Islam and Constitutionalism in the Arab World: The Puzzling Course of Islamic Inflation

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We begin with a series of puzzles. Islam, with its strong legal tradition, and constitution writing, an enterprise designed to build a legal foundation for governing, would seem to be natural marriage partners. But it took a while for them to meet, and the courtship was very slow and awkward. When the match was finally arranged, however, it became a passionate one indeed, at least in the Arab world. Or rather it became a match full of passionate declarations of fealty but precious little institutional action as various countries ratcheted up their verbal commitments to Islam in the constitutional texts they issued from one document to the next. Why did it take a while for such a seemingly natural link to be made? And why did the link grow stronger year after year in words but not in practice?

And we now be confronting the biggest puzzle of all: why, after 2011, when Islamist movements, dedicated to increasing the role of Islam in public life, surged forward to play an active and even governing role (most notably in Egypt and Tunisia), did the leading ones focused far less attention on those constitutional provisions that promise fidelity to Islamic law and principles and instead dug into the fine print of other clauses on structures of government, ones that did not seem to mention religion at all? Why, when the struggle for and against various forms of political Islam (especially that represented by large-scale movements like Egypt's Muslim Brotherhood and Tunisia's al-Nahda) to center stage, were the textual effects so slight?

In short, how do we explain the initial diffidence towards Islam in constitutional texts, the rapid verbal inflation on Islamic provisions that set in during the second half of the twentieth century, the sudden slowing of that inflation just as Islamists began to have a significant role in drafting (and in Egypt the only limited reversal after Islamists had been excluded once again)?

We will focus particular attention in this chapter on Egypt, but other Arab experiences will figure into our analysis. We will begin by tracing the Islamic inflation in Arab constitutionalism and then try to explain it and explore its effects. We will then close by speculating on the future relationship of Islam and constitutionalism in post-revolutionary Egypt.

The Strange Course of Islamic inflation

Let us now state our central puzzle in more detailed form. When the first drafters of constitutional texts for Arab political systems began their work in the second half of the nineteenth century, Islamic political concepts occasionally formed part of the backdrop for their efforts but rarely intruded into the foreground. When religion entered, it usually excited little attention or scrutiny. For almost a century, beginning with Tunisia's 1861 constitution, explicit references to Islam were either close to platitudinous (preambular in spirit if not in location) or unemotionally technical and detailed (designed to protect a specific sphere for practices deemed Islamic, such as in personal status law but hardly to construct a fully Islamic political order).

Yet beginning in the middle of the twentieth century, the slow process of Islamic inflation began—constitutional clauses, while often remaining either largely platitudinous or technical, grew far more fulsome and ambitious and began to promise a more fully Islamic political order.

This inflationary trend was augmented by a significant change in the public debate: Islam gradually but quite forcefully moved into the foreground, alternately pulled in by bombastic regimes and pushed in by assertive social and political movements. Over the past few years, efforts to draft new constitutions—first in Iraq, then in Tunisia and Egypt—have set off emotional debates about the relationship between Islam and the political order.

Yet despite the remarkably inflationary trend in the Islamic nature of constitutional clauses and debate, the actual effect on the legal and constitutional order has remained slim. This odd combination of heightened language with diminutive impact was threatened but still largely continued even with the rise of Islamist political parties in reconstituted political orders in Tunisia and Egypt. And indeed, if the political upheavals of 2011 have any lasting effect on Islamic provisions in constitutional texts, it may be to bring a halt to the inflationary spiral—sometimes in spite of Islamist movements but sometimes with their cooperation—and keep existing clauses as they are, largely intact but with only marginal legal and institutional effects. Even where Islamist movements have seemed to be in a position to give teeth to vague clauses, they have often been satisfied with slight changes. Their goal has generally been to move discussions of Islam in public life from hot air to cold reality, and constitutional provisions have not always been seen by them as the most favorable field.

In addressing these puzzles, we will have to buck two trends in constitutional analysis. First, constitution writing is often understood as an act of invention. Perhaps because of the ways the world's first constitutions for sovereign states were written (leading to Americans speaking of "Philadelphia moments" and those more influenced by the French precedent of a nation assembled in a representative body exercising the "pouvoir constituant"), many analyses tend to see constitution writing as fresh starting points or moments of rebirth. They sometimes are, but for most countries constitution writing is an iterative process, though not always intentionally

so. Most countries have had a series of constitutional texts, and constitution writing is therefore often an act of recovery, repair, reorientation, or recalibration more than wondrous invention. In our understanding of Islamic inflation, we will see how it emerged over time and became difficult to resist precisely because of the iterative nature of the process.

Second, constitutions are often seen as forward looking documents, structuring how decisions will be made in the future. And they often are. But that should not lead us to underestimate their connection to the present and debates about current identity as much as future decisions. Constitutions serve as expressive as well as legal documents; they not only lay down rules but also define political community. The noisiest debates in some drafting efforts often concern preambles precisely for this reason. In many Islamic societies, the balance has shifted from forward-looking purposes (until the mid-twentieth century) to expressive ones (the second half of the twentieth century); it now seems to be rapidly swinging back. This was particularly true in the Arab world, and much of the Islamic inflation took place precisely because expressive features trumped more prosaic legal ones for a long time. Constitutions became more about proclaiming current ideologies than about governing future generations.

But Egypt and Tunisia—and perhaps some other Arab societies—are now returning to a time in which constitutions are expected to have practical impact. In Hannah Lerner's terms, the thick parts of Arab constitutions (involving fundamental values and definitions of political community) had become fat indeed and the thin parts (legalistic mechanisms of procedures for governing) were emaciated.[1] That trend is now being reversed. The thick parts may now feel starved for attention and the battles over the thin parts will come thick and fast.

And for that reason, drafters sometimes have their appetites whetted by the very mechanical clauses and no longer find the purely symbolic battles so nourishing. The battle over whether and how Islam should be constitutonalized in Egypt after 2011 has taken place on the normal political ground of elections, legislation, various state structures, parliamentary politics, and presidential prerogatives more than on the field of vague textual promises about the importance of religion. Constitutional texts attract attention but no longer lie at the center of the debate. Something similar seems to be happening in many other Arab countries.

[1] Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge: Cambridge University Press, 2011).

Islamic inflation observed[2]

Let us begin by tracing the stages of courtship between Islam and constitutionalism.

The Arab world's first written document that might be termed a constitution was the *qanun al-dawla al-tunisiyya* [Law of the Tunisian State or Dynasty] of 1861. This law was understood by Europeans at the time—and by some scholars since—as a mechanical and perhaps inappropriate adaptation of European constitutional forms. A reading of the document, however, reveals something quite different: an attempt to adapt some emerging constitutional practices by placing them within a framework described in familiar terms.

The 1861 constitution did not present itself as Islamic in any explicit way, though its authors expressed themselves in terms that drew on Islamic political vocabulary (an attempt that was largely dropped in later constitutional documents in the Arab world despite the Islamic inflationary trend to be explored more fully below). Members of the newly-established Grand Council, for instance, were referred to as *ahl al-hall wa-l-'aqd*; literally, the people who loosen and bind; and the population was generally referred to as *ra'ayana*; literally, our flock. Some European usage was also adopted (the ruler was referred to as the king—*al-malik*—rather than *bey*—perhaps an implicit assertion of Tunisian sovereignty or at least a very heavy dose of autonomy within the Ottoman state) but less than is often supposed.

