

# A TALE OF THREE CONSTITUTIONS: COMMON DRIVES AND DIVERSE OUTCOMES IN POST-2010 ARAB LEGAL POLITICS

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## I. INTRODUCTION

At the beginning of 2011, mounting frustration with the non-democratic and cronyistic tendencies of many Arab political systems led to a period of popular mobilization against many regimes. This was especially true for those with predominantly military leadership. In swift succession and with varying degrees of violence, the citizens of Tunisia,<sup>1</sup> Egypt,<sup>2</sup> Yemen,<sup>3</sup> and Libya<sup>4</sup> suddenly and unprecedentedly ousted longstanding autocrats and were faced with challenges of political reconstruction. Other Arab polities with less authoritarian forms of governance, such as the ruling monarchies of Jordan and Morocco, looked around their region and took rapid measures to stave off broad challenges to their own rule.<sup>5</sup>

Initial hopes in 2011 for rapid Arab democratization—generally inflated—have mostly been dashed. Yet, much did change in the aftermath of the first part of 2011, including in legal politics. Throughout the Arab world, one set of responses to the outbreak of political participation and potential democratization of early 2011 centered on law. Post-colonial Arab political systems have generally lacked formal checks and balances on rulers, including a weak—often non-existent—system of judicial review.<sup>6</sup> With the political shifts of 2011, the use of law to

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1. *See generally Tunisia-Security*, MIDDLE E. REP., May 19, 2011.

2. *See generally* ALAA AL ASWANI, ON THE STATE OF EGYPT: WHAT MADE THE REVOLUTION INEVITABLE (Jonathan Wright trans., 2011).

3. *See generally* STEPHEN W. DAY, REGIONALISM AND REBELLION IN YEMEN (2012).

4. *See generally* Stephen Zunes, *Lessons and False Lessons from Libya*, 25 PEACE REV. 590 (2013).

5. *See Jordan-Politics*, MIDDLE E. REP., July 4, 2011 (discussing the rapid political changes taking place in Jordan in order to avoid a revolt). *See generally Morocco Politics: Citizen King*, ECON. INTELLIGENCE UNIT: COUNTRY VIEWSWIRE, June 20, 2011.

6. Egypt is the major exception to this general rule and has had an often robust recent history of judicial review. At the same time, the decade or so prior to 2011 saw a great deal of successful efforts by the Mubarak regime to subordinate Egypt's Supreme Constitutional Court to the political system. *See* TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS AND ECONOMIC DEVELOPMENT IN EGYPT 177, 217–18 (2007) (detailing Egypt's

legitimate and constrain centralized political abuse became a major focal point of activism and aspiration.

Unsurprisingly, a good bit of this focus highlighted constitutionalism. In countries that had overthrown their governments, like Tunisia and Egypt, constitutions had the potential to crystallize both central principles and institutions and to allow the country to move forward in a more representative and democratic way. Where centralized governments remained in place, like Morocco, constitutions provided a mechanism to signal and perhaps even establish accountability to the popular political concerns raised throughout the Arab world. In all three of these countries—Tunisia, Egypt, and Morocco—new constitutions have been adopted.

The comparative study of constitutions and constitution-drafting is a growing, though young field. Despite this, comparative constitutionalism often focuses on either texts and subsequent high court jurisprudence or somewhat narrow political institutional analysis, which is more typical within the field of political science.<sup>7</sup> Moreover, democracies in general and the models of Western Europe, the United States, and modern South Africa in particular tend to be the normative reference points for constitutional processes and norms.<sup>8</sup> The legal politics of non-democratic constitutionalism have been relatively neglected, particularly given that it is easy to wonder whether constitutions in authoritarian settings that lack a robust judicial review serve any real purpose.<sup>9</sup>

This article begins with the contrary assumption that non-Western and non-democratic constitutions and constitutional processes matter for a variety of reasons. One recent study argued that authoritarian constitutions are important in part for their diverse possible functions as “operating manuals, billboards, blueprints and window dressing.”<sup>10</sup> More generally, constitutions can have operational, publicity, aspirational, and propagandistic value for governments, whatever their level of political accountability. Constitutions in non-democratic political systems present interesting political opportunities and challenges for governments that limit both the extent of popular involvement in the construction of the political system and subsequent autonomous judicial review in their maintenance. Indeed, constitutional processes outside of the West may underscore

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robust history of judicial review, focusing on the recent influence of the Mubarak regime).

7. *But see* COMPARATIVE CONSTITUTIONS PROJECT, <http://comparativeconstitutionsproject.org> (last visited Sep. 12, 2014) (providing a repository for international constitutions and an indexed and searchable matrix of constitutional provisions by topic for ease of comparison).

8. *But see generally* CONSTITUTIONS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Alberto Simpser eds., 2014) (discussing the approach to constitutional processes and norms taken by authoritarian regimes around the world); CONSTITUTION-WRITING, RELIGION AND DEMOCRACY (Asli Bali & Hanna Lerner eds., forthcoming 2014).

9. *See* Ginsburg & Simpser, *Introduction* to CONSTITUTIONS IN AUTHORITARIAN REGIMES, *supra* note 8, at 1–15 (discussing the relatively ineffective nature of constitutions in authoritarian regimes without robust judicial review). *See generally* NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD (2002) [hereinafter BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD].

10. Ginsburg & Simpser, *supra* note 9, at 5.

the varied purposes of constitutions, as well as the possible non-democratic aspects of documents meant in part to foster political stability.

With the above in mind, this article compares basic elements of the Tunisian, Egyptian, and Moroccan constitutional processes and texts in order to generate hypotheses useful for broader comparative analysis. The discussion below addresses two main issues: (1) what were the major political and religious issues in these three recent Arab constitutional processes, and how were they resolved; and (2) considering constitutional process and text together in the cases, what does a comparative discussion of these three constitutions tell us relevant to the emerging literature on constitutions in non-Western contexts?

The article proceeds with sections devoted to each of the above questions. The specifics of each Arab country and their respective constitutional processes argue for some caution regarding broad comparative conclusions. Nonetheless, one major argument emerges from looking in tandem at Tunisian, Egyptian, and Moroccan constitutional drafting. Namely, the more salience at the regional and, particularly, at the global levels a constitutional process has, the greater the strong tensions around Islam and human rights complicate—and perhaps militate against—a broadly inclusive drafting process. This article develops this argument with reference to each of the three countries.

## II. THREE YEARS—(MORE THAN) THREE ARAB CONSTITUTIONS

In 2011, after a wave of popular discontent with a lack of both socioeconomic progress and political inclusion, Arab societies were ready for new constitutional systems that might better represent their values and institutionalize improvements in governance. The three constitutions discussed here fit into two basic patterns. Those of Egypt and Tunisia emerged in the aftermath of regime overthrows and, at least initially, were characterized by a broad popular interest in a foundational document drafted through an inclusive and participatory process.<sup>11</sup> That of Morocco, on the other hand, was a top-down effort by a ruling royal regime to add elements of political pluralism intended to deter broad segments of the public from trying to bring the government down.<sup>12</sup> Within these two basic categories, the three constitutional processes diverged further.

Each Arab country's process varied in speed and extent of participation. Tunisia's was the longest and slowest process, but also perhaps the most participatory.<sup>13</sup> Egypt's was the messiest, with two different constitutions emerging

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11. See David D. Kirkpatrick & Carlotta Gall, *Arab Neighbors Take Split Paths in Constitutions*, INT'L N.Y. TIMES (Jan. 14, 2014), <http://nyti.ms/19tbcNv> (comparing Egypt and Tunisia's post-revolt constitutional approaches).

12. See Aida Alami, *Morocco's Democratic Changes Fail to Appease All*, INT'L N.Y. TIMES (July 20, 2011), <http://www.nytimes.com/2011/07/21/world/africa/21iht-M21-MOR OCCO-REFERENDUM.html> (describing the Moroccan monarchy's efforts to get the constitution approved).

13. See *It Still Sometimes Feels Like Spring*, THE ECONOMIST, (Jan. 18, 2014), <http://www.economist.com/news/middle-east-and-africa/21594356-despite-wobbles-tunisia-still->

under different governments in 2012 and 2013.<sup>14</sup> Morocco's was both the quickest and most straightforward.<sup>15</sup>

Despite these differences, the three constitutional processes responded to four similar concerns. These four concerns were evident before the events of 2011 and emerged as central with the wave of uprisings. First, after the level of discontent with lack of leadership accountability, new constitutions could, at the very least, decentralize power away from a strong executive. This could occur as part of building a new system of government, like in Egypt and Tunisia, or the updating of an extant one, like in Morocco.<sup>16</sup> Second, and more ambitiously, a constitution might form the institutional and normative bedrock of an entirely new, more democratic, sociopolitical order based on civil and political rights in line with the idealization of a constitution as a grounding law above any particular set of leaders.<sup>17</sup> Third, new Arab constitutions could reflect the fact that many, perhaps most, citizens wish their governments to infuse their society with more open support for Islam, particularly in the former military republics that repressed political assertions of the majority religion.<sup>18</sup> Fourth, and possibly at odds with the third point, constitutions could improve rights for marginalized social groups, including women and ethnic or religious minorities.<sup>19</sup>

While the result of constitutionalism in these three cases differed with respect to each of these issues, general patterns nonetheless emerge. On the first and second issues, decentralization was common to all documents, but not of a sort that really precluded the reassertion or continuity of a strong central and largely unaccountable leader<sup>20</sup>—dashing more ambitious hopes around the more foundational nature of constitutions—with the possible exception of Tunisia.<sup>21</sup> On

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leads-way-towards-democracy-among-arabs-it (characterizing Egypt's constitution as hastily drafted and applauding the delayed Tunisian effort).

14. See *Comparing Egypt's Constitutions*, CARNEGIE ENDOWMENT FOR INT'L PEACE, <http://carnegieendowment.org/files/Comparing-Egypt-s-Constitutions.pdf> (last visited Sept. 15, 2014) (providing a table that compares some of the most important articles as quoted from English translations of the 2012 and 2013 constitutions).

15. See Alami, *supra* note 12 (summarizing the swift events that occurred in 2011, from a March 9th speech by King Mohammed VI agreeing to constitutional changes to a June 17th draft and July 1st referendum).

16. See *infra* notes 73–74 and accompanying text for a discussion of this in the Egyptian context and the extent to which it is conflated with the second concern. See also *infra* notes 31–35 for these concerns in the Tunisian context and notes 128 and 132 for these concerns in the Moroccan context.

17. See *infra* notes 33–35 and 130 and accompanying text discussing nominal goals in this regard.

18. See *infra* notes 43–46 and accompanying text which discuss commonalities of the issues Islam presents in these constitutional processes.

19. See *infra* note 42 and accompanying text on the tension between the centrality of Islam and the rights of marginalized groups.

20. See *infra* notes 117–118 and 123 and accompanying text, which summarizes how Egypt in particular came to a constitutional result that does not preclude such authoritarianism from returning.

21. See *infra* notes 186–189 and accompanying text and *infra* Part II.A generally for a discussion of Tunisia's relatively positive outcome.

the third and fourth issues, relatively loud noise but relatively little actual change took place in the end, either in the status of Islam or the expansion of rights.<sup>22</sup> Despite that, both Morocco and Tunisia have made some noteworthy shifts in their documents in the direction of women's and minority religious rights.<sup>23</sup>

A detailed, though hardly exhaustive, discussion of each constitutional process follows, with at least one general broader comparative implication embedded in each case discussion. A more general section comparing all three cases follows before the article concludes with a brief review.

### *A. The Case of Tunisia*

In 2011, Tunisia birthed a wave of anti-ruling-elite uprisings experienced in much of the Arab world and witnessed a three-year constitutional process. This process resulted in a constitution that provided more prospects for a new, less authoritarian political system alongside relatively constant provisions for human rights and religion. The shift to more politically representative constitutional institutions has been hailed as possibly the best model forward for a democratic Arab country.<sup>24</sup> Nonetheless, the constitutional process was not without fault lines and bumps.

The smoothest, most democratically promising aspect of Tunisia's constitutional process was the general, rather consistent commitment of major political actors to establishing politically accountable institutions. Several analysts familiar with the process have suggested that many of these central actors had been speaking with one another in advance of the overthrow of Zine Ben Ali's regime to come up with compromises and shared ground around a possibly more representative government in the future.<sup>25</sup>

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22. See *infra* notes 62–64, 107–114, and 159–165 and accompanying text for a discussion of the shortcomings of Tunisia, Egypt, and Morocco in this regard.

23. See Mohamed-Salah Omri, *Tunisia's New Constitution: How Compromise Won Out Over Conflict*, THINK AFR. PRESS (Feb. 7, 2014, 3:07 PM), <http://thinkafricapress.com/tunisia/new-constitution-success-story> (explaining that Tunisia's constitution provides freedom for religious minorities and extends the rights of women to parity in elected office and equality in work opportunity); Jennifer Rubin, *A King, a Speech, and a New Constitution for Morocco*, WASH. POST, (June 20, 2011, 10:15 AM), [http://www.washingtonpost.com/blogs/right-turn/post/a-king-a-speech-and-a-new-constitution-for-morocco/2011/03/29/AGSximcH\\_blog.html](http://www.washingtonpost.com/blogs/right-turn/post/a-king-a-speech-and-a-new-constitution-for-morocco/2011/03/29/AGSximcH_blog.html) (describing how the new Moroccan constitution concretizes protections of minorities and women, as well as guarantees the freedom of religious practice by providing for the preeminence of international covenants over national legislation and gender equality in civil rights).

24. See James Fromson, *Tunisia's Transition*, INT'L INST. FOR STRATEGIC STUDIES (Feb. 27, 2014), <http://www.iiss.org/en/iiss%20voices/blogsections/iiss-voices-2014-b4d9/february-72f2/tunisia-transition-d9e8> (providing a summary of an event in Washington D.C. in 2014 at the International Institute for Strategic Studies on Tunisia's constitution, in which Tunisian experts discussed the democratic potential of the new political system); see also Nadia Marzouki, *Dancing by the Cliff: Constitution-Writing in Tunisia 2011–2014*, in CONSTITUTION-WRITING, RELIGION AND DEMOCRACY, *supra* note 8.

