010.

Significantly, in connection therewith, I was given access to the plethora of negotiation materials that were compiled during the drafting of the Constitution, and because many of the same actors served on both the original committee drafting the Constitution and the committee tasked with amending it, I had extensive access to those individuals as well. Many of the reflections contained herein are the product of those conversations and that documentary review.

[37] Khilnani specifically indicates that following independence, "no attempt was made to impose a single or uniform 'Indian' identity." SUNIL KHILNANI, THE IDEA OF INDIA 173 (1999).The same can certainly not be said of Iraq.

[38] JAWAHARLAL NEHRU, THE DISCOVERY OF INDIA 55 (2004).

attempts to deny the Shi'a the ability to practice their most sacred rites in an effort to create national identity, could not be starker.

At the same time, the tensions were largely similar. On the one hand, there were nationalists seeking to foster national identity, concerned that personal laws based on religion divided the state. Three supporters of a constitutional provision in India's constitution that would require a uniform civil code on a non-justiciable basis specifically linked their demand to a "keen desire . . . for a more homogenous and closely knit Indian nation."[39] On the other hand, there were leading Muslim constitutional negotiators who framed the matter as being related to the autonomy of their community, and, indeed about religious freedom,[40] precisely as the Shi'a Islamists did by placing the personal law provision of Iraq's Constitution in the "Rights and Freedoms" section. And just as in Iraq, any effort to impose one vision onto the minority would certainly raise their fears considerably, and lead to unpredictable and destabilizing consequences.[41] A means to mediate the divide needed to be found.

The chief differences, in fact, between the Indian experience and the Iraqi lay less in the opposing commitments of the forces and the nature of the dynamic between them, and more in the identification of *which* force happened to be dominant and the status quo ante they sought to challenge. In Iraq, the rising dominating powers were Shi'a Islamists, eager to return their jurists to a position of prominence and distrustful of the state's ability to make rules in

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39 GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 81 (1972).

40 Lerner, *supra*. n. 3 at 137-38.

41 Austin, *supra*. n. 39 at 80.

areas of law traditionally reserved to the clergy.[42] They were challenging a longstanding Sunni-centric paradigm that had managed to create national *legal* uniformity in nearly all respects with the enactment of the Personal Status Code.[43] In India, the roles were reversed. The rising power was one that sought uniformity, challenging a British imposed system that had insisted upon particularism in the matter of personal law and nowhere else.[44]

Yet despite this, in two quite different nations, a remarkably similar constitutional division was resolved in a remarkably similar fashion—through resort to promissory fraud constitutionalism. The next section sets out the constitutional formulations and their consequences in more detail to see how this is so.

The Fraudulent Promises

Given the dominance of the forces in the constitutional drafting chambers favoring one particular formulation—of legal pluralism in the context of Iraq, and of legal uniformity in the case of India—it was almost inevitable that *something* would be inserted that would call for the very change that the dominant forces advanced with such passion. The only real question was the extent to which the provision itself called for immediate or at least near term change that

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42 *See* notes 29-35*supra.*and accompanying text.

43 It should be noted that the uniformity is not entirely complete, even in the context of the Personal Status Code itself. Hence, for example, Article 90 of that law largely requires courts to revert to rules of sect in determining the proper apportionment to be given to relatives of the decedent. Personal Status Code, *supra.* n.14 at Art. 90.This may well explain why the inheritance provisions are under less sustained attack than other provisions pertaining to family law.

44 MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA 144-45 n. 9 (1989) (pointing out that the British generally imposed uniform law applicable to all citizens throughout India, with the exception of personal law, where religious communities were each governed by their own respective religious rules).

was in some manner enforceable. In the absence of this, the provision would be merely *promissory*—that is, a promise to undertake a change—and there would be no real consequence attaching if it did not. Taken together with the political impossibility of imagining the promise fulfilled, at least without deep social unrest, that promissory undertaking is rendered into *promissory fraud.*

Hence, a self-executing provision that made a preferred formulation not only absolutely clear, but the law of the land, is not promissory, but effective immediately. In Iraq, this was a possibility as to personal law, as a constitutional provision can plainly *repeal* a law. Article 41 could, for example, as Governing Council Decision 137 did before it, declare the Personal Status Code null and void, with rules of personal status depending on religion and sect.[45] Alternatively, given that it was framed as a matter of religious freedom, the provision could keep the law intact, but give Iraqis the ability to exempt themselves from it and be governed instead by rules of religion and sect, to the extent they wished.[46] In India, a similar approach would not be possible purely as a logistical matter. One cannot create an entire personal law in a constitutional provision, after all. However, a formulation that obligated the state to create a law within a fairly short time period and that authorized a highly specialized and empowered tribunal to aggressively intervene to ensure passage of that law would be possible.