There were some real innovations in the document—such as insisting on designating only a share of the state budget for the king himself or that taxes be levied only on a legal basis—but these were not viewed as inimical to Islamic political practice. (The law did imply civil equality regardless of religion, but this principle had already been proclaimed in Tunisia prior to the promulgation of the law). In short, the Tunisian constitution presented itself to Tunisians less as a new political system based on non-Islamic sources but as a new codification of pre-existing political practices and institutions.[3] Yet the attempt to put such a constitutionalism into practice proved abortive not only in Tunisia but elsewhere.

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[2] For more details on the early constitutional documents examined in this sections, see my *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Govemment* (Albany: SUNY University Press, 2001). This section is an updated and condensed version of the historical parts of that book.

[3] For a general articulation of the ideology behind the constitution by one of its primary advocates, see the writings of Khayr al-Din al-Tunisi. His major treatise on the subject has been translated into English by L. Carl Brown, *The Surest Path: The Political Treatise of a Nineteenth-Century Muslim Statesman, A Translation of the* Introduction to The Surest Path To Knowledge Concerning The Condition of Countries *by Khayr al-Din al-Tunisi*, Harvard Middle Eastern Monographs, XVI, Center for Middle Eastern Studies, Harvard University, 1967.

The constitutional path of issuing documents to render political authority more accountable to established laws and procedures—without relying on any extensive borrowing from Islamic political concepts or traditions—was deepened by Egypt's 1882 constitution (termed the fundamental ordinance, or *al-la'iha al-asasiyya*). The document was fairly brief, focusing almost all of its fifty-two articles on a Consultative Council that was already sitting. An elected body, the Council was given an extensive role in legislation and in oversight of public finances. Ministers were invited to attend the Council sessions; they could also be summoned. The few rights provisions were directly related to the Council, covering issues such as petitioning the Council or the immunity of Council members, but no religious provisions were included.[4] In short, this law is better understood as an organic law for the Council rather than a comprehensive legal framework. It thus provoked little debate about its relationship with Islamic law.

The collapse of the Ottoman Empire at the close of the First World War occasioned a wave of constitution writing. Some (such as in short-lived Syrian Arab Kingdom in 1920 or the incompletely independent kingdom of Egypt in 1923) came from political entities working to assert their independence; others (such as Iraq and Transjordan) were heavily conditioned by the existence of a European mandatory power. These constitutions ratcheted up the symbolic commitment to Islam, often proclaiming Islam to be the religion of state.

And they also began to tread slowly into detailed provisions on Islam. Often the head of state was required to be a Muslim. In Iraq, the constitution recognized the shari'a courts as authoritative in personal status matters for Muslims. Islamic concerns touched off some sensitivities regarding religious freedoms. Religious minorities secured a constitutional right to their own schools in 1925 in Iraq. In Egypt, a leading Islamic scholar involved in drafting the country's 1923 constitution unsuccessfully objected to a clause stating that "the state will protect morals and feelings of religions and creeds;" he complained that this would offend Egypt's existing religions. The other drafters rejected his argument, motivated not simply by liberal sentiments but

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Also worth reading on the Tunisian constitution is Theresa Liane Womble, *Early Constitutionalism in Tunisia, 1857-1864: Reform and Revolt*, Ph.D. dissertation, department of Near Eastern Studies, Princeton University, 1997; Ahmad ibn Abi Diyaf, *Consult Them in the Matter: A Nineteenth-Century Islamic Argument for Constitutional Government*, L. Carl Brown translator (Fayetteville: University of Arkansas Press, 2005).

[4] The text of the document can be found in *Al-dasatir al-misriyya 1805-1971: nusus wa-tahlil* [The Egyptian Constitutions 1805-1971: Texts and Analysis] (Cairo: Markaz al-tanzim wa-l-mikrufilm, 1976). See also Juan R. I. Cole, *Colonialism and Revolution in the Middle East: Social and Cultural Origins of Egypt's `Urabi Movement*, Princeton: Princeton University Press, 1993, p. 105; and Alexander Scholch, *Egypt for the Egyptians! The Socio-political Crisis in Egypt 1878-1882*, London: Ithaca Press, 1981, p. 213.

likely as well by the desire to avoid giving Great Britain any excuse to intervene in order to protect foreigners and minorities.[5]

What is notable in all these efforts—most of them dominated by a small number of officials operating outside of the public eye—is that discussion was fairly practical. Drafters were concerned about big issues to be sure. They wished generally to achieve or protect sovereignty and none showed any sign of disloyalty to God or religion. But writing a constitution was not an exercise in jotting down everything that was good; it was a far thinner process of devising legal formulas that would guide the structures of government in the right direction. The concern with personal status law, for instance, stemmed not from an insistence on proudly proclaiming eternal truths about relations between family members; it was borne out of a desire to protect one area of law still informed by the Islamic shari'a (at least for Muslims) while preventing foreign powers from using it as an opening to impose protection of non-Muslims.

The resulting provisions, while increasingly detailed and carefully debated, had little effect on constitutional and political practice outside the very specific area they were designed to affect. And even on a symbolic level, the provisions appear fairly modest in retrospect. Two issues that have since emerged as central to debates about Islam and the political order—the source of sovereignty and the relationship between positive and shari'a law—were not addressed, nor was this silence deemed particularly noteworthy at the time.

Such reticence and silence can be explained by several factors. First, religious institutions (such as shari'a courts and institutions of learning) at that time tended to focus their attention on maintaining autonomy and jurisdiction over their existing realms rather than establishing hegemony over the political system as a whole; they had long accommodated themselves to a state structure they neither devised nor controlled.[6]

Second, most of the constitutions were written in an effort to establish or affirm independence from European rule. In that sense, the documents were written to shore up the state, not tie it down. Those documents that were drafted under conditions of limited sovereignty (such as Iraq, Transjordan, Lebanon, and Syria—written under British and French mandates—and even Egypt, with the Great Britain retaining and enforcing a claim to limits on Egyptian sovereignty after terminating its protectorate in 1922) still showed signs of battle over efforts to carve out autonomy for indigenous political institutions. (Extraterritoriality, for instance, was a major concern of the Egyptian drafters; Iraqi drafters inserted parliamentary oversight over treaties in a manner that complicated British efforts to retain influence in the

[5] Majlis al-Shuyukh, *Al-dustur: ta`liqat `ala mawadihi bi-l-a`mal al-tahdiriyya wa-l-munaqashat al-barlamaniyya*, Pat III, Cairo: Matba`at Misr, 1940Part I, discussion of article 13

[6] See my "Shari'a and State in the Modern Middle Muslim East," *International* Journal *of Middle East Studies* 29 (1997): 359

country.[7]) There was not a strong perceived contradiction between this international focus on independence and religion. Establishing national sovereignty was generally not cast in religious terms, but it was still seen as generally consistent with and even supportive of the Islamic character of the society.

Finally, the constitutions written during the period generally restricted themselves to modest general statements about the political order followed by a lengthier list of specific procedural provisions. The lengthy ideological and programmatic constitutions were a thing of the future.

