

# Constitutional Design Without Constitutional Moments: Lessons from Religiously Divided Societies

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High stakes constitution-writing exercises have burst into the headlines in recent years from Iraq and Afghanistan to Egypt and Tunisia. In some cases, heated debates have given way to conflict and even violence as transitioning societies struggle to resolve fundamental conflicts over identity. The challenges of constitution-making are more acute in societies that are marked by deep religious divisions, as is the case in many Muslim-majority countries that are currently undergoing political transitions. In this Article, we examine a distinctive feature of the current wave of new constitutional exercises: the challenge of constitution-drafting under conditions of deep disagreement over the state's religious or secular identity.

The Article offers three major contributions. First, we provide a detailed qualitative examination and comparison of constitution-making in the seven relatively understudied cases of Egypt, Indonesia, India, Israel, Lebanon, Tunisia, and Turkey. Second, our examination of these cases informs a critical assessment of some common assumptions in the literature that are drawn from well-studied, Western cases of constitution-drafting like those of the United States and France. We argue that an understanding of constitution-drafting as higher-order law-making that is designed to resolve questions of identity and entrench a foundational definition of “we the people” is inapposite at best and, at worst, may exacerbate conflict in religiously-divided countries. Thirdly, we develop a framework that expands the range of constitution-drafting tools and strategies discussed in the comparative law literature by identifying novel design features drawn from the qualitative cases and their potential merits.

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## Introduction

The beginning of 2016 witnessed the adoption of two constitutional amendments in Nepal only three months after the promulgation of the country’s new constitution amidst the threat of escalating violence over constitutional divisions.<sup>1</sup> The constitution-drafting process itself was marked by clashes over the course of 2015, in which over forty died and hundreds were injured.<sup>2</sup> One year earlier, eleven people were killed in violent clashes in Egypt during a referendum to vote on a new constitution.<sup>3</sup> Clearly constitution-drafting can be a fraught affair. The writing of a new constitution often raises or reopens fundamental questions of identity for societies where such matters remain unsettled. The stakes are raised even higher where countries undertake constitution-drafting in the wake of political transitions away from authoritarianism or violence in the country’s recent past. If constitution-drafting is understood as a matter of deliberating about the identity and values of a community in order to entrench a

1. *Nepal’s Divisive New Constitution: An Existential Crisis*, INT’L CRISIS GROUP (Apr. 4, 2016), <http://www.crisisgroup.org/en/regions/asia/south-asia/nepal/276-nepal-s-divisive-new-constitution-an-existential-crisis.aspx>.

2. Leena Rikkila Tamang, *Nepal’s new constitution*, INT’L INST. DEM. ELECTORAL ASSISTANCE (IDEA) (Sept. 22, 2015), [http://www.idea.int/asia\\_pacific/nepal/nepals-new-constitution.cfm](http://www.idea.int/asia_pacific/nepal/nepals-new-constitution.cfm).

3. Reza Sayah et al., *Violence Erupts as Egyptians Vote on New Constitution*, CNN (Jan. 14, 2014), <http://www.cnn.com/2014/01/14/world/africa/egypt-referendum/>.

foundational vision of the society, then in countries marked by deep social cleavages the battle to enforce competing visions can be very dangerous. Nowhere has this been clearer than in the constitutional exercises that have occurred in the aftermath of the Arab uprisings.

From Tunisia and Egypt to Libya,<sup>4</sup> Arab countries that have experienced mass uprisings against long-standing authoritarian regimes have opted to replace existing constitutions to mark a break from the past and establish a new political order for the post-authoritarian transition. Yet, in several cases constitution-drafting exercises in these countries have exacerbated underlying social cleavages, undermining rather than enabling democratizing transitions. In Egypt, for example, the attempt to write a new constitution immediately following the overthrow of the Mubarak regime revealed deep divisions over the religious or secular character of the new political order.<sup>5</sup> The result has been two constitutional decrees by the military and two new constitutions in the span of four years.<sup>6</sup> More disturbing than the constitutional instability is the fact that the losing side in the constitutional debates has experienced brutal repression resulting in an explosion of violence as political grievances are channeled in extra-constitutional (and extra-political) directions.<sup>7</sup>

Beyond the Arab uprisings, more than one-half of the countries in the world have written or re-written their constitutions in the last thirty or so years.<sup>8</sup> With so many countries writing new constitutions, it should be no surprise that constitution-drafting has emerged as a topic of interest not only among academics but also for policy-makers, development agencies, and a broad array of international organizations.<sup>9</sup> Yet, a distinctive feature of the current wave of new constitutional exercises remains relatively obscure in the literature: the challenge of constitution-drafting under conditions of deep disagreement over the state's religious or secular identity. While there has been some attention to the broader question of constitu-

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4. Even countries that did not experience large-scale protests have taken up constitutional revision as a means of staving revolutionary demands through an evolutionary approach to liberalization. *Morocco Approves King Mohammed's Constitutional Reforms*, BBC (July 2, 2011), <http://www.bbc.com/news/world-africa-13976480>.

5. Giles Elgood, *Egypt Opposition to Protest Against Invalid Constitution*, REUTERS (Dec. 17, 2012), <http://www.reuters.com/article/us-egypt-politics-idUSBRE8BD0CO20121217>.

6. CNN Library, *Egypt Fast Facts*, CNN (Jan. 28, 2016), <http://www.cnn.com/2013/07/03/world/africa/egypt-fast-facts/>.

7. Ben Wedeman et al., *Coup topples Egypt's Morsy; deposed president under 'house arrest'*, CNN (July 4, 2013), [www.cnn.com/2013/07/03/world/meast/egypt-protests/](http://www.cnn.com/2013/07/03/world/meast/egypt-protests/).

8. See ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 1-2, 65 (2009). In 2013 alone, three countries adopted new constitutions (Fiji, Vietnam, and Zimbabwe) while fifteen others were in the process of drafting and debating a new constitution or made substantial amendments to their existing constitutions (Tunisia, Egypt, Turkey, Liberia, Nepal, Tanzania, Chile, Libya, Yemen, Sierra Leone, Trinidad and Tobago, the Solomon Islands, Myanmar, South Sudan, and Zambia).

9. Sumit Bisarya, *Constitution Building: A Global Review*, INT'L IDEA 1, 1 (2013), <http://www.idea.int/es/publications/constitution-building-a-global-review/loader.cfm?csModule=security/getfile&pageID=65189/>.

tion-writing in divided societies,<sup>10</sup> the distinctive problems raised by religious divisions have not garnered significant attention.

When considered, the puzzle of democratic constitution-drafting in religiously divided societies is most often raised in the context of a single case-study of a particular country and analyzed in light of the society's own unique historical, cultural, political, and legal context.<sup>11</sup> Some recent scholarship in comparative constitutional law and politics has also focused on small-N case studies of the relationship between constitutions and religion. However, because such studies are primarily interested in examining how religious disputes are addressed in existing constitutional arrangements, they do not consider questions of constitutional design.<sup>12</sup> Rather, such work focuses on the post-drafting stage of constitutional interpretation or constitutional adjudication, examining the challenge of balancing religious accommodation with a pre-existing constitutional commitment to liberal rights protections.<sup>13</sup> Alternatively, the literature that focuses specifically on constitutional design (whether through large-N studies or more qualitative studies of single cases) tends to discuss institutional mechanisms for regulating inter-group competition rather than examining the effects of core normative conflicts such as those grounded in religious

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10. See HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES (2011); Sujit Choudhry, *Bridging comparative politics and comparative constitutional law: Constitutional law in divided societies*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 3, 4-6, 8-9 (Sujit Choudhry ed., 2011) [hereinafter CONSTITUTIONAL DESIGN]; Arend Lijphart, *Constitutional Design in Divided Societies*, 15 J. DEMOCRACY 96 (2004) [hereinafter *Constitutional Design in Divided Societies*].

11. Here are few examples: On Turkey, see ERGUN ÖZBUDUN & ÖMER FARUK GENCKAYA, *DEMOCRATIZATION AND THE POLITICS OF CONSTITUTION-MAKING IN TURKEY* (2009); Aslı Bâli, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 VA. J. INT'L L. 235 (2012). On India, see RAJEEV BHARGAVA, *THE PROMISE OF INDIA'S SECULAR CONSTITUTION* (2010). On Indonesia, see DONALD HOROWITZ, *CONSTITUTIONAL CHANGE AND DEMOCRACY IN INDONESIA* (2013); NADIRSYAH HOSEN, *SHARI'A AND CONSTITUTIONAL REFORM IN INDONESIA* 7, 127, 201-14 (2007). On Malaysia, see Kristin Stilt, *Contextualizing Constitutional Islam: The Malayan Experience*, 13 INT'L J. CONST. L. 407 (2015). On Egypt, see Clark Lombardi & Nathan J. Brown, *Islam in Egypt's New Constitution*, FOREIGN POL'Y (Dec. 13, 2012), [http://mideastafrica.foreignpolicy.com/posts/2012/12/13/islam\\_in\\_egypts\\_new\\_constitution](http://mideastafrica.foreignpolicy.com/posts/2012/12/13/islam_in_egypts_new_constitution). On Sri Lanka, see BENJAMIN SCHONTHAL, *BUDDHISM, POLITICS AND THE LIMITS OF LAW IN SRI LANKA* (forthcoming 2016).

12. See, e.g., SAID ARJOMAND, *CONSTITUTIONAL POLITICS IN THE MIDDLE EAST* 3-13 (Said Arjomand ed., 2008); *COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA* (Sunil Khilnani et al. eds., 2013); RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 19 (2010); GARY JACOBSON, *THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONTEXT* (2005). But see Hanna Lerner, *Permissive Constitutions, Democracy and Religious Freedom in India, Indonesia, Israel and Turkey*, 65 WORLD POL. 609 (2013).

13. This focus on constitutional interpretation and adjudication makes some sense, of course, because people can only fully appreciate the impact of constitutional design on alleviating or exacerbating underlying religious divisions over time by observing the implementation of constitutional provisions. Although constitutional interpretation of the draft by constitutional courts, legislatures, executives, and, in some instances, even the military is important to the operation of constitutions, we argue that focusing exclusively on the evolution of the text without studying its origins risks obscuring the degree to which constitution-drafters' deliberate design choices contribute to constitutional outcomes.

claims and identities.<sup>14</sup>

This Article fills this gap in the literature in two ways. First, it develops an initial framework through *qualitative comparison* of seven cases for studying the potential role of constitution-making in mitigating intense disagreements over the religious character of the state.<sup>15</sup> We draw on a broader set of case studies than is present in the current literature. In particular, we focus special attention on those countries that have recently undergone major constitution-drafting exercises, countries that have adopted new constitutions in the last half century or have produced new and comparatively understudied paradigms for resolving deep divisions over religion. Moreover, we include a substantial number of Muslim-majority countries to better understand the particular challenges faced by these countries in grappling with religion-state relations.

