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**CONSTITUTIONAL COURTS IN MUSLIM-MAJORITY
COUNTRIES AND SUPPORT FOR THE INTERNATIONAL COURT
OF JUSTICE**

INTRODUCTION

Over the past six decades, the constitutions of many Muslim-majority countries have included references to constitutional courts and councils.² Constitutional courts protect the rule of law domestically: to embed such a court in the language of the constitution is an institutionalization of the supremacy of law. The question that drives this

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2- Our universe of cases are countries where there is an identifiable substantial segment of the 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 (see Emilia Justyna Powell, *Islamic Law and International Law: Peaceful Resolution of Disputes*, Forthcoming book manuscript, University of Notre Dame.

paper is whether a domestic constitutional court is associated with a country's international political and legal behavior. In particular, we discuss the relationship between domestic constitutional courts, rule of law, and the International Court of Justice (ICJ) in 30 Muslim-Majority countries by focusing on constitutional language. The rationale for this focus is that the ICJ is the closest parallel institution to a constitutional court at the international level.

Our data show that between 1946 and 2017 constitutional oversight has increased in the Muslim milieu. As demonstrated by Figure 1 below, 76 percent of Muslim-majority countries currently reference a constitutional court or equivalent judicial organ in the constitution. This number has increased steadily over time from merely 10 percent in 1947.

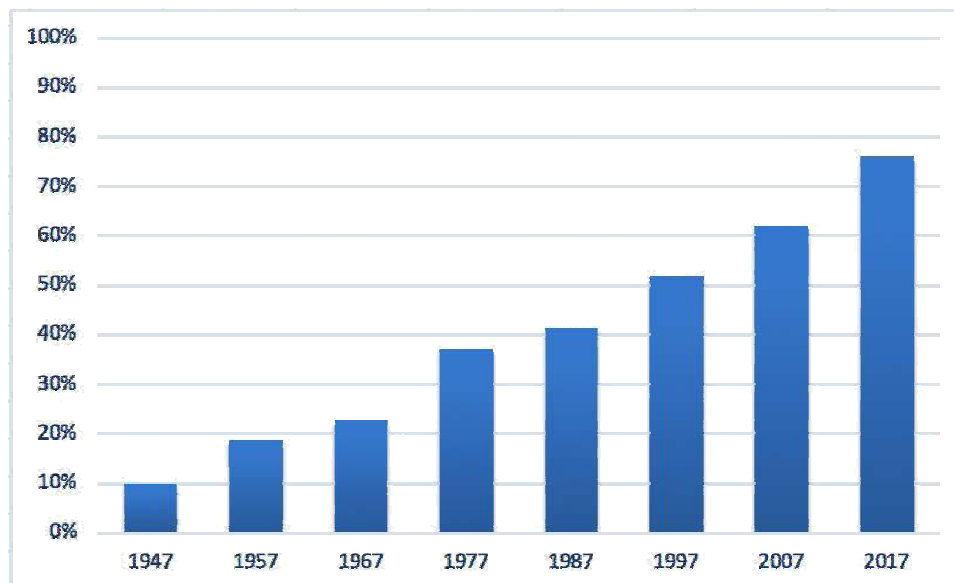


Figure 1: Percentage of Muslim-Majority Countries with Constitutional Court/Council

We suggest that measuring constitutional oversight in Muslim-majority countries can contribute to our understanding of the relationship between these countries and international law. In particular, it is interesting to assess the degree to which constitutional courts within a country influence the quality of domestic legal systems. The main takeaway from this paper is that efforts to design robust, independent domestic constitutional courts should not only benefit domestic rule of law, but international rule of law as well.