Yet as Arab constitutional law continued to develop, and Arab politics grew increasingly ideological, the symbolic provisions related to Islam often grew thicker. Islamic legal principles were often cited in constitutional debates.[8] Constitutional garrulousness meant that it was no longer enough to refer simply to Islam as the state religion, but lengthy catalogues of principles often grew to include references to Islamic values or heritage. The Saudi Basic Law of 1992 cites Islam and Islamic law in numerous provisions. In some cases—such as in the Libyan and Iraqi constitutions—newer provisions were as vague as the older ones. Occasionally, however, new, more specific elements were added. The Moroccan constitution of 1962 barred amendments diminishing the royal or Muslim nature of the state; the 1970 constitution specifically excepted these matters from parliamentary immunity.[9] Algeria invented a Higher Islamic Council in 1996 for its political system, specifically enjoined to exercise *ijtihad*. And specific steps were taken, especially in the states of the Arabian peninsula, to mandate Islamic legal norms in specific areas. In the Kuwaiti constitutions for instance, Article 18 stipulates "Inheritance is a right governed by the Islamic shari'a." Yemeni constitutions have probably been most ambitious and specific in this regard. The 1970 constitution, for instance, required enforcement of Islamic law in business transactions. The constitution further provided that "In cases heard by the Courts, the provisions of this constitution and of the State's laws shall be applied. If there is no precedent, the Courts shall pass their judgment in the case

[7] I examine the debate in Iraq in "Constitutionalism, Authoritarianism, and Imperialism in Iraq," *Drake Law Review* (53): 923.

[8] In the debate over the adoption of the first Moroccan constitution, for instance, the opposition was able to cite the opinion of a leading Islamic scholar criticizing the document because it assigned a greater right to legislation to the state than should exist in an Islamic system. See Charles F. Gallagher, "Toward Constitutional Government in Morocco: A Referendum Endorses the Constitution," American Universities Field Staff, North Africa Series, Volume IX, No. 1 (Morocco), 1963, p. 7. For a very different example see the discussion of women's suffrage in "Women in the Constitutional Committee" *Ruz al-yusuf*, 19 October 1953, p. 13. At that time, a committee drafting a constitution for Egypt considered the right of women to vote. Some committee members unsuccessfully cited Islamic grounds for opposing this right.

[9] Ahmad Majid Binjalun, *Al-dustur al-maghrabi: mabadi'ihi wa ahkamihi*, Casablanca: Dar al-Kitab, 1977, pp. 151-152.

they are dealing with in accordance with the general principles of the Islamic shari'a."[10]

Despite the increased salience of Islamic issues in constitutional debates, the provisions discussed thus far still generally preserved the constitution as the supreme law in the country. There might be symbolic or institutional concessions to Islamic beliefs, practices, and law, but ultimate political authority remains elsewhere: in the constitution; in the people (with popular sovereignty proclaimed in most constitutions); or in the head of state (formally in some royal system and effectively in some republican systems).

Yet another set of provisions began to creep into some Arab constitutional texts that suggests a different relationship between the political order described in the constitution and the legal system enjoined by Islam. Beginning with the Syrian constitution of 1950, some Arab constitutional systems began to cite the Islamic shari'a as a source—or more ambitiously—the chief source—of law.[11] The 1950 Syrian constitution—the first Arab document to introduce thick ideological sections and catalogues of social and economic as well as political rights—was only in effect for a few years, and its provision regarding Islamic law had no noticeable effect.[12] But its innovation spread. In Kuwait's 1962 constitution, a similar provision was introduced, in which "the Islamic shari'a is a primary source of legislation." Periodic proposals to amend the constitution to make the Islamic shari'a *the* rather than *a* primary source of legislation have thus far been unsuccessful, though at times there have appeared to be considerable popular support for such a change. Similar language has been adopted in other peninsular states (such as the United Arab Emirates and Oman); Saudi Arabia's 1992 basic law has a much more specific and detailed provision: according to Article 48 "The courts will apply the rules of the Islamic shari'a in the cases that are brought before them, in accordance with what is indicated in the Book and the Sunna, and statutes decreed by the Ruler which do not contradict the Book or the Sunna."

In 1971, Egypt received its "permanent" constitution to replace the avowedly temporary documents of the Nasser years. That constitution's second article went beyond mere declaration of Islam as the religion of the state; such a formula was deemed insufficient. It more ambitiously described the principles of the Islamic

[10] Article 153. For the text, see Albert P. Blaustein and Gisbert H. Flanz (editors), *Constitutions of the World*, Dobbs Ferry: Oceana Publications, updated periodically.

[11] On these clauses generally, see Clark B. Lombardi, *Constitutional Provisions Making Sharia "A" or "The" Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?*" *American University International Law Review* (28, 2013): 733-774.

[12] On the Syrian constitution of 1950, including Article 3 which described the Islamic shari`a as the chief source of legislation, see Majid Khadduri, "Constitutional Development in Syria," *Middle East Journal* 5 (2, Spring 1951), 137-160. Ironically, Syria later made Arab constitutional history when a constitution was proposed that removed the requirement that the head of state be a Muslim.

shari‘a as “a chief source of legislation.” Arguments in favor of still stronger provisions were rejected for the moment.[13] Yet the proponents of a stronger Article 2 won a delayed victory as the constitution as amended nine years later to make the principles of the Islamic shari‘a “the” chief source of legislation. (The amendment was likely introduced in order to attract voters to the polls to support a package of constitutional amendments that strengthened the positions and policies of then President Anwar al-Sadat; there is little evidence that much thought was given to the legal effect of the introduction of the definite article.) As amended, Article 2 of the Egyptian constitution came to proclaim: “Islam is the religion of the State, Arabic is its official language and the principles of the Islamic shari‘a are the chief source of legislation”. Thus Egypt has joined other Arab and Islamic countries in providing explicitly for a link between the Islamic shari‘a and legislation.

Such provisions can be taken to imply the possibility a very different basis for the legal order than a Kelsenian view in which the constitutional text as the highest legal norm. Rather than the constitution sanctioning Islam as an official religion and observance of the Islamic shari‘a in specific areas, these provisions might seem to imply that the shari‘a itself stands prior to the entire positive legal order—including, potentially and by implication, the constitution itself. If the shari‘a is a primary source—or even the primary source—of legislation, then it becomes possible to argue that it forms the fundamental legal framework. Indeed, it is noteworthy in this regard that constitutional texts tend to refer to the shari‘a as a basis of legislation (*tashri‘*) which would include all legal enactments (including laws, decrees, administrative regulations, and arguably the constitution) rather than as a basis of laws (*qawanin*) which would only refer to a specific category of legislation (laws passed by parliament or their equivalent).

But that is not simply not the effect that the clauses have had. We shall now turn to understand why the verbal commitment to Islam has grown but why the resulting constitutional tinkering has such little legal impact.

Explaining and exploring the inflation

Why did Islam in general—and the Islamic shari‘a specifically—increasingly intrude on Arab constitutional debates over the course of the twentieth century? In order to understand, we should realize that this story might be told a very different way. From the perspective of some of those taking the vantage point of religious institutions, the process has been far less one of religion invading politics and much more of politics invading religion.