These approaches were not adopted, however. While it is impossible to know precisely why, two primary reasons appear the

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45 Diamond, *supra.* n. 34 at 131.

46 Secular forces in Iraq tried (and failed) to include explicit reference in constitutional text to an option for those Iraqis who so chose to be governed by a civil law rather than religious rules. Deeks and Burton, *supra.* n. 22 at 21-22.

most plausible. First, some within the dominant community almost certainly wished to defer to the sentiments of minority voices that might feel imposed upon with an aggressive formulation.[47] Second, even if there was no sentiment in favor of deference, the possibilities of violence on the part of the minority also had to be considered by the majority community's representatives, who would be keenly aware during constitutional negotiations as to the depth and extent of the minority opposition.

As such, in India, Article 44 was not only devoid of timetables, but after much deliberation and debate, it was placed in the non-justiciable section of its constitution, meaning that at least in theory no court could interfere in the process of realizing it.[48] That it has effectively remained non-justiciable despite the increasing willingness of the Supreme Court of India to consider the sections of the technically non-justiciable Part IV of the Indian Constitution in constitutional adjudication[49] is all the more remarkable.

In Iraq, something similar resulted, though the path was more circuitous. The first proposed formulations of Article 41 read as follows:

Iraqis are free in their obligations concerning their personal status, according to their religions and their sects. This shall be organized by law.

While this did seem to leave something to be a subsequent legislature, neither is it clear what that would be, nor how they would

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47 *See* Austin, *supra.* n. 39 at 80 (suggesting that concern of the fears of Muslims and Sikhs motivated Nehru to argue for the non-justiciabilty of the uniform civil code requirement).

48 INDIA CONST. art. 37. *See supra.* n. 2 respecting the importance of not overemphasizing formal non-justiciabilty as an indicium of promissory fraud.

49 Singhvi, *supra.* n. 3 at 350-53.

organize it. It is also not clear what the judiciary might have done with such a formulation. Certainly nothing in the Constitution suggested that Article 41, or any other provision of the Constitution for that matter, was non-justiciable.[50] Hence, whether this formulation would have been promissory fraud, we will never know, but there is sufficient uncertainty respecting its applicability that the matter is at least in some doubt.

In any event, these early proposals of the Shi'a Islamists met with fierce resistance from both secular and nationalist groups, who dominated among the Kurds and the Sunnis, respectively.[51] The Shi'a on their own could not impose this change on the recalcitrant communities, because the ratification rules made this impossible. If three of Iraq's eighteen provinces rejected the proposed constitution by a vote of 2/3 or more, then the constitution would be defeated.[52]

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50 India's constitution is unusual, but by no means unique, in having a section of its constitution specifically described as being non-justiciable. In fact, its own provisions inspired other nations from Germany to Spain to Portugal to do the same. For a criticism of the approach, *see* Jeffrey Usman, *Non-Justiciable Directive Principles: A Constitutional Design Defect,* MICH ST. J. INT. L. 637, 645 (2007) (describing the inclusion of non-justiciable directive principles as "undermin[ing] the distinctiveness and purposes of a constitution (or constitutional law) in a constitutional representative democracy.")In any event, it suffices for our purposes to say that Iraq has not adopted the Indian model of including a non-justiciable section in its own constitution.

51 To be clear, not every Kurd is a secularist, nor is every Sunni a nationalist and every Shi'i an Islamist. To take the simplest example, the leader of the secular and nationalist Iraqiya coalition, Ayad Allawi, is a Shi'i. *See* Allawi, *supra.* n. 20 at 345.The point, ultimately, is not to stereotype but merely to indicate that nationalist leanings *predominated* among Sunni groups even as secular leanings *predominated* among Kurds and Islamist preferences predominated among the Shi'a.