Our choices of empirical cases represent a contribution because legal academic research on comparative constitutionalism tends to focus on a small handful of largely Western models that do not include cases characterized by religious divisions.<sup>16</sup> In particular, the United States, France, and, more recently, South Africa, receive the lion's share of academic attention as representative examples of constitutional design. The focus on a small set of states has produced important distortions in the literature, which unduly emphasizes features that these constitutional cases have in common, but which remain distinctive to their dramatic founding histories rather than serving as representative features to be generalized across comparative study.<sup>17</sup> In particular, the overreliance on these cases has yielded scholarly work on constitutions and constitution-writing since the mid-twentieth century that has been largely dominated by the paradigm of liberal constitutionalism.<sup>18</sup>

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14. CONSTITUTIONAL DESIGN, *supra* note 10; see also SAID AMIR ARJOMAND, CONSTITUTIONALISM AND POLITICAL RECONSTRUCTION (2007); COMPARATIVE CONSTITUTIONAL LAW AND POLICY, THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS (Denis J. Galligan & Mila Versteeg eds., 2013); TOM GINSBURG, COMPARATIVE CONSTITUTIONAL DESIGN 16–17 (2013); LAW, RELIGION, CONSTITUTION: FREEDOM OF RELIGION, EQUAL TREATMENT AND THE LAW (W. Cole Durham, Jr. et al. eds., 2013).

15. Because we do not undertake a large-N study, we do not seek to propose definite conclusions concerning the way constitutional drafters across all cases debate religion. Rather, we highlight issues, debates, questions, and trends that are missing in the current literature and shed light on new paths of empirical and conceptual research.

16. For an example of the heavy reliance on Western examples compared with minimal use of non-Western examples, see Claude Klein & András Sajó, *Constitution-Making: Process and Substance*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 429, 429–40 (Michel Rosenfeld & András Sajó eds., 2012). See also Keith E. Whittington, *Constitutionalism*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 281, 294–95 (Keith E. Whittington et al. eds., 2008) (noting that normative theories that dominate the constitutional literature “often rest on assumptions about constitutions that require greater conceptual and empirical work to adequately unpack and examine”).

17. A few recent comparative works have looked at constitutionalism and secularism beyond the West; however, they focus on constitutional interpretation and adjudication instead of the stage of constitutional drafting. See, e.g., COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA, *supra* note 12; JACOB SOHN, *supra* note 12, at 13.

18. For rare exceptions to this general tendency, see Nathan Brown, *Reason, Interest, Rationality, and Passion in Constitution Drafting*, 6 PERSP. ON POL. 675, 682 (2008).

Second, beyond providing an empirical account of the comparatively understudied experiences of constitution-drafting in non-Western societies, examining these cases enables us to critically assess some common assumptions in the literature. In particular, we query the generalizability of presumptions derived from detailed studies of the Western constitution-making exercises that have grappled with religious disagreements. We present a critical analysis of the shortcomings of the liberal constitutional paradigm in studying countries and constitutional exercises marked by religious plurality and religious conflict outside of the Western context. This critique does not intend to reject the liberal paradigm, but to clarify its premises. This Article focuses on whether societies that begin from different assumptions produce constitutional solutions for mitigating religious conflict that offer alternative lessons in constitutional design. Towards this end, we develop theoretical insights through the comparative analysis of (predominantly non-Western) constitutional debates that are sometimes grounded in different normative commitments than those presumed by liberal models.

Thirdly, based on these insights, we have developed a framework that expands the range of constitutional tools and strategies discussed in the comparative legal and political literature by identifying novel design features drawn from the cases that illustrate their potential advantages. We show that when debates begin from alternative premises, they may yield innovative solutions that offer new lessons on how constitutions can mitigate intense religious disagreements over the character of the state. Such lessons do not displace the value of liberal constitutional models but rather supplement the literature by revealing an array of previously understudied constitutional solutions of potential interest in constitution-drafting exercises. As we discuss in greater detail below, constitutional drafters in religiously divided societies often tacitly acknowledge the limited role formal constitutions may play in mitigating religious conflicts and innovate creative incremental strategies rather than imposing a definite formula in a constitutional moment that may risk exacerbating rather than resolving underlying disagreements.

Based on our examination of the cases under study in this Article, we do not share the commonly-held presumption that the constituent power rests with a clearly defined, pre-existing people, or that constitution-writing is by definition an act of invention.<sup>19</sup> The cases we consider rarely exemplify the model of a constitution that creates a new order *ex nihilo*. Nor are the cases examples of “we the people” engaging in higher order law-making through deliberation in a “constitutional moment.”<sup>20</sup> Rather, we are inter-

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19. Klein & Sajó, *supra* note 16, at 435; see ULRICH K. PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 109, 122-23 (1995).

20. On the theory of “constitutional moments,” which has influenced both the American constitutional law literature and scholarly work in comparative law, see BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6-7, 40-57 (1991). For a critical engagement with the concept of “constitutional moments” in the American constitutional law literature, see Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992).

ested in those constitution-drafting exercises that are undertaken by societies marked by disagreement over matters of identity and power-sharing. Such exercises often draw on a mix of extant constitutional repertoires—from the underlying society, regional experience, or international influences—and novel formulae for co-existence to fashion constitutional bargains at a particular juncture. These bargains, in turn, may produce new and shared civic identities and durable compromises to mitigate conflict or thinner *modus vivendi* that serve a specific purpose at a critical time. Our alternative starting-point, which neither assumes a pre-constitutional consensus on identity nor expects constitutions to be acts of *de novo* invention, offers an innovative approach to the study of constitution-making.<sup>21</sup>

Part I provides a preliminary set of observations concerning the distinctive character of social cleavages over questions of religion. We identify the ways in which religious divisions pose special challenges in constitution-drafting as a result of competing *normative* visions of the institutional and identitarian character of the state. Part II argues that the aspects of religious division that pose distinctive problems for constitutional design also limit the utility of the very liberal constitutional paradigm that serves as the presumed “model” for democratic constitutionalism in much of the literature. Section II.A explains the principal features of the liberal paradigm. Section II.B then provides a critical account of the limitations of the liberal paradigm as applied to the challenges faced by religiously divided societies.

Part III offers empirical case studies of seven countries where religious practices or identity were central sources of debate among constitution-drafters. The cases considered are from Egypt, India, Indonesia, Israel, Lebanon, Tunisia, and Turkey.<sup>22</sup> In all seven countries, the main moment of constitution-drafting on which we focus occurred at a foundational stage of the state, whether that moment was post-colonial (India, Indonesia, Israel), the transition to independence (Lebanon), post-imperial (Turkey), or the result of regime change (post Arab uprising Egypt and Tunisia). We have selected cases from Asia and the Middle East that vary across majority religions (Muslim, Jewish, and Hindu). All of the cases represent non-Western countries, in an effort to provide for an alternative constitutional perspective to the North-Atlantic, predominantly Christian examples that are overrepresented in the scholarly literature on constitu-

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21. For a broad overview of alternative comparative methods in constitutional law, see generally Vicki C. Jackson, *Comparative Constitutional Law: Methodologies*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW*, *supra* note 16, at 54, 54-72.

22. Our research for these cases draws on primary sources (e.g., protocols of constitutional debates, constitutional drafts, interviews with participants of constitution-making processes), secondary literatures, and collaborative work with other comparative constitutional scholars over the course of a series of workshops and conferences. Such collaborations include a workshop that we convened on Constitution Writing, Religion, and Human Rights held at the Rockefeller Center at Bellagio, Italy in July 2012, and a conference convened at the Center for Interdisciplinary Research (ZiF), Bielefeld University, Germany in June 2014. Selected papers presented at these workshops will appear in a forthcoming edited volume: *CONSTITUTION WRITING, RELIGION AND DEMOCRACY* (Ashli Bâli & Hanna Lerner eds., forthcoming 2016).

tion-making. For each of the case studies we offer short descriptions of the empirical record and major debates. In addition, some of our discussion draws on the recent constitutional experiences of four additional cases—Malaysia, Morocco, Pakistan, and Senegal—to provide further empirical support for our arguments.<sup>23</sup>

One dimension of state-religion relations we prioritized in relevant cases was the constitutional status of religious law. Although the status of religious law often arises in countries grappling with the role of *shari'a* law, questions concerning the role of the Jewish rabbinate in defining personal status issues in Israel revealed a similar dimension to the regulation of state-religion relations in the Israeli case. The common feature among the aforementioned cases is the opportunity they allow for close examination of the specific constitutional debates where religious conflicts or disagreements were critical axes of division prior to and during the period of constitution-writing. Constitutional debates on religion in these cases address conflicts over the religious or secular character of the state, the status of religious law, the protection of religious minorities, or the regulation of religious education by the state.

Part IV develops theoretical insights concerning four critical dimensions of constitution-drafting, based on the comparative framework we develop through our study of the seven cases. First, we draw lessons from the empirical record concerning the implications of the nature of underlying religious divisions for different constitution-drafting strategies. In particular, we find that intra-religious divisions, which often take the form of divisions between religiously observant and non-observant, secular groups *within* a single religious community, require very different constitutional-design strategies than divisions that are inter-religious, involving multiple different religious communities.

Second, we identify a range of constitutional formulae involving incrementalist strategies as a means of mitigating religious conflicts during the constitution-drafting process. When the drafters achieved no clear consensus concerning religiously related issues, and the imposing of the preferences of one side of the debate was undesirable, drafters adopted a more incrementalist approach in the various cases. Such an approach was expressed through different types of mechanisms, including ambiguity of the constitutional text, deferral of choices to a post-drafting stage, conflicting principles/provisions within a written constitution, and the inclusion

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23. We did not offer four additional case studies due to space constraints, but we rely on the excellent secondary literature on these cases to illustrate our points. See, e.g., Souleymane Bachir Diagne, *The Constitution of a "Laïc" African and Muslim Country: Senegal*, in CONSTITUTION WRITING, RELIGION AND DEMOCRACY (Aslı Bâli & Hanna Lerner eds., forthcoming 2016) (studying Senegal); David Mednicoff, *The Politics of Sacred Paralysis: Islam in Recent Moroccan and North African Constitutions*, in CONSTITUTION WRITING, RELIGION AND DEMOCRACY (Aslı Bâli & Hanna Lerner eds., forthcoming 2016) (studying Morocco); Matthew Nelson, *Islamic Law and Islamic Republic: What Role for Parliament?*, in CONSTITUTION WRITING, RELIGION AND DEMOCRACY 8 (Aslı Bâli & Hanna Lerner eds., forthcoming 2016) (studying Pakistan); Stilt, *supra* note 11 (studying Malaysia).



of non-justiciable principles. We analyze how the cases implement these strategies.

