

Ornamental Constitutionalism: The Saudi Basic Law of Governance

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Citizens shall pledge allegiance to the King on the basis of the Holy Quran and the Tradition of His Messenger, and on the basis of submission and obedience, in times of hardship and ease, fortune and adversity.¹

The democratic system that is predominant in the world is not a suitable system for the peoples of our region. Our peoples' makeup and unique qualities are different from those of the rest of the world. We cannot import the methods used by people in other countries and apply them to our people. We have our Islamic beliefs that constitute a complete and fully-integrated system. Free elections are not within this Islamic system, which is based on consultation (*shura*) and the openness between the ruler and his subjects before whom he is fully responsible The system of free elections is not suitable to our country, the Kingdom of Saudi Arabia—a country that is unique in that it represents the Muslim world in supervising the holy shrines, and unique in other ways as well as I have already pointed out In my view, Western democracies may be suitable in their own countries but they do not suit other countries.²

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1. BASIC LAW [Constitution] art. 6 (Saudi Arabia).

2. King Fahd, March 28, 1992. *Quoted in Introduction*, HUMAN RIGHTS WATCH, EMPTY REFORMS: SAUDI ARABIA'S NEW BASIC LAWS (May 1992), available at <http://www.hrw.org/reports/-1992/saudi/> [hereinafter EMPTY REFORMS].

I. INTRODUCTION

Ever since the collapse of the Soviet Union and the subsequent wave of democratization in Eastern Europe and elsewhere in the 1990s, the Arab world stands out as practically the only area where authoritarianism prevails.³ While debates about the causes of this “democratic gap” and Arab or Muslim “exceptionalism” are inconclusive, it is still the case that the Arab countries rank low on any scale of the protection of political and human rights or participatory politics.⁴ Yet on the whole, the Arab countries boast impressive constitutions that theoretically offer significant guarantees of those rights, that declare freedoms inviolate, and that base governance on popular will through periodic elections or plebiscites. The reality of these constitutions and politics is, of course, different: provisions about rights are suspended; virtually permanent states of emergency are declared; elections are either fraudulent or uncontested, or both; and authoritarianism is left unhampered by these theoretical safeguards. Even in so-called revolutionary republican regimes, dynastic rule prevails, presidents remain in power for life, sons inherit the presidency, and if constitutions become an impediment, they are hurriedly and shamelessly amended.⁵ Viewed in that context, the Saudi constitution, or Basic Law of Governance, stands out: it is unabashedly honest, promulgating no rights that will not be protected, promising no elections, and not conceding the principle of accountable governance in any direct way. Indeed, the Saudi Basic Law signifies, if anything, a qualified rejection of many of the standard notions of constitutionalism in terms of rights and freedoms, while ratifying a powerful executive circumscribed only by historical practices and Islamic ideas of governance.

II. A TRAIL OF PROMISES

The first mention of a basic law dates as far back as September 16, 1932, when King Abd al-Aziz (r. 1902–1953), after a long and arduous process of

3. In the Economist Intelligence Unit's recent *Index of Political Freedom* covering the Arab countries, Iran, and Israel, many of these states scored very low. Saudi Arabia lay at the bottom with a score of 1.75 out of a possible 10. Press Release, Economist Intelligence Unit, Saudi Arabia Is the Least Free Country in the Middle East, at http://store.eiu.com/index.asp?layout=pr_story&press_id=20000802 (Mar. 10, 2005).

4. The explanations range from the nature of Islam or certain interpretations thereof to the phenomenon of the rentier state. See Adrian Karatnycky, *The 2001 Freedom House Survey: Muslim Countries and the Democracy Gap*, J. DEMOCRACY, Jan. 2002, at 99; Sanford Lakoff, *The Reality of Muslim Exceptionalism*, J. DEMOCRACY, Oct. 2004, at 133; Michael L. Ross, *Does Oil Hinder Democracy?*, 53 WORLD POLITICS 325 (2001); Alfred C. Stepan & Graeme B. Robertson, *An "Arab" More Than "Muslim" Electoral Gap*, J. DEMOCRACY, July 2003, at 30; Alfred C. Stepan & Graeme B. Robertson, *Arab, Not Muslim, Exceptionalism*, J. DEMOCRACY, Oct. 2004, at 140. But cf. Michael Herb, *No Representation Without Taxation? Rents, Development, and Democracy*, 37 J. COMP. POL. 297 (2005) (adducing “ambivalent conclusion[s] concerning the [rentier state] theory”).

5. When President Hafiz al-Assad of Syria died on June 10, 2000, his son Bashar succeeded him as expected. The Syrian constitution, in Article 83, stipulated the minimum age of forty years for the president, but when Bashar (then only thirty-four) failed to qualify, the constitution was duly amended, and he predictably won the plebiscite. Saddam Hussein of Iraq was also apparently grooming his sons to succeed him. Finally, it is widely believed that President Hosni Mubarak of Egypt, President Ali Abdallah Salih of Yemen, and Colonel Muammar Qadhafi of Libya have more or less anointed their sons to rule after they pass away (it is unlikely they would leave their positions alive).

conquest and absorption, issued an order unifying the dual Kingdom of Hijaz and Najd and its Dependencies under the new designation of the Kingdom of Saudi Arabia. This seminal decree aimed to assure the world and Saudi citizens that the new Kingdom intended to partake fully of modern governance, declaring that "[o]ur existing Council of Deputies⁶ must immediately start the drafting of a basic law of governance for the Kingdom, a law of succession to the throne and a law for governmental organization."⁷ This urgency must have dissipated fairly quickly,⁸ since no mention was made of a basic law until the reign of Abd al-Aziz's successor, King Saud (r. 1953–1964), when several pronouncements were made but no action taken. One detailed announcement appeared in connection with the submission of then-Crown Prince Faysal, in his capacity as prime minister, of his Ten Point Program in 1962, but the matter went no further.⁹ Upon deposing King Saud and assuming the throne himself in November 1964, Faysal went further and appointed a committee to draft the promised basic law. Silence reigned until King Khalid succeeded to the throne after Faysal's assassination in 1975, and another promise was made of a basic law and a *shura* (consultative) council, followed by another statement in 1980 of the formation of yet another committee to draft the law.¹⁰ When Fahd became king in 1982, he promised that the law would be issued but none came into being. The sense of urgency, however, returned in the midst of the Gulf crisis following Iraq's occupation of Kuwait in 1990. Saturated with foreign troops, uncharacteristically exposed to the world media fanning out all over the country, and faced with petitions by various citizen groups demanding reforms, the Saudi leadership felt compelled to announce that major changes were pending, including a new *shura* council, a basic law of governance, and a new administrative law for the provinces. Finally, on March 1, 1992, the long-promised Basic Law of Governance, along with two other promised statutes, was promulgated.

In light of this rich history, one could be forgiven for harboring major expectations for a document that was promised for nearly sixty years and that sat in drafting committees for half that time. Such expectations, however, proved to be unwarranted. The document did not usher in a new age of

6. The term Council of Deputies (*Majlis al-Wukala*) is the early equivalent of the Council of Ministers, apparently inherited from old Ottoman administrative nomenclature.

7. Royal Order no. 2716, reprinted in UMM AL-QURA, no. 406, Sept. 23, 1932.

8. The old *Shura* (Consultative) Council submitted a 140-article draft, but nothing was heard of it. See UMM AL-QURA, no. 610, Aug. 18, 1936. Whether the Council of Deputies offered its own draft is not clear from the accessible public records.

9. In a speech in November 1962, Faysal declared:

[T]he government is of the opinion that the time has now come for the promulgation of a fundamental law for the country, based on the Book of God [the Quran], the Shariah of His Prophet and the life of His wise successors. The law clearly sets down the basic principles of government and the relation between ruler and citizen, organizes the different powers and authorities of the state and co-ordinates their relation to each other. It also sets down the basic rights of the citizen including that of freedom of expression, within the limits of the Islamic faith and public policy.

Quoted in GERALD DE GAURY, FAISAL, KING OF SAUDI ARABIA 153 (1966). On Faysal and his reform plans, see generally *id.*

10. In an interview given by then-Crown Prince Fahd to a Kuwaiti newspaper, he stated that a 209-article basic law was ready. The law eventually adopted was less than half that length. See EMPTY REFORMS, *supra* note 2, ch. 1.

constitutionalism, nor did it introduce meaningful changes or innovations in the governance practices and structures of the Kingdom. Beyond the mere fact of its promulgation, one was hard put to see much significance in this Law at all. Indeed, if anything, the Basic Law is a prism through which to view the regression in the philosophy and practice of Saudi governance over the same period. While early state practices allowed for degrees of participatory politics, accountability, and transparency, the Basic Law codifies¹¹ their more or less total removal from the body politic. The backsliding of Saudi politics, while regrettable in many respects, is fully understandable in historical terms, with rent from oil allowing the state a degree of autonomy from society that would have been unthinkable a few generations ago.