DOMESTIC CONSTITUTIONAL OVERSIGHT

As of 2017, 76 percent of Muslim-majority countries have a constitutional court or equivalent judicial organ. The presence of strong constitutional courts anchored in explicit constitutional language can effectively impact a country's rule of law at the domestic level.³

Naturally, there are valid arguments that a constitutional court does not automatically improve the quality of domestic rule of law. For example, the constitutional court could simply be a tool of the ruling elite and speak on constitutional issues only in a way that is endorsed by the political leadership. On the other hand, if the court has the authority and political will to act independently, it provides a means for people to question the constitutional legitimacy of sub-constitutional legislation. This can offer a point of connection between the domestic legal system and rule of law.

For example, in Algeria per article 183 the 2016 amended Constitution, the Constitutional Council is an “*autonomous* body” that “shall enjoy both

³- Powell and Rothkopf “Constitutional Courts and Rule of Law in Islamic Law States: A Comparative Study.” Forthcoming 2019 in the *Third Yearbook of the Arab Association of Constitutional Law*.

administrative and financial autonomy.”⁴ At first glance the language of this clause presents only a small change from Article 163 in the 2008 amended Constitution, but the effect of the language is significant. The 2008 Article stipulated that “A Constitutional Court is instituted [with the] responsibility to see to respect for the Constitution.” It also, like the 2016 amendment, describes the role of the Council in overseeing referenda and legislative elections, but it does not state that this council is autonomous. In clause 183 of the 2016 amended Constitution, the autonomy of the Constitutional Council is *explicitly* embedded into the language of the Constitution. The composition and functions of the Constitutional Council are also described at length, and as noted in the “patterns of constitutional oversight” section below, there is more than a 100 percent increase in the length of the section of the Constitution devoted to the Constitutional Council in 2008 versus 2016. In general, the constitutional language is a noteworthy signal of commitment to independent constitutional review, a key facet of the rule of law and supremacy of law within a country.

In Algeria, as a part of 2016 reforms, there has also been substantial effort to ensure that the Algerian Constitutional Council functions as designed by the Constitution. Moreover, a great emphasis has been placed on the Council’s role in upholding the rule of law. For example, the

Maghreb Times, an English-language newspaper that focuses on the Maghreb region, noted that the ability of political opposition to appeal to the Constitutional Council on the unconstitutional nature

⁴- Algeria Constitution of 2016. Title III. Ch 1.. Art. 182, 2016. [emphasis added]

of laws will confer additional credibility to the laws and to the functioning of constitutional institutions.⁵ The efforts of the Constitutional Council to improve domestic rule of law also include partnership with international institutions and foreign governments. In March 2018, the United Nations Development Programme (UNDP) signed an agreement with the Constitutional Council to support reform procedures that will help citizens ensure that sub-constitutional laws conform to the Constitution.⁶ Moreover, also exists a partnership between the French and Algerian Constitutional Councils to develop mechanisms for preliminary rulings on the issue of constitutionality.⁷ In 2017 the Constitutional Council co-organized a conference on “access of individuals to constitutional justice” with the Conference of Constitutional Jurisdictions of Africa, and in 2020 Algeria will host the Venice Commission’s 5th Congress of the World Conference on Constitutional Justice.⁸

⁵- Algeria Legislative elections 2017: Parliamentary opposition role strengthened in revised Constitution, “The Maghreb Times” (2017).

⁶- The Constitution at the service of citizens in Algeria: UNDP supports Constitutional Council’s pursuit to enable citizens to appeal the unconstitutionality of laws “United Nations Development Programme” (2018).

⁷- Interview Laurent Fabius, President of the [Conseil constitutionnel: 2017, an intense year, “Conseil Constitutionnel of France Annual Report 2017” (2017).

⁸- Conference on Constitutional Jurisdictions of Africa (CJCA), Council of Europe – Venice Commission; “World Conference on constitutional Justice 2020 “Council of Europe – Venice Commission.”

In general, it is important to emphasize that the Algerian Constitutional Council has demonstrated a sharp commitment to fostering judicial independence. As an independent institution, the Council continues to acknowledge the supremacy of law domestically and internationally through both domestic reform and international cooperation. In the next section, we portray how the ICJ offers a form of international constitutional oversight. In this context, it is interesting to identify points of connection and difference between domestic constitutional courts and the ICJ.