25. See Marzouki, *supra* note 24; see also Anthony Shadid, *Islamists' Ideas on Faith and Democracy Face Test in Tunisia*, N.Y. TIMES (Feb. 17, 2012), [http://www.nytimes.com/2012/02/18/world/africa/tunisia-islamists-test-ideas-decades-in-the-making.html?\\_r=0](http://www.nytimes.com/2012/02/18/world/africa/tunisia-islamists-test-ideas-decades-in-the-making.html?_r=0) (describing the

As in some other Arab countries, an Islamist party, an-Nahda, emerged in the aftermath of Tunisia's uprising as the dominant political organization.<sup>26</sup> Yet its victory was not large enough to justify a government limited to Islamists. Instead, by the end of 2011, a Tunisian unity government formed based on a troika of an-Nahda and two smaller non-Islamist parties.<sup>27</sup> This system of a caretaker government that represents a range of Tunisian political forces and supervises the establishment of a more long-term constitutional order meant that divisive issues had to be resolved through compromise.<sup>28</sup>

With the ground laid for a consensus-oriented caretaker government, a process of constitutional and broader political evolution took place over the next few years. One observer describes it as being like a car skidding away from the center of the road but still managing to get to its destination intact.<sup>29</sup> The main objective, from which the process never swerved entirely, was twofold.<sup>30</sup> The first aim was the establishment of a long-term constitutional electoral government balanced between legislative and executive powers.<sup>31</sup> The second aim was the provision of a constitutional court with actual judicial review for the first time in Tunisia's political history.<sup>32</sup> These main institutions were buttressed with ancillary ones to oversee elections,<sup>33</sup> supervise the country's human rights,<sup>34</sup> and monitor corruption and good governance issues.<sup>35</sup> This constitutional promise of an elected and accountable political system is no small feat and eluded the other constitutional processes under review here.<sup>36</sup>

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experience of Said Ferjani, a Tunisian man who advocated bringing democracy to Tunisia before the overthrow of Zine Ben Ali's regime); WORKSHOP REPORT, <http://www.uni-bielefeld.de/ZIF/FG/2014Balancing/events/06-04-Bali-report.pdf> (last visited Oct. 3, 2014) (detailing a Workshop on Constitution-Writing, Religion, and Human Rights on June 4, 2014, at the Bielefeld University in Germany, where the purpose was to advance the understanding of how constitutional drafters address the goals of religious conflict mitigation and human rights protection).

26. See JOCELYN CESARI, *THE ISLAMIC AWAKENING: RELIGION, DEMOCRACY AND MODERNITY* 159 (2014) (stating that an-Nahda won 42% of the vote and took ninety-one seats in the Constituent Assembly in the October 2011 elections).

27. *Id.* at 243 (describing an-Nahda's ruling coalition with two secular parties, the Congress for the Republic (CPR) and Ettakatol).

28. See Omri, *supra* note 23 (describing divisive issues like religion, minority rights, and the position of the judiciary and how they were resolved through compromise in the constitution).

29. See Marzouki, *supra* note 24.

30. See Omri, *supra* note 23 (describing the basic elements of the new government and the relevant articles in the new constitution).

31. *Id.*

32. *Id.*

33. DUSTUR AL-JUMHURIYYAH AL-TUNISIYYAH [CONSTITUTION] Jan. 26, 2014, art. 126 (Tunis.), *translated in English Translation of Tunisian Constitution: Final Edition*, [http://www.jasmine-foundation.org/doc/unofficial\\_english\\_translation\\_of\\_tunisian\\_constitution\\_final\\_ed.pdf](http://www.jasmine-foundation.org/doc/unofficial_english_translation_of_tunisian_constitution_final_ed.pdf) (last visited Oct. 26, 2014) (unofficial). All subsequent citations to this constitution are to this translation.

34. *Id.* art. 128.

35. *Id.* art. 130.

36. See Fromson, *supra* note 24 (stating that Tunisia is a unique case in the Middle East).

Tunisian politics that were generally outside of the governing party troika included disruptions in the form of escalated political violence in 2012 and 2013.<sup>37</sup> In fact, the troika parties themselves, despite their favorable structural configuration for completing work on the constitution, had problems.<sup>38</sup> But in the end, the troika parties were pushed hard towards completion by broader groups in society concerned with growing political violence.<sup>39</sup>

Moreover, the issue of the role of religion in the constitution proved divisive within the troika, as it was in the broader population.<sup>40</sup> Despite the experience in compromise of Tunisia's political forces, the role of Islam and human rights emerged as inflammatory issues in the constitutional process, as they did in other Arab countries with a relatively inclusive process.<sup>41</sup> If the question of the status of Islam and the rights of marginalized groups, most notably women, ultimately resolved itself, there was a lot of controversy on the way to this resolution.<sup>42</sup>

Each Arab country has a different background with respect to the official political status of Islam. However, several generalities apply to most countries. First, aside from family law, Islamic law (*shari'a*) was increasingly marginalized as an actual source for legislation or dispute resolution in most spheres of colonial and post-colonial Arab society due to Western European economic and military advancement over the Middle East by the nineteenth century.<sup>43</sup> Backlash to this earlier banishment of *shari'a* from most practical areas of Arab legislation has facilitated the inclusion of broad clauses establishing Islam as a state religion or *shari'a* as a significant source of legislation in many Arab constitutions in the past

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37. See CESARI, *supra* note 26, at 159–60, 193 (referring to street violence and assassinations as a response to an-Nahda's government, specifically the assassination of two secular political opponents in 2013); Omri, *supra* note 23 (mentioning political assassinations, specifically that of Chokri Belaid in 2013, and the presence of mass street protests).

38. See, e.g., Omri, *supra* note 23 (discussing how the parties became bogged down in electoral politics while writing the constitution, but were directed back on track by civil society mediators in the aftermath of assassinations and street violence).

39. *Id.*

40. See CESARI, *supra* note 26, at 243 (“[T]he extent to which Islam will be incorporated into the future constitution has generated heated discussions”); Omri, *supra* note 23 (detailing disagreements between two members of Tunisia's National Constituent Assembly, Rahoui and Ellouz, regarding Islam's place in the new constitution).

41. See CESARI, *supra* note 26, at 44–45, 247 (discussing the degree of inclusion of Islam and how rights granted to individuals are the most challenging aspect of the current transition); Omri, *supra* note 23 (describing how disagreements over Islam's place in the constitution brought the constitution-writing process to a deadlock until a compromise was reached).

42. See CESARI, *supra* note 26, at 245 (stating that political initiatives to improve the legal protection of minorities have been very marginal, if not nonexistent, due to the large population of Arab Muslims in Tunisia); Omri, *supra* note 23 (noting the presence of controversy over the status of Islam in the constitution and its eventual resolution through compromise).

43. See WAEL B. HALLAQ, *THE IMPOSSIBLE STATE: ISLAM, POLITICS AND MODERNITY'S MORAL PREDICAMENT*, at xi (2014) [hereinafter HALLAQ, *THE IMPOSSIBLE STATE*] (asserting that a modern state cannot be founded entirely on a specific religio-legal system like *shari'a*); WAEL B. HALLAQ, *SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS* 396–499 (2009) (discussing hegemonic modernity in North Africa and modernizing the law in the age of nation-states).

100 years.<sup>44</sup>

A second generality is that the exile of *shari'a* from a central source of legislation, in conjunction with the turn of many post-colonial Arab political systems towards more explicit secular ruling ideologies, has helped Islamism grow as a political ideology available to many Muslim Arabs to articulate as they see fit. This particularly has been the case in certain Islamist activists' tendency to see aspects of the contemporary globalized Arab nation state as being in conflict with an idealized version of an Islamic polity.<sup>45</sup> Thus, the socioeconomic problems and generally centralizing authoritarian political tendencies of Arab states—perhaps excluding the oil-rich Arab Gulf monarchies—have had an easy and politically-mobilizing riposte over the past several decades in the oft-articulated phrase “Islam is the solution.”<sup>46</sup>

The above basic context applies in distinct ways to each case that experienced popular anti-regime mobilization in 2011, but across cases led to the strength of Islamist political parties and divisive tensions with regard to constitutional and other issues surrounding the official status of Islam and *shari'a*. Turning back to Tunisia, this meant that the years of political dialogue between Islamist and non-Islamist political activists and the general commitment of the different parties to the establishment of a genuinely democratic system did not stop the flaring up of the status of Islam as a difficult general and constitutional issue.<sup>47</sup>

This divisiveness—albeit prone to exaggeration in some Western sources<sup>48</sup>—

44. See Bali & Lerner, CONSTITUTION-WRITING, RELIGION AND DEMOCRACY, *supra* note 8; CESARI, *supra* note 26, at 243–44 (explaining that although an-Nahda did not want to include *shari'a* in the constitution, the constitution still establishes Islam as the religion of the state); 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?*, 28 AM. U. INT'L L. REV. 733, 734 (2013) (explaining that especially after the Arab Spring of 2011, constitutions in Arab countries are more likely to include *shari'a*-as-source-of-legislation (SSL) provisions, which essentially declare Islamic norms to be a source of legislation).

45. See Lombardi, *supra* note 44, at 772 (“To make sense of this, it is important to remember that Muslims in the modern world disagree deeply about fundamental issues . . . . In almost every majority Muslim country, illiberal Islamic voices contest fiercely with liberal ones.”).

46. See *Profile: Egypt's Muslim Brotherhood*, BBC NEWS (Dec. 25, 2013), <http://www.bbc.com/news/world-middle-east-12313405> (explaining that the Muslim Brotherhood aims to create a state ruled by Islamic law, with the slogan “Islam is the solution” being used worldwide); see also HALLAQ, THE IMPOSSIBLE STATE, *supra* note 43, at xi (quoting a statement from the Muslim Brotherhood declaring that the modern nation-state does not contradict with the implementation of Islamic *shari'a*); Shadid, *supra* note 25 (discussing the ascent of the Muslim Brotherhood).

47. See Shadid, *supra* note 25 (stating that faith and democracy are often seen as irreconcilable among radical Islamists and detailing disagreements between two members of Tunisia's National Constituent Assembly regarding Islam's place in the new constitution).

48. E.g., NADER HASHEMI, ISLAM, SECULARISM, AND LIBERAL DEMOCRACY: TOWARD A DEMOCRATIC THEORY FOR MUSLIM SOCIETIES 133–70 (2009) (discussing the crisis resulting from secularism in Muslim societies and further arguing that a development of an indigenous theory of Islamic secularism will increase the prospects for liberal democracy in Muslim societies); see also ANDREW MARCH, ISLAM AND LIBERAL CITIZENSHIP: THE SEARCH FOR AN OVERLAPPING CONSENSUS (2009) (providing an engaging discussion highlighting possible



is particularly noteworthy in the peculiar history of Rachid Ghannouchi, Tunisia's dominant political Islamist. Ghannouchi found himself living in exile in Western Europe for the decades of Ben Ali's rule until the January 2011 ouster.<sup>49</sup> During this time, he established a reputation for being intellectually committed to a particularly inclusive version of Islamist politics.<sup>50</sup> This version endorsed pluralist and democratic ideals largely as expounded in Europe and North America.<sup>51</sup> As already implied, political discussions around Tunisia's future among Ghannouchi, his party, an-Nahda, and more secularist<sup>52</sup> political activists had been ongoing prior to 2011.<sup>53</sup>

Tunisia was peculiar in the degree to which the country had experienced significant top-down secularization under Habib Bourguiba, its French-trained lawyer, but still authoritarian ruler.<sup>54</sup> Bourguiba was famous for being the sole leader of a post-colonial Arab Muslim society who provided liberal divorce procedures for women, prohibited polygyny, and set an example that Muslims were not necessarily meant to fast during the holy month of Ramadan when he drank juice during a televised speech.<sup>55</sup> Given these early secularizing decisions

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tensions between Islam and secular rights in democracy and then seeking to resolve them).

49. See AZZAM TAMIMI, *A DEMOCRAT WITHIN ISLAMISM* 71–72, 103 (John L. Esposito ed., 2001) (describing Ghannouchi's exile and stating Ghannouchi's belief that by assimilating the Western democratic system, Islam can preserve the positive aspects of democracy).

50. See Shadid, *supra* note 25 (stating that Ghannouchi argued that notions of elections and majority rule were universal and not in conflict with Islam).

51. See *id.* (describing the democratic influences that impacted Ghannouchi during his exile in Western Europe); TAMIMI, *supra* note 49, at 81–83 (suggesting that Ghannouchi attempted to understand the Western concept of liberal democracy before suggesting that an Islamic model was possible, looking at American, Swiss, and English, as well as Western liberal and Western Marxist conceptions of political pluralism); see also *Literary Report of the Second Annual Conference on Islam and Democracy: Democratic Transformation in the Arab World: Tunisia as a Model*, CTR. FOR THE STUDY OF ISLAM AND DEMOCRACY, <http://www.csid-tunisia.org/en/index.php/annual-conferences/second-annual-conference/literary-report> (last visited Sept. 15, 2014) (summarizing Ghannouchi's own statements at a March 2012 lecture in Tunis).

52. Note that for expediency in this article, the meanings of secularism are not discussed. The question of the diverse meanings of Islamism and secularism is bracketed for the purposes of a broader comparative overview of recent Arab constitutionalism. Nonetheless, this article recognizes that reifying simple distinctions between Islamist and secular politics is problematic and potentially misleading. See generally CESARI, *supra* note 26 (continuing the discussion on the meaning of contemporary Islam).

53. See Shadid, *supra* note 25 (stating that Ghannouchi was an early proponent of an inclusive and tolerant Islamism, developing his thoughts in exile in the 1990s).

54. See DEREK HOPWOOD, *HABIB BOURGUIBA: THE TRAGEDY OF LONGEVITY* 25–26, 84–85 (1992) (explaining how Bourguiba got his certificate of law in France in 1927, did not distinguish where he ended and the state began, needed to control and influence everything that took place, and had no tolerance for his opposition).

55. *Id.* at 83–84 (describing Bourguiba's attempt to alter attitudes towards Ramadan, which he considered a wasted month, as well as his concern with the position of women, and his attack on fundamentals by abolishing polygamy and taking divorce into the courts); Shadid, *supra* note 25 (describing Bourguiba's public secularism).

and the decades of practical experience that followed them with relative gender and pluralist equity within a majority Muslim Arab society, the prospect for mutual understanding around religion among diverse political forces after Ben Ali's overthrow seemed high.