III. STATE-BUILDING: THE EARLY STAGES

The Saudi state dates back to the middle of the eighteenth century, when an alliance among the settled communities of central Arabia, mobilized by a religious reform movement later known as Wahhabism, launched campaigns to unify the disparate and warring towns, regions, and tribes. The success of the movement varied over time and space. Only with the rise of King Abd al-Aziz and through his campaigns, from 1902 to 1930, was a state formed on a stable footing—modern-day Saudi Arabia.¹² Traditional norms of governance,¹³ which put a premium on consensus, prevailed throughout this time. Such norms were strongly influenced by the classical Islamic notions of rule, according to which, inter alia, the religiously trained scholars and jurists (the *ulama*) play a major role as grantors of legitimacy and act as a constraint against despotism.¹⁴

The first challenge to this historically workable formula came with King Abd al-Aziz's 1925 conquest of the Hijaz, where Islam's holiest shrines are

11. In the speech the king gave upon promulgating the Basic Law, he stressed that the Kingdom had never suffered from a "constitutional vacuum" since it had always possessed general principles and rules that directed the working of the state and its rulers, judges, and functionaries. Thus, the Basic Law was simply a "codification" (*tawthiq*) of existing conditions and practices. See UMM AL-QURA, no. 69, Mar. 6, 1992.

12. For a short history of the rise of the Saudi and Wahhabi movement, see Abdulaziz H. Al-Fahad, *The 'Imamah vs. the 'Iqal: Hadari—Bedouin Conflict and the Formation of the Sa'udi State*, in COUNTER-NARRATIVES: HISTORY, CONTEMPORARY SOCIETY, AND POLITICS IN SAUDI ARABIA AND YEMEN 35 (Madawi Al-Rasheed & Robert Vitalis eds., 2003).

13. Among the traditional institutions of governance is the open audience through which, theoretically, any citizen could petition directly the king and his subordinates. On the role of the open audience, see FAISAL BIN MISHA'AL BIN SA'UD AL-SA'UD, THE "OPEN COUNCILS" AND THE ISLAMIC CONCEPT OF RULE IN SAUDI ARABIAN POLITICS ch. 6 (2003).

14. For a historical review of Sunni constitutional theory and practice, see H.A.R. Gibb, *Constitutional Organization*, in I LAW IN THE MIDDLE EAST: ORIGIN AND DEVELOPMENT OF ISLAMIC LAW 3 (Majid Khadduri & Herbert J. Liebesny eds., 1955). On the juristic theory of government, see ANN K.S. LAMBTON, STATE AND GOVERNMENT IN MEDIEVAL ISLAM: AN INTRODUCTION TO THE STUDY OF ISLAMIC POLITICAL THEORY: THE JURISTS (1981). For a recent and more elaborate study, see PATRICIA CRONE, GOD'S RULE: GOVERNMENT AND ISLAM (2004). On the relationship between the *ulama* and the political leadership in classical Islam, see WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 178 (2005). The author is grateful to Professor Hallaq for sharing a draft copy of this work prior to its publication. For a study of the role of the *ulama* in modern times, including references to Saudi *ulama*, see MUHAMMAD QASIM ZAMAN, THE ULAMA IN CONTEMPORARY ISLAM: CUSTODIANS OF CHANGE (2002).

located. That region had been part of the Ottoman Empire for centuries and boasted a relatively sophisticated, cosmopolitan, urban population that was familiar with modern methods of governance and had enjoyed independence for the prior decade, during which it had begun forming its own modern structures of governance.¹⁵ The traditional forms of rule common in other parts of the new state proved inadequate for this more worldly and exposed region. The problem of governance in the Hijaz was further compounded by the intense interest and competition evinced by other major Muslim powers, such as Egypt and the Indian Muslim communities. Demands for the internationalization of the Islamic holy places were articulated but were ultimately defeated by the deft political skills of Abd al-Aziz. To assure the Muslim communities of his qualifications to govern the holy territory, and to persuade the larger world to ratify his exploits and recognize the young state, the king embarked on a fast-paced program to create modern state structures and laws. For some time, such structures and laws were applied only in the Hijaz, which was designated as a viceroyalty with Abd al-Aziz's second-eldest son, Faysal, as viceroy. Abd al-Aziz continued to govern the rest of the country according to time-honored practices whereby complex but informal political structures were maintained.

Shortly after he assumed total control of the territory, Abd al-Aziz was proclaimed King of the Hijaz,¹⁶ adding this title to his existing position as Sultan of Najd and its Dependencies. To consolidate Saudi rule in the Hijaz, the king convened a constituent assembly (*hayah tasisiyyah*)¹⁷ of influential inhabitants of the region, some of whom were chosen by secret ballot, which approved a Hijazi constitution on September 3, 1926 (formally known as the Organic Instructions of the Hijazi Kingdom).¹⁸ While declaring the Hijaz to be a "consultative, Islamic State,"¹⁹ the constitution did not overplay its Islamic identity as later documents would. Further, it allowed for no distinction between legislative and executive functions and did not include references to

15. For a history of that period, see generally JOSHUA TEITELBAUM, *THE RISE AND FALL OF THE HASHEMITE KINGDOM OF ARABIA* (2001).

16. UMM AL-QURA, no. 55, Jan. 15, 1926.

17. The king ordered the formation of a constituent assembly (*hayah tasisiyyah*) composed of Hijazi citizens to determine the name of the chief of the government of the Hijaz, the nature of its relations with Najd, the form of government, the international posture of the region, and the Hijazi flag and currency. The assembly consisted of fifty-one members from all over the Hijaz who eventually recommended the proclamation of Abd al-Aziz as King of the Hijaz and Sultan of Najd and its Dependencies.

18. For the original Arabic text, see UMM AL-QURA, no. 90, Sept. 3, 1926. A review of the early issues of this Saudi official gazette, first published in November 1924, reveals the impressive array of decisions taken in the first two years to facilitate the consolidation of Saudi rule. Thus *Umm al-Qura* reports that the sultan called for the election of a *shura* council from among the merchants, *ulama*, and notables of Makkah, stressing that such a council must be "real and not fictional," and further called for the formation of a national council (*majlis ahli*) to look into the affairs of the city. UMM AL-QURA, no. 3, Dec. 12, 1924. Elections were duly held in the sultan's palace, and fourteen National Council members were chosen. The National Council was dissolved in the summer of 1925 and a new one elected, with one representative from each neighborhood, one representative for the merchants, one for the *ulama*, and three from among the *ashraf*, the ruling group that had governed before the Saudi conquest. The functions of the council were also published. UMM AL-QURA, no. 31, Aug. 1, 1925; UMM AL-QURA, no. 32, Aug. 8, 1925.

19. Although some translate this phrase, *dawlah malakiyyah islamiyah shuriyyah*, as "constitutional Muslim monarchy," a more accurate rendering would be "consultative Islamic State."

elections. Yet this constitution and its ancillary institutions permitted a modicum of accountable and participatory governance.

Most important of such institutions were the old *Shura* Council²⁰ and the Council of Deputies,²¹ which collectively held relatively strong powers over decisions of state policy and the budget. Although the old *Shura* Council was appointed and the king could dissolve it or change its membership at any time, the government was still required to submit the budget, planned public ventures, new laws, concessions, and government contracts to the Council. Similarly, the heads of government agencies were obligated to attend the old Council's sessions when matters related to their activities were under discussion. The Council of Deputies met for twenty years until its functions were taken over in 1953 by a less powerful Council of Ministers,²² which eclipsed the old *Shura* Council. The old *Shura* Council remained dormant until the formation of the new *Shura* Council in 1993, which enjoyed fewer powers than the former.