Third, we analyze the relationship between process choices concerning the method by which constitution-drafting occurs and the outcome of the drafting process, within the context of constitutional provisions concerning religion. We argue that the various cases under discussion represent outliers from expected trends concerning the degree to which various methods of constitution-drafting affect outcomes. While our limited number of cases is not sufficiently large to establish theoretical conclusions regarding the relations between process and outcome in constitutional drafting, it is sufficient to demonstrate the limitations of some common intuitions in the existing literature on this topic. Our cases illustrate deviations from general claims such as (a) that a top-down, elite-led drafting process yields definite and often repressive constitutional outcomes, (b) that broadly participatory and inclusive processes are expected to yield constitutional texts more attentive to rights-protections, and (c) that the type of constitution-drafting process (top-down vs. participatory and inclusive) affects the degree of “secularism” or “religiosity” of the constitutional provisions adopted. More generally, we have found that the common binary treatment of the constitution-drafting process, as either elite-led or broadly participatory, is too black and white. We argue that a contextual appreciation of the factors impacting both process and outcome is more helpful than a dichotomous treatment that defines processes as either top-down imposition or bottom-up participation.

Finally, we offer lessons concerning the possible determinants of the durability of the constitutional solutions that emerge from drafting under conditions of deep religious disagreements. Based on our selected case studies, we found greater durability of top-down constitutional formulae, whether imposed by external actors or on a non-consensual basis by a dominant actor during a constitution-drafting period. Moreover, we found that the constitutional orders created in the context of nation-building (as a result of decolonization or post-imperial transition) have proven to be more durable than constitution-making processes that occur after the initial founding moment of the polity.

We conclude that the most ambitious conceptions of constitution-drafting rooted in liberal presumptions may be inapposite in countries deeply divided over matters of religion. To frame constitution-drafting as a higher order moment in which foundational questions must be resolved raises the stakes of the constitution-making process in ways that may exacerbate conflict or produce stalemate and paralysis. Although deferring such foundational questions also has some costs, on balance we argue in favor of the potential merits of an incrementalist approach to constitutional design in religiously divided societies.

## I. Is Religion (in Constitution-Drafting) Special?

### A. A Qualified "Yes"

Given the great variation in the nature and intensity of religious conflicts among cases studied in this Article, ranging from Egypt to Indonesia to Israel to Tunisia, an immediate question is whether anything distinctive unites these cases and presents common theoretical questions. In other words, is there anything special in the way constitutional drafters address religious conflicts? Or, in short, are constitutional debates on religion special?

Based on empirical study of the different case studies, we believe the answer to this question is a qualified yes. The qualification of our positive answer stems, first and foremost, from the empirical difficulty in defining the boundaries between religious conflicts and other related societal, ideational or political conflicts. There is often an overlap between religious divisions and other axes of tension, including those with ethnic, linguistic, class, or regional characteristics.<sup>24</sup>

Another difficulty that challenges any attempt to develop a theoretical framework based on comparative analysis of religion in constitution drafting stems from the degree of variation with respect to the nature of the conflict underlying the constitutional debates and the level of intensity with which religious issues were discussed by constitutional drafters. This is because the nature and intensity of the religious divisions that characterize different societies, and which are reflected in their constitution-drafting debates, vary significantly.<sup>25</sup> Different religious traditions also present different kinds of challenges in a constitution-drafting context: Catholicism raises the question of structuring relations between the state and a hierarchically-organized external authority, the Vatican, while Islam raises the question of the relationship between state law and *shari'a*. Religious traditions represent an array of conceptions of authority, bureaucratized clerical institutions and legal traditions governing everything from the structure of family to the content of education. Given the variation across religious traditions, there may be no single, universally applicable way of defining precisely how religion is distinctive.<sup>26</sup>

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24. The literature on the interconnection between religious identity and national or ethnic identity, for example, is immense. For two recent publications, see generally TALAL ASAD, *FORMATION OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* (2003) and AZAR GAT WITH ALEXANDER YAKOBSON, *NATIONS: THE LONG HISTORY AND DEEP ROOTS OF POLITICAL ETHNICITY AND NATIONALISM* (2013).

25. This variation is linked to documented decline in religious beliefs in some countries, as well as to other historical developments, including the emergence of secularism. See, e.g., JOSÉ CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD* (1994); PIPA NORRIS AND RONALD INGLEHART, *SACRED AND SECULAR: RELIGION AND POLITICS WORLDWIDE* (2004); CHARLES TAYLOR, *A SECULAR AGE* (2007).

26. For some examples from the long-standing debates about the definition of religion and the question of whether it is distinctive across a number of contexts and disciplines, see Talal Asad, *The Construction of Religion as an Anthropological Category*, in *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* 27, 27-54 (1982); Clifford Geertz, *Religion as a Cultural System*, in *THE INTERPRETATION OF CULTURES* 87, 87-125 (1973); *THE PRAGMATICS OF DEFINING RELIGION: CONTEXTS, CON-*

Moreover, any comparative analysis of constitutional debates on religion must tackle the difficult challenge of definitions. Often different members of the same society understand terms such as “religion,” “religious,” “secular,” or “secularism” differently, let alone the great variation in understandings of the terms between different societies, cultures, or historic periods.<sup>27</sup>

While we are aware that “religion” is a contested term and that there is substantial literature addressing such definitional questions,<sup>28</sup> we have left the debates over the definition of “religion” outside the scope of this Article. Rather, we adopt the definition of religion employed by the actors and groups under study. That is, if the parties believe that their disagreements are over questions of religion or have a religious character, we accept that designation.

Regardless of the specific nature of the religious divisions and their intensity across cases, there is something distinctive about conflicts over religious questions that cannot be reduced to or conflated with other kinds of material or identitarian conflicts. As we further illustrate below, in many cases constitutional debates on religious issues are not just proxies for conflicts over class, geographic, ethnic, or linguistic differences. Rather, they reflect conflicts over beliefs, values, and normative commitments that have proven to be remarkably durable. We do not argue that all societies marked by religious diversity experience such conflicts, but those societies experiencing religious conflict share common features that are not present where conflicts focus more on interests and distributional questions and less on beliefs and values.

Religious conflicts present a special problem in the context of constitutional-drafting for another reason. Both religions and constitutions, to borrow from John Searle’s terminology, include “constitutive rules.”<sup>29</sup> In contrast to “regulative rules,” which regulate activities present in a society,

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CEPTS & CONTESTS (Jan G. Platvoet & Arie L. Molendijk eds., 1999). For a more recent debate about the distinctiveness of religion in constitutional contexts, see generally Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

27. In recent years, the literature on the meaning of religion and secularism has flourished. See, e.g., ASAD, *supra* note 24, at 187–94; PETER BERGER ET AL., *RELIGIOUS AMERICA, SECULAR EUROPE: A THEME AND VARIATIONS* (2008); STEVE BRUCE, *GOD IS DEAD: SECULARIZATION IN THE WEST* (2002); *RELIGION AND THE POLITICAL IMAGINATION* (Ira Katznelson & Gareth Stedman Jones eds., 2010); *RETHINKING SECULARISM* (Craig Calhoun et al. eds., 2011); *SECULARISM AND ITS CRITICS* (Rajeev Bhargava ed., 1998); *VARIETIES OF SECULARISM IN A SECULAR AGE* (Michael Warner et al. eds., 2010); John R. Bowen, *Secularism: Conceptual Genealogy or Political Dilemma*, 52 COMP. STUD. IN SOC’Y & HIST. 680 (2010).

28. For example, a definition of “religious” parties commonly found in the literature on political parties emphasizes that, in contrast to other ideological parties, tradition and its interpretation by clerics and/or religious institutions outside of the party itself determine the basis of the religious party’s programs. See Richard Gunther & Larry Diamond, *Species of Political Parties: A New Typology*, 9 PARTY POL. 167, 182 (2003). Another recent debate emerged in the political theory literature concerning the definition of religious freedom as a special legal category. See, e.g., Cécile Laborde, *Religion in the Law: The Disaggregation Approach*, 34 LAW & PHIL. 581 (2015).

29. JOHN SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 27–28 (1995).

constitutive rules create the very possibility of certain activity.<sup>30</sup> Both religions and constitutions not only regulate human behavior and activities, but also create the very possibility of social, political, and legal practices and institutions. The practices and institutions created by religions often compete with the political and legal institutions brought into existence by constitutions. For example, in the case of parallel judicial institutions, which exist in pluri-legal systems, such competition can be quite pronounced in the area of personal status law.<sup>31</sup>

Historically, the question of the separation of religious and temporal authority has long been one of the central battles of modernization and state-formation, especially in the European context. This was in part because, unlike other identity categories or sources of affiliation, religious authorities made competing demands of obedience on the individuals constituting the state.<sup>32</sup> In some religious traditions, religion is also a competing source of law and invokes a legal tradition outside of the state.<sup>33</sup> Elsewhere, there is a long history of religious political parties that structure political contestation in ways that make religious identity more salient.<sup>34</sup> Further, for societies that are former colonies, colonial governors often used religion to legally define the communities in the territories under their administration. Thus, colonial legacies and the legal patrimony inherited by the post-colonial state are marked by the entrenchment of religion in law.<sup>35</sup> These characteristics of religion continue to have impor-

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30. *Id.* Searle uses the example of driving rules vs. chess rules to explain the difference between the two types of rules. "Don't drive on the right side" is a rule that regulates driving, an activity that existed prior to any driving rules. By contrast, rules of chess do not regulate an antecedently existing activity but rather "create the very possibility of playing chess."

31. See, e.g., YÜKSEL SEZGIN, *HUMAN RIGHTS UNDER STATE-ENFORCED RELIGIOUS FAMILY LAWS IN ISRAEL, EGYPT AND INDIA* (2013).

32. See Alfred Stepan, *The World's Religious Systems and Democracy: Crafting the "Twin Tolerations,"* in *ARGUING COMPARATIVE POLITICS* 213 (2001).