Yet, the gulf that emerged around the role of Islam in the constitution among members of the 2012 party troika demonstrated the perceived stakes for the political role of Islam, even in a country with a political elite that looked well-prepared to manage this issue. Part of this was due to the very speed with which Ben Ali's regime was overthrown. This accelerated the timetable for putting in place a new constitutional order beyond what many Tunisians expected. The main problem—perhaps amplified by Bourguiba's legacy—was the concern of Tunisian secularists that members of an-Nahda, or other political Islamists, would use their relative political influence to force a more robust constitutional status for Islam in the new constitution.<sup>56</sup> One leaked constitutional draft from early 2012, which may or may not have had an-Nahda support, called for *shari'a* to be the main source for legislation and for freedom of expression to be limited when such expression was disrespectful to the sacred.<sup>57</sup> Between this leaked document and other divisive discussions in the broader public sphere, the question of whether the new constitution should explicitly endorse *shari'a* threatened to undermine broader shared political purpose among the troika.<sup>58</sup>

As the deadlock among the troika continued regarding the religious status question, Tunisian society experienced broader polarization, culminating in the killing of a prominent member of the country's political elite, Chokri Belaid, on February 2, 2013.<sup>59</sup> In addition, a public dispute between an Islamist and non-Islamist member of Tunisia's interim legislature concerning the role of Islam led the more secular political figure to receive personal threats and charges that he was not a Muslim.<sup>60</sup> These events marked a turning point, after which many members of civil society pressed the deadlocked government members to lead the country forward with compromise.<sup>61</sup> Furthermore, an-Nahda's own leaders may have

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56. See CESARI, *supra* note 26, at 190 (explaining women's groups' concern about an-Nahda reinstating strict Islamic provisions in family law), 193 (detailing general uncertainty regarding the status of religious minorities and women), 252 (describing doubts about an-Nahda's willingness to move forward due to the slow drafting process).

57. Marzouki, *supra* note 24.

58. See Asma Ghribi, *The Problem with Tunisia's New Constitution*, FOREIGN POLICY (Jan. 9, 2014), [http://transitions.foreignpolicy.com/posts/2014/01/09/the\\_problem\\_with\\_tunisiass\\_new\\_constitution](http://transitions.foreignpolicy.com/posts/2014/01/09/the_problem_with_tunisiass_new_constitution) (discussing the political disputes surrounding the role of *shari'a* in the Tunisian constitutional process); Omri, *supra* note 23 (exploring several of the obstacles to the Tunisia constitutional process stemming from the debate over *shari'a*).

59. See Monica Marks & Kareem Fahim, *Tunisia Moves to Contain Fallout After Opposition Figure is Assassinated*, N.Y. TIMES (Feb. 6, 2013), [http://www.nytimes.com/2013/02/07/world/africa/chokri-belaid-tunisian-opposition-figure-is-killed.html?\\_r=1&](http://www.nytimes.com/2013/02/07/world/africa/chokri-belaid-tunisian-opposition-figure-is-killed.html?_r=1&) (describing the assassination of Chokri Belaid and resulting civil unrest).

60. See Ghribi, *supra* note 58 (addressing the dispute between Islamist parliamentary member Habib Ellouz and secularist member Mongi Rahoui).

61. See Omri, *supra* note 23 (discussing the compromise that arose out of the conflict surrounding the Tunisian constitutional process).

feared that less pluralist Islamist groups, including outside organizations like Al-Qaeda North Africa, might drive their country's agenda and undermine a stable political solution for the country that favored an-Nahda.

In any case, the members of the troika ultimately settled on a formulation with respect to Islam that maintained much of the status quo. Islam was declared the state religion in Article 1,<sup>62</sup> exactly as it had been in the 1959 Constitution.<sup>63</sup> Specific endorsements of *shari'a* were left out, again like the earlier constitution.<sup>64</sup> Ambiguity around the underlying meaning of constitutional establishment of religion allowed the different parties to cling to their diverse interpretations of what it meant for the Tunisian state to be Islamic.

In fact, the new constitution contains an important and innovative provision that demarcates Tunisia as more pluralistically tolerant in one respect than other Arab states. New Article 6 reads:

The State shall protect religion, guarantee freedom of belief and conscience and religious practices, and ensure the impartiality of mosques and places of worship away from partisan instrumentalisation. The State shall commit to spreading the values of moderation and tolerance, protecting sanctities and preventing attacks on them, just as it shall commit to preventing calls of *takfeer* [calling another Muslim an unbeliever] and incitement to hatred and violence and to confronting them.<sup>65</sup>

This new article embodies both the compromises within the Tunisian process and affirms the hopes that the new constitution might be innovative. On the one hand, the clause about “protecting sanctities” affirms the state's commitment to ensuring that Muslim holy sites and practices are protected.<sup>66</sup> On the other, the clause immediately following explicitly takes a stand against the use of religion to incite the marginalization of Tunisians whom express the sort of secularist views that led to the threats against the legislator in 2013.<sup>67</sup> This formal juridical stand against *takfeer* may well be difficult to enforce in practice, but goes explicitly against a trend whereby individuals, or even occasionally courts, have been able to

62. DUSTUR AL-JUMHURIYYAH AL-TUNISIYYAH [CONSTITUTION] Jan. 26, 2014, art. 126 (Tunis.).

63. DUSTUR AL-JUMHURIYYAH AL-TUNISIYYAH [CONSTITUTION] June 1, 1959, art. 1 (Tunis.), translated in *The Constitution of Tunisia*, 1959, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=188948](http://www.wipo.int/wipolex/en/text.jsp?file_id=188948) (last visited Oct. 26, 2014) (unofficial). All subsequent citations to this constitution are to this translation.

64. Compare DUSTUR AL-JUMHURIYYAH AL-TUNISIYYAH [CONSTITUTION] Jan. 26, 2014 (Tunis.), with DUSTUR AL-JUMHURIYYAH AL-TUNISIYYAH [CONSTITUTION] Jun. 1, 1959 (Tunis.) (illustrating that both constitutions lack a specific reference to *shari'a*).

65. DUSTUR AL-JUMHURIYYAH AL-TUNISIYYAH [CONSTITUTION] Jan. 26, 2014, art. 6 (Tunis.).

66. *Id.* (“The State shall commit to . . . protecting sanctities and preventing attacks on them . . .”).

67. *Id.* (“The State . . . shall commit to preventing calls of *takfeer* [calling another Muslim an unbeliever] and incitement to hatred and violence and to confronting them.”).

undermine the status of outspoken Middle Eastern Muslims.<sup>68</sup>

In short, Tunisia has emerged as the tentative success story of recent Arab constitutionalism. It enjoyed a process guided by diverse drafters whose organizations have histories of mutual engagement and a commitment to a more democratic political system. In this respect, Tunisia's constitutional construction may look like the sort of deliberative process many assume to be essential to, if not necessarily typical of, constitutional promulgation.<sup>69</sup> Yet the constitutional drafting process was nonetheless imperiled, making it clear that the resolution of political and religious status in a document acceptable to both the political elite and broader population was hardly inevitable.<sup>70</sup>

The question of what may have helped or hurt the highly contingent politics of Tunisia's constitutional drafting in comparative perspective will be addressed below. In the meantime, it is appropriate to assess the other major broad Arab constitutional reconfiguration that was taking place at the same time to the east of Tunisia.

### ***B. The Case of Egypt***

While Tunisia was the first Arab state to overthrow a long-standing oppressive regime and launch a new constitutional process, Egypt—the most populous country in the Arab world<sup>71</sup>—soon followed. Entering their own revolution, Egyptians bore both a strong leadership burden and very high domestic and global expectations for what their new political system should be.<sup>72</sup> Whether

68. See, e.g., Mona Abaza, *Civil Society and Islam in Egypt: The Case of Nasir Hamid Abu Zayd*, 2 J. OF ARABIC, ISLAMIC & MIDDLE E. STUD. 29 (1995) (detailing the prominent case of Nasr Hamid Abu Zayd, a prominent Egyptian theology professor whose Muslim status was revoked by the Cairo Court of Appeals because of his rationalist revisionist views); Adel Darwish, *Professor Nasr Hamed Abu Zaid: Modernist Islamic Philosopher Who Was Forced Into Exile by Fundamentalists*, THE INDEPENDENT (July 14, 2010), <http://www.independent.co.uk/news/obituaries/professor-nasr-hamed-abu-zaid-modernist-islamic-philosopher-who-was-forced-into-exile-by-fundamentalists-2025754.html>; Judith Miller, *New Tack for Islamic Militants: Imposing Divorce*, N.Y. TIMES (Dec. 28, 1996), <http://www.nytimes.com/1996/12/28/arts/new-tack-for-egypt-s-islamic-militants-imposing-divorce.html>. See generally REZA ASLAN, HOW TO WIN A COSMIC WAR: CONFRONTING RADICAL RELIGIONS 107 (2010).

69. Jon Elster has been one of the leading theorists connecting constitutionalism with political deliberation. See JON ELSTER, *Deliberation and Constitution Making*, in DELIBERATIVE DEMOCRACY 97 (Jon Elster ed., 1998) (exploring the idea of “deliberative democracy” in constitutional drafting). See generally Nathan J. Brown, *Reason, Interest, Rationality and Passion in Constitution Drafting*, 6 PERSP. ON POL. 675 (2008) (discussing theories of constitutionalism as rational with competing human motivations in the context of the Middle East).

70. See generally Marzouki, *supra* note 24; Omri, *supra* note 23; Lise Storm, *The Constitutional Process in Egypt and Tunisia*, E-INTERNATIONAL RELATIONS (Mar. 8, 2014), <http://www.e-ir.info/2014/03/08/the-constitutional-process-in-egypt-and-tunisia/> (discussing the contingent politics of Tunisian drafting).

71. *World Factbook: Country Comparisons, Population*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html?countryname=Egypt> (last updated July 2014).

72. U.S. President Barack Obama demonstrated such expectations when he stated that “this moment of volatility has to be turned into a moment of promise . . . [T]here must be reform—

the often self-asserted status that Egypt is the most prominent Arab country has helped or hurt its constitutional process remains to be seen. However, in the several years immediately following the overthrow of Egypt's longstanding military ruler, Hosni Mubarak, the country's inability to establish a new, constitutionally democratic system has proved to be a messy model of constitutionalism, whereas Tunisia's model has seemed to suggest hope.

The main problem that emerged in Egypt's constitutional process was the increasing and unchecked intensification of discord, and even open hostility, between Egyptian activists committed to a more specific role for Islam in their country's political system and those who were against this.<sup>73</sup> This broad cleavage was not the result of an inherent irreconcilability between anti-Mubarak Islamist and non-Islamist actors, who worked well together in 2011.<sup>74</sup> Rather, the political polarization took place in a complex context of many political actors seeking to deal with the still-entrenched remnants of a military "deep state."<sup>75</sup> These military-backed elites had neither relinquished power in Egypt nor stopped their longstanding pattern of gaining political traction by demonizing Islamist political actors. In short, as Nathan Brown argues, the outcomes of Egyptian constitutionalism, particularly with regard to the roles of Islam, flowed from political contingency and the residue of earlier Egyptian politics, just as Tunisia's constitutional process flowed from its prior political history.<sup>76</sup>

More specifically, Egypt's military establishment was rooted significantly deeper in Egyptian politics and had been the core of the country's ruling class for

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political, social, and economic reforms that meet the aspirations of the Egyptian people." U.S. President Barack Obama, Remarks on the Situation in Egypt (Jan. 28, 2011) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=88942&st=&st1=>) (referencing the expectations of Egypt as a leader in the Middle East and reaffirming the United States' commitment to the country's peaceable transition following the Egyptian Revolution); see also Ed Husain, *Expectations in Egypt Are Still High*, N.Y. TIMES (Oct. 20, 2011), <http://www.nytimes.com/roomfordebate/2011/10/07/is-egypt-losing-its-regional-power/expectations-in-egypt-are-still-high> (discussing Egyptian domestic expectations for the constitutional process following the Arab Spring revolution).

73. See Michael Slackman, *Islamist Group Is Rising Force in a New Egypt*, N.Y. TIMES (Mar. 24, 2011), [http://www.nytimes.com/2011/03/25/world/middleeast/25egypt.html?\\_page\\_wanted=all&\\_r=0](http://www.nytimes.com/2011/03/25/world/middleeast/25egypt.html?_page_wanted=all&_r=0) (highlighting tensions between Islamists and secularists in Egypt's post-Arab Spring constitutional process).

74. See Michael Wahid Hanna, *Sectarianism Stalks Egypt*, FOREIGN POLICY (May 9, 2011), [http://mideastafrica.foreignpolicy.com/posts/2011/05/09/sectarianism\\_stalks\\_egypt](http://mideastafrica.foreignpolicy.com/posts/2011/05/09/sectarianism_stalks_egypt) (discussing the solidarity between Islamist and secular forces in the 2011 Egyptian uprising and the subsequent breakdown of this cooperation).

75. See generally David M. Faris, *Deep State, Deep Crisis: Egypt and American Policy*, 20 MIDDLE E. POL'Y 99 (2013) (explaining that the "deep state" refers to the elites who comprised and backed the military throughout the long tenure of Mubarak in Egypt and retained substantial power even after his 2011 ouster).