Equally significant, municipal elections were regularly held in the major towns of the Hijaz between 1926 and 1963.²³ As part of Faysal's 1962 reform program, such elections were held in other towns, including the capital city Riyadh. In 1963, after voters cast their ballots, the results were annulled and a revision of the laws was announced, to be enacted fourteen years later in 1977.²⁴ Repealing the earlier laws of 1939 and 1942, the 1977 Municipalities and Village Law, promulgated by Royal Decree M/5 dated February 10, 1977, strengthened the role of the central government in municipal affairs but permitted the election of half the members of each municipal council (the other half to be appointed by the minister of municipal affairs). Coming at the height of the oil boom, with citizens enjoying inexorable improvement in their quality of life, this law proved to be superfluous and no elections were discussed, let alone held.²⁵

This trend toward democratic backslide could also be observed at the level of provincial administration. The 1940 Law of Administrative Councils contained elaborate provisions concerning the powers of the provincial administrative councils and mandated elections in each province.²⁶ This law

20. See ORGANIC INSTRUCTIONS [Constitution, 1926] arts. 28-31, 36 (Saudi Arabia), cited in UMM AL-QURA, no. 90, *supra* note 18. Appointments and amendments were made on several occasions. See, e.g., UMM AL-QURA, no. 135, July 15, 1927; UMM AL-QURA, no. 186, July 13, 1928.

21. See UMM AL-QURA, no. 370, Jan. 15, 1932.

22. For a study of the early stages of the Council of Ministers, see Charles W. Harrington, *The Saudi Arabian Council of Ministers*, 117 MIDDLE E. J. 1 (1958); SUMMER SCOTT HUYETTE, *POLITICAL ADAPTATION IN SA'UDI ARABIA, A STUDY OF THE COUNCIL OF MINISTERS* (1985).

23. See, e.g., UMM AL-QURA, no. 47, Nov. 20, 1925 (Municipal Elections Regulations); UMM AL-QURA, no. 727, Nov. 11, 1938 (Law of the Capital's Municipality and Municipalities of the Kingdom of Saudi Arabia).

24. See EMPTY REFORMS, *supra* note 2, ch. 3.

25. Only in 2004 was the law applied, and implementing regulations adopted, authorizing the recent municipal elections.

26. Apparently not published in the official gazette, the Governors and Administrative Councils Law is available in the government archives of the Public Administration Institute in Riyadh. In Chapter Two, the law establishes administrative councils, authorizes the election of their members, and enumerates their powers. It stipulates that elections are to be held every two years; that the size of each council should vary according to the size of each province, ranging from four to eight members; and that the chair of the council should be the appointed governor. Governors and Administrative

was later superseded by a 1963 statute that eliminated elections and provided that all members be appointed by the king, a norm sanctioned by the Law of Provinces of 1992.²⁷

IV. THE ECLIPSE OF PARTICIPATORY POLITICS AND THE CONSOLIDATION OF THE RENTIER STATE

Between 1932 and 1992, Saudi society and government were transformed beyond recognition. In the early years of the modern Saudi state, most of the national income had come from customs duties and fees collected from Muslim pilgrims flocking to the holy places in the Hijaz, a modest income by any standards but considerably more substantial than the traditional *zakat* (religious tax) collected by the state in the rest of the country. With the signing of a concession agreement with the Standard Oil Company of California in 1933, the old sources of income were soon eclipsed by oil revenue.²⁸ As the state received successively higher oil rents, the Saudi governing elite was slowly freed from the typical constraints faced by other ruling groups, which had to resort to the citizenry to collect taxes and fees for financing government functions. Indeed, the state became the major benefactor in society through the distribution of oil largesse. With such radical economic transformation, embryonic participatory and accountable governance was gradually abandoned, and a powerful state apparatus managed to rule the country without much need to consult with the populace or worry about accountability.

With respect to modern methods and structures of governance, and until the reforms of the 1990s, the pressures faced by the Saudi state derived from its external relations rather than from domestic demands. Thus the first Hijaz constitution was promulgated to secure the Saudi position against other Muslim claimants of the holy sites. The call in the unification decree of 1932 for the drafting of a basic law of governance was dictated by the need for international recognition. Similarly, the struggle with Egyptian President Jamal Abdel Nasser and the threats posed by pan-Arabism in the 1950s and 1960s forced several changes on the Saudis,²⁹ culminating in the deposal of King Saud and his replacement with King Faysal.

As a result of these struggles, various efforts at reform were made, mostly to placate the outside world. The most serious effort at constitutional reform took the form of a radical, 200-article draft basic law prepared under the auspices of one of Faysal's brothers, Prince Talal, which came close to

Councils Law, ch. 2, arts. 29, 34 (1940) (Saudi Arabia). These councils had wide powers over a range of fiscal and administrative issues, including budgetary items, contracts, licenses, complaints against bureaucrats, welfare projects, and disputes among inhabitants (not subject to the courts' jurisdiction). *Id.* arts. 35-50.

27. EMPTY REFORMS, *supra* note 2. For the text of the 1963 law, see UMM AL-QURA, no. 1992, Oct. 18, 1963.

28. Oil was found in commercial quantities in 1938, but the country achieved substantial exports only after World War II.

29. For a brief history of the inter-Arab conflicts of that era, see MALCOLM KERR, *THE ARAB COLD WAR* (2d ed. 1967).

adoption in 1961.³⁰ In this draft, the authority of the king was clearly circumscribed by an empowered national assembly, two-thirds of whose members were to be elected. In addition, the draft required transparency in public finance and permitted the assembly to take no-confidence votes and compel the resignation of ministers, including the prime minister. Other innovations included a clear division among the executive, legislative, and judicial authorities and the establishment of a council of state to adjudicate constitutional disputes. Private and public rights were also elaborated, with the draft reflecting the tenor of the times by exhibiting some clearly discernable socialist tendencies. The radicalism of this draft basic law was demonstrated by the prince's suggestion that even the name of the country should be changed from that of the ruling dynasty.³¹

Prince Talal's constitution was decisively defeated by the ruling elite. King Faysal triumphed in his struggle with King Saud.³² Yet King Faysal himself could not avoid coming up with his own alternative proposals, first in his acknowledgment of the need for a new constitutional framework when he assumed the premiership in 1962, and later when he formed a drafting committee upon acceding to the throne in 1964. After radical pan-Arabism was curtailed with the Arab defeat in the 1967 war with Israel, the intra-family rift had healed, and the country was back on sound financial footing, little need was felt even to discuss constitutional changes publicly. A fleeting reference to the need for a new basic law was ritually made when King Khalid succeeded to the throne in 1975. In a country dizzy with the proceeds of the oil boom, however, such reference attracted little attention.

V. THE ADVENT OF PUBLIC PETITIONS

It was once again foreign events, this time coupled with serious domestic disturbances, that thrust the issue of constitutional reform to the fore. In early 1979 the Iranian revolution took place, its leaders espousing a radical Islamist and anti-monarchical stance. Following the revolution in Iran came an attack on the Holy Mosque in Mecca later that year by a large group of disgruntled fundamentalists. These two events led to the 1980 announcement that a 209-article draft basic law was ready for promulgation.³³ Unsurprisingly, this promise proved to be hollow. Yet another pledge was made when King Fahd succeeded to the throne in 1982 at the height of the Iran-Iraq war.

In contrast with past experiences, the 1990 declaration about imminent constitutional reforms found its genesis mostly in domestic pressures. The Saudi ruling elite was treading on unfamiliar territory, with some 700,000 foreign troops stationed in the country to protect it against Iraq and to prepare

30. The draft basic law, with an explanatory introduction and a law of provinces, was published by Prince Talal as *Risalah ila Muwatin* [Letter to a Citizen].

31. *Id.*

32. For a study of the intra-family disputes during that period, see SARAH YIZRAELI, *THE REMAKING OF SAUDI ARABIA: THE STRUGGLE BETWEEN KING SA'UD AND CROWN PRINCE FAYSAL* (1997).

33. EMPTY REFORMS, *supra* note 2, ch. 1.

for the liberation of Kuwait. The looming danger in the north and the foreign presence, which included a large contingent of international reporters freely roaming the country, created a combustible mix that duly translated into major demands for all kinds of reform. Some activist women seized on the presence of the foreign media and demonstrated publicly by driving cars,³⁴ flouting the informal ban (and eliciting a formal one) and raising the ire of fundamentalists, who expressed their rage using all fora available to them, not least the mosques. Into that mix came two petitions presented to the king, which were quickly leaked to foreign publications. Both contained demands for major reform.

The pressure of those hectic events forced the ruling elite to articulate promises in order to placate elite and popular demands.³⁵ Accordingly, on November 8, 1990, the king promised a new *shura* council appointed from among capable citizens.³⁶ On the heels of this promise, a group of forty-three public figures, including ex-cabinet ministers, journalists, businessmen, and academics representing both religious and liberal trends, submitted a petition to the king.³⁷ It implored the king to introduce many changes, the most important of which were the promulgation of a basic law and the establishment of a new *shura* council. The religious elite was alarmed by this liberal petition and, not to be outdone, weighed in two months later with its own petition, signed by more than 200 citizens, including scores of top religious authorities as well as the grand *mufti*.