52 Transitional Administrative Law of Iraq, art. 61(c).

There were considerably more than three provinces where Sunnis, Kurds, or some combination of them predominated.[53]

Hence the Shi'a Islamists were aware that there was no real way that they were going to be able to repeal the Personal Status Code in the Constitution, given the vociferous objection thereto. And surely they were aware that to attempt such a matter in a subsequent legislative session would cause severe social unrest. At the same time, their commitment to repealing the Personal Status Code was so long standing and so well known that they were simply not prepared to waive it, and accept the secularist and nationalist demand to remove Article 41. This would have required them to come to frank terms with the political realities of modern Iraq and the real limitations on their own deeply held visions for it, a difficult task on its own. And even if they could manage it, it would have been difficult to justify such a concession to their own base which continued to agitate for the very change that their leadership had been demanding for decades.

The decision, then, was to adopt for *promissory fraud.* Specifically, the Shi'a Islamists insisted on a formulation that continued to articulate their vision of a repealed Personal Status Code, or at least a dramatically diminished one that could be ignored in favor of religious rules should one so desire. At the same time, the formulation would be chimerical, absolutely incapable of realization for political reasons alone. Hence the representatives could tell their

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[53] As Istrabadi notes, the opposition of the Sunnis alone to the final constitution nearly doomed it. Feisal Amin Rasoul al-Istrabadi, *A Constitution Without Constitutionalism: Reflections on Iraq's Failed Constitutional Process*, 87 TEX. L. REV. 1627, 1641 (2009). The Kurds predominate in three provinces in Iraq's north. Istrabadi, supra at 1630-31. Had they also opposed the constitution, there is simply no way it could have been ratified.

electoral base (and perhaps even fool themselves into believing) that they had not made any concession, and that the Constitution calls for the very change they demand, even as they were surely aware (whether they chose to acknowledge it or not, even privately) that the change would never come to pass.

The promissory fraud took place through a fairly modest change to Article 41, somewhat similar in effect (though certainly not form) to the decision to render Article 44 at least formally non-justiciable in the Indian context. Rather than merely "free" to adopt rules of religion and sect as to matters of personal status, Article 41 broadened the freedom considerably. In its final form, it reads as follows:

> *"Iraqis are free in their obligations concerning their personal status, according to their religions, sects, beliefs and choices. This shall be organized by law."*

The addition of "beliefs" and "choices" effectively renders the provision meaningless in the absence of an organizing law. This is because without such a law, the article would mean that there will be *no* personal status law, save what each individual chooses to obligate upon herself based on her own free choice. Such a formulation could not possibly be made to work in any social order that does not resemble Hobbes' state of nature. Hence the conclusion appears to be to defer to the legislature to organize this freedom and define its contours, and in a highly charged and deeply divisive political context where it is difficult to see how such an organizing law could ever pass.

This is doubly true given that the judiciary would hardly be predisposed to intervene in such a matter as Article 41, particularly in

the Iraqi context. As Hirschl notes, courts quite often act as secularizing agents in societies where religious rules are expected to play some sort of constitutional role.[54] Iraq is no exception. Its Federal Supreme Court is staffed by national judges of prominence who were educated in national law schools and national judicial training institutes.[55] They are practiced in and familiar with the interpretation of law and its application in given factual situations. Irrespective of their own particular piety, they are neither experts in *shari'a*, nor do they necessarily understand in any degree of depth the methodologies of interpretation of clerics and religious scholars.[56] They would hardly be interested in furthering a legal system that weakened the role of state law and increased the role of religious rules promulgated by non state clerics.

As such, the Federal Supreme Court was never likely to want to prod the legislature to take action to cause the state to withdraw from rulemaking over personal law under any conditions, much less those presented in the final version of Article 41.The confirmation of this came in Decision 59 of 2011.In that case, a Shi'i woman was seeking to confirm a divorce by agency, prohibited by Article 24(2) of the Personal Status Code, but permitted by Shi'i jurists.[57] If she had the freedom to live by her own rules of personal status, she argued, then she wished to exercise this freedom and have this religiously recognized divorce be legally enforced.[58] The Court denied the request, holding in relevant part as follows:

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54 RAN HIRSCHL, CONSTITUTIONAL THEOCRACY 50-51 (2010).

55 Haider Ala Hamoudi, *Ornamental Repugnancy: Identitarian Islam and the Iraq Constitution* 7 U. ST. THOM. L. J. 692, 701 (2010).