INTERNATIONAL OVERSIGHT

The ICJ is an excellent starting point for analyzing the relationship between domestic rule of law and international rule of law because in essence, the ICJ acknowledges the supremacy of law at the international level much like a domestic constitutional court or council does at the domestic level.⁹ There is variation in how countries can choose to recognize the jurisdiction of the ICJ. First, they can file declarations recognizing the ICJ's compulsory jurisdiction for all or some legal disputes. This action demonstrates that the state accepts the Court's adjudicative powers in all international legal disputes that fall under the Court's wide subject matter

⁹- Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (2004). [hereinafter *De Wet Chapter VII Powers*] ; Michael W. Doyle, "The UN Charter: A Global Constitution?" in *Charter of the United Nations: together with scholarly commentaries and essential historical documents* (Ian Shapiro and Joseph Lampert eds. 2014). We note that this is a contested assertion. Some scholars suggest that the Charter lacks certain qualities of a national constitution but has evolved into something more than a standard treaty due to its supremacy and reach.

jurisdiction.¹⁰ There is also an extensive practice of reservations by states that recognize the Court's compulsory jurisdiction via reservations. States can limit the ICJ's jurisdiction in substantive issues (*ratione materiae*), with respect to time (*ratione temporis*), and certain states (*ratione personae*). Alternatively, states may confer ICJ jurisdiction in bilateral and multilateral treaties. These compromissory jurisdiction clauses appear in international agreements pertaining to a variety of issue areas, such as the environment, organized crime, corruption, and air services. This is a far more popular way to recognize the ICJ's jurisdiction, as it applies only to the treaty signatories for disputes of a given type that are outlined in the treaty text. The flexibility of compromissory jurisdiction explains therefore, why many more countries recognize the ICJ's compromissory jurisdiction. The following section presents cross-national data for Muslim-majority countries and describes the relationship between the constitutional court, rule of law, and the International Court of Justice.

PATTERNS OF CONSTITUTIONAL OVERSIGHT

We have collected data on the constitutional language for constitutional courts in Muslim-majority countries as well as on countries' acceptance of the ICJ's jurisdiction.¹¹ The basic unit of analysis is country-year, which

¹⁰- Emilia Justyna Powell, *Islamic law states and the authority of the International Court of Justice: territorial sovereignty and diplomatic immunity*, 79 *Law & Contemp. Probs.* 209 (2016). See also *Declarations Recognizing the jurisdiction of the Court as compulsory for primary source material*, <http://www.icj-cij.org/en/declarations>.

¹¹- Emilia Justyna Powell, *Islamic Law States and Peaceful Resolution of Territorial Disputes*, 69 *International Organization* 777–807 (2015).

allows us to observe trends over time. The data include all constitutions and major constitutional amendments in effect between 1946 and 2017 for a total of 30 Muslim-majority countries and 106 constitutions.

We measure the presence of a constitutional court and constitutional language in three ways: *Constitutional Court*, *Times Mentioned*, and *Word Count*. The *Constitutional Court* variable captures simply whether a constitution references a constitutional court or another judicial organ charged with checking the constitutionality of laws of lower status (Yes/No). The other two variables are designed to capture a fuller picture of the constitutional language. *Times Mentioned* is a count of the number of times the constitutional court or similar judicial organ is referenced in the entire constitution. For example, some constitutions mention such court only a few times, such as Yemen's 2001 Constitution, which references the Court 3 times. Other constitutions refer to a constitutional court a multiplicity of times, such as the 2011 Constitution of Morocco, which references the Constitutional Court 29 times or Algeria's 2016 amended constitution references the Constitutional Council 21 times. The *Word Count* variable is an absolute word count of the relevant section of the constitution that is dedicated to the constitutional court.¹² At times, some constitutions devote a very small portion of the constitution to describing the constitutional court function, and others devote several articles and paragraphs to the court. This variable depicts the robustness of the constitutions' attention to the structure and functions of the constitutional court.