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[13] See Jamal al-`Utayfi, *Ara' fi al-shari`a wa-fi al-hurriyya* [Opinions on the Shari`a and Freedom], Cairo: Al-hay'a al-misriyya al-`amma li-l-kitab, 1980; Joseph P. O'Kane, "Islam in the New Egyptian Constitution: Some Discussions in al-Ahram," *Middle East Journa*l 26 (2, 1972): 137-148; and the unpublished minutes of the preparatory committee for drafting the constitution for the Arab Republic of Egypt, 1971(held in the library of the Majlis al-Sha`b, Cairo).

The initial disinterest of those with religiously-informed perspectives to pull Islam into constitutional debates and drafting was hardly surprising. Islamic institutions—schools, courts, mosques—operated in a different sphere, separate from the new political institutions being constructed. Even the Islamic shari'a was understood and pursued through a set of practices and institutions that stood at some distance from the process of governing. Thus, general obeisance to the Islamic nature of the society as well as some protection for critical shari'a-based institutions (especially in the area of personal status law—itself a category partly created by the imperial encounter[14] was sufficient to render constitutional architecture compatible with Islam.

Yet the unspoken mutual deference between constitutional state and scholarly shari'a decayed over the course of the twentieth century—and it was generally state institutions that initiated an incursion into the realm of the shari'a rather than the other way around. States asserted control over general education and then moved to incorporate religious education within their realms; religious endowments and the institutions they supported were nationalized and folded into ministries and other state structures; mosques were similarly brought under state ownership or licensing with preachers given weekly guidance on their sermons; state-constructed court structures assimilated shari'a-based judicial structures; and even matters of personal status, the area of law most associated with shari'a-based norms, vocabularies, and practices, became subject to legislated codification efforts in many Arab states.[15] The structure of the state was no longer primarily political or administrative; it was beginning to take on strongly religious implications.

The incursion was not merely institutional, legal, and fiscal: it was ideological as well. Earlier constitutional documents were thin documents primarily focused on laying down procedures for passing laws and developing budges; they laid out the basic structures of rule and their interrelationship to each other. That function of constitutions actually declined over the course of the twentieth century as constitutional devices to ensure the separation of powers and the accountability of political authority were gradually hollowed out and the constitution became a device for entrenching executive domination. But if constitutions thus became less constitutionalist in spirit, they became increasingly fulsome and even bombastic in their ideological provisions. No longer were constitutions primarily about defining the mechanisms of governance; they increasingly became thicker platforms for espousing official ideologies and defining the nature and identity of the entire

[14] Kenneth Cuno, "Muhammad Qadri's Code of Personal Status Law in Egypt," paper presented at the annual meeting of the Middle East Studies Association, Washington DC, December 2011.

[15] I have written on this elsewhere in "Shari'a and State" and in "Consensus and Cacophony: Debating the Islamic Shari'a in 21st-Century Egypt," in Robert W. Hefner (editor) *Sharia Politics* (Bloomington: Indiana University Press, 2011).

society.[16] And if constitutions were about declaiming on anything that was good, it was hard to exclude Islam.

But if states began the intrusion into the religious spheres, in latter decades of the twentieth century, new social actors began to return the favor with their own effort to insert Islamic provisions into constitutional texts. The trend was led by Egypt's Muslim Brotherhood, a religiously-inspired (but always lay-led) reform movement, founded in 1928. Throughout most of its first two decades, the Brotherhood showed only sporadic interest in legal and constitutional issues, and indeed its political involvement was something that came only gradually.[17] But by the 1950s (perhaps with the entrance of former judges into leadership positions in the movement, the Brotherhood's interest increased. With the creation of a committee to draft a new constitution in 1954, the Brotherhood felt a call to spell out its position.[18]

The repression of the Brotherhood in Egypt was closely connected to the emergence of far more radical strains in Islamist political thought; one that spawned the radical political demands of Sayyid Qutb, and one that veered in a salafi direction. Such approaches generally did not articulate full constitutional visions, and indeed they tended to show a lack of interest even bordering on contempt for written constitutional forms.[19]

But the bulk of Islamist movements focused (when allowed in the sharply constricted political environment that prevailed in most Arab states in the second half of the twentieth century) in a few constitutional provisions, notably those that spoke of the Islamic shari'a as well as those involving religious qualifications for the head of state. And pressure from such movements may have had some effect in the Jordanian and Kuwaiti cases; in Egypt, it was less Islamist movements and more of a regime attempt to cloak itself in religious legitimacy that had such an effect on the 1971 constitution and the 1980 amendment to the second article.

The process of Islamic inflation was also assisted by the increasingly public nature of the constitution drafting effort. Popular participation was introduced, generally in a ritualistic fashion, but still in such a manner that declarations of piety were

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[16] See Said Arjomand, "Constitutions and the struggle for political order: A study in the modernization of political traditions," *Archives Européennes de Sociologie* 33 (4, 1992): 39-82.

[17] I examine this pattern in *When Victory is Not an Option: Islamist Movements in Arab Politics* (Ithaca: Cornell University Press, 2012).

[18] Hasan al-Hudaybi's short pamphlet, *Dusturuna* (Cairo: Dar al-Ansar, 1978) apparently dates from this period. I am grateful to Barbara Zollner for brining this to my attention. For her work on Hudaybi, The *Muslim Brotherhood: Hasan al-Hudaybi and Ideology* (Abington: Routledge, 2009).

[19] There had, to be sure, always been an anti-constitutionalist strain in some Islamist circles even before the Brotherhood's suppression. The Hizb al-Tahrir, for instance, grounded its call for an absolutist caliphate in traditional Islamic political thought.

encouraged. The nineteenth century efforts were largely concerns of the ruling elites; the constitutional documents of the first half of the twentieth century were generally drafted by committees working in private who presented their work to rulers for promulgation.

But in the second half of the twentieth century, more participatory processes were gradually introduced—constitutions were sometimes drafted by elected bodies (as in Tunisia and Kuwait); they were also more routinely submitted to popular referenda (as in Egypt and Morocco). Such forms of participation were generally far from substantive (though not totally—the Kuwaiti assembly, for instance, does seem to have had some impact on the final text). It is for that reason that it is better to refer to the process as "public" rather than fully "participatory." The process of constitution drafting was designed to communicate the regime's orientation to the population and lend the political order a degree of popular legitimacy; the referenda in particular were in essence political spectacles that more resembled a mass loyalty oath than a mechanism for the people to speak in their own voices.

Yet it was precisely this publicity in process that gave such a boost to the Islamic inflationary trend in constitutional texts. Once a proposal was made to include Islam in some way, it became politically difficult to call for ignoring such ideas or eliminate such provisions. It was far easier to ratchet up religion rather than ratchet it down.

And the publicity explains in turn why the trend had so little legal effect. The provisions were designed to communicate general orientations, not to have specific legal effects. Indeed, those legal and constitutional scholars who have scoured the provisions related to Islam to discern their possible impact and meaning may have been missing the point of the clauses: they are far more products of a political and constitutional environment than they are producers of it. More simply, they are far more effect than cause.