76. Nathan Brown, *Islam and Constitutionalism in the Arab World: The Puzzling Course of Islamic Inflation*, in CONSTITUTION-WRITING, RELIGION AND DEMOCRACY (Asli Bali & Hanna Lerner, eds., forthcoming 2014) [hereinafter Brown, *Islam and Constitutionalism*].

at least three decades.<sup>77</sup> Similarly, Islamist political groups are firmly established in Egypt's past.<sup>78</sup> The Muslim Brotherhood—the parent group or inspiration for many of today's political Islamist groups—began in Egypt in 1928.<sup>79</sup> While Arab political systems frequently touted Islamist groups as the *bête-noire* of a responsible political order, under Mubarak, Egypt targeted Islamists consistently with the foreign aid resources provided by Western countries in the decades following former Egyptian President Anwar Sadat's assassination by a particular group of Islamists.<sup>80</sup> The seeds of suspicion between activists who wished for a more central political role for Islam in the post-Mubarak order and those who did not were thus in place in Egypt, decreasing significantly the prospects for the sort of political dialogue and compromise that occurred in Tunisia.<sup>81</sup>

Moreover, it is likely that Egypt's large size and more globally-prominent politics heightened the difficulties in crafting a constitutional order. One Arab-American legal consultant, well aware of the process, observed that many more external actors tried to be involved in Egypt's constitutional politics than in Tunisia's.<sup>82</sup> At the same time, Egyptians' sense of their own political experience and legal knowledge led them to try to exclude these advisors from the process.<sup>83</sup> In other words, in the Egyptian 2011 context, it was true both that constitutional reconstruction was subject to a high degree of global scrutiny and that the Egyptian political sphere was large and contested enough that international advisers were seen as part of a divisive problem more than as useful to a solution.

As in Tunisia, soon after the rapid overthrow of the aged authoritarian dictator, Islamists in Egypt emerged as the best-organized political force. They dominated early parliamentary elections despite not having been central to the successful broad anti-regime mobilization.<sup>84</sup> After the election of a constituent

77. See generally Anna Kordunsky & Michael Lokesson, *The Egyptian Military's Huge Historical Role*, NAT'L GEO. (July 5, 2013), <http://news.nationalgeographic.com/news/2013/07/130705-egypt-morsi-government-overthrow-military-revolution-independence-history/> (giving a broad historical overview of the political power of the Egyptian military).

78. See generally U.S. Dep't of Army, *Islamic Political Movements*, in EGYPT: A COUNTRY STUDY (Helen Chapin Metz, ed., 1990), available at <http://www.higginsctc.org/terrorism/Egypt%20-%20Islamic%20Political%20Movements.htm> (providing an outline of Islamist groups in Egypt).

79. CARRIE ROSEFSKY WICKHAM, *THE MUSLIM BROTHERHOOD: EVOLUTION OF AN ISLAMIST MOVEMENT* 20 (2013).

80. See Charles Robert Davidson, *Reform and Repression in Mubarak's Egypt*, 24 FLETCHER F. WORLD AFF. 75, 85–91 (2000), available at <http://dl.tufts.edu/catalog/tufts:UP149.001.00048.00007> (exploring former Egyptian President Mubarak's harsh attitude towards the country's Islamists and his attempts to limit the influence of these groups); see also Yolande Knell, *The Complicated Legacy of Egypt's Hosni Mubarak*, BBC WORLD NEWS (Jan. 25, 2013), <http://www.bbc.com/news/world-middle-east-21201364> (exploring Western aid given to Egypt under Mubarak).

81. See Storm, *supra* note 70 (contrasting the short and haphazard drafting process of the Egyptian constitution with the slow, deliberate negotiations in Tunisia).

82. Interview with Zaid al-Ali, Senior Adviser, Int'l Inst. for Democracy and Electoral Assistance (July 10, 2014).

83. *Id.*

84. See WICKHAM, *supra* note 79, at 154 (exploring the role of the Muslim Brotherhood

assembly in March that began the constitutional drafting and a two-tiered voting process for Egypt's first freely-contested presidential election, a leadership dominated by Muslim Brotherhood members and led by President Mohamed Morsi set to work translating its plurality into moves to fuse Islam more specifically to the emerging political system.<sup>85</sup> The rapid success of the Brotherhood to some extent lessened the constitutional stakes surrounding formal public Islamization, since these longstanding Islamist activists now occupied, and hoped to retain, a prime role in Egypt's broader politics.<sup>86</sup>

Nonetheless, in 2012 the new Morsi government supervised the first of two post-2011 constitution-drafting processes and introduced several key procedures to signal a more specific and public role for Islam in Egyptian politics. Article 2, the main broad provision concerning Islam—establishing it as Egypt's state religion and *shari'a* as the principal source of legislation—remained the same in the 2012 constitution as in the country's pre-2011 document.<sup>87</sup> However, the 2012 constitution also fleshed out, in Article 219, the general sources that constituted *shari'a*, so that there was an implicit message that *shari'a* might be more than a symbolic concept in constitutional jurisprudence.<sup>88</sup>

In addition, Egypt's premier Islamic institution, Al-Azhar, was given detailed and guaranteed status in Article 4 as the major source for consultation in matters of

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specifically after the Egyptian uprising); *Muslim Brotherhood Tops Egyptian Poll Result*, AL JAZEERA (Jan. 22, 2012), <http://www.aljazeera.com/news/middleeast/2012/01/2012121125958580264.html> (providing an overview of the 2012 Egyptian parliamentary election results, specifically the success of Islamist parties); Slackman, *supra* note 73 (discussing the power of Islamist groups in the post-Mubarak era, specifically the power of these groups in contrast to the liberal intellectuals who led the Egyptian revolution).

85. Technically, the Brotherhood was not allowed to participate as a political party, but instead formed the related Freedom and Justice Party (FJP) (*Ḥizb Al-Ḥurriya Wal-'Adala* in Arabic), which was in fact populated by Brotherhood members. See, e.g., Eric Trager, *The Unbreakable Muslim Brotherhood: Grim Prospects for a Liberal Egypt*, FOREIGN AFFAIRS, September–October, 2011, available at <http://www.washingtoninstitute.org/policy-analysis/view/the-unbreakable-muslim-brotherhood-grim-prospects-for-a-liberal-egypt> (providing an overview of the Muslim Brotherhood's influence in the post-Arab Spring Egypt, their rise to prominence in the Freedom and Justice Party). When Morsi won the two-round election for president, he resigned from the FJP in order to maximize his claim to represent the entire Egyptian population. *Id.*

86. Brown, *Islam and Constitutionalism*, *supra* note 76.

87. Compare DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26, 2012, art. 2 (Egypt), translated in Nariman Youssef, *Egypt's Draft Constitution Translated*, EGYPT INDEPENDENT (Dec. 2, 2012), <http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated> (unofficial), with DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], 11 Sept. 1971, as amended, May 22, 1980, May 25, 2005, March 26, 2007, art. 2 (Egypt) translated in COMPARATIVE CONSTITUTION PROJECT, *Egypt 2007*, <http://portal.clinecenter.illinois.edu/cgibin/rview?REPOSID=1&ID=8458> (unofficial) (“Islam is the religion of the state and Arabic its official language. Principles of Islamic Sharia are the principal source of legislation.”). All subsequent citations to these constitutions are to the respective translations above.

88. DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26, 2012, art. 219 (Egypt) (“The principles of Islamic *Shari'a* include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community.”).

Islamic law.<sup>89</sup> Article 6 included *shura*, an Islamic concept of stakeholder consultation, as one of the bases of the new system's democratic politics.<sup>90</sup> Article 10, although focused on women's rights rather than Islam specifically, added language endeavoring to protect the traditional character of the Egyptian family and to help reconcile women's work roles with their traditional familial roles.<sup>91</sup> This language, although similar to the earlier Egyptian Constitution,<sup>92</sup> conveyed a paternalistic framework that may seem common to conservative religious movements. Finally, Article 44 forbade insults to major religious figures and prophets, a significant potential limit on free speech.<sup>93</sup>

Given that the Islamist-dominated Egyptian government rushed through a constitutional draft during one weekend in closed session<sup>94</sup> and that the proposed document added definite detail to the legal status and meaning of Islam in Egypt, it is easy to look at the document from afar as a quick political push from the Islamists. Yet the actual process was more complex. As in Tunisia, the provisions that emerged, though they definitely advanced official Islam in Egyptian constitutionalism, also represented compromises with non-Islamist sources. For example, some Islamists lobbied for Article 2 to be changed to have more particular content about the controlling legislative nature of a more specific type of Islamic ruling.<sup>95</sup> Some Islamists saw Al-Azhar—a longstanding official state institution—as an unlikely ally in advancing Islamic influence in Egyptian society.<sup>96</sup> What looks from a distance as a movement to constitutionalize increased

89. *Id.* art. 4. (“Al-Azhar is an encompassing independent Islamic institution, with exclusive autonomy over its own affairs, responsible for preaching Islam, theology and the Arabic language in Egypt and the world. Al-Azhar Senior Scholars are to be consulted in matters pertaining to Islamic law.”).

90. *Id.* art. 6. (“The political system is based on the principles of democracy and *shura* . . .”).

91. *Id.* art. 10. (“The family is the basis of the society and is founded on religion, morality and patriotism. The State is keen to preserve the genuine character of the Egyptian family, its cohesion and stability, and to protect its moral values, all as regulated by law. The State shall ensure maternal and child health services free of charge, and enable the reconciliation between the duties of a woman toward her family and her work. The State shall provide special care and protection to female breadwinners, divorced women and widows.”).

92. See DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 9 (Egypt) (“The family is the basis of the society founded on religion, morality and patriotism. The State strives to preserve the genuine character of the Egyptian family—with the values and traditions it embodies—while affirming and developing its character in relations within the Egyptian society.”).

93. DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26, 2012, art. 44 (Egypt) (“Insult or abuse of all religious messengers and prophets shall be prohibited.”).

94. CNN Wire Staff, *Islamists unilaterally pass draft constitution in Egypt*, CNN (Nov. 2012), <http://www.cnn.com/2012/11/30/world/meast/egypt-protests/>; Nathan J. Brown, *Egypt's State Constitutes Itself*, in THE BATTLE FOR EGYPT'S CONSTITUTION 6, 6 (Project on Middle E. Political Sci. eds., 2013), available at [http://pomeps.org/wp-content/uploads/2013/01/POMEPS\\_BriefBooklet17\\_Egypt\\_web.pdf](http://pomeps.org/wp-content/uploads/2013/01/POMEPS_BriefBooklet17_Egypt_web.pdf).

95. See BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD, *supra* note 9, at 179–84 (discussing attempts to draft the Egyptian constitution, particularly Article 2, in accordance with Islamic *shari'a* law).

96. See NATHAN J. BROWN, ISLAM AND POLITICS IN THE NEW EGYPT 12–18 (2013),



Islamic politics actually entailed compromise and negotiation among the diverse participants in the drafting process.

Nonetheless, even this modest constitutional specification around the content and official role of Islam proved divisive in the broader frame of Egypt's large, easily-polarized population and the global stage. The closed nature of the constitutional promulgation process looked to opponents of the Muslim Brotherhood not involved in it like evidence that the new Islamist government cared little for long-term democracy in Egypt.<sup>97</sup> This is despite the fact that Egypt's 2012 constitution provided fairly robust elected representative political institutions, in part because of the Brotherhood's confidence that the majoritarian government seemed to favor their political fortunes.<sup>98</sup>

This is an important point about contemporary constitutional processes: there may be no ideal procedure for negotiating a contentious set of issues in a large society. The relative speed and efficiency of Egypt's 2012 process seemed to come with the danger of an exaggeration of the perceived problems or discord among participants. In Egypt's case, parties outside of the process perceived constitutional shifts that explicated the nature of the Islamic establishment less than majority Islamists might have wanted as a major departure from the status quo ante. As a result, given the particular prior context of some Egyptians' political socialization against Islamist organizations from the Mubarak regime, the 2012 constitution became one of several major political grievances that turned growing numbers of Egyptians against the Morsi government.<sup>99</sup>

By July 2013, over fifty million Egyptians had raised deep concerns about their first freely-elected government, which clustered around impatience with economic progress, evidence of the government's tendency to overreach its political power, and fear, at least among some, of further state Islamicization.<sup>100</sup>

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available at [http://carnegieendowment.org/files/islam\\_politics.pdf](http://carnegieendowment.org/files/islam_politics.pdf) (suggesting that some viewed Al-Azhar's proper role as the defender of Egypt's Islamic conscience and the voice for the Islamic public interest).

97. See H.A. Hellyer, *A Better Egyptian Constitution*, in THE BATTLE FOR EGYPT'S CONSTITUTION 29, 29–30, (Project on Middle E. Political Sci. eds., 2013), available at [http://pomeps.org/wp-content/uploads/2013/01/POMEPS\\_BriefBooklet17\\_Egypt\\_web.pdf](http://pomeps.org/wp-content/uploads/2013/01/POMEPS_BriefBooklet17_Egypt_web.pdf) (arguing that the draft constitution barely tolerates civil society and does not serve the goals of the January 25th revolution).

98. Nathan J. Brown, *Egypt's State Constitutes Itself*, in THE BATTLE FOR EGYPT'S CONSTITUTION 6, 7 (Project on Middle E. Political Sci. eds., 2013), available at [http://pomeps.org/wp-content/uploads/2013/01/POMEPS\\_BriefBooklet17\\_Egypt\\_web.pdf](http://pomeps.org/wp-content/uploads/2013/01/POMEPS_BriefBooklet17_Egypt_web.pdf) (“Optimistic about how well politics has served them thus far, and sanguine about their electoral fortunes, Brotherhood leaders can easily see compromises with these state bodies as a small price to pay for a working constitution in which Islamists will play a leading role.”).

99. See Hellyer, *supra* note 97, at 29–31 (listing points of frustration with 2012 constitution and describing the violent response to protests of constitutional drafts produced under the Morsi government).

100. See David D. Kirkpatrick, *Army Ousts Egypt's President; Morsi is Taken Into Military Custody*, N.Y. TIMES (July 3, 2012), [http://www.nytimes.com/2013/07/04/world/middleeast/egypt.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/04/world/middleeast/egypt.html?pagewanted=all&_r=0) (discussing the overall context and frustrations leading up to

Here again, it is worth underscoring the political contingency of the anti-Morsi mobilization. Remnants of the politicized military who had exercised control under Mubarak, among other forces, helped work to ensure that popular frustration around Morsi would grow in ways that encouraged the resultant mass-driven coup.<sup>101</sup> After July 2013, the new military government led by General Abdel Fattah el-Sisi moved quickly to consolidate power and move the country away from Islamist political influence.<sup>102</sup> As a result, a new constitutional process took place, albeit framed as a set of amendments to the 2012 document.<sup>103</sup>

However, this second constitutional process occurred after a few months of dramatic political change, once again, a sign that in Egypt, as in Tunisia, constitutionalism was nested in the broad country-specific nexus of regime-shaping and political contestation. In post-Morsi Egypt, this nexus was the new military leader Sisi's efforts not to merely sideline Islamist political forces, but to subjugate them brutally. In the several months following the July coup, Sisi's forces arrested or killed thousands of Muslim Brothers, as well as journalists and others whom the new Egyptian state deemed had helped the Brotherhood attain or stay in power.<sup>104</sup> Sisi's public efforts to root out Islamists and their supposed sympathizers in a brutal matter were facilitated by the polarization that Morsi's government unwittingly, and other political forces intentionally, unleashed around the state's decree of institutional Islamicization.<sup>105</sup> The 2012 constitutional process

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the 2013 coup d'état of President Morsi). See generally Nguyen Kieu Van, *Egyptian Upheaval Creates Uncertainty*, VIETNAMNEWS (Sept. 13, 2014), <http://vietnamnews.vn/in-bai/241697/egyptian-upheaval-creates-uncertainty.htm> (detailing frustrations leading up to the 2013 coup of President Morsi).