¹² - The Word Count variable is counted in English.

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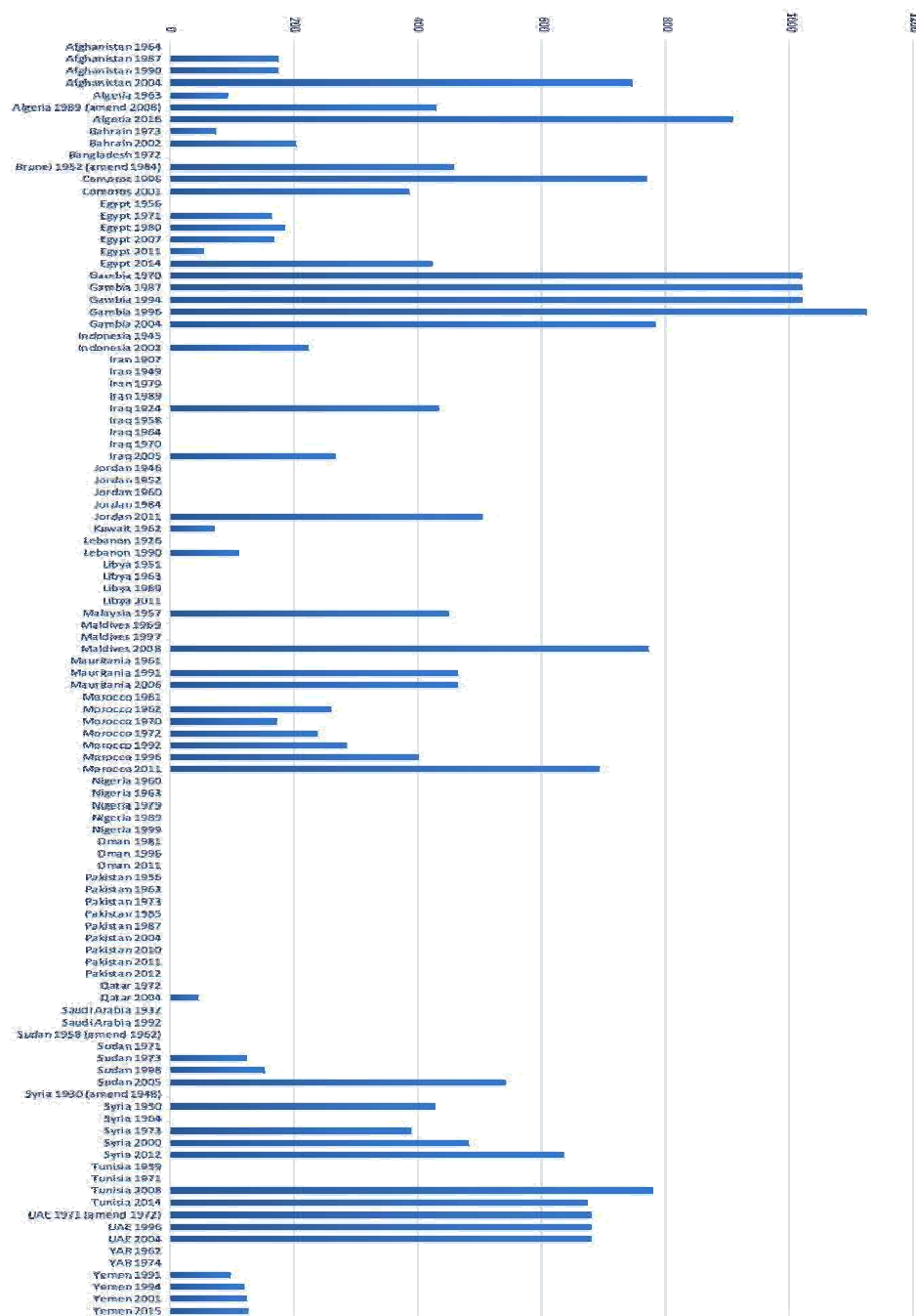