Starting with the recognition of the need for change in order to check the deterioration in the country's political and social environment, the signatories then adumbrated their proposals for reform, stressing the need for a new *shura* council and for the comprehensive Islamization of state policies, the civil service, and the laws.³⁸ Government displeasure with the publication of this

34. See Youssef M. Ibrahim, *An Outcry from the Saudis' Liberal Minority*, N.Y. TIMES, Nov. 8, 1990, at A15.

35. Populist measures undertaken during the 1990–1991 Gulf crisis included partial forgiveness of governmental home loans, UMM AL-QURA, no. 3340, Jan. 11, 1991, and lower prices for gasoline, electricity, water, telephone, expatriate worker visas, and ports and commercial registrations for businesses, UMM AL-QURA, no. 3400, Mar. 27, 1992.

36. Up until the formation of the new council, the old *Shura* Council was still technically in existence, but its membership was inactive and was literally dying out.

37. The signatories made the following demands: (1) A review of the monopolistic system under which *fatwas* are rendered should be instituted, and more open debate allowing for more pluralism in views should be encouraged. (2) The repeated statements issued by the government should be honored, and a basic law of governance promulgated. (3) A consultative council should be formed, composed of qualified and knowledgeable opinion-makers representing all regions of the Kingdom. The council must have among its responsibilities the study, development, and adoption of laws and rules related to all economic, political, educational, and other issues, and it should exercise effective scrutiny of all executive agencies. (4) Municipal councils should be revived; the Law of Provinces should be implemented; and the chamber of commerce experience should be generalized as a model for all other trades. (5) The judicial system should be reformed to ensure the competence of judges and their independence, and it should be open to all qualified citizens. (6) There should be a commitment to total equality among all citizens in all aspects of their lives, without distinction based on ethnic, tribal, sectarian, or social origins. The principle of protecting citizens against interference in their lives without a court order must be firmly established. (7) The media must be reformed. (8) Comprehensive reform of the religious police should be introduced, and their arbitrary powers should be curbed. (9) Finally, reforms related to the status of women and education should be undertaken.

38. The petition called for the following specific reforms: (1) A consultative council to decide

petition caused the Council of Senior *Ulama* (chaired by the grand *mufti* himself) to issue a condemnation at the request of the political authorities, but its criticism addressed the act of publication, not the substance of the petition, since Sunni traditions hold that counsel to the ruler should be offered in private only.³⁹

VI. THE 1990S REFORM: NEW FORM, OLD SUBSTANCE

Immediately after the liberation of Kuwait and the departure of most foreign troops, the king issued three royal orders on March 1, 1992, promulgating a package of the promised reforms: a Basic Law of Governance, a *Shura* Council Law, and a Law of Provinces. The Basic Law, touted as a foundational document for the governance of Saudi Arabia, is unique in many respects. It was drafted in secrecy, and the names of the members of the drafting committee were not released until after its enactment.⁴⁰ There was no public debate, nor was there the usual Saudi private consultation within various governmental agencies. Declaring that the true constitution of the country was the "the Book of God [the Quran] and the Tradition of His

internal and external issues on the basis of shariah should be formed. Its members must be honest and represent all fields of expertise. They must be totally independent and not subject to any pressure that may affect the authority of the council. (2) All laws and regulations of political, economic, administrative, or other nature must be reconciled with the principles of shariah. Trusted committees with expertise in the shariah should be authorized to repeal non-conforming legislation. (3) The selection of government officials and overseas representatives must be based not just on expertise but also on exemplary Islamic morality. (4) Equality must be ensured for all citizens, not favoring the nobles or disfavoring the weak, and abuse of power must be stopped. (5) High officials must be held accountable and the corrupt removed regardless of other considerations. (6) Public wealth must be distributed fairly among all classes and groups, taxes eliminated, and burdensome fees reduced. Government revenue must be protected from exploitation and abuse; all forms of monopoly or illegitimate ownership eliminated; restrictions on Islamic banks lifted; and public and private banking institutions cleansed of usury. (7) The army must be strengthened and fully integrated, and weapon sources must be diversified. (8) The media must be remodeled to educate, serve Islam, and express the morals of society. (9) Foreign policy must be based on the national interest without relying on alliances not sanctioned by shariah. (10) Religious and proselytizing institutions must be developed and strengthened with financial and human resources. (11) The judiciary must be unified and granted full and effective independence. Its authority must be applied to all, and effective methods must be devised to execute judgments. (12) Finally, the rights of individuals and society must be guaranteed. Every restriction on people's rights must be removed to ensure the enjoyment of human dignity within acceptable religious safeguards. Significantly, the petition does not refer to a basic law at all.

39. The statement made by the Council of Senior *Ulama*, the highest religious body in the country, was published in UMM AL-QURA, no. 3360, June 7, 1991. This statement is a study in traditional Sunni terms on the proper manner of proffering advice to the community and to *wali al-amr*, the political leadership. In the preamble, the jurists recapitulate the importance of mutual advice and cite textual support from the sayings of the Prophet. They also cite the correct rules for offering advice where it would work as a corrective of errant ways and help to attain the good of the community, as well as warn against giving advice that may cause dissention or that overlooks positive aspects and deals exclusively with the negatives. As to providing advice specifically to the rulers, the statement declares that such advice must be given confidentially. Reminding the community of the blessings of security and unity, and after reviewing media reports about "writings to the ruler" with respect to matters the writers hoped "would be implemented," the council proclaimed its condemnation of the "manner followed in publishing and disseminating what was written" and warned against the repetition of such activity. The substance of the petition was never mentioned.

40. For a list of the names and positions of the committee's members, see Rahshed Abanmay, *Constitutional Reform: A Systemization of Saudi Politics*, J. S. ASIAN & MIDDLE E. STUD., Spring 1993, at 53 n.14.

Prophet,"⁴¹ the Basic Law made no allowance for popular sovereignty as a foundation of its authority. No popular ratification was therefore needed by way of a constituent assembly representing the people or a direct vote. Like some early European constitutions (for example, that of Prussia), the Saudi document was derived from the goodwill of the sovereign, whose powers were in no way thereby diminished, and promulgated by means of a royal order, which was also the instrument to modify the Basic Law. The only constraints on executive power remained those of traditional norms and Islamic precepts, which are external to the Basic Law.

The codification of the status quo of essentially unbridled executive power is reflected throughout the Basic Law. Thus, after acknowledging the usual division (separation would be an overstatement) of power into executive, legislative, and judicial authorities, Article 44 concludes by declaring the king to be "their final authority."⁴² The king also appoints and relieves judges of their offices upon recommendation of the Supreme Judicial Council. He is to run the affairs of state in accordance with the dictates of Islam, supervise the application of shariah⁴³ and the general policies of the state, and see to the state's protection and defense (Article 55). The king is the president of the Council of Ministers and appoints his deputies, as well as all ministers and high-ranking civil servants, by royal order (Articles 56 & 57). He is the commander-in-chief of all armed forces, appoints and dismisses officers (Article 60), and declares emergencies, mobilization, and war (Article 61). He is empowered to take urgent measures that he deems necessary to safeguard the Kingdom and its territorial integrity and interests (Article 62). He accepts the accreditation of foreign envoys, appoints ambassadors (Article 63), and bestows medals (Article 64). He may delegate some of his authority to the crown prince (Article 65) and appoint a viceroy when he leaves the Kingdom (Article 66).

Another significant theme permeating the Basic Law is the emphasis on the country's Islamic identity, with references to Islam and shariah suffusing the document. Such references range from the pure declaration of identity, such as the affirmation that the state is Arab and Islamic in Article 1, to the designation of the two annual Islamic feasts (*'id al-fitr* and *'id al-adha*) as official holidays and the Islamic lunar calendar as the official calendar (Article 2).⁴⁴ Invocation of traditional Islamic political themes can be found in

41. BASIC LAW [Constitution] art. 1 (Saudi Arabia). Libya, in a constitutional declaration in 1977, also proclaimed the Quran, but not the Traditions (*Sunnah*) of the Prophet, to be the constitution of the country. NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD 86 (2002).

42. Therefore, a constitutional court is not necessary, and the Basic Law provides for none.

43. Shariah (*shari'ah*) is the totality of God's commands as revealed to the Prophet Muhammad and contained in the Islamic scriptures, the Quran and the *Sunnah*—the standard of exemplary behavior of the Prophet as recorded in narrative reports, or *hadith*. *Fiqh* is the scholarly product of deduction of positive law from these sources to determine the proper legal rules governing ritual and worldly affairs. *Fiqh* covers both substantive law and legal methodology (*usul al-fiqh*, literally "foundations of *fiqh*"). Somewhat separate from *fiqh*, but part of shariah, is theology, or *'aqidah*. See Abdulaziz H. Al-Fahad, *From Exclusivism to Accommodation: Doctrinal and Legal Evolution of Wahhabism*, 79 N.Y.U. L. REV. 485, 486 n.2 (2004) (discussing and defining these concepts). For a primer in Islamic law, see generally WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI USUL AL-FIQH (1997).