33. In the case of Catholicism, the Vatican has at times served as a legal authority and source of law beyond the state. In the case of Islam, some institutions—like al Azhar—might also play a role that has legal authority but is not entirely officially within the control of the state. More importantly, in the broader Islamic tradition there have been multiple examples across Muslim societies of legal pluralism emerging from the institutional competition between state-sanctioned legal institutions and more informal centers of legal authority. A recent example that has received some scholarly attention has been the emergence of *shari'a* courts in the Egyptian Sinai. See, e.g., Mara Revkin, *Triadic Legal Pluralism in North Sinai: A Case Study of State, Shari'a and 'Urf Courts in Conflict and Cooperation*, J. ISLAMIC & NEAR E. L. (2014).

34. See generally MICHAEL PATRICK FOGARTY, *CHRISTIAN DEMOCRACY IN WESTERN EUROPE, 1820-1953* (1957); STATHIS N. KALYVAS, *THE RISE OF CHRISTIAN DEMOCRACY IN EUROPE* (1996).

35. India is a good example. British colonial rulers viewed the division between Hindus and Muslims as the main problem of India's society. This view was expressed in a three-volume report published in 1944 by British historian Reginald Coupland, who was also a member of the Cripps Mission. See generally REGINALD COUPLAND, *THE INDIAN PROBLEM: REPORT ON THE CONSTITUTIONAL PROBLEM OF INDIA* (1944). In 1946, a British cabinet plan for a federal structure of independent India divided the provinces into three geographical groupings according to religious divisions: one of the groupings would be

tant institutional and ideational implications in contemporary religiously-divided societies undertaking constitution-drafting exercises.

Having addressed the question of what, if anything, makes debates over religion in constitution-making distinctive, we next turn to another preliminary question raised by our theoretical inquiry: What makes a society religiously divided and how are such divisions distinctive?

## B. Religiously Divided Societies

Religiously divided societies differ from the category of “deeply divided societies” which is used in the literature on comparative constitutional design and conflict resolution. The study of deeply divided societies emerged in the past four decades. It tends to explore contemporary cases of severe internal conflicts and the special challenges they pose on the establishment of a democratic government. Some scholars use slightly different terminology, such as “severely divided,”<sup>36</sup> “plural societies,”<sup>37</sup> or simply “divided societies”<sup>38</sup> in referring to the same societal phenomenon. One of the most widely cited definitions of the term was provided by Ian Lustick who considers a society deeply divided if ascriptive ties generate antagonistic segmentation of societies, based on terminal identities with high political salience, sustained over a substantial period of time and a wide variety of issues.<sup>39</sup>

Most definitions of the term have used similarly broad language focused on the intensity and comprehensiveness of societal conflicts without paying particular attention to the nature of the schism. Distinctions are not typically made between various types of deeply divided societies, whether the society in question is segmented along ethnic, religious, or economic lines, or whether the division between groups is based on any other type of identity.<sup>40</sup> Similarly, many comparative works refer interchangeably to deeply divided societies and to ethnically divided societies thus focusing on ethnic identity as the main source of divisions. For example, two leading political scientists who have written extensively on divided societies, Arend Lijphart<sup>41</sup> and Donald Horowitz,<sup>42</sup> have not distinguished

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predominantly Hindu, one would be predominantly Muslim, and a third would be equally Hindu and Muslim. LERNER, *supra* note 10, at 112–18.

36. See DONALD HOROWITZ, *ETHNIC GROUPS IN CONFLICT* (1985) [hereinafter *ETHNIC GROUPS*]; Donald Horowitz, *Democracy in Divided Societies*, 4 J. DEMOCRACY 18, 18 (1993) [hereinafter *Democracy*].

37. See generally AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* (1977).

38. See generally ERIC A. NORDLINGER, *CONFLICT REGULATION IN DIVIDED SOCIETIES* (1972).

39. Ian Lustick, *Stability in Deeply Divided Societies: Consociationalism Versus Control*, 31 WORLD POL. 325, 325 (1979).

40. ERIC A. NORDLINGER, *CONFLICT REGULATION IN DIVIDED SOCIETIES* 9 (1972); see also ADRIAN GUELKE, *POLITICS IN DEEPLY DIVIDED SOCIETIES* (2012); Arend Lijphart, *Majority Rule Versus Democracy in Deeply Divided Societies*, 4 *Politikon* 113 (1977) [hereinafter *Majority Rule*].

41. See generally AREND LIJPHART, *THE POLITICS OF ACCOMMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS* (2d ed. 1975); LIJPHART, *supra* note 37; *Constitutional*

among types of divisions. Both have suggested various institutional mechanisms for mitigating identity conflicts and promoting democracy under conditions of deep societal divisions. Both authors have written on various cases of divided societies in Europe, Asia, and Africa,<sup>43</sup> and developed competing sets of institutional solutions for the long-term conflicts that characterize these societies: Lijphart suggested consociational arrangements of power sharing among elites of the conflicting groups,<sup>44</sup> while Horowitz advocated for various mechanisms of electoral rules for advancing political integration across societal divisions.<sup>45</sup> However, both Lijphart and Horowitz proposed that their institutional solutions could reconcile all types of societal divisions, regardless of their nature—whether based on ethnic, linguistic, religious, or other types of identity. This trend is also reflected in the widely cited volume edited by Sujit Choudhry, *Constitutional Design for Divided Societies: Accommodation or Integration?*, which presents a theoretical analysis of the challenges posed by divided societies to constitutional drafters, as well as various case studies of constitutional design.<sup>46</sup>

By contrast, one of the basic tenets of this Article is that the nature of the schisms in divided societies is important, particularly in the context of constitution writing. Religious divisions carry a normative weight that does not exist in the case of ethnic or linguistic divisions. For example, the competing perspectives presented by the conflicting religious groups often prevent the adoption of the principles of political liberalism.<sup>47</sup> That is, tension exists between those who distinguish between private identity and public, shared civic identity and those who reject this distinction. Such conflicts usually cannot be resolved by redistributing power or resources.

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*Design in Divided Societies*, *supra* note 10; Arend Lijphart, *Consociational Democracy*, 21 WORLD POL. 207 (1969) [hereinafter *Consociational Democracy*]; Arend Lijphart, *Indian Democracy: A Consociational Interpretation*, 90 AM. POL. SCI. REV. 258 (1996); *Majority Rule*, *supra* note 40.

42. See DONALD L. HOROWITZ, A DEMOCRATIC SOUTH AFRICA?: CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY (1991); ETHNIC GROUPS, *supra* note 36; Donald L. Horowitz, *Constitutional Design: and Oxymoron?*, in DESIGNING DEMOCRATIC INSTITUTIONS 253, 253-84 (Ian Shapiro & Steven Macedo eds., 2000); Donald L. Horowitz, *Constitutional Design: Proposal versus Process*, in THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT AND DEMOCRACY 15, 15-36 (Andrew Reynolds ed., 2002); *Democracy*, *supra* note 36. For an overview of the writings of both Lijphart and Horowitz, as well as a helpful comparison of their approaches, see John McGarry et al., *Integration or Accommodation? The Enduring Debate in Conflict Regulation*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 41, 41-90 (Sujit Choudhry ed., 2008).

43. For example, Lijphart has written about the Netherlands, Lebanon, Iraq, South Africa, and dozens of other countries. Horowitz has conducted studies in various countries in Asia, including Indonesia and Sri Lanka, as well on North Ireland, South Africa, among many others.

44. *Consociational Democracy*, *supra* note 41.

45. Donald L. Horowitz, *Encouraging Electoral Accommodation in Divided Societies*, in ELECTORAL SYSTEMS IN DIVIDED SOCIETIES: THE FIJI CONSTITUTION REVIEW 21, 22-34 (Brij V. Lal & Peter Larmour eds., 2012).

46. See CONSTITUTIONAL DESIGN, *supra* note 10.

47. Lerner, *supra* note 12, at 615.

Religiously-divided societies also differ from multi-religious or religiously heterogenic societies. Religious diversity characterizes heterogenic societies, meaning that their members belong to various religious groups. Religious heterogeneity does not necessarily yield intense constitutional disagreements concerning the role of the state in regulating religion, or the religious definition of the state's identity. We use "divided society" here to mean societies marked by identitarian divisions that are the basis for political mobilization. The mere presence of ethnic, linguistic, cultural, or (in the cases with which we are most interested) religious diversity does not mean that a society is "divided" in the sense we intend. Rather, it is only when such diversity translates into political fragmentation that we would define that society as "divided." In this respect, our definition of religiously divided societies echoes that of deeply divided societies mentioned above, albeit with a more specific focus.

The case studies we consider in this Article involve societies where differences over the appropriate relationship between religion and the state become a source of political fragmentation. Such divisions can occur between different religious groups or within a single religious group.<sup>48</sup> In religiously divided societies, we posit, frictions go beyond the type of tensions that can be bridged by what John Rawls termed "overlapping consensus."<sup>49</sup> The conflict is not over group rights or allocation of resources; instead, it focuses on the fundamental norms and values that should guide state policies in the area of religion for the entire population.<sup>50</sup> Albert Hirschman termed such conflicts as "non-divisible," or "either or" conflicts, that are characterized by the unwillingness of the parties to compromise.<sup>51</sup> He distinguished between such conflicts and "divisible" conflicts over the distribution of a good or value, which he described as a competition over "more or less."<sup>52</sup> Hirschman argued that non-divisible conflicts are characteristic of societies split along rival religious (and other identitarian) lines.<sup>53</sup> We share this insight that identitarian conflicts raise a special category of challenges for these reasons, and, even within the subset of identitarian conflicts, we believe those conflicts that are specifically over religious identity have some distinctive characteristics.

Religious conflicts addressed by constitutional drafters may be along inter-religious or intra-religious lines.<sup>54</sup> The case of intra-religious-group

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48. For more elaboration on inter-religious and intra-religious conflicts see *infra* note 52.

49. Lerner, *supra* note 12, at 614.

50. *Id.* at 615.

51. Albert O. Hirschman, *Social Conflicts as Pillars of Democratic Market Society*, 22 *POL. THEORY* 203, 213–14 (1994).

52. *Id.* at 213.

53. *Id.* On related debates in political science over integrationist or accommodationist approaches to constitutional design in the presence of identitarian divisions, see *CONSTITUTIONAL DESIGN*, *supra* note 10.