Figure 2: Number of Times Constitutional Court/Council Referenced

constitutional courts in muslim-majority countries

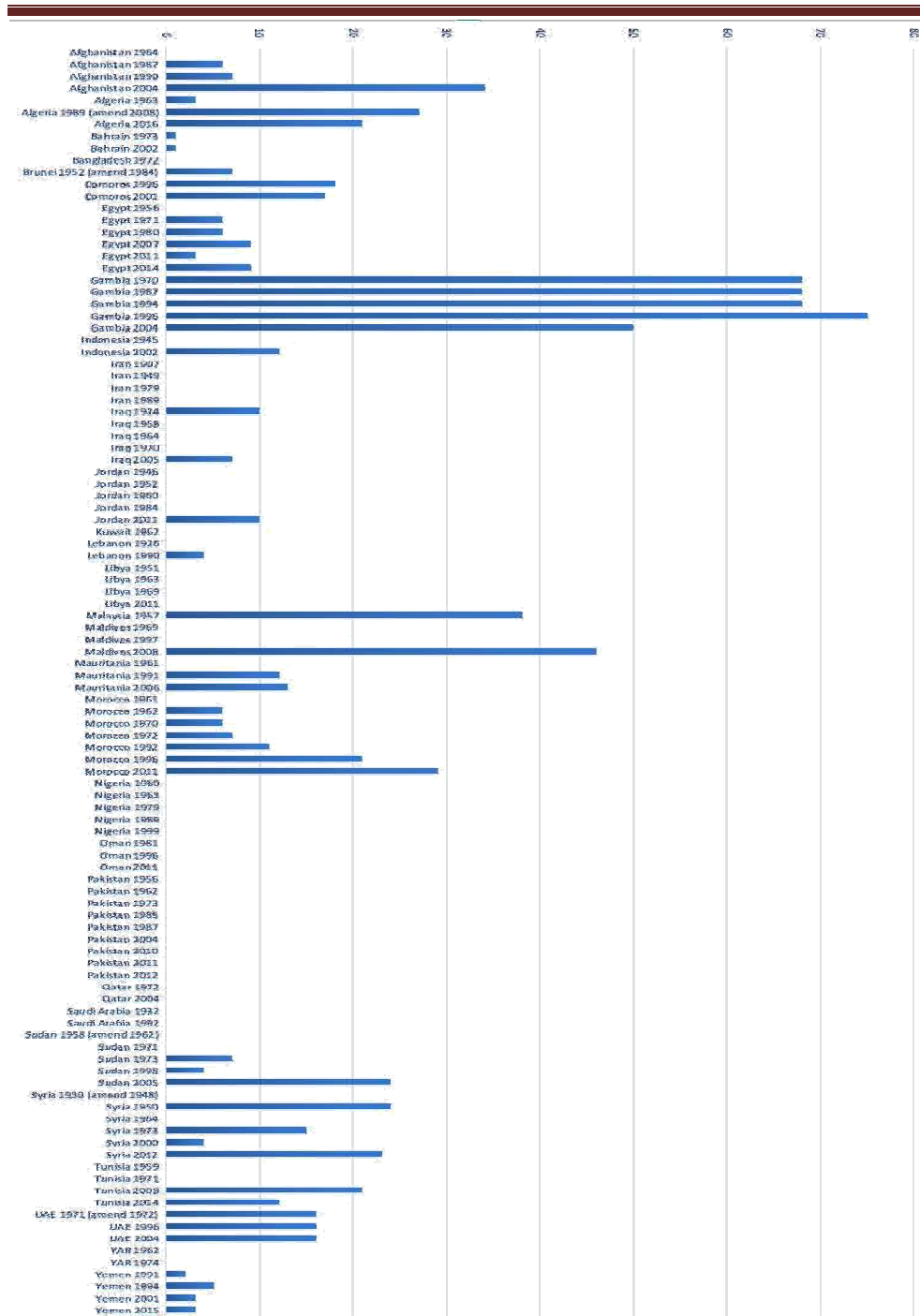


Figure 3: Word Count of Relevant Articles/Chapters on the Constitutional Court or Council