44. Suggestions that such references in the Basic Law are "an exercise in triviality," Ann

the manner in which the king receives allegiance upon assuming the throne (Article 6). The state also protects the Islamic creed and applies shariah, maintains the holy shrines and facilitates the annual pilgrimage, and strives to realize the aspirations of solidarity among Arab and Islamic nations (Articles 23-25). More significantly, the Basic Law establishes Islam, and shariah specifically, as the only substantial constraint on executive power, duly declaring at the outset that the constitution of the state is the Quran and the Prophet's Tradition. Article 7 affirms that "governance . . . derives its authority from the [Quran and Tradition] of the Prophet, both of which govern this Law and all the laws of the State."⁴⁵ Shariah also governs the notions of justice, consultation, and equality in governance (Article 8). The Basic Law acknowledges the sacrosanct nature of shariah, and when it provides that the king may suspend the Basic Law, it specifically subordinates this power to the Islamic authority granted in Article 7.

In addition to providing general constraints on government, shariah operates as the legal system of the country. Accordingly, statutory laws are subordinated to Islamic law. Thus the concept of legislative authority is highly attenuated, and even the language employed avoids the term commonly used in Arabic for legislation, *tashri'*, a cognate of shariah; resort is instead made to the less offensive expression *nizam*, or regulations. While the king is empowered to issue new laws (with or without the non-binding input of the *Shura* Council), judges are enjoined to apply shariah and only those statutes not inconsistent with it (Article 48). The traditional shariah courts are given comprehensive jurisdiction over all civil and criminal disputes (Article 49), subject to the limited authority of the Board of Grievances, which is

Elizabeth Mayer, *Conundrums in Constitutionalism: Islamic Monarchies in an Era of Transition*, 1 UCLA J. ISLAMIC & NEAR E.L. 183, 192 (2002), are mistaken. Holidays and the calendar are sensitive issues, as the *ulama* uphold the Islamic injunction that only these two feasts are legitimate holidays in Islam. Moreover, they take exception to using the Christian (i.e., Gregorian) solar year instead of the Islamic Hijri lunar year. Because of the unpredictability of exact dates in the lunar calendar, early on King Abd al-Aziz had resort to the traditional solar (zodiac) year and designated the first day of Capricorn (January 8) as a national day celebrating his ascent to the throne. This celebration lasted only for a couple of years and was confined to the Hijaz. FUAD HAMZAH, AL-BILAD AL-ARABIYYAH AL-SAUDIYYAH [THE SAUDI ARAB NATION] 154 (1968). Since the famous unification decree, which specified the first day of Libra as the national holiday, the political leadership has been trying to have the country celebrate the holiday but has been frustrated by the *ulama's* objections. Despite its being referred to as a holiday in the Labor and Workmen Law (Article 155 gives the minister of labor and social affairs the power to determine these holidays, which he designated in his Ministerial Resolution no. 812, dated November 30, 1974, to include the national holiday), in reality it is not viewed as such and is generally not enforced by the labor courts. The same may be said about the fiscal year. Seeking to rationalize the annual budget, the best the leadership could do was to continue to use the zodiac year's equivalent of the Gregorian calendar, but it was always careful to announce the budget on a date other than January 1.

45. The references to the "Quran and the *Sunnah* [Traditions] of His Prophet" represent a clear indication that Sunni Islam is the authoritative religious order. There are no provisions allowing for the formal equality of the other sects that exist in Saudi Arabia, including substantial minorities of two Shiite groups (the *Imamiyyah*, or Twelvers, in the Eastern Province and in Madinah, and the *Ismailis* in Najran on the border with Yemen). In this respect, the Saudi Basic Law is unique among Arab constitutions. Even when the Iranian constitution establishes Imami Shiism as the official religion, it grants some theoretical rights to other minorities, including the Sunni community in Iran (Article 12).

empowered to apply most of the new statutory laws that the shariah courts frequently view as non-binding (Article 53).⁴⁶

With respect to modern notions of rights, the Basic Law exhibits two different attitudes. While generally protective of rights in the private and economic spheres, it is decidedly parsimonious with public rights. The Basic Law appears to guarantee a decent livelihood to all citizens and facilitate employment (Articles 27-28); encourage science, culture, and research (Article 29); make education and health services available, presumably free of charge (Articles 30 & 31); and protect the environment (Article 32). Homes are held inviolable (Article 37); criminal statutes may not be applied retroactively (Article 38); privacy of communications is protected (Article 40); and private property is inviolate (Article 18). In the public sphere, however, the Basic Law fails to provide for the panoply of rights to which most constitutions would at least pay lip service. While acknowledging the concept of the protection of human rights, this protection is limited to such rights as are consistent with shariah notions (Article 26). Moreover, freedoms of religion and assembly are completely absent,⁴⁷ while freedom of expression is greatly circumscribed (Article 39).⁴⁸ Absent also is the right of association, not surprising in a country that bans political parties, trade unions, and demonstrations and which generally views civic organizations with suspicion.⁴⁹

46. The reluctance of shariah judges to apply modern statutory laws forced the government over the years to set up special tribunals to adjudicate many areas of law, including negotiable instruments, customs, boycotts, labor, and trademarks. The instrument promulgating the Basic Law took care to allow for all pre-existing laws inconsistent with the Basic Law to remain valid until they are brought into conformity. Yet when recent laws were promulgated, new judicial tribunals were set up in derogation of the jurisdiction of the shariah courts as affirmed in Article 49, a clear violation of the Basic Law. Most significant among the new tribunals are two relating to capital markets and to the press. See Law of Printed Matters and Publication, art. 37, reprinted in UMM AL-QURA, no. 3825, Dec. 23, 2000 (stipulating the formation and jurisdiction of the tribunal); Capital Market Law, art. 25, reprinted in UMM AL-QURA, no. 3965, Aug. 29, 2003 (stipulating the formation of a tribunal and an appellate court to adjudicate disputes stemming from the Capital Market Law). For a study of the evolution of statutory law and its relationship with shariah, see Ahron Layish, *Saudi Arabian Legal Reform as a Mechanism to Moderate Wahābi Doctrine*, 107 J. AM. ORIENTAL SOC'Y 279 (1987). For the general question of the future of shariah in Islamic countries, see Ahron Layish, *The Transformation of Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World*, 44 DIE WELT DE ISLAMIS 85 (2004).

47. While freedom of assembly is mostly a policy question subject to the control of the political leaders, freedom of religion is a very sensitive issue in Saudi Arabia. Even if politicians had the will to relax it, doing so would damage their own legitimacy in the eyes of a society still intolerant of this notion.

48. Freedom of expression is constrained by political as well as religious considerations. Recently, some writers have been sued by private citizens in shariah courts for allegedly violating shariah. The complaints have been referred to the press tribunal set up under the Law of Printed Matters and Publications promulgated on November 29, 2000, see *supra* note 46. In a recent controversy about jurisdiction over printed matter violations, the crown prince "nullified" a judgment by a shariah court against a university professor sued by one of his colleagues for mocking his conservative appearance. The decision again restricts jurisdiction over such matters to the press tribunal set up under the Law of Printed Matters and Publications and administered by the ministry of information and culture. Raid Qusti, *Crown Prince Quashes Jail Term of Saudi Writer*, ARAB NEWS, <http://www.arabnews.com/?page=1&section=0&article=60829&d=22&m=3&y=2005> (Mar. 22, 2005).

49. An odd provision in the Basic Law is the rejection of the non-*refoulement* principle of asylum law, considered part of customary international law. Grant of political asylum is determined by consideration of Saudi "public interest" rather than the need of the asylum seeker (Article 42). See A.