What such textual analyses often miss—and indeed, what much of the public discussion around such clauses often overlooked—was the silence of Islamic provisions on any matters of enforcement or interpretation. This was obviously true with those clauses that proclaimed Islam the official religion: it was never clear what practical effect such a declaration might have. But it was even true for the detailed provisions. Allowing matters of personal status to be decided in accordance with religiously-based norms gave no guidance on how those norms were to be derived and who would apply them. Egypt's amended Article 2, proclaiming "the principles of the Islamic shari'a" as "the chief source of legislation" never explained how the shari'a's principles might be different from its detailed rulings, how they were to be discovered or discerned, and what the process would be for deriving legislation from them. And indeed, in practice, this process was left to the courts in general (with the Supreme Constitutional Court taking a particularly assertive role in measuring Egyptian legislation against its interpretation of Article 2), the parliament (which had the authority to pass laws, dominated as it was by the president's party), the executive branch (which had the authority to issue regulations), and state controlled religious institutions (including al-Azhar and Dar al-Ifta').

In the drafting, it is therefore not surprising that the most difficult debates involved matters of principle divorced from any consideration of implementation. Advocates of women's rights, for instance, clashed with Islamic scholars in a long series of discussions about any provisions for gender and gender equality. The result of those discussions was a clause (Article 11) which reads as if it was designed by a committee attempting to offer something to everybody (as indeed it was): "The state guarantees harmony between the duties of a woman toward the family and her work in the society, [as well as] her equality with men in the fields of political, social, cultural, economic life without violating the rulings of the Islamic shari'a." Such an article provokes all kinds of question: What are these rulings? Who determines when they are violated? What does this harmonization mean in practice? But it offers neither answers nor even any guidance on how such questions could be answered. Women were offered equality, Islamic scholars were offered the rulings of the shari'a, and Egyptians were offered a clause that could bear almost any interpretation.

Even some of the apparent attempts to ensure state respect for religion could just as easily be read as attempting to ensure state control over religion—and that is precisely the effect that some detailed clauses had. The Egyptian constitution, for instance, mandated religious education—and therefore implicitly but quite clearly made defining the faith and instilling it in schoolchildren a state function. Religious freedom clauses generally accorded respect to "creeds" [*'aqa'id*] and sometimes to "rites" [*'asha'ir*], terms that suggested something different from full freedom of conscience on an individual basis but instead the liberty of citizens to subscribe to a recognized set of beliefs and practices—and thus giving state bodies an effective authority to license religious sects and communities.

The 1971 constitution was hardly written in secret. There was extensive press discussion of its provisions and a nationwide series of meetings to solicit comments about its contents. At the time, it was a major topic of public debate. Yet much of the discussion died when the document was promulgated. The minutes of the drafting committee have never been published; typed manuscripts gather dust in a couple locations, rarely consulted even when the document was in force.

By diverting attention from the question of who has religious authority to that of what the constitution stipulates about religion, the inflated constitutional clauses of the second half of the twentieth century could mask the largely symbolic nature of the language. The passionate nature of symbolic constitutional debates is actually a global phenomenon; as constitution drafting has become an increasingly public process (and, in many places, a more participatory one as well), it is striking how much political energy is expended on preambles and basic proclamations of identity, sometimes it seems even at the expense of finely-grained discussions of how constitutional clauses will actually work in practice.[20]

[20] I examine this issue in "Reason, Interest, Rationality, and Passion in Constitution Drafting," *Perspectives on Politics* 6 (2008): 675.

A new age of constitution writing—an end to inflation?

If the constitutions of the second half of the twentieth century were public but not participatory in their drafting, the post-revolutionary process in both Tunisia and Egypt promised a sharp departure. Not only were democratic mechanisms used to generate a constitutional drafting process, but the largest and most powerful electoral actors in both countries in the first elections were movements dedicated to enhancing the role of Islam in public life. This development, while striking, was not wholly unprecedented: in Iraq, Islamically-oriented political parties played a similar role in drafting the country's post-invasion constitution. The Arab world is entering a new constitutional era—one where participation was edging out ritualistic publicity and in which Islamists might quickly fill the resulting political space. Did this have the effect of moving the religious provisions from the realm of political effect (a measure of the regime's desire to stake out religious claims) to cause (bringing about the Islamization of the constitutional order)? And did reversals to that trend—most notably with the ouster of Egypt's Muslim Brotherhood from power in July 2013 and the direct appointment of a new drafting body by an interim president himself appointed by the military—also rollback any changes?

Oddly, the variations in the influence and role of Islamist movements may not be have had that as much effect as might have been expected. In both Egypt and Tunisia, as their fortunes rose, Islamists played a more subtle political game. The Islamist scene was surprisingly varied (in Egypt most notably, salafis joined the Brotherhood in the electoral arena); and the Islamist rise generated significant opposition. To be sure, Islamists sought to have Islam play a greater role. But the largest Islamist movements—the Muslim Brotherhood in Egypt and al-Nahda in Tunisia—focused far more on maintaining existing (largely symbolic) language rather than expanding it. The rest of their constitutional energies were devoted to bringing about far more democratic systems, confident as they are of their popular standing. In that sense, they sought less to build explicitly Islamic structures but to breathe life into democratic and constitutional structures that have been hollowed out by the preceding authoritarian regimes and use the newly empowered tools to pursue their chose policy goals.

The shift in Islamist focus was apparent even before the revolutions in Tunisia and Egypt. A focus on platitudes written in thick bold letters was replaced by an interest in the fine print written in a thin bookkeeper's pencil. In Kuwait in the mid-2000s, for instance, the Muslim Brotherhood's political arm, the Islamic Constitutional Movement, largely abandoned attempts to amend the constitution to refer to the Islamic shari'a as "the" rather than "a" source of law but instead worked on specific pieces of legislation (such as its successful pursuit of a zakat law for corporations); when it did press for new constitutional language it asked that legislation be barred that violated the shari'a, a far more specific formula (as well as one that would presumably empower a specific structure, the Constitutional Court, to apply it).

In the wave of mass politics during and after the Tunisian and Egyptian revolutions, the text of the constitution became a central focus. And Islam was hardly forgotten.

As with the pre-revolutionary situation, the symbolic clauses generated passionate feelings. But those debates distracted attention from the legal heavy lifting done by the more procedural aspects of the document. And Islamist forces generally realized that. Those who paid attention to the loudest and angriest debates often tended to hear only those symbolic issues and overestimated their importance; those who listened by contrast to the quiet detailed discussions found the processes that will likely have far more effect in shaping the constitutional developments of the societies in question.

And thus we come to the dramatically different constitutional context after 2011. Constitution drafting is still iterative, as it was before. Tunisians beginning the process in 2011 looked back at their older documents and processes as a starting point. Egypt's temporary military rulers suspended the entire 1971 constitution in February 2011 and then issued a "constitutional declaration" in March that borrowed very extensively from its clauses. When a constituent assembly finally began work on a new document in the summer of 2012, it very quickly went back to the 1971 constitution as a starting point, making changes of some symbolic but uncertain practical importance. And when the text produced by the 2012 assembly was suspended in June 2013, drafters of a very comprehensive set of revisions simply moved back to the 1971 document, seeking to entrench the way it had approached the relationship between religion and state more deeply.

So text did not differ nearly as much from the past as might have been expected. But political context had shifted dramatically—and the ground continued to shift under the feet of the drafters. When Egypt's drafters turned to Article 11 of the 1971 constitution (the tortured phrasing regarding gender equality and the Islamic shari'a discussed above), they first tried to adopt the old wording without much discussion. But they found what had been a soluble problem in a small room now became a national crisis. And for the Islamists driving the process in 2012, that was not what they wished to spend their energies on. They had battles to fight, to be sure, but the meat was now in the thin parts. And most of all it lay in the fine print.