54. The distinction between inter-religious and intra-religious divides may vary across place as well as across time. For example, the Catholic-Protestant divide may be considered inter-religious in Northern Ireland, while it may be viewed as intra-religious (i.e. intra-Christian) in other European countries, such as Germany. Similarly, the

divisions often takes the form of sharp disagreements concerning the secular or religious character of the state. For instance, in Muslim-majority countries such as Turkey, Pakistan, Tunisia, Egypt, and Indonesia, the main split over religious issues is between Muslims who define themselves as secular-liberal and Muslims who define themselves as religious-conservative.<sup>55</sup> In other cases, religious divisions may be both inter-religious and intra-religious. Such a schism, for example, cuts across the Muslim-Hindu divide in India, where tensions exist between conservative-religious camps and liberal-secular camps in both religious groups.<sup>56</sup> Similarly, in Israel and in Lebanon, the conflict over the religious character of the state has an inter-religious dimension (the conflict between the Jewish majority and non-Jewish minority in Israel and the Muslim-Christian and Sunni-Shia divisions in Lebanon), yet there is also an intense debate at the intra-religious level (as in Israel between the Orthodox and secular camps within the Jewish majority population).<sup>57</sup>

One could argue that most, perhaps all, societies have been religiously divided at some point.<sup>58</sup> Indeed, such divisions are not social facts but processes that evolve, with the continual formation and re-formation of the boundaries of identity-based affinities and disagreements. In this process, some societies have for a period of time managed to constitutionalize arrangements that mitigate and even successfully pacify disagreements over religion, and some have not.<sup>59</sup> A broad comparative overview reveals that the dividing line between countries currently experiencing deep religious divisions and those that have settled these issues is not neatly split between Western and non-Western cases.<sup>60</sup> In some Western cases, we see issues of intra- or inter-religious dispute newly resurgent, such as the emergence of far-right anti-Muslim parties in countries like France, Denmark,

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Sunni-Shia divide may be considered inter-religious in the contemporary Lebanese context, while in the 1920s it would more commonly have been viewed as intra-religious particularly as compared with the principal axis of division in that period between Muslims and Christians.

55. See, e.g., DALE F. EICKELMAN & JAMES PISCATORI, *MUSLIM POLITICS* (2004).

56. Rajeswari Sunder Rajan & Anuradha Dingwaney Needham, *Introduction*, in *THE CRISIS OF SECULARISM IN INDIA* 1, 1 (Rajeswari Sunder Rajan & Anuradha Dingwaney Needham eds., 2007).

57. For more details, see Sections III.d (on Israel) and III.e (on Lebanon).

58. The sociological study of religion from the early twentieth century onwards has explored the hypothesis that all societies are marked by unified systems of beliefs and practices that both generate moral community and produce divisions. See generally EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* (Joseph Ward Swain trans., George Allen & Unwin Ltd. 1915) (1912); MAX WEBER, *SOCIOLOGY OF RELIGION* (Ephraim Fischhoff trans., Beacon Press 1963) (1922).

59. For an account of successful constitutionalization of religious divisions, see JOSÉ CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD* (1994); TAYLOR, *supra* note 25.

60. Some social scientists may have argued this, most famously Max Weber. See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Stephen Kalberg trans., Oxford Univ. Press 2010) (1920). However, others have attempted to overcome this Western/non-Western distinction and argued for a more nuanced comparison between processes of secularization and constitutionalization. See, most recently, *A SECULAR AGE BEYOND THE WEST* (Mirjam Künkler et al. eds., forthcoming).



and the Netherlands.<sup>61</sup> By contrast, in some non-Western societies that are very heterogeneous, we see constitutional devices that have successfully settled long-standing religious divisions, as in Senegal<sup>62</sup> and to a more limited extent Indonesia.<sup>63</sup> While in some cases societies have accomplished successful constitutional resolution of religious disagreements, in this Article we particularly focus on cases of societies still grappling with deep religious divisions.

Constitutional conflicts in such societies, we argue, pose particular challenges to the commonly held paradigm of liberal constitutionalism, which dominates contemporary scholarship on constitution-making, and call for a rethinking of this model.

## II. Questioning the Liberal Constitutional Paradigm in the Context of Religious Divisions

In very broad and general terms, the paradigm of liberal constitutionalism is characterized by six key features. Each individual feature may not be unique to the liberal constitutional paradigm,<sup>64</sup> but all six features taken together make the liberal constitutional paradigm distinctive.

### A. Features of the Liberal Paradigm

*Institutional role.* Constitutions are perceived as primarily fulfilling an institutional and procedural role. They are expected to establish the legal and political structure of governmental institutions, to regulate the relationship between the state organs, and to determine the procedures of future legislation.<sup>65</sup> By contrast to pre-modern constitutional documents, which merely reflected the state's existing legal and political reality, modern constitutions create and define the rules according to which governments function, and regulate the balance of power.<sup>66</sup> They are expected to establish legal limitations on governmental power and thus to constrain

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61. See JYTTE KLAUSEN, *THE ISLAMIC CHALLENGE: POLITICS AND RELIGION IN WESTERN EUROPE* (2008); Geoffrey Brahm Levey & Tariq Modood, *Liberal Democracy, Multicultural Citizenship and the Danish Cartoon Affair*, in *SECULARISM, RELIGION AND MULTICULTURAL CITIZENSHIP* 216, 216-42 (Geoffrey Brahm Levey & Tariq Modood eds., 2009); András Sajó, *Preliminaries to a Concept of Constitutional Secularism*, 6 *INT'L J. CONST. L.* 605, 605-29 (2008).

62. Diagne, *supra* note 23.

63. See *infra* Section III.C.

64. For instance, decisionism, supremacy, or institutionalism may also be characteristics of authoritarian constitutions. But, when those three features are packaged together with the other features we identify with the liberal constitutional paradigm, the distinction from authoritarian constitutions becomes clear.

65. See generally JAMES BRYCE, *CONSTITUTIONS* (photo. reprint 1997) (1901); STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (1995); ANDRÁS SAJÓ, *LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM* 2, 49 (2008).

66. CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM, ANCIENT AND MODERN* 5 (rev. ed. 1958); K.C. WHEARE, *MODERN CONSTITUTIONS* 1-2 (1966).

political authorities.<sup>67</sup> As Thomas Paine wrote in 1792, “a [c]onstitution is not an act of Government but of a People constituting a Government.”<sup>68</sup>

*Formality.* Constitutions are expected to be written documents created by a formal legislative act.<sup>69</sup> The United Kingdom’s unwritten constitution (as well as those of Israel and New Zealand) represents an exception to this general rule, as made evident by the fact that there is a formal constitution in almost each of the 193 UN member countries, half of which have been written or re-written in the past three decades.<sup>70</sup>

*Supremacy.* Since constitutional rules provide the legal framework for the political order, they are conceived as distinct from and superior to ordinary legislation.<sup>71</sup> For this reason, the adoption of constitutional rules has been described as “higher lawmaking,” and rests on greater democratic legitimacy than does “normal lawmaking,” which is conducted by elected representatives.<sup>72</sup> In addition, the superiority of constitutional rules is usually preserved through mechanisms of entrenchment, implying special and relatively more rigid amendment procedures compared with those required for reforming ordinary legislation.<sup>73</sup> Such entrenchment measures are based on the premise that constitutional matters not only determine the methods by which collective decisions will be reached but also define the common good and shared goals; hence, they require a more thorough deliberative process than do routine legislative matters.<sup>74</sup>

*Decisionism.* By providing the legal tool for future judicial and legislative decisions, constitutions are expected to adhere to and represent a definitive set of norms and values, intended to guide decisions of future generations.<sup>75</sup> Moreover, constitutional thinking seeks to harmonize law. In this conception of constitutionalism, the role of judicial reasoning is to ensure normative harmony between the legislative enterprise and constitutional foundations.<sup>76</sup>

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67. CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA* 124 (1950) [hereinafter *GOVERNMENT AND DEMOCRACY*]; see CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* (1968); FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1978).

68. THOMAS PAINE, *COMMON SENSE AND OTHER WRITINGS* 157 (Gordon S. Wood ed., Modern Library Classics 2003) (1776).

69. See generally HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1961).

70. ELKINS ET AL., *supra* note 8, at 215–21.

71. See, e.g., U.S. CONST. art. VI (“This Constitution . . . shall be the supreme Law of the land.”). See also Larry Alexander, *What Are Constitutions, and What Should (and Can) They Do*, 28 SOC. PHIL. & POL’Y 1, 7–8 (2010); Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 152, 153–54 (Larry Alexander ed., 1998).

72. BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 16 (1992).

73. See generally RESPONDING TO IMPERFECTION: *THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (Sanford Levinson ed., 1995).

74. Donald Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 356 (1994); see also BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

75. See KELSEN, *supra* note 69.

76. Andras Jakab, *Judicial Reasoning in Constitutional Courts: A European Perspective*, 14 GERMAN L.J. 1, 15 (2012) (explaining the special issue of constitutional reasoning).

*New Beginning.* Given that the Western constitutional imagination is grounded in the American and French experiences, it perceives the moment of constitution-making in revolutionary terms. From Hanna Arendt to Bruce Ackerman, constitutional theorists consider the act of constitution-writing as a moment of rupture.<sup>77</sup> Accordingly, constitutions are created either to formally incorporate the substantive achievements of a successful revolution, or to provide a point of departure for initiating a radical change and a clean break with the past.

*Individual Rights.* Lastly, liberal constitutionalism is normatively committed to the legal protection of fundamental civil and political rights.<sup>78</sup> Importantly, these protections are identified with *individuals* who are the basic components of the underlying society and the relevant level at which rights protections must be provided. As such, group rights are either secondary or excluded altogether. The institutionalization of constraints on political authorities in the name of individual rights is the key distinction between constitutions that are considered “proper” or “real” from those that are viewed as “nominal” or “façade” constitutions.<sup>79</sup> According to this view, constitutions are expected to limit governmental power by crafting an institutional system that distributes powers between various branches of the government and provides a formal basis for protection of fundamental rights.<sup>80</sup>

According to some, the commitment to individual rights implies a conception of secularism as the strict separation between religion and the public sphere. This understanding of secularism, grounded in normative rights frameworks, is a crucial component of liberal constitutionalism.<sup>81</sup> The separation between religious identity in the private sphere and the shared civic identity of the citizenry is one of the definitive features of political liberalism.<sup>82</sup> Constitutions, according to the liberal approach, are expected to avoid interfering in identity issues, particularly those pertaining to religion.<sup>83</sup> Beyond the inclusion of statements guaranteeing freedom of religious exercise, the ideal-type of liberal constitutionalism assumes that constitutions should play a minimalist role in religious matters.<sup>84</sup>

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77. See generally ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION*, *supra* note 72; HANNA ARENDT, *ON REVOLUTION* (1965); ULRICH K. PREUSS, *CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS* (1995).