101. See Ben Hubbard and David Kirkpatrick, *Sudden Improvements in Egypt Suggest a Campaign to Undermine Morsi*, N.Y. TIMES (Jul. 10, 2013), [http://www.nytimes.com/2013/07/11/world/middleeast/improvements-in-egypt-suggest-a-campaign-that-undermined-morsi.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/11/world/middleeast/improvements-in-egypt-suggest-a-campaign-that-undermined-morsi.html?pagewanted=all&_r=0) (discussing the military coup d'état and the suspicious restoration of basic services immediately following); see also Marc Lynch, *Downfall in Cairo*, in ARAB UPRISINGS: EGYPT'S POLITICAL RESET 5, 5–6 (Project on Middle E. Political Sci. eds., 2013), available at [http://pomeps.org/wp-content/uploads/2013/07/POMEPS\\_BriefBooklet20\\_Egypt\\_web.pdf](http://pomeps.org/wp-content/uploads/2013/07/POMEPS_BriefBooklet20_Egypt_web.pdf) (detailing the military involvement in the removal of President Morsi and the suspension of Egypt's constitution).

102. Kirkpatrick, *supra* note 100 (reporting Sisi's announcement of the removal of President Morsi and the suspension of the Egyptian Constitution).

103. See *Sisi Seeks to Expand his Constitutional Powers*, MIDDLE EAST MONITOR (Sept. 2, 2014), <https://www.middleeastmonitor.com/news/africa/13884-sisi-seeks-to-expand-his-constitutional-powers> (reporting Sisi's attempt to amend Egypt's constitution in order to expand his powers).

104. See Stephen Gowans, *Egypt's Illegitimate President, Abdel Fattah el-Sisi*, GLOBALRESEARCH: CENTRE FOR RESEARCH ON GLOBALIZATION (May 27, 2014), <http://www.globalresearch.ca/egypts-illegitimate-president-abdel-fattah-el-sisi/5384112> ("It has also jailed tens of thousands of other Morsi supporters, banned demonstrations, and discouraged dissent by locking up journalists who oppose the military take-over."); Shadia Nasralla, *As Egypt votes, Some Still Caught in Political Crossfire*, REUTERS, May 26, 2014, available at <http://www.reuters.com/article/2014/05/26/us-egypt-election-suez-idUSKBN0E60US20140526> ("Under Sisi's watch, security forces have killed hundreds of Muslim Brotherhood members and arrested thousands, driving the group underground and raising political tensions.").

105. See *infra* notes 100–01 and accompanying text for a discussion of the factors behind

further exacerbated this polarization.

Purging the constitution of its new marginally Islamicizing language was thus a second, and less central, act in the post-coup Egyptian political drama. Indeed, the polarization and violence that had emerged in the aftermath of Mubarak's overthrow played into the hands of Egyptian forces, mostly linked to the military, which seemed to find broad democratic politics difficult and divisive with Egypt's large problems and socioeconomic challenges. As a result, the sense of a constitution as a long-term foundational moment for a representative, participatory government was gone among many Egyptians who had tired at what they perceived political participation to have unleashed. In other words, the post-coup 2013 constitutional process was a mere echo of the one from a year earlier.

The new constitutional drafting process took place in two compact stages in late 2013. First, a group of senior Egyptian judges suggested amendments to the previous document, which then went to a drafting committee of fifty elite Egyptians representative of key political constituencies—with the very notable exception of Muslim Brothers or other Islamists.<sup>106</sup> This amended constitution was then ratified by the population in January 2014 through a plebiscite process that offered no alternative and served as another signal, if one was needed, of the Sisi government's decreasing tolerance for public political contestation.<sup>107</sup>

The 2014 constitution removed most of the new 2012 language regarding Islam.<sup>108</sup> Article 2 stayed as it had been,<sup>109</sup> but Article 219, specifying the nature of *shari'a*,<sup>110</sup> and Article 44, the anti-blasphemy provision,<sup>111</sup> were eliminated. Prior Article 4, about the state al-Azhar Islamic central religious institution,<sup>112</sup> became Article 7, albeit with a focus more on the institution's role in Islamic science, instead of theology, and with no explicit granting of an official Islamic advisory power to the state.<sup>113</sup> Both the 2012 and 2014 constitutions allowed non-Muslim Jewish and Christian minorities to be governed by their own internal procedures

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the polarization.

106. *See Comparing Egypt's Constitutions*, *supra* note 14 (detailing the two phase process of creating a new constitution in 2013).

107. *Id.*

108. *See generally id.* at 1.

109. *Compare* DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26, 2012, art. 2 (Egypt), *with* DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26 2012, *as amended*, Jan. 15, 2014, art. 2 (Egypt), *translated by* Adly Monsour, *available at* <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf> (unofficial) (“Islam is the religion of the state and Arabic its official language. Principles of Islamic Sharia are the main source of legislation.”) All subsequent citations to this constitution are to this translation.

110. DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26, 2012, art. 219 (Egypt).

111. *Id.* art. 44.

112. *Id.* art. 4.

113. DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26 2012, *as amended*, Jan. 15, 2014, art. 7 (Egypt); *see Comparing Egypt's Constitutions*, *supra* note 14 (providing side by side comparison of the al-Azhar provisions of the 2012 constitution and the 2014 amendment).

for community leadership and personal status issues in Article 3.<sup>114</sup> Article 64 in the new document superseded 2012's Article 43 in guaranteeing freedom of religion; it also removed from the prior document a clause stipulating an affirmative duty on the state's part to guarantee that monotheistic religions can establish religious institutions.<sup>115</sup> In addition, the 2014 constitution added Article 11, a specific set of clauses related to women's rights that included a state commitment to ensuring increased representation by women in political and administrative positions.<sup>116</sup>

All of these changes moved Egypt back towards the general position of most Arab states with respect to the formal constitutional role of Islam and, in this respect, the 2014 constitution resembled the new Tunisian Constitution. Egypt's constitutional process moved decidedly in a different direction with regard to the likelihood of the institutional underpinnings of a more democratic government. Indeed, where Article 1 in 2012 declared Egypt's system "democratic" and Article 6 specified that the political system has a basis in the principles of democracy, Article 1 from 2014 uses the phrase "democratic republican system that is based on citizenship and the rule of law."<sup>117</sup> Article 5 from 2014, which corresponds to 2012's Article 6, does not use the term "democracy" at all and only mentions the separation of powers.<sup>118</sup> The watering down here of the term "democracy" could be read as subordinating political contestation to other state laws, such as new Article

114. *Compare* DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26, 2012, art. 3 (Egypt) ("The canon principles of Egyptian Christians and Jews are the main source of legislation for their personal status laws, religious affairs, and the selection of their spiritual leaders.") *with* DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26 2012, *as amended*, Jan. 15, 2014, art. 3 (Egypt) ("The principles of Christian and Jewish Sharia of Egyptian Christians and Jews are the main source of legislations that regulate their respective personal status, religious affairs, and selection of spiritual leaders.").

115. *Compare* DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26, 2012, art. 43 (Egypt) ("Freedom of belief is an inviolable right. The State shall guarantee the freedom to practice religious rites and to establish places of worship for the divine religions, as regulated by law.") *with* DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26 2012, *as amended*, Jan. 15, 2014, art. 64 (Egypt) ("Freedom of belief is absolute. The freedom of practicing religious rituals and establishing worship places for the followers of Abrahamic religions is a right regulated by Law.").

116. DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26 2012, *as amended*, Jan. 15, 2014, art. 11 (Egypt).

117. *Compare* DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26, 2012, art. 1 ("The Arab Republic of Egypt is an independent sovereign state, united and indivisible, its system democratic."), art. 6 (Egypt) ("The political system is based on the principles of democracy . . .") *with* DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26 2012, *as amended*, Jan. 15, 2014, art. 1 (Egypt) ("The Arab Republic of Egypt is a sovereign state, united and indivisible, where no part may be given up, having a democratic republican system that is based on citizenship and the rule of law.").

118. DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26 2012, *as amended*, Jan. 15, 2014, art. 5 (Egypt) ("The political system is based on political and partisan pluralism, the peaceful rotation of power, separation and balance of powers, the inevitable correlation between powers and responsibilities, and respect for human rights and freedoms . . .").

154, which provides that states of emergency now can be extended without limit.<sup>119</sup>

This constitutional language's shift away from democracy is also reflected in the 2014 document's more specific institutional features. In addition to the amplification around states of emergency—a consistent Mubarak government tool used to suspend the 1971 constitution's rights provisions—the military enjoys diverse privileges in the new charter.<sup>120</sup> The House of Representatives is directly elected by secret ballot; its role looks similar to that in, and is a potential political response to, the 2012 document.<sup>121</sup> At the same time, the House of Representatives' role is reduced vis-à-vis the military, most notably in the House's inability to unpack the defense budget proposed by the military-dominated National Defense Council.<sup>122</sup> While the 2012 constitution had not mentioned state abilities or responsibilities to fight “terrorism,” the new version requires Egypt's government “to fight all types and forms of terrorism.”<sup>123</sup> Given the pre-2011 and post-Morsi history of Egypt's presidents' use of the “terrorist” label to justify states of emergency with human rights suppression and harsh crackdowns on Islamist and other opponents, this new constitutional provision looks likely to provide justification for renewed authoritarian politics.<sup>124</sup>

In short, the country with the Arab world's largest population, longest tradition of judicial review, and leading number of legal experts went from embodying global hopes for a constitution that could lay long-term democratic foundations to a retreat towards institutionalized military rule. In 2012, a politically-contested and unclear process led to an elected Egyptian government that drafted a messy constitution, which may have exhibited some state Islamicizing tendencies. But it also represented a departure from the country's prior military-dominated 1971 political order. Polarization, in part a result of the politics surrounding the 2012 constitution, facilitated a move that increasingly looks like the status quo before 2011. Egyptian women's and religious pluralist rights may be improved constitutionally over what some feared would be the case in 2012, but the trade-off may well be in a reestablished military authoritarian political order.

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119. *Id.* art. 154.

120. *Id.* arts. 200–07.

121. Compare DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26, 2012, arts. 113–27 (Egypt) with DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26 2012, *as amended*, Jan. 15, 2014, arts. 102–38 (Egypt).

122. See DUSTUR JUINHURIYAT MISR AL-ARABIYAH [CONSTITUTION], Dec. 26 2012, *as amended*, Jan. 15, 2014, art. 203 (Egypt).

123. *Id.* art. 237.

124. See Ahmed Eldakak, *Approaching Rule of Law in Post-Revolution Egypt: Where We Were, Where We Are, and Where We Should Be*, 18 U.C. DAVIS J. INT'L L. & POL'Y 261, 280 (2012) (suggesting that in 2007, President Mubarak made constitutional amendments that would allow him to be freed from requirements to comply with constitutional rights related to detention of an accused if the accused was labeled a terrorist).

### C. *The Case of Morocco*<sup>125</sup>

The 2011 Moroccan constitutional redrafting case is distinct from those in Tunisia and Egypt in that no leader was overthrown. Instead, the king of Morocco reacted to concerns that the Arab uprisings would spread to the long-ruling western Arab monarchy and oversaw a top-down drafting process meant to limit potential popular dissent.<sup>126</sup>

Moroccan constitutions are also distinct in their relative frequency. As a result, they have functioned as snapshots of a particular balance of political forces and tendencies, rather than as basic laws that are difficult to change. Since independence in 1956, former King Hassan II promulgated constitutions in 1962, 1970, 1972, 1992, and 1996.<sup>127</sup> It was not surprising that Morocco's current King Mohammed VI chose his late father's strategy of putting forth a new constitution to signal that political change was occurring and popular concerns were heeded.<sup>128</sup>

The key points of the reformation process previously used by King Hassan were that the king and his officials always controlled the process from above, limited the scope of participants, and restricted Moroccans' debate of the resulting draft.<sup>129</sup> This is specifically how the current Moroccan king's response to regional uprisings duplicated that of his father. Soon after Tunisians and Egyptians had overthrown their governments and with a whiff of political activism sensed in the Moroccan capital of Rabat, Mohammed VI announced that a new constitution would be promulgated in March of 2011.<sup>130</sup>

Indeed, a few weeks before the king's speech, Morocco saw the formation of the "February 20" movement throughout the country, named for a set of coordinated, if hardly massive, demonstrations for political rights and reform.<sup>131</sup>

125. This material on Morocco is a less detailed and revised version of the account that the author wrote of the drafting process for his chapter in CONSTITUTION-WRITING, RELIGION AND DEMOCRACY, *supra* note 8.

126. See Marina Ottaway, *The New Moroccan Constitution: Real Change or More of the Same?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (June 20, 2011), <http://carnegieendowment.org/2011/06/20/new-moroccan-constitution-real-change-or-more-or-same/51> (noting that the results of the Arab Spring and current state of protestation in Morocco led King Mohammed VI to reintroduce reform).

127. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD, *supra* note 9, at 51–54.

128. See Ottaway, *supra* note 126 (describing how King Hassan II's recognition of the need for political openness led to King Mohammed VI continuing the path of reform).