56 *Id.*

57 Federal Supreme Court of Iraq, *Decision 59 of 2011*, available at http://www.iraqja.iq/viewd.886/.

58 *Id.*

[T]he subject of the litigation requires extensive, specialized study in the opinions of all of the Islamic schools in the process of enacting legislation for personal status in accordance with Article 41 of the Constitution. . . . This is so that there is a text for all Iraqis in light of their differences in their Islamic groups, so that the removal of the requested passage does not exceed or contradict what the various opinions of the matter have agreed upon or whatever is reconciled between them. Based on all of the foregoing, the claim of the litigant to remove the text . . . from Article 24(2) of the Personal Status Code must be in accordance with the mechanism described above and with the notice of the legislative branch in this.[59]

The Court thereby passed on the matter, deferring it to a legislature that plainly will not act on such a highly divisive issue. Even if Iraq's constitution is less than a decade old, it is noteworthy that no proposed law has been presented even once in the legislature,[60] that if it were so presented it would almost surely earn the vociferous denunciation of secular and nationalist groups, who oppose repeal of or exemption from the law now as much as they did earlier. As such, the matter appears to have disappeared from the political agenda nearly entirely. The lessons of India in this regard are also quite instructive, where six decades as a vibrant, successful democracy have not led to any sort of enactment of a uniform civil code, and where strong divisions over the matter remain.

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59 *Id.*

60 The website of Iraq's current legislature, the Council of Representatives, contains the list of laws that have been read in the Council for consideration by the entire Council. A law organizing Personal Status nowhere appears. An obscure reference to amendment to the Personal Status Code does appear under the heading "Recommended Laws," but no draft, or even summary, of such a law is publicly available. *See* Website of the Council of Representatives of Iraq, www.parliament.iq.

Broader Lessons

The primary focus of this paper is to discuss an understudied aspect of constitutional *design;* namely, the use of promissory fraud to commit to a change that quite obviously will never happen in a divided society. Yet the processes of promissory fraud constitutionalism need not be limited to questions of design alone. That is, the increase in understanding unearthed by deeper considerations of promissory fraud constitutionalism are greater than the relatively narrow factual context provided at the start of this Article. In some cases, in societies that are not necessarily divided, subsequent political or judicial actors might work to render a clause that might not have been intended as fraudulent into a form of promissory fraud. The subsequent actors of course do not claim to thwart the promise made in the Constitution, but they do change it to such an extent that the promise is no longer realizable even if recorded on paper.

An instructive example of this is offered by the Supreme Constitutional Court of Egypt, faced with a difficult claim from the historic seat of Sunni Muslim learning, the Azhar, that it would not pay an interest claim on an overdue debt because interest on debt is forbidden by Islam.[61] Egypt's Constitution had been amended in 1980 to indicate that the principles of the *shari'a* were "the main source of legislation."[62] It was hard to see how a provision that permitted something that Islam prohibited could be understood to use *shari'a* as its main source. It seemed positively repugnant to it.

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61 A translation of the decision is available. Supreme Constitutional Court(Egypt) *Shari'a and Riba: Decision No. 20 of 1985*,1 ARAB L.Q. 100 (1985). [hereinafter "SCC Decision"].

62 Lombardi, *supra.* n. 21 at 133.

The Court could have tried to develop an interpretation of *shari'a* that permitted interest. Plausible approaches along these lines have been put forward before,[63] but to do so would have certainly earned the ire of rather powerful political Islamist forces. [64] At the same time, there was an obvious problem in banning the taking of interest in Egypt, though the problem was of a different nature than India would face enacting a uniform civil code or Iraq would face repealing the Personal Status Code. The problem was not that a significant ethnic, religious or sectarian minority passionately committed to a different formulation would resist, leading to broad social unrest. Broadly speaking, support for *shari'a* based legislation in some form is quite strong across Egypt.[65] Rather, the problem would be that the banning of interest would be, quite obviously, devastating economically, particularly in a developing society such as Egypt.

The clever if legally incoherent solution that the Court adopted given these conflicting pressures was to render the constitutional demand of adherence to *shari'a* into a form of promissory fraud, at least as applied to the question of interest. Thus, the Court decided that interest was plainly prohibited by Islam, thereby avoiding any charge that it had somehow contaminated Islam with Westernized understandings of Sacred Text.[66] However, it also held that the challenged legislation was "immune" from judicial review because it

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63 For an interesting example, developed by the drafter of the Iraqi and Egyptian Civil Codes, *see* Haider Ala Hamoudi, *Muhammad's Social Justice or Muslim Cant: Langdellianism and the Failures of Islamic Finance*, 40 CORNELL INT'L L. J. 89, 128-29 (2007).