What was so different? First, past constitutions had been written in the context of existing regimes and in fact initiated by those regimes. After 2011, by contrast, Tunisia and Egypt were both in a period of transition—the old regime had fallen and only provisions ones in place. Second, the rules for the process itself were contested: it was necessary for competing forces to work out (through a combination of negotiation, election, threats, popular mobilization, lawsuits, and even coups) precisely how the new documents were to be drafted and ratified. Third, no single political actor could dominate the process. Fourth, the issue of national sovereignty—so central to earlier efforts—had faded, giving more space to domestic political debates.

Let us turn to each experience in turn.

Tunisia

The Tunisian constitution of 1959 was remarkable for its brevity on identity issues as well as the brevity of its reference to Islam. There was a fleeting reference in the preamble to the people's determination "to remain faithful to the teachings of Islam," a declaration that the president's religion is Islam, and a short statement in articles 1 and 2 that: "Tunisia is a free, independent and sovereign state. Its religion is Islam, its language is Arabic and its type of government is the Republic. The Republic of Tunisia is a part of the Great Arab Maghreb, an entity which it endeavors to unify within the framework of mutual interests."

Ruled from independence until 2011 by two presidents who showed a determination to control religious institutions, contain and then suppress religious movements, and even circumscribe the role of Islam in public life, Tunisia stood aloof from the regional inflationary trend.

It was therefore remarkable that when al-Nahda—an Islamist movement—emerged as the largest party by far in balloting for the country's Constituent Assembly in 2011, it decided not to make up for lost time but simply to make due with existing constitutional language. And the reasoning was often explicit, steering in an almost secular direction: bringing state and religion too closely together had been a technique of the old regime to bring Islam under state domination. Al-Nahda leader Rashid Al-Ghannushi spoke explicitly of an Anglo-Saxon (as opposed to French) model of religion-state relations in which the natural religiosity of the people could gain organized and public expression while escaping from official control.[21]

Behind this attitude lay a supreme confidence that what was necessary to increase the role of Islam in Tunisian life was not a constitutional clause or even a set of legal provisions but instead the removal of the sharp restrictions of the old regimes. Of course, al-Nahda's strong electoral showing did provoke some within the movement to float the idea of more extensive constitutional provisions for Islam and the shari'a, and when the Constituent Assembly began meeting, some al-Nahda deputies strove to persuade the movement to reconsider its position. After an intensive internal party debate in the spring of 2012, the effort was turned back. This was hardly an abandonment of the Islamic shari'a by Tunisia's Islamists but only a savvy political (if symbolically difficult) judgment that their energies were better focused elsewhere. As the Tunisian constitution drafting neared completion, al-Nahda was satisfied with repeating the vague formula on Islam in the country's post-independence constitution (while entrenching the clause by making the official status of Islam unamendable) and inserting a vague provision allowing the state to protect those (unspecified) things that are sacred.

The liberal attitude of al-Nahda was controversial within the movement; indeed, it seems to have been imposed by some of the leadership on a base that was more enthusiastic about constitutionalizing the shari`a. The concession was deemed a

[21] Al-Ghannushi, personal interview, Tunis, July 2011.

necessary one to hold together the political process that promised far friendlier political terrain for al-Nahda than the pre-2011 regime ever allowed for.

Egypt

The Egyptian case is far more complicated and contested than the Tunisian. While Tunisia plodded along a difficult constitutional path, Egypt careened through a series of interim constitutions and constitutional drafting efforts before arriving at a final document in 2014 (one that many of its own drafters thought might not last very long). During the process, Islamists played a varied political role. In 2012, Islamists in general, and the Muslim Brotherhood in particular, dominated the drafting process and were instrumental in passing a constitutional document at the end of the year. But that constitution was suspended on July 3, 2013 as the military intervened and security forces worked to suppress the Brotherhood's political activity (salafis also suffered some repression, but the main salafi political party limped along as an active participant in the post-July 3 political process). Tossing the Brotherhood out of the presidential palace and into prison reopened all constitutional issues. A thoroughly revised constitution was drafted by an appointed committee of fifty that contained only one member of the salafi party and one ex-member of the Brotherhood; no other Islamists were represented (though some academic specialists in Islamic law and members of state religious institutions did participate).

But surprisingly, in constitutional terms, all the political turmoil amounted to frantically running in place. The country's largest post-2011 political party, the Freedom and Justice Party (the political wing of the Muslim Brotherhood) neither sought to emulate al-Nahda's dalliance with an "Anglo-Saxon" model of religion-state relations nor did it seek to build an Iranian style system in which religious scholars oversaw the existing political system. Other Islamists (chiefly salafis) had stronger demands; non-Islamist groups came to resist these. Arguments were bitter but focused on only a few constitutional clauses. The final result in the 2014 constitution was fairly similar to the Tunisian case in one sense: existing constitutional provisions largely survived with only minor wording changes, sometimes to make the Islamic commitments more specific and sometimes to loosen them. And behind even these minor changes, the driving force behind those changes was not the Freedom and Justice Party but its Islamist and non-Islamist rivals.

Initial efforts

In the year after the fall of Mubarak, there was some discussion about the role of Islam in the constitution, most of which centered on Article 2. Some suggested dropping the word "the" (added in 1980); others suggested adding some protection for non-Muslim religious communities to follow their own laws of personal status. But by the time drafting had begun, the focus had turned very much to practical issues of enforcement. And Egyptian political debate quickly developed a remarkable sophistication about such issues.

When salafi movements entered the political fray, for instance, in the aftermath of the revolution, they first showed a very limited familiarity with the political issues that had

occupied the attention of their fellow citizens. In March 2011, as Egyptians voted on a series of constitutional amendments (eventually worked into a comprehensive "constitutional declaration" issued by the interim military rulers at the end of the month), salafi leaders recommended a "yes" vote simply because the text offered gave Islam official status and copied the wording of Article 2 of the suspended constitution. By summer, however, they had begun to become more demanding and discerning. Some began to explore ideas about constitutional text that was derived from (rather than just making a nod toward) Islamic legal principles and rulings.

Non-Islamists began to develop their own concerns: that the electoral process would edge them aside. They therefore argued strenuously for a set of largely liberal "supra-constitutional principles" to guide any drafting effort. Salafi and Brotherhood leaders denounced the effort as attempting to tie the people's hands through an elite bargain. In a huge demonstration I visited in Tahrir Square in July 2011, I heard salafis chant "No principles above the constitution," a far cry from their earlier insistence that it was God's word, not human law, that should govern communal affairs.

Drafters set to work in 2012 and completed their work in December. In the assembly drafting the documents, Brotherhood members dominated, but salafis were a significant voice. Non-Islamists generally grew increasingly critical of the process and gradually pulled out, but for a while, the Brotherhood hoped to bring enough along so that it could present the result as a consensus document.

The 2012 constitution

When the drafters turned from the procedure of drafting to the substance, the results were reflected each side's understanding of its electoral position. Non-Islamists sought either to disrupt the process or to write in guarantees that would limit majoritarianism. Brotherhood members felt sufficiently comfortable about their future electoral chances to be willing to defer most religious issues to normal politics rather than the constitution. Salafis were also fairly optimistic about their electoral prospects but they were also anxious to show they were more faithful to the Islamic shari`a than the Brotherhood; they also showed more interest in securing in the fine print than the Brotherhood being a bit less certain that they would be able to secure what they wished through the ordinary legislative process.