While the Basic Law concedes a right to participatory governance, this right is restricted to the traditional notions enshrined in shariah; thus the basis of *shura*, or consultation, for governance is so qualified in Article 8. It is further reiterated in Article 67, which empowers the "regulatory authority" (the royally appointed *Shura* Council) to draft laws and regulations in the public interest in accordance with Islamic rules. Legislation adopted by the Council is conceived as mere advice that the sovereign is at liberty to accept or disregard. Indeed, according to the *Shura* Council Law, legislation is to be forwarded to the president of the Council of Ministers and not to the king, further devaluing the *Shura* Council's status as a legislative body.⁵⁰ Needless to say, the Council has no authority to view, let alone debate, the state budget.⁵¹

Finally, the Basic Law fails to introduce any meaningful changes to the law of succession in Saudi Arabia. True, the Basic Law for the first time formally declares that succession is restricted to the male descendants of the late King Abd al-Aziz to the exclusion of the collateral branches of the royal family. It further codifies the power of the King to choose and relieve his heir apparent (Article 5). Even this power, while theoretically more efficient, is still problematic as a practical matter.⁵² Moreover, the declaration that the "most suitable" or "fittest" among the descendants of the late King Abd al-Aziz are eligible to be king is not an innovation and is consistent with past

Michael Tarazi, Recent Developments, *Saudi Arabia's New Basic Laws: The Struggle for Participatory Islamic Government*, 34 HARV. INT'L L.J. 258 (1993).

50. The constitutional arrangement is somewhat complicated. Article 17 of the *Shura* Council Law, promulgated on March 1, 1992, originally stated:

Shura Council resolutions shall be referred to the President of the Council of Ministers who shall refer them to the Council of Ministers for consideration. If the views of both councils concur, the resolutions shall come into force following the King's approval. If the views are at variance, the King may decide whatever he deems appropriate.

This text was amended on November 26, 2003, to read:

Shura Council resolutions shall be referred to the King who shall determine what of which shall be referred to the Council of Ministers. If the views of the *Shura* Council and the Council of Ministers are identical, the resolutions shall be promulgated upon approval of the king. If the views of the two councils diverge, the matter shall be referred back to the *Shura* Council to take the appropriate action and then submit it to the King for action as he sees fit.

It should be noted that under both Article 6 of the Basic Law and Article 1 of the Law of the Council of Ministers, the king is also the president of the Council of Ministers, the resolutions of which become final only after the king's approval. There can be no conflict unless the king approves a resolution of the Council of Ministers that is inconsistent with another adopted by the *Shura* Council.

51. Article 15 of the *Shura* Council Law explicitly states four duties of the Council: (1) to "discuss the general plan of economic and social development"; (2) to "study international laws, charters, treaties and agreements"; (3) to "interpret laws"; and (4) to "discuss annual reports submitted by ministries and other government bodies, and make appropriate suggestions regarding them."

52. Historically, appointments to the heir apparent position were effected as follows: King Abd al-Aziz proposed his eldest son, Saud, as crown prince, and the Council of Deputies and the *Shura* Council ratified his decision, pledging allegiance to Saud. On the same day that Saud acceded to the throne, he nominated his younger brother, Faysal, to be his heir apparent, an act sanctioned by the royal family. Khalid's appointment as crown prince took place several months after Faysal's accession and was effected through a statement by the king that he had chosen Khalid to be king after him. See UMM AL-QURA, no. 2065, Apr. 2, 1965. When Faysal was killed and Khalid became king, he simultaneously nominated Prince Fahd to be heir apparent. After receiving homage as king upon the death of Khalid, Fahd simultaneously nominated Abd Allah to be his successor.

practices: the age of the sons of King Abd al-Aziz was not previously accepted as the sole determinant for succession.⁵³

In early Saudi history, the Wahhabi movement introduced agnatic primogeniture—a revolutionary concept by local standards. Going against a tradition of succession that effected rule through regicide more often than not, the founder of Wahhabism nominated the eldest son of the Saudi ruler of his time, a convention that survived remarkably intact through most of the turbulent history of the Saudi dynasty. Even King Abd al-Aziz blocked the attempts of his older nephew to succeed him and appointed his eldest surviving son Saud as crown prince.⁵⁴ Only with the conflict that ensued between Saud and Faysal and the subsequent deposal of the former did the concept of primogeniture disappear without any clear mechanism to replace it. Although in his famous unification edict King Abd al-Aziz ordered the drafting of a succession law, none has been written—a failure reflected in the Basic Law.⁵⁵

VII. THE PRIMACY OF TRADITIONAL NORMS OF GOVERNANCE

Such a weak basic law still has one fundamental strength—honesty. While laying some claims to being a foundational document, it is a royal edict that does not pretend to be aspirational, an expression of the national will, a basis for any newly recognized rights, or the beacon of a new constitutionalist age. It does not even resolve the intra-elite issue of a functional succession mechanism. The Basic Law merely codifies the authority of an all-powerful executive and reiterates a strong Islamic identity, all the while remaining faithful to established ideas and practices relating to governance and carefully avoiding norms that the population would not accept such as freedom of belief and gender equality. It is relatively rich in its designs of state organs, but it skirts accountability, participatory politics, and transparency. Yet its unqualified acknowledgment of the supremacy of Islamic norms does impose meaningful constraints and checks on executive power.⁵⁶

53. Khalid (r. 1975–1982) was appointed crown prince and acceded to the throne while his elder brother Muhammad was alive. Fahd assumed his positions of crown prince and king during the lifetimes of his older siblings.

54. For the full story of royal succession in Saudi Arabia, see ALEXANDER BLIGH, *FROM PRINCE TO KING: ROYAL SUCCESSION IN THE HOUSE OF SAUD IN THE TWENTIETH CENTURY* (1984).

55. The Saudi succession system is nonetheless able to avoid any crisis at the time of the king's death by designating the next crown prince nominee in advance, before the king's death and the accession of the existing heir apparent. Ever since King Faysal assumed the throne, the crown prince has been designated deputy president of the Council of Ministers, with the prospective crown prince as second deputy president.

56. These constraints have practical and sometimes profound implications. For example, holding to the view that bank interest is a form of prohibited usury, the judiciary would void most banking transactions, forcing the state to set up a special tribunal to adjudicate banking disputes. Even such a tribunal would not compel payment of interest; the most it would do is decline to recharacterize past interest payments as repayment of principal. The same dilemma long obtained with respect to the insurance industry. Some agencies were allowed to offer services but could not have recourse to courts, which viewed such contracts as void due to uncertainty. Only recently was a compromise reached that would legalize insurance of the mutual type. It remains to be seen if the courts will validate such insurance.

First, the Basic Law treats the king neither as a sacrosanct figure nor as an interpreter of Islam. While other Arab monarchical constitutions attribute semi-divine qualities to the person of the king,⁵⁷ the Basic Law avoids such pretensions. The king of Morocco is declared "sacred" and his person inviolable; he is also the ultimate interpreter of shariah.⁵⁸ The sultan of Oman is likewise declared to enjoy sacralized legitimacy.⁵⁹ The Wahhabi interpretation of Islam, in contrast, does not allow for such claims, and the Basic Law shies away from endowing the Saudi king with any sacred qualities.⁶⁰ The Wahhabi view entrusts the interpretation of Islamic law to its historical guardians, the *ulama*, institutionalized in the Council of Senior *Ulama* and the Department of Ifta and [Religious] Scholarly Research,⁶¹ no interpretative role or sanctified attributes are given to the Saudi king. Indeed, the monarch, contrary to the usual privileges of kingship, is theoretically subject to the law and cannot rise above it.

Besides the traditional Islamic constraints, rights and government accountability must be sought in the more mundane realm of negotiations among the elite and between them and the populace at large. Within the ruling Saudi circles, for example—and the clear language of the Basic Law notwithstanding—it is doubtful that the king would be able to name his crown prince by edict without securing the prior consensus and blessing of the royal family, or at least of its influential members. Similarly, it is questionable whether a Saudi king could name his cabinet or the membership of the *Shura* Council without some input from senior members of the ruling family.

Statutory law has proven to be a reasonably effective vehicle for granting and protecting rights and allowing for more participatory politics. The Basic Law, for instance, by relegating the regulation of some issues to statutory development, has advanced a number of protections.⁶² Likewise, a criminal procedure statute enacted in 2001 offered significant improvements in rights and protections relative to past practices.⁶³ Not only does the law prohibit torture, mental coercion, and arbitrary arrest, but it grants the right to

57. In modern times, these claims probably originated in the first Ottoman Constitution, which held the sultan both "sacred" and "not responsible." OTTOMAN CONST. art. 5, *reprinted in* 2 AM. J. INT'L L. 367 (Supp. 1908).

58. See, e.g., MOROCCO CONST. art. 23. The Moroccan king also holds the historically loaded title of "*amir al mu'minin*" (Commander of the Faithful), *id.* art. 19. The Constitution of Bahrain holds that "the King's person is protected and untouchable." BAHR. CONST. art. 33. The Jordanian Constitution holds that the king "is immune from any liability and responsibility." JORDAN CONST. art. 30.