129. See Ahmed Benchemsi, *La sacralité de la monarchie marocaine est un frein à la démocratisation*, LE MONDE, Mar. 15, 2011, [http://www.lemonde.fr/idees/article/2011/03/15/la-sacralite-de-la-monarchie-marocaine-est-un-frein-a-la-democratisation\\_1493390\\_3232.html](http://www.lemonde.fr/idees/article/2011/03/15/la-sacralite-de-la-monarchie-marocaine-est-un-frein-a-la-democratisation_1493390_3232.html), translated in <http://ahmedbenchemsi.com/9-march-speech-off-the-cuff/> (describing how the scope of reform was limited by a commission of government officials and servants of the state appointed by the king); Ottaway, *supra* note 126 (describing how there was no follow up or debate after submissions by organizations part of the *mechanisme de suivi*, and interested parties were only given drafts days before the king presented the draft to the nation).

130. King Mohammed VI of Morocco, King Mohammed VI's Speech to the Nation (March 9, 2011) (transcript available at <http://www.voltairenet.org/article168894>).

131. See Benchemsi, *supra* note 129 (describing the fifty-three city, 120,000 member protest that occurred throughout Morocco on February 20, 2011 and the following weeks until the

The movement, like its Tunisian and Egyptian predecessors, was initiated through Facebook and other social media, such as Mamfakinch.<sup>132</sup> The movement formed around demands for the monarchy to cede a good deal of its political and some of its symbolic religious power, as well as a decoupling of the concentration of economic resources in the hands of the political elite.<sup>133</sup>

From the regime's perspective, these sorts of demands had to be nipped in the bud, particularly in light of the quick mass mobilizations in Tunisia and Egypt. Hence, Mohammed VI moved quickly to make a major speech launching a new constitutional drafting process.<sup>134</sup> In the speech, the Moroccan king made no references to political uprisings in Egypt or Tunisia and certainly did not suggest that the youth-driven regional mass protests might have salience in Morocco, despite the February 20 movement.<sup>135</sup> Rather, he framed the new constitutional initiative as a new phase of a national planning commission charged with establishing regional autonomy within Morocco.<sup>136</sup>

The king's suggested rationale for constitutional change underscores two themes that characterized the reform process and Morocco's royal politics generally. First, the monarchy typically emphasizes Moroccan uniqueness and continuity so that there would not be any official acknowledgment that reform came as a response to broader Arab political discontent, despite the February 20 movement's inspiration by regional events.<sup>137</sup> Of course, the timing of the new constitution was obvious to everyone, with one journalist claiming that the king took unprecedented major reform measures in response to popular pressures.<sup>138</sup> However, the constitutional redrafts that Mohammed VI's father, Hassan II, undertook also could be said to have been indirect responses to popular protests and perceived political discontent where most people in the system understood the

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king's speech on March 9, 2011).

132. *See id.* (noting that the new wave of activism was fueled by social media); *see also Mamfakinch*, Moroccans For Change (Apr. 3, 2011), [moroccansforchange.com/2011/04/03/mamfakinch/](http://moroccansforchange.com/2011/04/03/mamfakinch/) (describing the news portal prior to protests).

133. *See, e.g., Maroc: Une révolution urgente et légitime*, LIBERATION (Apr. 22, 2011, 12:00 AM), [http://www.liberation.fr/monde/2011/04/22/maroc\\_une\\_revolution-urgente-et-legitime\\_730776](http://www.liberation.fr/monde/2011/04/22/maroc_une_revolution-urgente-et-legitime_730776).

134. *See* Emma Hayward, *Morocco's Constitutional Referendum: Context, Content, and Impact*, WASH. INST. FOR NEAR EAST POLICY (June 30, 2011), <http://www.washingtoninstitute.org/policy-analysis/view/moroccos-constitutional-referendum-context-content-and-impact> (stating that King Mohammed VI announced the constitutional reform in direct response to the growing protests).

135. *See* King Mohammed VI of Morocco, *supra* note 130 (stating that the constitutional reforms follow from the next stage of an advanced regionalization process).

136. *See id.* (stating that the advanced regionalization process will be part of a comprehensive constitutional reform).

137. *See* Laila Lalami, *The Moroccan "Exception,"* THE NATION (Sept. 12, 2011), available at <http://www.thenation.com/article/162967/moroccan-exception> (discussing the seven stated principles governing the constitutional reform with criticisms that the reform itself was undemocratic).

138. *See* Benchemsi, *supra* note 129.

regime's reactive posture.

Second, in lieu of allowing a truly democratic constitutional monarchy, the Moroccan throne has historically enacted political reforms that marginally increased the sphere of actual political power exercised outside of the palace while retaining royal control.<sup>139</sup> The next logical step to reforms, as decided by prior constitutions, is subnational regionalization, which allowed for greater popular electoral input or influence for the country's two-tiered quasi-autonomous parliament.<sup>140</sup> Few Moroccans or knowledgeable outsiders could believe that writing and ratifying a new constitution would reduce the political preeminence of the royal palace. This is why the king's speech itself referred to this process as "a milestone in the consolidation of our distinctive model which is based on democracy and the pursuit of development."<sup>141</sup> Nonetheless, in the long term, Morocco's politics have become marginally more diffuse and plural, especially in comparison to some other Arab states, including nearby Algeria and pre-2011 Tunisia.

Generally, and with respect to the 2011 constitution, there was hardly a popular expectation that the Moroccan regime would put forth a document to eliminate, or even reduce significantly, the throne's political significance.<sup>142</sup> Instead, from the regime's standpoint, the constitutional reformation was about winning over enough potential opponents to reduce the possibility of major popular uprisings inspired by diverse anti-monarchists. The king could succeed by heightening the country's pluralism and citizens' rights to acknowledge the possible demands of important political constituencies, and increasing through new small steps the separation of powers and political institutional autonomy outside of the throne.<sup>143</sup> In the March speech, Mohammed VI announced these two strategies as the broad foundations for the constitutional reform.<sup>144</sup>

The stated background makes sense of the fact that constitutional reform in Morocco—unlike in Tunisia and Egypt—was never assumed by insiders to be about major political reinvention.<sup>145</sup> This is important in situating comments by Moroccans favorable towards, or frustrated with, the document in the fairly narrow terms of what expanded political space the new law provided. The constitutional reformation process that followed was also constrained and essentially closed to

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139. See BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD, *supra* note 9, at 52 (describing how the 1962 constitution established a directly elected lower house; however, future constitutions limited this by reinstating an indirectly elected upper house).

140. See *id.* at 53 (describing the changes in parliamentary roles after constitutional reform).

141. See King Mohammed VI of Morocco, *supra* note 130.

142. See Benchemsi, *supra* note 129 (suggesting continued presence in the palace by noting that the king described the prime minister as the head of "an" executive branch, not "the" executive branch).

143. See *Maroc: Une révolution urgente et légitime*, *supra* note 133 (discussing what the anti-monarchists wanted from the constitution reform).

144. King Mohammed VI of Morocco, *supra* note 130.

145. See Hayward, *supra* note 134 (stating that considering the vagueness of the reforms and the commission's ties to the throne, it is likely the constitutional reform was meant as a means of political stabilization).



the public except for the announcement of the members of the drafting commission.<sup>146</sup>

Directed by an eminent Moroccan law professor and comprised of a number of law faculty, lawyers, and judicial peers, the nineteen-person constitutional commission promised a consolidation of local expertise within the bounds of political insiders that the palace found trustworthy.<sup>147</sup> Indeed, Abdellatif Mennouni, the commission's head, was well known among Moroccans as a senior advisor to the palace.<sup>148</sup> Naysayers could easily criticize the commission as a group of proven monarchy loyalists.<sup>149</sup>

However, alongside the constitutional commission itself, an additional committee (*mechanisme de suivi*) was formed to work with and facilitate input from political parties, unions, and other interested civil society organizations.<sup>150</sup> This accompanying committee allowed for a clear channel for diverse Moroccan stakeholder input into the drafting. Although, it is unclear if any suggestions and draft constitutional provisions from these groups had any influence on the final constitutional draft.<sup>151</sup>

The document was produced in a process that included the voices of Moroccan political elites and civil society members but only behind closed doors. The document was revealed to these key stakeholders on June 8 through an oral presentation, with the written draft released to them on June 16, and to the entire country one day later.<sup>152</sup>

As with many voting processes in mostly authoritarian contexts, the constitutional referendum was set for July 1, just a few weeks after the draft was made public.<sup>153</sup> The king and his political apparatus spared no effort in using leverage to encourage Moroccans to vote for the new document and left no alternative process for establishing a new constitution other than this vote.<sup>154</sup> The short time period allowed little possibility for broad dissent, although the February

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146. See Lalami, *supra* note 137 (stating that the draft was presented to the political parties in a closed-door, ten-hour session).

147. See Benchemsi, *supra* note 129 (noting that the majority of those appointed to the commission were loyal civil servants).

148. See Ottaway, *supra* note 126 (noting that Mennouni headed the commission).

149. See Benchemsi, *supra* note 129 (stating that little independence is expected from the commission considering its appointed members).

150. See Ottaway, *supra* note 126 (describing the accompanying mechanism, known as the *mechanism de suivi*, that functioned as a liaison between the drafters and interested parties looking to provide input into the new constitution).

151. See *id.* (noting that the *mechanism de suivi* did not necessarily allow for interested organizations to successfully submit drafts or proposed changes).

152. See *id.* (noting that these stakeholders were only permitted to listen to an oral presentation discussing the new constitution until June 16, when they were able to see the written draft).

153. See Hayward, *supra* note 134.

154. See *id.* (stating that the government reduced the time allowed to debate the draft, while also forcing the vote to either accept or reject the referendum as a whole, as opposed to individual provisions).

20 movement and related activists made some efforts to encourage a boycott of the referendum.<sup>155</sup> A largely favorable vote was unsurprisingly the final result, albeit one that seemed incredible to many observers.<sup>156</sup>

Given the bounds of preserving Morocco's basic ruling monarchy and the short, non-publicized nature of the drafting process, there was little reason to think that the new document would separate actual political powers from the throne to any great extent. Indeed, the powers of the monarchy remained intact, despite some nudges in the direction of enhanced capacity and more independence for the head of the government, the parliament, and the judiciary.<sup>157</sup> One member of the commission—one of Morocco's best-known political scientists—defended the process and resultant document because of the amount of terrain for political contestation it left open.<sup>158</sup> One important institutional innovation is Morocco's first post-independence Supreme Court that is authorized to engage in judicial review, although it has yet to prove itself in practice.<sup>159</sup>

Despite the possible exception of this Supreme Court, if the Moroccan drafters offered mostly the expected incremental institutional change amid ongoing royal control, then new provisions with respect to pluralism, rights, and religion would be more significant. Morocco is thus an example of one Arab country where top-down reform allowed for constitutional change that specifically fused Islam and pluralist accommodation somewhat, in contrast to the pressures of the region's broader Islamism. The closed drafting process of the 2011 constitution suggests the potential for contained local politics that will allow greater leeway for minority protection and rights, especially compared with the more openly contentious environments of post-2011 Egypt or Tunisia.

At first glance, the 2011 constitution reads like its numerous predecessors with respect to pluralism and religion. The preamble describes Morocco as an Islamic state,<sup>160</sup> while a basic early article regarding Islam, now renumbered to Article 3, retains consistent prior language that "Islam is the religion of the state,

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155. See *Morocco's referendum: A very small step*, THE ECONOMIST (July 7, 2011), <http://www.economist.com/node/18929381> (stating that 800 dissidents in Benslimane campaigned for a boycott of the referendum).

156. See *id.* (discussing that mainstream political parties represented in Parliament often vote in support of the monarchy).

157. See, e.g., *id.* (noting that the new constitution granted new powers to Parliament and the prime minister and reformed the judiciary).

158. See Abdallah Saaf, *Une nouvelle constitution au Maroc: sortie de monarchie exécutive*, LE NOUVEL OBSERVATEUR (July 6, 2011), <http://leplus.nouvelobs.com/contribution/166564-nouvelle-constitution-marocaine-suffisante-pour-sortir-de-la-crise.html> (explaining that there are several conditions that can determine the future of political reform in Morocco).

159. See DUSTUR AL-MAMLAKAH AL-MAGHRIBIYAH [CONSTITUTION] July 1, 2011, art. 134 (Morocco), translated in WORLD CONSTITUTIONS ILLUSTRATED LIBRARY (Jefri J. Ruchti ed., trans., 2011), available at <http://heinonline.org> (unofficial) (describing the powers of the Constitutional Court). All subsequent citations to this constitution are to this translation. See also BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD, *supra* note 9, at 148–50 (providing an overview and a history of judicial review within the Arab world).

160. See DUSTUR AL-MAMLAKAH AL-MAGHRIBIYAH [CONSTITUTION] July 1, 2011, pmbl (Morocco).

which guarantees to all freedom of religion.”<sup>161</sup> However, beneath these broad constants, the new Moroccan Constitution departs from its predecessors in a way that subtly moves towards increased pluralism within the country’s *pro forma* Islamic establishment.<sup>162</sup> This is evident in the preamble, which expands and departs from earlier Moroccan constitutions substantially, in grounding its politics on the rule of law and the “principles of participation, of pluralism and of good governance.”<sup>163</sup>

The theme of pluralism is developed further in new text in the preamble, which links the establishment of Islam to other plural values: “The preeminence accorded to the Muslim religion in this national reference is consistent with the attachment of the Moroccan people to the values of openness, of moderation, of tolerance and of dialogue for mutual understanding among all of the cultures and civilizations of the world.”<sup>164</sup> These broad statements evince the regime’s public intent to identify itself with tolerance, pluralism, and globalization. Moreover, the document is repetitively explicit about men’s and women’s equal rights.<sup>165</sup> More remarkably, Article 5 recognizes officially and unprecedentedly the significance and freedom of expression of the Berber language, the language indigenous to Morocco.<sup>166</sup>

Recognition of the indigenous Berber language is a significant formal shift in pluralistic rights. The nonstop assertion of a unified Moroccan national identity under all three patrilineal post-independence kings left little room for ethnic and linguistic diversity within the majority Muslim population. Indeed, a defining moment for the Moroccan independence movement against the French, which became a trope of official post-colonial government media, was how French efforts to distinguish Berbers from other Moroccan Muslims, through a 1930 decree, backfired and helped concretize demands for an independent Morocco in the

161. *Compare id.* art. 3 (“Islam is the religion of the State, which guarantees to all the free exercise of beliefs.”), with DUSTUR AL-MAMLAKAH AL-MAGHRIBIYAH [CONSTITUTION] Sept. 13, 1996, art. 6 (Morocco), translated in UNPAN, available at <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan041912.pdf> (unofficial) (“Islam shall be the state religion. The state shall guarantee freedom of worship for all.”). All subsequent citations to the 1996 constitution are to this translation.