What is most remarkable about this debate is how quickly attention turned to very practical issues—and how much most participants preferred to focus on issues of judicial independence, executive-legislative relations, the removal of loopholes in human rights provisions, and the status of various state bodies (such as the press and al-Azhar). And the Muslim Brotherhood's Freedom and Justice Party led the charge in most of these areas, leaving much of the debate over the Islamic provisions to others.

Why, when it stood on the brink of exercising a considerable measure of political authority for the first time in its history, did the Brotherhood back off ambitious attempt

to toughen constitutional language on Islam?[22] Oddly, it was precisely because of its politically powerful position. The Brotherhood felt it had the potential to set the legislative agenda, draft whatever laws it liked, recast the country's Constitutional Court, and even mold the enormous complex of Islamic educational, research, charitable and didactic institutions under control of the Egyptian state. In short, the Brotherhood was likely be able to get far more of what it wanted (a greater role for Islam in public life) through majoritarian institutions than through rigid constitutional language.

As the Brotherhood General Guide Muhammad Badi` explicitly stated, "What is happening is a political competition. We have to defer to the ballot box. Let us compete with honor."[23] If the Brotherhood had a dispute with the Supreme Constitutional Court, for instance, it was not because of the Court's Article 2 jurisprudence but because the Court dissolved the Brotherhood-dominated parliament in June 2012. And its members in the constituent assembly therefore explored ways of folding the Court into the regular judiciary rather than ask to have its justices schooled in Islamic law. Similarly, the Brotherhood resisted calls to constitutionalize alms giving (*zaka*) on the explicit grounds that there was no need to insert such a clause in the constitution itself. As a prominent Brotherhood leader put it, "There is no difference among [constituent assembly] attendees, Muslim or Christian, on the duty of zaka. But the difference is whether or not to include textual provision in the constitution on it. We did not include a text on building mosques or the duty of the pilgrimage or the duty of fasting."[24]

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[22] I base the information in this section on a series of personal interviews with Brotherhood and Party leaders during 2011 and 2012.

[23] See Nada Hussein Rashwan, "'This is not politics, but interests,' says MB Supreme Guide of current protests" *Al-Ahram Online, December 8, 2012.* http://english.ahram.org.eg/NewsContent/1/64/60059/Egypt/Politics-/This-is-not-politics,-but-interests,-says-MB-Supre.aspx, accessed August 6, 2013. See also "Badi` Video: Decision Now to the Ballot Boxes," *al-Wafd*, December 8, 2012, http://www.alwafd.org/%25D8%25A3%25D8%25AE%25D8%25A8%25D8%25A7%25D8%25B1-%25D9%2588%25D8%25AA%25D9%2582%25D8%25A7%25D8%25B1%25D9%258A%25D8%25B1/13-%25D8%25A7%25D9%2584%25D8%25B4%25D8%25A7%25D8%25B1%25D8%25B9%20%25D8%25A7%25D9%2584%25D8%25B3%25D9%258A%25D8%25A7%25D8%25B3%25D9%258A/323213-%25D8%25A8%25D8%25AF%25D9%258A%25D8%25B9-%25D8%25A7%25D9%2584%25D8%25A7%25D8%25AD%25D8%25AA%25D9%2583%25D8%25A7%25D9%2585-%25D8%25A7%25D9%2584%25D8%25A2%25D9%2586-%25D9%2584%25D9%2584%25D8%25B5%25D9%2586%25D8%25A7%25D8%25AF%25D9%258A%25D9%2582 , accessed August 6, 2013.

[24] See Wala' Na`mat Allah, Muhammad Hamdi, Muhammad Yusif Wahba Amin, "Constituent [Assembly]: We Reject the Text on the Zaka Clause in the Constitution," *al-Watan*, November 13, 2012, accessed November 13, 2012

Less convinced that they would win at the ballot box, salafi leaders tended to be more demanding on the text. But they also contented themselves with the assurance that Islamists of various stripes would play a significant role in drafting any implementing legislation. A widely circulated video during the constitutional debate revealed a prominent Salafi leader, Yasir Burhami, justifying the constitution to his followers by pointing to its Islamizing potential.[25] Shocked opponents inclined to see the 2012 constitution as an Islamist Trojan horse felt they had a smoking gun. Whether or not they did, the video showed something else as well: a prominent Salafi leader forced to sell his compromises to followers who had before them a document that only had a few clauses with any obvious Islamic content.

In the end a series of odd compromises resulted. On one issue—the provisions for women's rights carried over from Article 11 of the 1971 constitution—the drafters confronted the unbridgeable positions by simply removing both parts of the compromise arrived at during the earlier drafting process. Instead of addressing the issue with a messy and ambiguous compromise, they left the issue for the post-constitutional political process. (They attempted to placate women's rights activists only by sticing a general commitment to gender equality in the preamble.) Defenders of women's rights and defenders of the shari`a cancelled each other out in effect and the struggle was moved to the normal legislative and political arena.

A second area of controversy focused on provisions for religious freedom. Some Islamists in particular were worried about sanctioning heterodox forms of Islam or religions that some more conservative members would not recognize as legitimate at all (such as Bahai'ism). An absolute freedom of individual conscience would be legally difficult to codify in a country in which matters of personal status are governed by religious community—the effect of the Egyptian legal order (supported by religious leaders of almost all orientations) is to require all Egyptians to be members of one of a group of recognized religious communities, not to allow each individual to designate his or her own personalized set of beliefs and practices. Some Christian religious leaders demanded that some recognition be given to their right to be governed in accordance with their own law of personal status—a principle nobody opposed--but conservatives and some Islamists were wary about opening the door too widely. Hoping to bring along skeptics inside and outside the country, the draft offered stronger protection to specific groups than it did to the principle of religious freedom. The end result was to give recognition to Christianity and Judaism as "heavenly" religions alongside Islam—with the strange effect of according Egyptian Jews constitutional protection a half century after most of them left (or fled) the country.

What of Article 2 and the commitment to the Islamic shari`a more generally? The outcome there was particularly complex, thought it was not clear what the changes meant.

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[25] "Salafi Leader Reveals Plot to Oust Azhar's Grand Imam," english.alarabiya.net, December 25, 2011, http://english.alarabiya.net/articles/2012/12/25/256924.html. The full lecture can be viewed at www.youtube.com/watch?v=_xzsVgwG9-o. An edited excerpt of the segment in question can be viewed at www.youtube.com/watch?v=tGbOM_4TJh4.

Many non-Islamists were content with Article 2 as it had been interpreted but were nervous about any change in wording that might place the article's vague promises in Islamist hands. While a few sought to water down the wording, the majority seemed to accept it but insisted that the interpretation of Islamic legal principles be left to the country's Supreme Constitutional Court or perhaps entrusted to al-Azhar, the chief seat of Islamic learning, whose leader non-Islamists regarded as leaning toward liberal interpretations.