64 Lombardi, *supra.* n. 21 at 165.

65 *See, e.g.,* Shibley Telhami, *Egypt's Identity Crisis,* WASH. POST, Aug. 16, 2013 (noting divisions as to literal application of *shari'a* and a broader application of its "spirit").

66 SCC Decision, *supra.* n. 61 at 102.

predated the amendment in question.[67] It was the legislature, and not the executive, which had to take action as to such preexisting legislation.[68]

It is worthy to note the extent of the strained reasoning necessary to reach the result. Under such an approach, a constitutional amendment that prohibited slavery would have no effect on existing laws permitting slavery, but would only prohibit future laws. Yet there can be no doubting the Court's intentions. Faced with the prospect of losing all credibility as interpretive agent for *shari'a* by declaring interest religiously permissible, or acceding to the demands of powerful forces and prohibiting it against its own preferences (thereby doing enormous damage to Egypt's economy in the process), the Court rendered the provision into a promise it is fully aware will never be realized. No reasonable person with even a basic understanding of finance, let alone a judge on Egypt's highest court, could believe that any legislature in Egypt would make the foolhardy decision to ban interest no matter how rhetorically popular that might be. The commitment to *shari'a* continued to exist, as did the *promise* to amend legislation to be in conformity with it. Yet at least as concerned legislation permitting interest, the promise was fraudulent, and there was no real intent to enact it.

Conclusion

In these few pages, I have only sought to highlight what has at least been an understudied aspect of the constitutional experience in some states—the constitutionalized *promise* to enact a change, in full expectation that the change will not be enacted. While the most

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67 *Id.*

68 *Id.*

obvious examples of this are in divided societies, the promise of it suggests, indeed almost invites, broader use, particularly by actors and institutions who are aware of unrealizable popular demands and yet sensitive to popular opinion, as nearly all state institutions are to a greater or lesser extent. The promise to *shari'afy* commercial and financial legislation set forth in the last section is but one example of this.

My adoption of a contractual term that includes the word "fraud" is deliberate, as a decision to deceive a constituency is problematic. Far better in an ideal world to be honest and frank, and to discover and declare what is achievable, and to work to achieve it, than it is to make rhetorical promises one has no intention of keeping. Still, it is probably important to qualify the term here, given the obvious differences in use between the contractual setting and the constitutional. As it relates to contract, promissory fraud is tortious for good reason. It involves the willful and knowing deception of a counterparty for personal gain. In the constitutional setting, by contrast, the "fraud", as it were, is almost as much directed internally as it is to any third party. The Shi'a Islamists, that is, are almost as unwilling *to admit to themselves* the reality that the Personal Status Code will never be repealed in favor of *shari'a,* as they are unwilling to admit it to their constituencies. It is difficult, after all, for the elite of a repressed majority community to spend years persecuted under a putatively secular dictatorship, patiently waiting for a day when they might be able to rule, only to find that when such a day comes, one of the most fervently consistent demands of the community is not ever going to be realized.

Moreover, the alternative to contractual promissory fraud is, frankly, fair dealing. The alternative to constitutional promissory

fraud might prove to be broad and serious social unrest. Promissory fraud might be the only way to temper majoritarian demands without explicitly claiming to do so. It would be difficult for a dominant force to refrain from exercising its power to obtain constitutional language to its liking on a matter important to it. Even if the leaders of the movement could be persuaded in the abstract, the rank and file would find the concession rather bewildering and unacceptable, leading to a delegitimization of the representatives if they were to accept it. Yet, under circumstances where an important minority is no less committed to a different formulation, imposition would seemingly be an extremely unwise course of action.

Hence, there should be significant distaste in choosing to adopt promissory fraud, and it is probably overused, though this is probably the subject of a subsequent paper. Still, it is important to note that in some contexts promissory constitutionalism perhaps offers the only avenue available to manage a serious social conflict peacefully—formally in favor of the dominant group, but in effect in favor of the minority forces. Hence, the majoritarian demands are *recognized* in constitutional text, but in a manner that all but ensures that they will have no effect of any kind over a long period of time. It enables, that is, the majority and the dominant forces to claim victory in theory while conceding to the fervent commitments of a minority in practice. Whatever else might be said of this fraudulent means of navigating difficult political and social divides, it does seem to have been effective in blunting majoritarian demands that, if put in effect, could prove destabilizing or worse.