162. See Ali Chibani, *Maroc: Trois Projets de Constitution et des doutes*, LE MONDE DIPLOMATIQUE (June 30, 2011), available at: <http://www.monde-diplomatique.fr/carnet/2011-06-30-Maroc> (noting that the 2011 constitution was less oriented towards Islam).

163. *Compare* DUSTUR AL-MAMLAKAH AL-MAGHRIBIYAH [CONSTITUTION] July 1, 2011, pmbl. (Morocco) with DUSTUR AL-MAMLAKAH AL-MAGHRIBIYAH [CONSTITUTION] Sept. 13, 1996, pmbl. (Morocco) (providing a comparatively shorter and more generalized list of affirmations and commitments).

164. See DUSTUR AL-MAMLAKAH AL-MAGHRIBIYAH [CONSTITUTION] July 1, 2011, pmbl. (Morocco).

165. See *id.* art. 19 (mandating that men and women have equal rights and freedoms), art. 154 (mandating that public services be organized equally to access everyone, specifically pointing out gender differences).

166. *Id.* art. 5.

ensuing decades.<sup>167</sup> Even into the mid-2000s, Berber language rights were only beginning to emerge as a possible terrain for legal political contestation.<sup>168</sup>

The specific embrace of historical language identity distinct from Arabic is an unusual step in an Arab Islamic country. It is somewhat analogous to a hypothetical provision in the U.S. Constitution specifically endorsing Native American identity and establishing a Native American language as an official national one. A similar unique feature of the 2011 Moroccan document is the recognition in the preamble not only of Andalusian (pre-modern Spanish Islamic), African, and Mediterranean influences as part of the country's unified identity, but also Hebraic influence.<sup>169</sup> While some Middle Eastern constitutions have provided for freedom of worship for all religions generally, or Jews specifically, Morocco's official acknowledgment of the nation's partial Jewish roots is a unique constitutional innovation.

If Morocco's recent constitution is unique among its Arab peers for its language fusing national identity and robust pluralism, its linkage of the king as both a political and symbolically religious figure is also unusual, if less new. A long-term feature of Moroccan politics has been the monarchy's self-depiction as the head of the Moroccan Muslim community—*amir el-mu'minin* ("Commander of the Faithful").<sup>170</sup> Despite that Muslims are not divided along national lines, this regime-enforced status of the king as the quasi-papal figure of his country's majority faith has served an important symbolic political role throughout post-independence history.<sup>171</sup> However, the 2011 constitution separates the king's religious authority and secular political powers into two components in Articles 41 and 42, respectively.<sup>172</sup> They had previously been combined in Article 19.<sup>173</sup>

167. See generally David M. Hart, *The Berber Dahir of 1930 in Colonial Morocco: Then and Now (1930–1996)*, 2 J. N. AFR. STUD., no. 2, 1997, at 11 (offering a primer on the Berber Dahir).

168. See *Moroccan Constitutional Reform: Berbers Say the Battle's Just Begun*, INTERNATIONAL BUSINESS TIMES (Jul. 6, 2011), <http://www.ibtimes.com/moroccan-constitutional-reform-berbers-say-battles-just-begun-296479> (providing an overview of the Berber movement for language rights and political representation).

169. See DUSTUR AL-MAMLAKAH AL-MAGHRIBIYAH [CONSTITUTION] July 1, 2011, pmb1. (Morocco) ("[The Kingdom of Morocco's] unity, is forged by the convergence of its Arab-Islamist, Berber . . . and Saharan-Hassanic . . . components, nourished and enriched by its African, Andalusian, Hebraic and Mediterranean influences . . .").

170. See DUSTUR AL-MAMLAKAH AL-MAGHRIBIYAH [CONSTITUTION] July 1, 2011, art. 41 (Morocco) ("The King, Commander of the Faithful . . . sees to the respect for Islam.").

171. See, e.g., MOHAMMED TOZY, *MONARCHIE ET ISLAM POLITIQUE AU MAROC* [Monarchy and Political Islam in Morocco], 92 (2d edition, 1999) (noting that the depiction of the monarch as *amir el-mu'minin* symbolized the monarch's role as both political and religious representative of the Moroccan people).

172. See DUSTUR AL-MAMLAKAH AL-MAGHRIBIYAH [CONSTITUTION] July 1, 2011, art. 41 (Morocco) (bestowing the king authority over a council charged with applying Islamic principles in commenting on religious fatwas), art. 42 ("[The king] is the Guarantor of the Independence of the country and of the territorial integrity of the Kingdom within its authentic frontiers.").

173. See DUSTUR AL-MAMLAKAH AL-MAGHRIBIYAH [CONSTITUTION] Sept. 4, 1992, art. 19 (Morocco), translated in WORLD CONSTITUTIONS ILLUSTRATED LIBRARY (Mohammed Abutalib trans., 1992) (unofficial). All subsequent citations to this constitution are to this translation.

Moreover, Article 46 removes language from previous constitutions referring to the person of the king as sacred.<sup>174</sup>

Those relatively few Moroccans and international observers who expected the new constitution to take away real power or sacred authority from the king were likely disappointed with the new document. Yet, the constitution's literal and new separation of the powers of church and state sent a message of embracing a globally recognizable political system alongside an Islamic establishment. Morocco's history of political assertiveness around the monarchy's central role in representing both Islam and pluralistic tolerance suggests one answer to a major question regarding the substance of the new constitution. Namely, given the post-2011 contentiousness of the constitutional politics of Islamic establishment, why did the Moroccan government expand language around Islam generally and provisions endorsing universal rights and pluralism that some Arab Islamists might find problematic?

Morocco's new constitution may represent a new iteration of a consistent political tendency towards monarchical primacy and symbolic linkage with national Islam. Unlike in most Arab countries, however, where the constitution remained the same for decades, the frequency of Moroccan constitutional promulgation has meant consistent incremental change in constitutional documents, reflecting, but also restricting, social and political contestation.<sup>175</sup> In Morocco, in other words, constitutions have functioned as a sort of political bandage, designed to heal gradually perceived wounds on the body politic, while maintaining that body's basic form.<sup>176</sup> But the question remains whether there is any link between the pluralism of rights in Morocco's recent document and the country's rather strange, frequent, and iterative constitutional process. What other generalizations might follow from comparative contrast of Morocco's constitutional case from that of Tunisia and Egypt?

### III. NEW ARAB CONSTITUTIONS? NEW COMPARATIVE CONSTITUTIONAL INSIGHTS?

One starting point for a comparative analysis of recent Arab constitutions flows from a second political interpretation for the Moroccan government's new, more detailed, and more pluralistic 2011 example. Namely, the Moroccan document may have reflected a more confined and less democratic drafting process as compared, for example, to Tunisia. Thus, the Moroccan case, in contrast to the

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174. *Compare* DUSTUR AL-MAMLAKAH AL-MAGHRIBIYAH [CONSTITUTION] July 1, 2011, art. 46 (Morocco) (omitting any reference to the king as being sacred), *with* DUSTUR AL-MAMLAKAH AL-MAGHRIBIYAH [CONSTITUTION] Sept. 4, 1992, art. 23 (Morocco) ("The person of the King shall be sacred and inviolable.").

175. *See, e.g.,* Lalami, *supra* note 137 (describing opponents' characterization of the constitutional reform process initiated by King Muhammad in responding to the February 20 movement as undemocratic).

176. *See, e.g.,* BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD, *supra* note 9, at 54 (describing the general role of the Moroccan constitutions as reflecting the will of the monarchy).

other two, brings up the broad and not easily resolved possible trade-off in constitutional promulgation or even interpretation. Specifically, narrow, less representative political bodies may be in a better position than elected ones to protect minorities, or otherwise insulate their work from majoritarian pressure, particularly in the absence of established judicial review.<sup>177</sup> While the Moroccan drafting and voting process for the 2011 constitution can be criticized for providing little time and space for the involvement of most Moroccans,<sup>178</sup> that very lack of voice had the possible advantage of fostering an environment that was more conducive to expansive pluralistic rights.

One could go further with a more contentious political hypothesis, based on the recent Moroccan constitution's tilt towards greater expansiveness surrounding Islamic and minority religious and linguistic influence. Namely, the monarchy came up with a constitution that many outside of the country could view as somewhat progressive as a result of the relative success of its history of incremental constitutions.<sup>179</sup> Incremental constitutions are those that are relatively frequently promulgated documents that serve to codify temporary but broad political balances in the country.

The Moroccan strategy of using top-down constitutions to stave off sociopolitical pressures, along with its related regime effort to coopt Islamist opposition through constant symbolic religious assertion, may have been more effective at keeping hostility towards the regime at a simmer, rather than allowing it to boil over as it did in Tunisia and Egypt.<sup>180</sup> While it is too early to know how Morocco's recent constitution will compare in practice with the other Arab countries' untested basic laws regarding religion and rights, the document's greater explicit embrace of non-Arab, non-Islamic influence is noteworthy.

In fact, iterative constitutional processes such as Morocco's might be a partial solution to the problems of democratic legitimacy and lack of judicial review that are common to authoritarian systems. Extending the new emphasis on the significance of authoritarian constitutions from scholars like Tom Ginsburg and his collaborators,<sup>181</sup> authoritarian constitutions may be as significant as their democratic counterparts in their operating manual function of detailing the institutions of a political system. In particular, inclusion of mechanisms through which citizens can see institutional accountability and relevance will enforce such

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177. See, e.g., DUSTUR AL-MAMLAKAH AL-MAGHRIBIYAH [CONSTITUTION] July 1, 2011, art. 5 (Morocco) (recognizing the indigenous Berber language as an official language).

178. See, e.g., Hayward, *supra* note 134.

179. See generally BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD, *supra* note 9.

180. See Omri, *supra* note 23 (describing hostilities in Tunisia leading up to constitutional reform); Slackman, *supra* note 73 (commenting on the killings of hundreds of protestors during revolution in Egypt).

181. Author and authoritative expert Tom Ginsburg is the Leo Spitz Professor of International Law at the University of Chicago and co-director of the Comparative Constitutions Project, a project responsible for cataloging the world's constitutions and providing comparative insights since 1789. THE UNIVERSITY OF CHICAGO LAW SCHOOL, <http://www.law.uchicago.edu/faculty/ginsburg-t> (last visited Oct. 26, 2014).

significance. Judicial review in more responsive governments serves this function well, since a country's supreme court can both interpret the specific responsibilities of political institutions over time and ground the meaning of important laws to some extent in the current state of its society. Where a political system cannot or will not allow a judiciary that can rule on laws quasi-autonomously, political institutions established in constitutions are likely to be rigid snapshots of a particular political era.<sup>182</sup> The Moroccan strategy of top-down successive constitutions addresses this problem, in that institutions are likely to be reframed when a possible crisis of political legitimacy appears on the horizon. In other words, iterative constitutionalism, by helping to frame a society's ever-shifting constitutional identity,<sup>183</sup> may serve a function similar to judicial review, if in a less transparent or detailed manner than published court opinions allow.

If the Moroccan case demonstrates, in part, that closed drafting processes may carry the advantage of trading off broad participation for possibly contentious minority plural rights protections, the Egyptian case offers a different lesson about drafting and politics. Highly-contested contexts, perhaps especially in potentially revolutionary political moments, may elude an easy process for long-term constitutional promulgation. What is striking about Egypt's post-Mubarak constitutionalism is that there have been not one, but two easily critiqued constitutional drafting periods.<sup>184</sup> Both of these failed to satisfy: (1) Egyptians hoping for a more democratic political foundation; (2) advocates hoping for a clearer separation of mosque and state; (3) activists hoping for a more Islamist political system; and (4) international constitutional experts hoping that democratic alternatives would have capitalized on cracks in the system.<sup>185</sup> In the end, despite the plethora of Egyptian and foreign legal experts concerned about constitutionalism in the Arab world's most populous country, Egypt between 2011 and 2014 is likely to stand as a case of the probability for dissatisfactory outcomes in a highly-politicized constitutional drafting climate.

By contrast, it appears that Tunisia's process and, perhaps, prospects for a constitutionally-grounded ongoing transition to a more representative, accountable government were more successful. Yet that success also had a lot of political

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182. See Norman L. Greene, *Rule of Law in Morocco: A Journey Towards A Better Judiciary Through the Implementation of the 2011 Constitutional Reforms*, 18 ILSA J. INT'L & COMP. L. 455, 483 (2012) (suggesting that where the judiciary is not structurally independent, the rule of law may merely reflect legislative or executive authority).

183. See generally GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY (2010) (offering a complex understanding of the term "constitutional identity," which assumes an ongoing, dynamic set of processes that could be partially worked out through iterative constitutionalism).

184. See, e.g., Nathan J. Brown & Michele Dunne, *Egypt's Draft Constitution Rewards the Military and Judiciary*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Dec. 4, 2013), <http://carnegieendowment.org/2013/12/04/egypt-s-draft-constitution-rewards-military-and-judiciary/hoo0> ("The new constitution offers better human rights protections than the 2012 version . . . Yet it also continues a pattern of leaving much up to the vagaries of implementing legislation.")

185. See generally Hellyer, *supra* note 97.

contingency. What accounted for it? While one knowledgeable observer argues that Tunisia's broader political culture embraced a level of moderation and compromise that is peculiar,<sup>186</sup> this is a difficult conclusion to test, and it doesn't necessarily account for the fact that Tunisia's drafting process stalled and nearly collapsed in the wake of increasing political disorder in 2012 and 2013. A more nuanced argument from an international expert observer is that the groundwork for Tunisia's post-military, authoritarian order had been laid rather carefully for at least a decade prior to 2011. The country's secularized and exiled Islamist opposition had been in frequent dialogue designed precisely to lay out approaches for a more representative political order.<sup>187</sup> Even if both the speed of Ben Ali's 2011 fall and the subsequent broader political discord took leading opposition figures somewhat by surprise, the well-laid foundation for a new order remained largely intact to help keep the political elite on course.<sup>188</sup> Tunisia's smaller overall and more politicized population compared with the more politically contentious Egypt to its east may have also made a difference.<sup>189</sup> Yet in both Egypt and Tunisia, constitution-drafting was politically contingent,<sup>190</sup> and no particular results seemed inevitable other than perhaps relatively little ultimate change with respect to the formal constitutional status of Islam, given the ongoing volatile nature of this issue.