Salafis, however, grew increasingly demanding, arguing that Article 2 had delivered on none of its promise. Some wished to ratchet up Egypt's constitutional commitment to Islam still further by inserting the word *ahkam* (rulings) before making reference to the shari'a so that the constitution would make the rulings of the Islamic shari'a—a far more specific and exacting standards than the current "principles" of the Islamic shari'a—the chief source of legislation. Were such a phrase adopted, it would pack a potentially serious constitutional punch: it would make it difficult to avoid a whole host of specific shari'a-based rules. And salafi leaders were explicit in their reasoning: the current wording was too vague to be enforceable.

In the end, all parties seemed to get what they wanted—though some immediately drew back from the compromise when they saw how it might work. Non-Islamists got Article 2 kept intact. A new article was added requiring that al-Azhar be consulted in matters of Islamic law and another one (Article 212) was added defining the principles of Islamic law in terms of traditional Sunni jurisprudence. The Brotherhood got a constitution that seemed to defer most matters to the political process; non-Islamists got Islamic law placed in hands they trusted; and salafis got some role for al-Azhar, an institution they did not trust but still saw as superior to Constitutional Court judges with no training in Islamic law.[26]

But the compromise, while adopted, proved problematic. Non-Islamists outside of the bargaining room came to fear that they had taken a step toward theocracy—not only was a religious institution empowered, but the provisions defining Islamic law, though difficult to understand for non-specialists, seemed potentially far more detailed than they would have wished. The Brotherhood found that al-Azhar took its role seriously, inserting itself into debates that the Brotherhood saw as a parliamentary prerogative. Salafis had to content themselves with a document that was not all that visibly Islamic and that would only move things in what they saw as an appropriate legal direction if al-Azhar became friendlier to salafi approaches (the existing leadership was hostile).

The 2014 Constitution

On July 3, 2013, the Egyptian military stepped in after mass street demonstrations and dismissed Muhammad Morsi, the first freely elected Egyptian president; a few days later the upper house of the Egyptian parliament was disbanded (the lower

[26] For more on this compromise and its meaning, see Gianluca Parolin, "(Re)Arrangement of State/Islam Relations in Egypt's Constitutional Transition," NYU School of Law, Public Law Research Paper No. 13-15, May 2013; Clark Lombardi and Nathan J. Brown, "Islam in Egypt's New Constitution," *Foreign Policy*, December 13, 2012; and Zaid al-Ali and Nathan J. Brown, "Egypt's Constitution Swings into Action," *Foreign Policy*, March 27, 2013.

house had earlier been disbanded by court order). Oddly, however, despite the thoroughness with which they overturned the results of the ballot box, the generals merely suspended the 2012 constitution. A quickly issued provisional "constitutional declaration" reproduced some (but not all) of its clauses on Islamic law. Even the language of Article 219 was retained in a clear attempt to keep the largest salafi political party on board.

But for the long term, the post-coup leaders promised only a tightly-supervised process by which the 2012 constitution would be amended and then restored. The compromises of 2012 had come unraveled but it was not clear if new compromises could be struck. With the Brotherhood now shut out of the process—and with it much less certain of its electoral standing after a precipitous loss in public support after it won the presidency—it was not even clear who would be trying to rewrite the text and what the goals of the various parties would be.

In the end, a group of senior judges was appointed to draft a set of constitutional amendments to the 2012 constitution; these proposals were then handed over to the appointed committee of fifty representatives of various state bodies, political parties, officially-chartered unions and associations, civil society groups, and intellectuals. Marked by a determination to root out the effects of the brief period of Brotherhood rule, the committee of fifty went over every clause of the 2012 constitution and offered a series of amendments so extensive in number that they virtually amounted to a wholly new document; their proposals were presented to Egyptian voters in January 2014 in a referendum that bore more of a resemblance to the ritualistic plebiscites of an earlier era than a wide-ranging and inclusive national debate.

But while the drafters of the 2014 document took aim at liquidating Islamist provisions, the actual changes they made were slight. Article 2 was retained intact; the constitutional role for al-Azhar was retained but the requirement that it be consulted in matters of Islamic shari`a was dropped. (The political effect of this was likely marginal: it might not be constitutionally necessary to consult al-Azhar but it would be politically very difficult to ignore the institution, especially as it consolidated its hold over other parts of the Egyptian religious establishment). Article 219 was dropped—and language was inserted into the preamble emphasizing the jurisprudence of the country's Supreme Constitutional Court on Article 2—but it was never clear that Article 219 would have led to any real changes in the way that the Islamic shari`a informed legislation (indeed, in the Court's one shari`a-related decision issued under the 2012 constitution, its approach was unchanged and it made no reference whatsoever to Article 219). Gender equality was moved back from the preamble to the main text (and the qualification in the 1971 constitution that it be enforced with the bounds of the rulings of the Islamic shari`a) was dropped. Religious freedom provisions were strengthened for existing recognized religions, but individual freedom of conscience received only a quick nod (and with most freedoms restricted to specified religion likely had little real protection).

No Going Backwards (or Forwards): A Cap on Islamic Inflation (and Deflation)

Thus the period of Islamist ascendancy brought at most mild furtherance of Islamic inflation (and sometimes not even that). When Islamists were evicted from powering Egypt in 2013, there was only limited deflation. Rhetoric and even vitriol escalated but textual changes were not large. Process more than outcome was affected. Islamists were no longer likely to be satisfied either with vague promises or with majoritarian politics; non-Islamists were less likely to be trustful or amenable to compromise and indeed had begun to educate themselves on the implications of apparently subtle changes in wording. With the expectation that constitutions would actually mean something and that public participation was a necessary part of writing them, constitution writing was become more difficult.

Even in calmer Tunisia, the more liberal approach of al-Nahda was met with widespread opposition just as the drafting process was near completion. Again, there was growing mistrust on all sides regarding rival's willingness to play either the constitutional or the electoral game faithfully and fairly, and the result was seriously destabilizing and briefly threatened the constitutional process as a whole.

Egypt and Tunisia are currently in the midst of regime change of uncertain type. And that explains the sharply different shape of constitution drafting. In a sense, society is far more democratic but the political system has changed less and is still very much in flux.

Democratic elements have very weak institutional expression in both countries. But democratic—and pluralist—politics has been born. Egyptians organize, demonstrate, complain, pressure, and argue. After 2011, it was in the interest of Islamist movements—with their large numbers—to ensure democratic practices—especially majoritarian ones—took strong institutional roots. That would allow them to play politics on a field that favored them. They did not then feel the need to have their preferences on the Islamic shari'a or their conservative social values written into the text; they need only for normal politics to operate in a democratic manner.

The post-2011 Arab cases were less anomalous than might meet the eye. Dominant political forces with an optimistic view that the political process unrestrained by constitutional text will often be quite content with "thin" constitutions that do not delve into contentious issues in much detail. Minorities fearful that the majority will write its will into a constitution often feel compelled to accept such documents knowing that if the constitution contains specifics, it may be at their expense. Hanna Lerner, who has examined this phenomenon in some detail, shows us as well that such choices are not politically neutral; "thin" constitutions are often a bit thicker than they seem because of the ways that they enable politics to operate.[27]

[27] Lerner, *Making Constitutions in Deeply Divided Societies*.

And thus we come to the central irony: in the Arab world today, the rising centrality of Islamist movements (as governing parties and as entrenched opposition) ushered Islam partially out of the constitutional arena and led it to descend to the level of everyday politics.