Figures 2 and 3 depict the number of references to the constitutional court and the word count of the section dedicated to a constitutional court in each of the 106 constitutions. Most countries that have had multiple constitutions or major amendments demonstrate an increase in word count over time. For example, the Algerian Constitution's word count of the section addressing the Constitutional Council in 1963 was 94 words compared with 430 words in the 1989 constitution with 2008 amendments, and 908 words in the constitution with 2016 amendments. Two countries, Gambia and Maldives, are outliers in that they have the two of the highest number of references to the court and largest wordcounts, 784 and 773, respectively. This high word count is a product of their unique constitutional systems: in these countries the jurisdiction to review the constitutionality of laws is shared between a Supreme Court and a High Court. As such, we counted references to both pertinent courts.

It is interesting to investigate constitutional support for a domestic constitutional court and a country's views of the ICJ – a court that arguably guards the international rule of law.¹³ Support for the ICJ is measured in two ways that represent the methods through which countries can accept the ICJ's jurisdiction. First, support is indicated by the acceptance of the ICJ's compulsory jurisdiction, a dichotomous variable (Yes/No) for each year in which the state has accepted the compulsory jurisdiction of the Court. A second measure is acceptance of the ICJ's compromissory jurisdiction, measured as a count of treaty membership in each country-year. Figure 4

¹³ - Emilia Justyna Powell, *Two Courts Two Roads: Domestic Rule of Law and Legitimacy of International Courts*, 9 *Foreign Policy Analysis* 349–368 (2013).

depicts the percentage of Muslim-majority countries that accept the ICJ's jurisdiction over time.

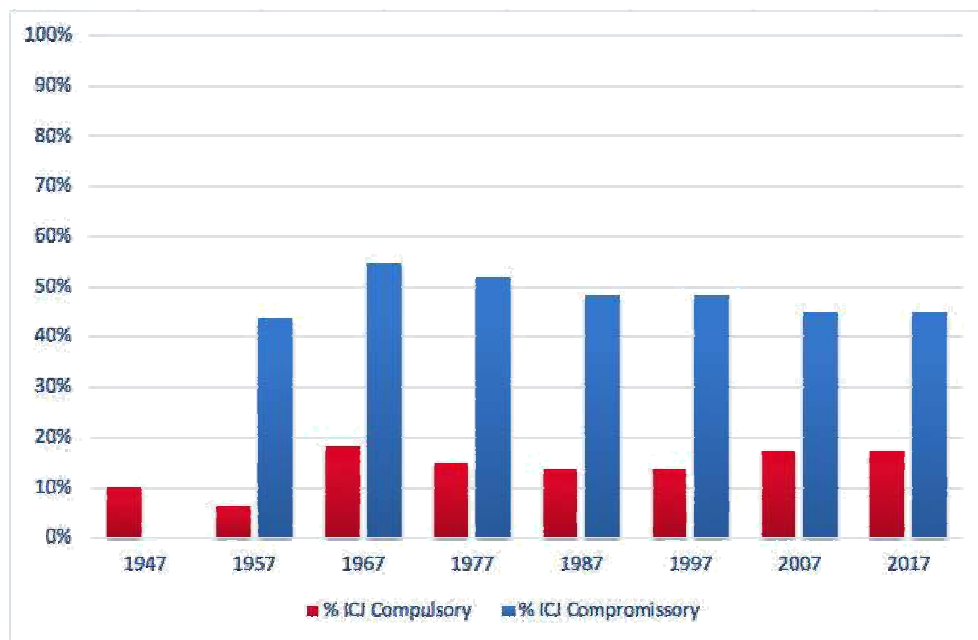


Figure 4: Percentage of Muslim-Majority Countries that Accept the ICJ's Jurisdiction