Of course, the above arguments about drafting processes all assume that constitutions matter and not merely in democracies. This is an especially important point for new constitutions, including those surveyed whose long-term likely results are hardly clear. This leads to further consideration of generalizations based on what functional and other significance constitutions have, even when, as in Egypt and Morocco, they do not appear to be setting up definitive institutional shifts towards accountable representative governments.<sup>191</sup> Indeed, the record of non-democratic Arab states has been that most constitutions matter. Leaders obey their own basic laws even if this means declaring constitutional states of emergency to justify suspending some of the rights given to their citizens, as was the case in Mubarak's pre-2011 Egypt.<sup>192</sup> Indeed, in one of the few books on Arab

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186. See Marzouki, *supra* note 24 (referencing an International Institute for Strategic Studies roundtable discussion that addressed the successes of Tunisia's democratic transition and lessons for the broader Middle East).

187. Alfred Stepan & Juan J. Linz, *Democratization Theory and the "Arab Spring,"* 24 J. DEMOCRACY 15, 23–24 (2013).

188. *Id.*

189. *Id.* at 23.

190. *Id.* See generally BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD, *supra* note 9, at 26–29.

191. See, e.g., BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD, *supra* note 9, at 50–54 (describing Moroccan constitutional amendments as not transformative, but suggestive of potential for greater political liberalization that would nonetheless be well controlled); Eldakak, *supra* note 124, at 300–02 (describing post-revolutionary constitutional drafting in Egypt as failing to represent the express will of the people).

192. Kristen Stilt, *Constitutions in Authoritarian Regimes: The Egyptian Constitution of 1971*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES, *supra* note 8, at 111. See generally BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD, *supra* note 9.



constitutions, Nathan Brown argued that constitutions are taken seriously by drafters and matter in setting general political visions, social boundaries, and even institutional structures, if not in limiting central political authority.<sup>193</sup> Even where the result of a constitutional process is not—as may hold true in Tunisia—the establishment of democratic institutions and principles that can be assessed through independent judicial review, the salience of constitutionalism after 2011 in Egypt, Morocco, and Tunisia suggests that constitutions function even in less-than-democratic contexts as “operating manuals,” “blueprints,” and “window dressing.”<sup>194</sup>

The juxtaposition of the iterative nature of constitutionalism in Morocco and the political contestation of constitutionalism in Egypt and Tunisia leads to a broader conclusion of possible generalizability outside of the Middle Eastern context. Namely, contemporary constitutions may stand somewhere between their idealized status in democratic systems as politically foundational and enduring and their less resonant possible impact in authoritarian systems as mostly window-dressing. In Tunisia and Egypt, the political contestation around new constitutions was important but muted in relation to the country’s broader politics.

In Tunisia, the constitutional process was sidetracked somewhat as the emerging political elite became deadlocked and sidelined by the emergence of more extremist Islamists and the polarization that ensued. In Egypt, rushed constitutionalism under Morsi’s government served as one of the pretexts for the mass movement to curtail prematurely his elected government, following which the ensuing military coup eclipsed constitutionalism altogether. In Morocco, the new constitution clearly holds significance as an expression of the country’s identity, an operating manual, and a blueprint, particularly with respect to judicial review. Yet, it stands as one among a series of post-independence basic laws, giving no reason for a presumption of permanence. In all three cases, constitutionalism appears to have represented an intermediate level of sociopolitical significance, neither the most important piece of the post-2011 picture nor a peripheral element. This is true whether the ultimate result of 2011’s contestational politics was a new, more democratic system (Tunisia), a highly polarizing politicization and authoritarian retrenchment (Egypt), or a re-stabilized balance (Morocco).

If recent Arab cases suggest that constitutions may be less politically foundational than early Western cases like the United States imply, this is also true with respect to thorny problems of religion. In all three of the Arab cases discussed above, language about the state role of Islam was at issue. Note that the establishment of Islam as state religion in Egypt, Morocco, and Tunisia was less of an issue in and of itself, even for avowed secularists, perhaps because it was a *fait accompli* before 2011. However, the level of specificity around how Islam would

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193. See generally BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD, *supra* note 9, 195–200.

194. See Ginsburg & Simpser, *supra* note 9, at 5–10 for an explanation and illustration of these terms in various government settings.

influence the state became a contested piece of each constitutional process. In Egypt and Tunisia, this led to the polarization, and in Tunisia, the near derailment of the constitution, while at the same time relocated religious political contestation outside of the constitutional arena.<sup>195</sup> In Morocco, perhaps due to the less open constitutional process, or the king's longer-term strategy of associating his regime with state Islam, or both, the most recent constitution actually contains an unusual endorsement of cultural and religious pluralism for an Arab country apart from religiously-divided Lebanon.<sup>196</sup> The broader lesson here is that religion remains a tricky and important issue in many constitutional processes, but is not likely to be resolved as an issue in the constitutional document itself.

An implied, rather than explicit, generalization from the discussions above on recent Arab constitutionalism is the highly transnational context of contemporary processes. Three points are worth making about this. First, the global nature of constitutionalism, and the possible influence or even explicit borrowing of foreign constitutional provisions or ideas during a country's drafting process is hardly new. It can be harkened back, in the modern nation-state era at least, to the prominence of the American and French constitutional models. It is therefore important not to overstate the global milieu of contemporary constitutionalism as something entirely novel. Second, and on the other hand, the transnational dimensions of the constitutional drafting described above are evident both in the sense that the entire Arab uprising phenomenon was regional in nature and that human rights and other international actors sought to engage themselves in these Arab processes. Third, based on what is known about the Tunisian, Egyptian, and less transparent Moroccan constitutional promulgation processes, international advisers were generally kept from playing at least an overt role in drafting, based on the notion that constitutions are normatively presumed to be products of a particular national context.<sup>197</sup> In particular, the 2012 Egyptian constitutional process specifically forbade the presence of non-Egyptians in the drafting room.<sup>198</sup>

Yet the exclusion of international actors from drafting discussions in the largest Arab country example of post-2011 constitutionalism underscores the concern around constitutional political polarization that the plethora of would-be global advisers raised locally, particularly with respect to religion. The drafting process took place after a post-Mubarak Egyptian state crackdown on mostly

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195. See generally BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD, *supra* note 9, at 161–93.

196. See DUSTUR AL-MAMLAKAH AL-MAGHRIBIAH [CONSTITUTION] July 1, 2011, art. 28 (Morocco) (recognizing the cultural and political pluralism of the new Moroccan society).

197. See JACOBSON, *supra* note 183 for a succinct discussion on the tendency for contemporary constitutional judges—who are akin to constitutional drafters—to eschew explicit reference to foreign constitutional provisions. See generally Zaid Al-Ali & Donia Ben Romdhane, *Tunisia's New Constitution: Progress and Challenges to Come*, OPEN DEMOCRACY (Feb. 16, 2014), <https://www.opendemocracy.net/arab-awakening/zaid-al-ali-donia-ben-romdhane/tunisia%E2%80%99s-new-constitution-progress-and-challenges-to>.

198. Al-Ali & Romdhane, *supra* note 197. See generally Kelly Buchanan, *Egypt's New Constitution: General Overview of Drafting History and Content*, LIBRARY OF CONGRESS (Jan. 15, 2013), <http://blogs.loc.gov/law/2013/01/egypts-new-constitution-general-overview> (naming participants responsible for drafting the 2012 Egyptian Constitution).

American democracy-promotion groups, which led to prosecution under Morsi of some of their members.<sup>199</sup> International rights activists were not merely refused a seat anywhere near the table of constitutional promulgation, they were expelled, suggesting a highly conflictive aspect of basic norms of representative politics that were part and parcel of the constitution process.<sup>200</sup> Of course, the removal of some international groups—and their specific insights—from the constitutional field in Egypt is part of a more generally compressed drafting process that then became one of the touchstones of explosive popular opposition to the Morsi government itself. In short, even in the absence of non-Egyptian actors at the drafting table, the Egyptian process in particular foregrounds the volatile combinations of global and domestic actors typical of a high-stakes constitutional moment in the contemporary world.<sup>201</sup>

The complex nature of regional and other international involvement with recent Arab constitutionalism also suggests the importance of devoting more analytical attention to comparative constitutional globalism. One significant effort along these lines, drawn from a major ongoing study of comparative constitutional meanings and processes, correlates a comprehensive dataset of recent constitutional rights provisions in terms of their similarity to several prominent Western constitutions to conclude that the U.S. Constitution is waning as an influence on other constitutions.<sup>202</sup> What work like this is missing is the politics of how putative foreign constitutional influences are invoked, incorporated, ignored, or rebuffed in particular processes. This would be a useful avenue for further research in Arab and other recent constitutional cases. This is particularly true in light of the very limited direct influences that transnational human rights advocates and constitutional advisers from Western countries had in the drafting process in Tunisia, Egypt, and Morocco.

A final point for comparative reflection—somewhat narrowly mentioned at the beginning of this section—is how and whether to compare constitutions with a clear central role for judicial review with those where subsequent court jurisprudence is more tendentious. This issue hearkens back generally to the utility of comparing constitutions in democratic political systems with those in more repressive ones. Recall that one of the major possible lessons of a comparative account of the Moroccan constitution and other Arab ones is the way that Morocco's repeated constitutionalism may serve the purpose of increasing a popular sense that the document is roughly representative of its country's political identity. Comparing constitutional processes and documents across basic political

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199. See, e.g., *US criticises Egypt sentencing of NGO workers*, AL JAZEERA (June 5, 2013), <http://www.aljazeera.com/news/middleeast/2013/06/201364231748620669.html>.

200. *Id.*

201. See generally Esam Al-Amin, *Egypt's Constitution, the Opposition, and the Dialogue of the Deaf*, INTERNATIONAL POLICY DIGEST (Dec. 14, 2012), <http://www.internationalpolicydigest.org/2012/12/14/egypts-constitution-the-opposition-and-the-dialogue-of-the-deaf/>.

202. See David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 850–55 (2012) (explaining the decline of American constitutional leadership).

system types calls attention to functional similarities, rather than marking a bright line around differences. Since judicial review—as we know from pre-2011 Egypt,<sup>203</sup> Pakistan,<sup>204</sup> and elsewhere—does not guarantee and is not limited to democratic governments, it is worth thinking more about what political functions it actually fosters. Broadly speaking, judicial review allows for constitutional provisions to be used and contested within a part of a country's political system, thereby allowing the constitution to seem relevant. It also, through constitutional interpretation, helps the constitution itself endure.

The Moroccan case shows that, even without a robust supreme court, a substitution of frequent top-down constitutional promulgation can fill judicial review's first function of making constitutions relevant to their populations. The publicity involved in the establishment of a new constitution can be similar to that of important cases involving judicial review in engaging a broader swath of society in the basic meaning and significance of a constitution. Nevertheless, frequent constitutional promulgation is not a common strategy, as we saw in Egypt and Tunisia, whether because such iterative constitutionalism is labor-intensive for a regime, it suggests general political institutional fragility, or it undermines a presumption, fair or not, that constitutions should indeed be enduring.<sup>205</sup> And if countries generally do not follow Morocco's path of frequent constitutional reconstruction, then there is no real equivalent to judicial review's second function of buttressing a constitution's durability in documents that do not establish judicial review.

Thus, judicial review certainly matters and may be critical to watch in the aftermath of recent Arab constitutionalism. But this is less the case because of any guarantees that it provides of establishing or strengthening democracy and more because of its function in amplifying constitutional salience and stability, in addition to its possible role in adjudicating legal disputes and elaborating substantive rights. The study of constitutions and constitutional drafting highlights that judicial review may have political functions—in addition to its jurisprudential ones—which are only partially replaceable by other mechanisms.

#### IV. CONCLUSION

The Middle East stands at a point of convergence for a variety of conflicting religious, political, and social forces. This helps explain the trajectory of widespread hopes that were raised during the 2011 uprisings, the subsequent contestation around religious and other political identity that followed, and the more recent emergence of civil war, fragmentation, and renewed state repression.

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203. See MOUSTAFA, *supra* note 6, at 52–54 (describing a centralized judicial review structure tightly controlled by the executive). See generally BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD, *supra* note 9, at 143–59.

204. See generally MATTHEW J. NELSON, IN THE SHADOW OF SHARI'AH: ISLAM, ISLAMIC LAW, AND DEMOCRACY IN PAKISTAN (2011).

205. See generally ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009) (providing a general overview of constitutional endurance, whether it matters, and what it takes to maintain it).

For a set of countries with such a complex recent political history and ongoing global geopolitical significance, it is important to highlight the nature and meaning of constitutions and constitutionalism. Indeed, this is both because of the ongoing nature of regional constitutionalism, with drafting processes continuing in Libya<sup>206</sup> and Yemen, and the significance of constitutions to political stability and the rule of law more generally.

This article looked specifically at three recent Arab constitutional drafting processes with the broad aim of appreciating these processes in their own contexts and in a more global comparative perspective. If there is a single theme that emerges from recent processes of basic laws in Tunisia, Egypt, and Morocco, then it is that such processes take place in a highly contested and contingent political process, albeit one with possibly significant long-term implications. This is an important theme to underscore when trying to understand the problems and prospects for an enduring, more humane grounding for the rule of law in a region of the world that, whatever its prior history as perhaps the cradle of legalism, often seems to need it urgently.

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206. See, e.g., Ayman Al-Warfalli, *Libya's constitution-drafting body starts work*, REUTERS, Apr. 21, 2014, available at [www.reuters.com/article/2014/04/21/us-libya-constitution-idUSBREA3K0NS20140421](http://www.reuters.com/article/2014/04/21/us-libya-constitution-idUSBREA3K0NS20140421) (discussing Libya's attempt to draft a new constitution after the 2011 ouster of Muammar Gaddafi).