59. See Nikolaus A. Siegfried, *Legislation and Legitimation in Oman: The Basic Law*, 7 ISLAMIC L. & SOC'Y 359 (2000).

60. The king himself, when announcing the promulgation of the Basic Law, emphasized that "there is no difference between ruler and ruled and all are equal before God's shariah." See UMM AL-QURA, no. 69, Mar. 6, 1992. Indeed, Wahhabi interpretation would not even allow the king to partake of the venerable and ancient Muslim practice of mentioning the name of the sovereign in the Friday sermon. Article 7 of the Ottoman Constitution, in contrast, invokes this right. OTTOMAN CONST., *supra* note 57, art. 7.

61. *Ifta* is the response of a qualified jurisconsult to a particular legal question; it is the practice of rendering fatwas.

62. See Royal Decree M/39, Oct. 15, 2001, *reprinted in* UMM AL-QURA, no. 3867, Nov. 3, 2001.

63. Human Rights Watch, Saudi Justice: Report Card Needed, <http://hrw.org/press/2003/05/saudi052803.htm> (May 28, 2003).

counsel during both interrogation and trial and offers safeguards against arbitrary search and interception of communications. Concomitantly, the Saudi legal profession has finally received formal recognition and a Code of Legal Practice was promulgated in 2003.⁶⁴ Equally important, the resistance⁶⁵ to a civil procedure code for the shariah courts was finally overcome through a long and detailed statute enacted in 2000, bringing uniformity and better predictability to legal proceedings throughout the shariah system.⁶⁶

In the realm of private and public rights, while the Basic Law has a mixed record, other avenues are still available to the citizenry to advance their interests and secure more recognition and protection, including petitions addressed directly to the king or his crown prince. The petition is a traditional but at times controversial instrument through which any citizen (or sometimes group) with a grievance can seek redress from the sovereign.⁶⁷ While mostly used to address private claims, this method has been occasionally extended to demands concerning public policy. Essential to the acceptability of petitions is their confidentiality, necessary to avoid embarrassing the sovereign as the conventional conception of advice to Islamic rulers would dictate. However, it did not take petitioners long to discover that publicity was an effective tool to pressure decision-makers to undertake reforms, even if it drew their ire most of the time.

Similarly, despite the Basic Law's silence with respect to freedom of association and the growth of civil society, tentative steps have been taken in both areas. Long skeptical about modern notions of human rights, the Saudi authorities slowly came to the recognition that the wave of globalization and domestic pressures required a more positive response. Accordingly, on March 9, 2004, a nongovernmental organization was established to that effect: the National Human Rights Society.⁶⁸ While it cannot be described as vibrant, it is nonetheless active in pursuing reports and complaints about human rights abuses. In the same vein, in deference to global norms about workers' rights, a compromise was reached by which large organizations (employing more than one hundred people) are required to allow a labor committee to be organized for collective representation.

64. See Royal Decree M/38, Oct. 16, 2001, reprinted in UMM AL-QURA, no. 3867, Nov. 3, 2001.

65. As a result of the generally hostile attitude displayed by shariah-trained judges to statutory law, earlier attempts to enact a civil procedure code were unsuccessful. Just prior to the Iraqi invasion of Kuwait on August 2, 1990, such a code was promulgated and was greeted with strong criticism by many judges and *ulama*. The clamor during such a delicate period left the king no choice but to abrogate the law within months.

66. Royal Decree M/21, *The Law of Procedure before the Shariah Courts*, Aug. 20, 2000, reprinted in UMM AL-QURA, no. 3811, Sept. 16, 2000.

67. See BASIC LAW *supra* note 41, art. 43. Article 43 recognizes citizens' rights to petition the king and his crown prince, but its language is carefully drawn, couched in terms of an individual, as opposed to a collective, right. This drafting reflects the fact that concerted action is always strongly discouraged, if not criminalized.

68. Attempts to set up civil groups to monitor human rights violations first came in the aftermath of the 1991 Gulf War. In May 1993, a group of Saudi Islamist activists formed what they called the Committee for the Defense of Legitimate Rights, which was eventually closed by the government. More recently, a number of activists reportedly submitted an application to form a nongovernmental human rights association to the ministry of social affairs in April 2003.

Finally, the notion of consultation has been expanding over the last decade or so. As discussed above, the powers of the *Shura* Council have been modestly augmented and could potentially be reformed further. The *Shura* Council's membership has also been enlarged from 60 to 150 to allow for stronger regional representation and more varied strands of orientation. While tame by any standard, the council's influence over laws and policy has been steadily growing. To the surprise of many, the council's draft laws are invariably adopted by the king.⁶⁹ Further, the council has taken a principled stand against government efforts to impose taxes and fees, consistently defeating measures to that effect, sometimes in the face of strong government lobbying.⁷⁰ The council is now assuming a higher profile, with some of its deliberations beginning to be broadcast on local television. Equally significant in the process of consultation was the establishment in 1999 of the Supreme Economic Council, which is a mini-cabinet chaired by the crown prince and charged with introducing and overseeing economic reform in the Kingdom. Attached to this council is an Advisory Commission composed of sixteen members drawn from the private business sector and some professionals. This advisory body not only has the mandate to review government economic policies and laws referred to it, but may also take the initiative to propose laws and make policy recommendations. A plethora of other councils and commissions with advisory boards have proliferated over the last decade, covering fields such as education, health, and labor.

VIII. 9/11 AND ITS AFTERMATH

Over the last few years, public petitions have proved to be the most noticeable and effective approach to lobby for and secure reform.⁷¹ Like the impetus for the petitions of the prior decade, the tragic events of September 11, 2001, as well as the unprecedented pressures and international scrutiny to which Saudi Arabia was subjected in their aftermath, provided the necessary opening for the submission of petitions, sometimes with far-reaching demands. The best known—and surprisingly acceptable—petition has been a document drafted and signed by a sizeable number of the Saudi elite, both religious and liberal, Sunni and Shiite, entitled *A Vision for the Present and Future of the Homeland*, addressed to the crown prince in January 2003.⁷² The willingness of the crown prince to receive publicly both the petition and representatives of the signatories represented a clear break with past

69. Unofficial statistics indicate that so far, only three laws have been passed by the Council but not adopted by royal decree.

70. This remarkable result is partly due to the fact that since the government does not involve the council in matters of expenditure, the council is not in a position to rubberstamp the enhancement of revenue without simultaneously having a say in how it is spent. This situation sometimes introduces distortions into the economy, as when the council defeated a provision in the new tax code that would have re-imposed an income tax on expatriate workers intended to make the Saudi labor force more competitive vis-à-vis foreign workers.

71. Even before September 11, there were a few petitions submitted asking for reform, including a Shiite request in 1993 for an enhancement of Shiite rights and an Islamist petition in 1999.

72. Petition, *A Vision for the Present and Future of the Homeland* (Jan. 30, 2003) (on file with the author).

practices.⁷³ The taboo against collective public demands was further lessened by the semi-public way through which the leadership of the country sought written input and comment on the petition from a cross-section of the citizenry, along with subsequent efforts to implement some of the demands of the petitioners.⁷⁴

The petition's demands have been partially met. The first municipal elections, along the early 1977 model, were held in February through April of 2005 and were generally recognized to be fair and transparent. The petitions have sparked a national dialogue that has broached, many previously taboo subjects.⁷⁵ Thus, for the first time, Wahhabi scholars agreed to sit with Saudi Shiite and Sufi shaykhs and seemed to concede a limited notion of religious pluralism in society.⁷⁶ The same might also be said about the debate on women and their proper role in a modern Islamic state (this dialogue had to be carried on through an intercom system, since intermingling of the sexes is still taboo).⁷⁷

The reformers were impatient with the slow pace of reform and lodged another petition in September 2003 entitled *In Defense of the Homeland*, signed by 300 Saudis, including women and Shiites. Writing shortly after

73. Shortly thereafter, on April 30, 2003, the Shiite of the Eastern Province submitted their own petition entitled *Partners in the Homeland*. Four hundred and fifty men and women signed the document, in which they affirm their loyalty to the state and demand protections of their rights. Apparently, the Ismaili minority in the south also weighed in with their own petition.

74. The demands of the 104 signatories are far-reaching. They include a revision of the Basic Law and steps to further institutionalize governance, including elections for the *Shura* Council and provincial councils, judicial independence, respect for human rights, a more active civil society, and freedom of association. The petition further calls for more vigorous economic policies to lessen dependence on oil, reduce the national debt, and provide services to the public. Finally, the petition seeks to improve the rights of women, provide amnesty for and rehabilitation of reform activists, protect freedom of expression, and institutionalize a public dialogue among various groups and sects of society.