The prevalence of a domestic constitutional court does not perfectly match acceptance of the ICJ's jurisdiction. Acceptance of compulsory jurisdiction can be interpreted as the strongest indicator of acceptance of the international rule of law. Signing the ICJ's Optional Clause may arguably be seen as acknowledging the supremacy of law at the international level across the board. However, many countries do not accept the compulsory jurisdiction. 5 of 29 Muslim-majority countries (17%) accept the Court's compulsory jurisdiction as of 2017. Compromissory clauses, embedded in bilateral and multilateral treaties, are a far more popular option for states to

accept the jurisdiction of the Court. As of 2006, 13 Muslim-majority countries (43%) are part of a collective 129 treaties with compromissory clauses.¹⁴ For example, Algeria is part of a treaty that contains compromissory clauses: the Évian Accords of 1962. The Treaty stipulates that should Algeria and France fail to resolve their disputes peacefully via conciliation or arbitration, they shall have recourse to the ICJ.¹⁵ Table 1 provides a summary of the presence of a constitutional court and the acceptance of the ICJ's jurisdiction for our full list of Muslim-majority countries.

14- Data on treaties with compromissory clauses is only available through 2006.

15- Chapter IV, Agreements Relating to Algerian Independence, 1962.

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Country	References to Court/ Council	Compulsory Jurisdiction	Compromisory Jurisdiction
Afghanistan	Yes	No	4
Algeria	Yes	No	1
Bahrain	Yes	No	0
Bangladesh	Yes	No	0
Brunei	Yes	No	0
Comoros	Yes	No	0
Egypt	Yes	Yes	3
Gambia	Yes	Yes	21
Indonesia	Yes	No	0
Iran	No	No	5
Iraq	Yes	No	0
Jordan	Yes	No	2
Kuwait	Yes	No	0
Lebanon	Yes	No	10
Libya	No	No	5
Malaysia	Yes	No	0
Maldives	Yes	No	0
Mauretania	Yes	No	30
Morocco	Yes	No	0
Nigeria	No	Yes	32
Oman	No	No	0
Pakistan	No	Yes	14
Qatar	Yes	No	0
Saudi Arabia	No	No	1
Sudan	No	Yes	1
Syria	Yes	No	0
Tunisia	Yes	No	0
UAE	Yes	No	0
Yemen	Yes	No	0
Yemen A.R.	No	No	N/A
Total: 30	22 YES 8 NO	5 YES	129 Treaties

Table 1: Muslim-Majority Countries, Constitutional Courts, and the ICJ

As Table 1 indicates, not all countries that have a constitutional court accept the jurisdiction of the ICJ. Some countries have an independent constitutional court that is firmly embedded in the language of the constitution and they do not accept the ICJ's jurisdiction, or they do so only

via compromissory clauses. Other countries accept the jurisdiction of the ICJ but they do not have a constitutional court, or they have a court with only relatively sparse constitutional language.

CONCLUSION

There is significant variation in the presence of constitutional courts or equivalent institutions in Muslim-majority countries. Over time there is a clear increase in the number of countries that reference constitutional court in the constitution. However, there is no parallel increase in the number of countries that accept the compulsory or compromissory jurisdiction of the ICJ. Our data show that some countries may have a constitutional court and simultaneously accept the jurisdiction of the ICJ in specific issue areas, via compromissory jurisdiction. Some of these countries may also refrain from accepting any form of ICJ jurisdiction. On the other hand, there are several countries that do not have a constitutionally-embedded constitutional court that nevertheless accept the compulsory jurisdiction of the ICJ. Our data suggest that the association between commitment to an independent constitutional institution domestically and internationally is indeed very complex. The Algerian case highlights the fact that countries may support a strong, independent domestic constitutional court or council and simultaneously choose to accept the jurisdiction of the ICJ only in specific issue areas or specific circumstances. This paper therefore emphasizes the importance of not only comparative analysis, but also deeper study of individual Muslim-majority countries in effort to understand the relationship between domestic and international rule of law.

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