78. See GOVERNMENT AND DEMOCRACY, *supra* note 67, at 123–24; CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 6 (2001); Jon Elster, *Introduction*, in *CONSTITUTIONALISM AND DEMOCRACY* 1, 3 (Jon Elster & Rune Slagstad eds., 1993).

79. Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 861 (1962).

80. Jon Elster, *supra* note 78.

81. Andras Sajó, *Preliminaries to a Concept of Constitutional Secularism*, 6 INT'L J. CONST. L. 605, 625 (2008).

82. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1996).

83. See *id.*; see also JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* (Ciaran Cronin & Pablo De Greiff eds., 1998); Jürgen Habermas, *Why Europe Needs a Constitution*, NEW LEFT REV. 1, 1–4 (2001); Sajó, *supra* note 81.

84. Although studies have shown that the inclusion of provisions for freedom of religion empirically does not guarantee limitations on governmental intervention in

In sum, drafting a constitution, according to the liberal paradigm, is a moment of new beginning, in which supreme principles, intended to guide future generations and prevent the violation of individual rights through limited government and separation of church and state, are to be entrenched in a formal document.

#### B. Limits of the Liberal Constitutional Paradigm: Constitution-Drafting in Religiously-Divided Societies

The paradigm of liberal constitutionalism dominates not only the legal scholarship, which is highly influenced by the Anglo-American constitutional experience, but also the comparative politics literature of constitutional design, which has flourished in recent decades.<sup>85</sup> Such comparative work focuses on the question of democratization and institutional design in divided or post-conflict societies, and, by and large, emphasizes the role of constitutions in establishing democratic institutional mechanisms, regulating the balance of power between the different branches of government, and playing a minimalist role in addressing disagreements concerning religious issues.<sup>86</sup> The institutional solutions typically proposed by experts in constitutional design include either mechanisms of special groups' rights,<sup>87</sup> the establishment of power-sharing devices,<sup>88</sup> or the adoption of a variety of electoral rules.<sup>89</sup>

These mechanisms of conflict resolution are helpful when the conflict between identity groups concerns the allocation of resources and power. In societies where inter-religious divisions are primarily about achieving a balance between a plurality of religious communities, some of these mechanisms may work well, as with the consociational constitutional formula adopted in Lebanon.<sup>90</sup> Yet, they are less helpful when tensions are over the relationship between state law and religious law, or when conflicts concern the religious character of the state as a whole. Similarly, territorial solutions, including various forms of federalism and devolution, may be irrelevant to addressing disagreements concerning religious issues, since

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religious affairs. Jonathan Fox & Deborah Flores, *Religions, Constitutions, and the State: A Cross-National Study*, 71 J. POL. 1499, 1499 (2009).

85. For an example of scholarship in this tradition, see generally Bisarya, *supra* note 9.

86. See generally MICHELE BRANDT ET AL., CONSTITUTION-MAKING AND REFORM: OPTIONS FOR THE PROCESS (2011); FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING (Laurel E. Miller ed., 2010); Jamal Benomar, *Constitution-Making After Conflict: Lessons for Iraq*, 15 J. DEMOCRACY 81 (2004); CONSTITUTIONAL DESIGN, *supra* note 10; Hallie Ludsin, *Peacemaking and Constitution-Drafting: A Dysfunctional Marriage*, 33 U. PA. J. INT'L L. 239, 239-40 (2011); Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 663-64 (2006); Jennifer Widner, *Constitution Writing in Post-Conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513, 1513-15 (2008).

87. See generally WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995); JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY (1995).

88. See Lijphart, *supra* note 40, at 118.

89. See ETHNIC GROUPS, *supra* note 36, at 574-75.

90. See LIJPHART, *supra* note 37, at 147-50.

they require geographical concentration of the conflicting groups,<sup>91</sup> which is rare when the conflict is intra-religious. Tensions that are not amenable to consociational or territorial solutions exist, for example, between Muslims who espouse political Islam and those who prefer to confine religion to the private sphere in Egypt, Pakistan, and Turkey.<sup>92</sup> By contrast, to some extent religious autonomy on a geographical basis was introduced in Indonesia, in the case of Aceh.<sup>93</sup> In 2001, after years of separatist struggle against the central government, Aceh became the only province in Indonesia authorized to include *shari'a* Islamic laws in provincial legislation.<sup>94</sup>

Lastly, special group rights are often advocated by proponents of multiculturalism, suggesting that “personal federalism” may resolve religious tensions when geographical federalism is impossible.<sup>95</sup> Special group rights may resolve religious tensions in societies that by and large accept a priori the principles of political liberalism and more specifically the distinction between expressions of identity in the private versus the public sphere. However, when religious groups demand to reorganize the entire state and society around religious doctrinal principles, special group rights are not perceived by them as a neutral compromise solution, but rather as an imposition of the liberal-secular approach against which they are struggling.

Approaches focused on institutional design solutions to implementing political liberal formulae dominate not only academic scholarship, but have also been adopted by several international organizations, national NGOs, and think tanks that have published reports on recent constitution-writing events or policy guidelines for future constitution-writing projects.<sup>96</sup> Like the academic scholarship, these reports propose institu-

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91. See generally *FEDERALISM, SUBNATIONAL CONSTITUTIONS AND MINORITY RIGHTS* (G. Alan Tarr et al. eds., 2004).

92. See generally, e.g., *THE RULE OF LAW, ISLAM, AND CONSTITUTIONAL POLITICS IN EGYPT AND IRAN* (Saïd Amir Arjomand & Nathan J. Brown eds., 2013); IHSAN YILMAZ, *MUSLIM LAWS, POLITICS AND SOCIETY IN MODERN NATION STATES: DYNAMIC LEGAL PLURALISMS IN ENGLAND, TURKEY AND PAKISTAN* (2005); Bâli, *supra* note 11.

93. See John R. Bowen, *Contours of Sharia in Indonesia*, in *DEMOCRACY AND ISLAM IN INDONESIA* 149, 161 (Mirjam Künkler & Alfred Stepan eds., 2013).

94. Aceh's provincial government introduced, for example, legislation against alcohol drinking, gambling and “seclusion” (i.e. laws that limit association with unmarried individuals from the other sex). See *id.* at 164.

95. See Theo Jans, *Personal Federalism: A Solution to Ethno-National Conflicts? What It Has Meant in Brussels and What It Could Mean in Abkhazia*, in *FEDERAL PRACTICE: EXPLORING ALTERNATIVES FOR GEORGIA AND ABKHAZIA* 215, 226 (Bruno Coppieters et al. eds., 2000).

96. See, e.g., *Constitution Building Processes*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE (IDEA), <http://www.idea.int/cbp/> (last visited Feb. 28, 2016); *Constitution Making, Peacebuilding and National Reconciliation*, U.S. INST. PEACE, <http://www.usip.org/programs/initiatives/constitution-making-peacebuilding-and-national-reconciliation> (last visited Feb. 28, 2016); *Supporting Constitution-Making for Peace Globally*, INTERPEACE CONSTITUTION-MAKING FOR PEACE, <http://www.constitutionmakingforpeace.org/> (last visited Feb. 28, 2016); see also U.N. Secretary-General, *Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes* (Apr. 2009), [http://www.unrol.org/files/Guidance\\_Note\\_United\\_Nations\\_Assistance\\_to\\_Constitution-making\\_Processes\\_FINAL.pdf](http://www.unrol.org/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf).

tional design fixes that begin from a model that may be difficult to transpose to societies where some of the basic prerequisites or foundational assumptions of liberal constitutionalism in terms of political values or commitments are absent or contested.<sup>97</sup>

There is much to learn from the constitutional design literature that develops institutional solutions based on the liberal constitutional paradigm.<sup>98</sup> This paradigm certainly offers a good fit for projects of constitution-writing or re-writing that take place in societies characterized by what John Rawls defined as “overlapping consensus”<sup>99</sup> regarding the religious/secular vision of the state. Liberal constitutions may be the best choice for societies that inhabit, in Charles Taylor’s terms, “a secular age.”<sup>100</sup> Where societies are characterized by the institutional separation between religion and state, a decline of belief and practice, and general skepticism towards “a naïve acknowledgment of the transcendent,” crucial prerequisites of liberal constitutionalism are already in place.<sup>101</sup>

However, a liberal constitutionalist approach may be far less apposite when constitutions are written in societies divided over the religious/secular definition of the state, in which disagreements concerning religious symbols, practices, or law are constitutive of core constitutional debates. In such contexts, there may not be a shared commitment to a strong constitution that meets the characteristics of institutionalism and supremacy encompassed by the liberal constitutional paradigm. Instead, normative disagreements stemming from religious conflict will likely be reflected in the constitutional exercise, producing models at variance with many liberal assumptions.

Yet, some religiously-divided societies that do not begin from liberal commitments have developed constitutional solutions for conflict mitigation worth studying. In the remainder of this Article, we turn our attention to lessons that may be learned from drafting processes that begin in the absence of shared normative commitments—or are grounded in alternative commitments to those of the liberal constitutional paradigm.

While constitution-drafting in the context of deep divisions poses special challenges, constitutionalism remains the dominant paradigm for the political and legal organization of divided societies. On the one hand, constitutions are increasingly promoted by good governance and rule-of-law experts as a means of promoting reconciliation and advancing democrati-

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97. See generally Ludsin, *supra* note 86; Vijayashri Sripati, *UN Constitutional Assistance Projects in Comprehensive Peace Missions: An Inventory 1989-2011*, 19 INT’L PEACEKEEPING 93 (2012).

98. See, e.g., FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING, *supra* note 86; HOROWITZ, *supra* note 11; Widner, *supra* note 86.

99. See generally JOHN RAWLS, *Lecture IV: The Idea of an Overlapping Consensus*, in POLITICAL LIBERALISM 133, 134-72 (2011).

100. Of course there are also liberal constitutional theorists, like the later work of John Rawls or the recent scholarship of Jürgen Habermas, who do not insist on excluding religious claims from the public sphere. Jürgen Habermas, *Religion in the Public Sphere*, 14 EUR. J. PHIL. 1, 11 (2006).

101. See TAYLOR, *supra* note 25.

zation. On the other hand, attempts to craft a shared conception of the state in deeply-divided societies run the risk of entrenching or escalating existing conflicts in counter-productive ways. Unsurprisingly, we see wide variation in the outcomes of constitution-drafting processes undertaken against a backdrop of deep divisions. In some cases, constitutions are adopted, but the frequency with which constitutional compromises are revisited and redrafted blurs the distinction between constitution-drafting and ordinary legislative action.<sup>102</sup> In other cases, constitutional texts remain unchanged after promulgation while the underlying institutional and normative foundations of the political order evolve unmoored from constitutional constraint.<sup>103</sup> And in yet other instances, societies defer efforts to arrive at a durable compromise over contested questions of identity, settling for various strategies of constitutional ambiguity, running the spectrum from the adoption of vague and open-ended language to avoiding drafting any written constitution at all.