75. The First National Dialogue was held in Riyadh on June 15-18, 2003, with participation by a representative group reflecting "several intellectual spectra." It dealt with many of sensitive and usually taboo concerns, such as religious pluralism, the role of women, *fatwas*, relations with non-Muslims, the notion of jihad, and freedom of expression. Working papers were discussed in nine sessions, after which a final communiqué was issued with recommendations of further open debate and relaxation of some of the existing strictures. After proposals to institutionalize the National Dialogue, there is now a national center for dialogue located in Riyadh. For more information on this and subsequent National Dialogues, see The King Abdul-Aziz Center for National Dialog, at <http://www.kacnd.org>.

76. The Second National Dialogue was held in Makkah on December 27-31, 2003, with seventy-five participants, including women, on the theme *Extremism and Moderation: A Comprehensive and Systematic Vision*. The conferees issued seventeen recommendations, some with significant implications: number 3 urges "the acceleration of political reform and the enlargement of popular participation through elections of the *shura* and regional councils, encouragement of the formation of unions, voluntary organizations and civic institutions"; number 4 urges the separation of the executive, legislative, and judicial authorities; number 5 calls for transparency and accountability in public finance; number 6 calls for the renewal of religious discourse; number 7 rejects the individual *fatwa* in connection with national issues; number 8 is a call for "opening the door for responsible free speech"; and number 14 urges fair trial and the provision of counsel for those accused of violence and terrorism.

77. The Third National Dialogue was held in Madinah on June 12-14, 2004, with the title *Women: Their Rights and Duties and Education*. Eighty-eight participants, evenly divided between men and women, issued a long list of recommendations characterized by an emphasis on practical issues and avoidance of controversial matters. The most recent dialogue took place in Dammam on December 7-9, 2004, and dealt with youth issues. The session was preceded by workshops for youth all over the country involving some 600 young men and women. The long list of recommendations concentrated on improvements in education and reform of the labor market and relevant laws.

violent attacks by al-Qaida on foreign and Saudi targets within Saudi territory, the petitioners unequivocally condemned the violence and boldly declared their belief that the failure to institute popular participation in governance was one of the "principal" underlying causes of the attacks. Shortly thereafter, and apparently emboldened by the (admittedly limited) success of their post-September 11 petitions, a more determined group of the original signatories drafted and circulated a stronger letter of demand, pointedly entitled *Constitutional Reform First*, on December 16, 2003.⁷⁸ Like the earlier petitions, it was addressed to the crown prince and circulated over the Internet, a vehicle the reformers still use widely to disseminate their views in light of limited press freedom in Saudi Arabia. The 2003 petition, however, departed from the early petitions in important ways. Like the September document, it began by condemning the violence and urging a careful consideration of its genesis. While eschewing "American and Zionist" claims that the religious curriculum was responsible for this phenomenon, and condemning their refusal to acknowledge that actions in Palestine and elsewhere were contributory factors, the petitioners again identified the rise in violence as a result of the lack of participatory politics in Saudi Arabia. Further, the draft is composed of two parts, one addressing particular demands to the leadership and the other aimed directly at the people, urging them to take participatory politics seriously and to perform their sacred duty and be active, apparently a veiled call to collective action. Another significant departure is the introduction of the sensitive idea of "constitutional monarchy." These innovations proved to be too much for the leadership and the signatories were directly warned to cease and desist from their activities. Instead, more petitions were filed.⁷⁹ Subsequently, the leaders were arrested and those who agreed to sign an undertaking to terminate their activities were duly released.⁸⁰

78. The petitioners point to the regression in popular participation from fifty years ago, during the reign of the founder, King Abd al-Aziz, to the present day. The petition also bemoans the lack of fundamental freedoms—of speech, assembly, association, or "responsible" thought. It demands that all rights and freedoms enshrined in Islamic law be respected without discrimination of any kind and that proper mechanisms be devised for their protection. It calls for: (1) the election of a national assembly empowered to watch over domestic and foreign policies as well as public funds; (2) the separation of powers among the executive, legislative, and judicial branches, and specifically for the independence of the judiciary, its integrity, its unification, and the establishment of proper mechanisms to assure the expeditious enforcement of judgments; (3) the formation of a constitutional court; (4) the free formation of civic associations and unions, and grants of a right to public assembly and peaceful demonstrations; (5) immediate constitutional reform in the form of a declared commitment to a "constitutional monarchy" and the formation of an independent national commission to draft a new permanent constitution based on shariah, to be the subject of a popular plebiscite within one year and to be applied within three years.

79. Another petition followed on February 21, 2004, again addressed to the crown prince and this time signed by more than 900 petitioners. Titled *Together on the Road of Reform*, this short document simply reiterates earlier demands. After quoting a recent pronouncement by the crown prince that "the State is continuing in the process of reform," that "no one will be permitted to stop it," and that "freedom of thought" will not be penalized, they thank the crown prince for receiving the *Vision for the Present and Future of the Homeland* and its signatories. They then implore the crown prince to accelerate reforms as demanded in the earlier petition and promulgate a time schedule for their implementation.

80. In March 2004, the government arrested thirteen leading reform advocates on charges that they were involved in activities "that do not serve the unity of the country or the cohesion of a society based on Islamic law." Most were released after reportedly signing statements promising not to speak

IX. CONCLUSION

Despite its designation, the Saudi Basic Law is not the foundational document that constitutions are meant to be. It represents a modest and long-overdue step in recognizing the need to modernize the organization of a state with increasingly sophisticated organs, and a tentative step in a process of institutionalizing the state's relationship with its own increasingly complex society. Moreover, for all its limitations, it is actually a realistic document—it faithfully reflects the state of the relative powers held by the governing elite and society. It does not promise more than it intends to deliver, nor does it affect the functioning of the state or society in any profound way. It therefore should not be surprising that when announcing the promulgation of the Basic Law, King Fahd himself—after declaring that the Basic Law and the *Shura* and Provinces Laws were not new but were actually “a codification of existing conditions and an articulation of ongoing practices”—took the opportunity to emphasize that such laws will be “subject to assessment and improvement as the Kingdom's circumstances and interests dictate.”⁸¹ Not only would the Basic Law not foreclose the evolution of other laws, but it is itself subject to further negotiations.

As noted at the beginning of this Essay, the Arab world is one of the last bastions of authoritarian governance today. It has been observed that today's Arab world is rich with constitutions that grant unchecked powers to the executive, contain poorly developed rights provisions, and do not allow for clear succession mechanisms or, when they do allow for them, fail to hold the leadership accountable.⁸² Moreover, Arab constitutions are so riddled with escape hatches that the rulers can constitutionally violate their own constitutions. It is a world that develops constitutions for many purposes, but not for the primary constitutional purpose of limiting power. In this context, the Saudi Basic Law stands out as disarmingly candid. No pretense of limiting executive authority and no offer of rights that are not intended to be upheld are made. From the Saudi perspective, if modern nations have flags, national anthems, and emblems, they also happen to have constitutions. In the final analysis, perhaps the best way to view the Saudi document is as an ornament of modernity, an accoutrement of sovereignty.

An ornament with modest substance, and in contrast with the ostensibly democratic constitutions of the Arab states that simply mask authoritarian rule, the Saudi Basic Law avoids excessive political hypocrisy that is the bane of the “democratic” experiences in its neighborhood. In the Middle Eastern states, deception reigns supreme, no serious turnover in power occurs, no one is held accountable despite the vast exercise in “elections” and “plebiscites,” and citizens are routinely repressed despite the panoply of rights explicitly “guaranteed” to them. Under such conditions, popular disenchantment with

publicly or to agitate for reform; three remain imprisoned. U.S. DEP'T OF STATE, *Saudi Arabia*, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2004, available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41731.htm> (Feb. 28, 2005).

81. See UMM AL-QURA, no. 69, Mar. 6, 1992.

82. BROWN, *supra* note 41, at 13.

participatory politics and the promise of freedom is a natural outcome, making the realization of these goals even more difficult. By promising basically nothing it could (or would) not deliver, while at the same time offering an opening for further evolution, the Saudi limited exercise in constitutional reform may be more promising. By frankly showing the limits of what the ruling elite is willing to concede, the Basic Law leaves it to the various segments of society to negotiate their demands and to mobilize with the implicit understanding that it is a potentially meaningful exercise. The recent campaigns demanding that the ruling elite allow certain rights and accept certain limits, and the resistance they have engendered, could be interpreted as testimony to the fact that all parties understand that such changes, if implemented, would be consequential and not just an engagement in a fraudulently democratic exchange.