Recent experiences have underscored the degree to which constitution-writing can be a high-stakes game. In the presence of intense polarization between competing visions of the state, drafting a constitution risks undermining fragile forms of political stability and derailing fledgling efforts at democratization. This has been a troubling challenge in the cases of countries where constitutional debates have revealed deep divisions over foundational values. In these cases, efforts at constitution-drafting have catalyzed renewed conflict instead of contributing to state-building.

The question, then, is how to address the complex challenge of drafting a democratic constitution under conditions of disagreement regarding the role religion should play in the constitution and in the state. The focus on drafting as the locus of attention reflects our view that drafting processes may tell us a great deal about why proposed constitutional solutions in the presence of religious divisions succeed or fail. Such processes offer a microcosm of the ways in which religiously-divided societies address their internal polarization over the nature of the state and seek (sometimes without success) to produce convergence.

In contrast to the literature that views constitutions as a legal embodiment of an existing pre-constitutional consensus on the identity of the polity (and thus takes subsequent constitutional implementation as the focal point of analysis), we examine the process of constitution-drafting as an attempt to produce shared values and norms out of dissensus. Thus, the constitution is neither a product of prior “thick” consensus (on the cultural, national, or religious identity of the state), nor is it grounded in a “thin” consensus around a shared liberal political culture. Rather, the challenge in deeply religiously-divided societies is how to grapple with constitution-making in the absence of consensus on the shared norms or values underpinning the state. The next part of the Article demonstrates how

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102. This is the case, for example, in Latin America, where new constitutions are frequently written following elections. See David Landau, *Constitution Writing Gone Wrong*, 64 ALA. L. REV. 923, 970 (2013).

103. The Pakistani case is illustrative of this point. See Nelson, *supra* note 23.

constitutional drafters have addressed this challenge in seven religiously divided societies in Asia and the Middle East during the 20th and early 21st century.

### III. Case Studies

The seven case-studies presented in this section illustrate the various ways in which constitutional drafters addressed the religious conflicts that divided their societies. The following descriptions are in no way intended to provide a complete constitutional history of the seven countries. Rather, in each case study we focus on a particular constitution-making episode in order to highlight its distinctive features. Overall, the seven cases demonstrate a range of different constitutional tools used to mitigate (or suppress) intense disagreements over religiously-related questions. While the cases differ in the types of religious issues discussed by the constitutional framers as well as in the variety of methods used to draft the constitutions, they provide a rich basis for analysis. We present the lessons drawn from the comparison of the cases in Part IV.

#### A. Egypt: 2011-2014

Egypt's first constitution was written in 1923 by an elite-dominated constituent assembly of thirty appointed members. The principal goal of the constitution was to establish the country's autonomy from colonial rule, with questions of the status of religion receiving scant attention. For the next half century, appointed, elite-dominated assemblies replaced one constitutional text with another. When the death of Gamal Abdel Nasser, Egypt's most powerful post-independence president, occasioned a transition in the country, his successor, Anwar Sadat, declared that a "permanent constitution" would be promulgated. In 1971, an eighty-member constituent assembly, once again appointed rather than elected, was convened to deliberate on what would be the republic's first durable constitution and also the first to introduce a more robust account of religion-state relations.<sup>104</sup>

Prior constitutions had each repeated a formula with respect to state-religion relations that defined Islam as the religion of the state and a source of personal status laws. The 1971 Constitution, by contrast, added a provision in Article 2 that described the principles of Islamic *shari'a* as "a principal source of legislation."<sup>105</sup> During the drafting process some had argued for an even stronger formulation, substituting a definite article that

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104. For a detailed account of the process by which this constitution was drafted and its text, see generally NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT (2001).

105. For an English translation of the text of the Constitution of the Arab Republic of Egypt of 1971 (as amended through 2007), see CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, as amended, May 22, 1980, May 25, 2005, March 26, 2007.



would make Islamic *shari'a* the principal source of legislation.<sup>106</sup> While this position did not prevail in 1971, a later amendment of Article 2 in 1980 inserted the stronger formulation. While symbolically significant, the change made little or no difference in the actual enforcement of Article 2 as interpreted by Egypt's Supreme Constitutional Court (SCC).

From 1923 to 1980, constitution-drafting in Egypt did not involve serious conflict over religion-state relations. Divisions over the role of religion became more salient after the Iranian revolution of 1979—and, in the case of Egypt, the 1981 assassination of Anwar Sadat—when concerns that political Islamist movements might become destabilizing for authoritarian regimes. These concerns produced the twin strategies of selective accommodation and repression. Such efforts increased constitutional references to Islam, while giving rise to political contestation about the appropriate relationship between religion and the state.

Through the 1980s and 90s, as political Islam became the vehicle for opposition to authoritarianism, the formally illegal Muslim Brotherhood (MB) in Egypt emerged as a significant actor. The Brotherhood—which renounced violence in the 1970s and 80s—was tolerated as a sort of “loyal opposition” by the regime of President Hosni Mubarak, allowed to field independent candidates in elections that exercised a mild Islamizing influence on the political order. By the time of the Egyptian uprising that ousted Mubarak in 2011, the MB had emerged as the only organized political actor with substantial experience in the constrained forms of electoral competition that had been permissible in Egypt for over a decade.

After the uprising, free and fair legislative elections gave the MB the largest bloc of seats in parliament by January 2012. Their candidate, Mohammed Morsi, won the first free presidential elections in May of the same year.<sup>107</sup> The MB's electoral success raised the stakes of constitution-drafting by a representative constituent assembly, with the prospect of having committed Islamists determine revisions to state-religion relations for the first time.

On February 13, 2011, the 1971 Constitution was suspended following the resignation of Mubarak and it was officially repealed on March 30th of the same year. The military—through the aegis of the Supreme Council of the Armed Forces (SCAF)—assumed power and established the rules of the game for the transitional period.<sup>108</sup> Governing from February 11, 2011, to June 30, 2012, when President Morsi assumed office, the

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106. *Id.*; see also Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L. L. REV. 379, 414 (2006).

107. David D. Kirkpatrick, *Named Egypt's Winner, Islamist Makes History*, N.Y. TIMES, June 24, 2012, at A1 (discussing Morsi's election as president); *Egypt's Islamist Parties Win Elections to Parliament*, BBC (Jan. 21, 2012), <http://www.bbc.com/news/world-middle-east-16665748>.

108. James Feuille, Note, *Reforming Egypt's Constitution: Hope for Egyptian Democracy?*, 47 TEX. INT'L L.J. 237, 238 (2011); John Liolos, Note, *Erecting New Constitutional Cultures: The Problem and Promise of Constitutionalism Post-Arab Spring*, 36 B.C. INT'L COMP. L. REV. 219, 225 (2013).

SCAF promulgated a constitutional declaration in place of the suspended constitution, establishing the timeframe for drafting a new constitution. Like all previous constitutional texts, the Declaration was drafted by an appointed body with no public input apart from an up-or-down referendum.<sup>109</sup> The substantive provisions of the Declaration borrowed heavily from the 1971 Constitution while the procedural provisions established a timeframe that all but doomed the subsequent constitution-drafting process. The Declaration required that the elected legislature would have to select a constituent assembly composed of one hundred members within six months. The Assembly, in turn, would have six months to complete a new draft constitution. Moreover, the draft was to be submitted to the people for approval in a referendum within fifteen days of its completion.<sup>110</sup> Thus, the Assembly was given a compressed timetable for completion of work and the public little time to familiarize themselves with the text or debate its provisions before voting on it in a referendum.

While the MB's success in parliamentary elections had been anticipated, the real surprise was the strong showing by the more religiously conservative Salafi movement, which had no prior experience participating in Egyptian elections. The Salafi Nour party came in second after the MB with 21% of the lower house and 25% of the upper house, trailed by the most successful non-Islamist party, the Wafd (7.5% of seats in the lower house and 8% in the upper). These three groupings—the MB, the Salafists, and the non-Islamist secular parties—represented the three forces present in the Constituent Assembly, which was indirectly elected by parliament.

Due to its large parliamentary bloc, the Brotherhood's Freedom and Justice Party dominated the selection process for the 100-member Assembly, leading to sharp objections from the non-Islamist camp. In the end, the first constituent assembly was dissolved by an administrative court on the grounds that it was unrepresentative.<sup>111</sup> Yet, in the absence of consensus among the parties in parliament, the second constituent assembly resembled the first in composition and conducted its work under threat of another court-ordered dissolution. The lower house of parliament, too, was dissolved upon a successful challenge to the constitutionality of the electoral law by which it had been elected.<sup>112</sup> As election outcomes were reversed by the courts, the need to backstop electoral gains with new constitutional provisions became more urgent. Following the presidential elections, the MB found itself in control of all of the remaining elected organs with an outright majority in the upper house and in the constituent assembly and its candidate serving as president.

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109. Nicolas Heliotis, Note, *A Textual Analysis of Presidential Power Under the 2014 Egyptian Constitution*, 48 INT'L LAW. 127, 133 (2014).

110. EGYPT'S CONSTITUTIONAL DECLARATION, Mar. 30, 2011, art. 60.

111. Marina Ottoway, *Egypt's Fundamental Crisis of Legitimacy*, NAT'L INT. (June 6, 2013), <http://nationalinterest.org/commentary/egypts-fundamental-crisis-legitimacy-8561>.

112. *Egypt Parliament to be Dissolved After Ruling: Court Official*, REUTERS (June 14, 2012), <http://www.reuters.com/article/us-egypt-court-dissolution-idUSBRE85D0XN20120614>.

The discomfort felt by non-Islamists and military and business elites in Egypt over the consolidation of power in the hands of the MB cast a long shadow over constitutional debates. As the Constituent Assembly began its work, state-religion relations were at issue in two competing ways. First, there were the debates about the provisions of the constitution substantively related to religion (for example, the state's identity in relations to religion and the status of Islamic law). Second, there were the provisions defining the allocation of powers between institutions to interpret and enforce the constitution. From the outset both sets of issues were deeply polarizing. In the words of one analyst, the "old argument" that "secular authoritarianism is preferable to a democracy infused with faith" led to a determination amongst non-Islamist elites and the military to "undo the product of multiple national elections and constitutional deliberation by democratically chosen representatives."<sup>113</sup> The Assembly debates were marked by repeated attempts to delay the drafting process through constitutional challenges and strategic boycotts aimed at undermining the work of an elected body dominated by Islamists.

In response to these efforts, the MB adopted two strategies. First, it sought to identify compromise positions that would facilitate consensus around a constitutional draft. One mechanism for such compromises was the deferral of religious issues to ordinary politics, rather than seeking to entrench Islamist commitments at the constitutional level. Because of its confidence in its electoral prospects, the MB was generally happy to embrace vague and broad language at the constitutional level to be given concrete meaning through their legislative agenda in parliament. The MB's second strategy was more alienating—using its majoritarian advantage to force a text through the Assembly as the SCAF imposed deadline for completion of work loomed.

In the end, much of the actual debate about substantive provisions concerning state-religion relations occurred between the Salafists and the non-Islamists with the MB working to forge consensus.<sup>114</sup> The principal provisions in question related to designating the status of Islamic law, defining the meaning of Islamic *shari'a*, and specifying which institution would serve as authoritative constitutional interpreter in matters of religion. The non-Islamists wanted to retain the vague reference to Islamic *shari'a* in Article 2 with no additional constraining text and with the SCC as the authoritative interpreter. The Salafists wished to incorporate more precise and constraining language in defining the principles of Islamic *shari'a* to ensure the enforceability of *shari'a*-based review of legislation. They also sought to replace (or at least complement) the SCC's role as constitutional interpreter with that of a religious authority.

The final constitutional draft was produced through all-night sessions, boycotted by the non-Islamist parties, in a race to meet the original SCAF

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113. Jason Brownlee, *Liberalism vs. Democracy in Egypt*, MIDDLE E. RES. & INFO. PROJECT (Dec. 6, 2012), <http://www.merip.org/liberalism-vs-democracy-egypt>.

114. Lombardi & Brown, *supra* note 106, at 8.

imposed deadline. The resulting text left intact the language of Article 2—defining Islamic *shari'a* as the principal source of legislation—from the 1971 Constitution. Maintaining the wording of Article 2 and the role of the SCC as its interpreter had been among the main goals of the non-Islamist camp. While these goals were achieved in part, additional articles modified the meaning of Article 2 and the SCC's role somewhat. Under the 2012 Constitution, Article 2 was to be read in conjunction with Article 219, which widened the scope of the definition of the principles of Islamic *shari'a* to include Sunni jurisprudence. On the one hand, this met the Salafi demand for a more concrete and constraining definition. On the other hand, the definition remained broad enough to “include various opinions (some moderate and others more severe) about most issues,” leaving a substantial margin of maneuver to the legislature and courts.<sup>115</sup>

Secondly, Article 4 now required that al-Azhar be consulted on all matters related to interpretation of the *shari'a*. Again, the inclusion of this Article was an apparent victory for the Salafists, but the vagueness of the provision allowed considerable leeway in its implementation. The Article neither specified the weight to be given to al-Azhar's opinions (which are non-binding) nor prohibited the courts from seeking other opinions. Here, again, the text represented a compromise that would be given meaning through the ordinary political channels. In the end, while the additions to Article 4 and 219 represented changes to the 1971 constitutional framework, the earlier approach to religion-state relations was not radically redesigned. While the MB's attempt to forge compromise did not go far enough to satisfy Salafis, MB's modifications were still such that non-Islamists found them threatening.

The 2012 Constitution was ultimately too short-lived to be tested against the fears of the secular camp that it would lead to creeping Islamization or the worries of the Salafi camp that it would prove a dead letter. Six months after a constitutional referendum yielded a sixty-eight percent majority in favor of the draft,<sup>116</sup> the Egyptian military stepped in, removed Morsi from office and suspended the 2012 Constitution.

At first, the military regime issued a provisional Constitutional Declaration that reproduced most of the clauses on religion from the 2012 Constitution, including Article 219. Next, a group of senior judges were appointed to draft amendments to the 2012 Constitution. Their proposals were then forwarded to a fifty-member appointed drafting committee under the stewardship of General Abdel Fatah el-Sisi, the head of the military regime.<sup>117</sup> The committee completely excluded representatives of the Mus-

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115. Zaid Al-Ali, *The New Egyptian Constitution: An Initial Assessment of its Merits and Flaws*, OPEN DEMOCRACY (Dec. 26, 2012), <https://www.opendemocracy.net/zaid-al-ali/new-egyptian-constitution-initial-assessment-of-its-merits-and-flaws>.

116. Albeit the disappointing voter turnout of thirty-two percent meant that many analysts found the democratic mandate of the 2012 Constitution wanting.

117. Ashraf Khalil, *Egypt's Committee of 50 Rewrites the Constitution—Again*, ALJAZEERA AM. (Nov. 11, 2013), <http://america.aljazeera.com/articles/2013/11/11/egypt-constitutioncommitteeof50.html>; see also Nathan J. Brown & Michele Dunne, *Egypt's Draft Constitution Rewards the Military and Judiciary*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Dec.

lim Brotherhood, despite the fact that the party had received more than fifty percent of the votes in legislative elections eighteen months earlier. In short, the military terminated Egypt's brief experience of an elected Constituent Assembly and returned drafting authority to an appointed body.

The amendments drafted by the committee, in turn, largely reverted to the 1971 constitutional balance in state-religion relations. Article 2 remained intact, al-Azhar retained a role although mandatory consultation on matters of *shari'a* was repealed, and Article 219 was removed entirely. In addition, provisions concerning gender equality were moved from the preamble back to the main text of the constitution and religious freedom provisions were strengthened for existing religions, but without strong protections for individual freedom of conscience.<sup>118</sup>

For all of the drama attendant to the constitution-drafting process—most of it driven by fears of Islamization on the one hand and concern that elites would block democratic reform of religion-state relations on the other—neither the 2012 nor the 2014 Constitutions departed radically from the 1971 framework on the role of Islam. Moreover, the practical effects of the changes introduced in 2012—with vague wording and broad, flexible provisions—could not be determined given the speed with which they were repealed. While the crackdown against the MB and the ensuing violence in Egypt suggest that state-religion relations remain contentious, it is too soon to measure the effects of the 2014 Constitution, in force for only twenty months as of this writing. What can be discerned, however, is that the principal impact of the heated constitutional debates over state-religion relations in Egypt was the deepening of religious divisions in the country. The Egyptian case provides a cautionary tale that where divisions over religion are profound and existential, procedural rules for constitution-drafting are in flux, and no single party dominates the process, the outcome may exacerbate rather than resolve underlying tensions.

## B. India: 1946–1950

The process of constitutional drafting in India began in December 1946 and lasted three years, until the new constitution was enacted in January 1950. From the very beginning, questions concerning India's religious identity were among the central issues debated by the Indian drafters. The discussions revolved around inter-religious issues between the Hindu majority and Muslim minorities and around intrareligious issues, regarding the question of state interference in religious practices. What is India and to what extent is it exclusively Hindu? What is the place of Muslim and other religious minorities in India? Should the state intervene in relig-

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4, 2013), <http://carnegieendowment.org/2013/12/04/egypt-s-draft-constitution-rewards-military-and-judiciary>.

118. The Carnegie Endowment helpfully prepared a table that compares the constitutional provisions in the 1971, 2012, and 2014 Constitutions with a clearly designated section enumerating all provisions relating to religion. *Comparing Egypt's Constitutions*, CARNEGIE ENDOWMENT INT'L PEACE, <http://carnegieendowment.org/files/Comparing-Egypt-s-Constitutions.pdf> (last visited Apr. 12, 2016).

ious practices of either majority or minority religions that conflict with basic principles of equality and liberty? What is the meaning of secularism in India and what should be the relations between the various religious traditions and the emerging new secular legal system? These questions were vigorously debated by the Constituent Assembly.<sup>119</sup>

The drafting process in India may be divided into two stages: the first stage began on December 9, 1946, with the convening of the Constituent Assembly in New Delhi and lasted for seven months, until July 1947 when India gained independence from British rule and the country was partitioned. Pakistan was then created in part of the territory that was originally planned to be included in greater India. The composition of the Constituent Assembly was determined by a three-member British Cabinet Mission during the summer of 1946. According to the Cabinet Mission Plan, the members of the Constituent Assembly were to be elected by Legislative Assemblies of the provinces included in British India, which themselves were elected according to the 1935 Government of India Act. The Congress Party, which had an overwhelming majority in most provincial legislatures, filled 208 seats out of the total of 296 seats allotted to these provinces. The Muslim League won all but seven seats reserved for Muslims.<sup>120</sup> However, none of the seventy-three Muslim League representatives who were elected for the Constituent Assembly attended the discussions. Despite intense negotiations between the leaders of the Congress Party, the Muslim League, and the British government in the months that led to the partition, the attempt to draft a formal constitution for the entire territory of India had failed. The partition of the country was accompanied by large scale killings on both Hindu and Muslim sides, and by population transfers between the newly independent countries.

Whether the partition of India was inevitable or not is a question long debated by historians.<sup>121</sup> Nevertheless, the failure of the first round of constitution-making in India demonstrated the limitations of constitutional procedures in religiously divided societies. While the preliminary constitutional negotiations and deliberations may not have exacerbated the conflict, they certainly failed to mitigate it. The two main parties to the conflict—the Hindu dominated Congress Party on the one hand and the Muslim League on the other—used the disagreement over constitutional procedures for political advantage. Instead of bringing the sides together, the constitutional debate turned into a focus for political tension which emphasized the differences between the two sides. As the tripartite negotiations between the Congress, the League, and the British government

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119. See also GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 50-83 (1966). See generally B. N. RAU, *INDIA'S CONSTITUTION IN THE MAKING* (B. Shiva Rao, ed., 1960).

120. AUSTIN, *supra* note 119, at 9.

121. On the origins of partition, see generally *INDIA'S PARTITION: PROCESS, STRATEGY AND MOBILIZATION* (Mushirul Hasan ed., 2001); C. H. PHILIPS & MARY DOREEN WAINWRIGHT, *THE PARTITION OF INDIA: POLICIES AND PERSPECTIVES, 1935-1947* (Mary Doreen Wainwright ed., M.I.T. Press 1970); ANITA Inder SINGH, *THE ORIGINS OF THE PARTITION OF INDIA, 1936-1947* (1990).

regarding the procedures of the Constituent Assembly and the form of India's federal system reveals, the leaders of both Congress Party and of the Muslim League used the Mission's plan and its legal formulations as a battering ram, rather than as a vehicle for compromise.<sup>122</sup> The dispute over the proposal of provincial grouping heightened the tensions and exposed fundamental disagreements between the Congress and the League.

The second stage of constitutional drafting lasted for about two and a half years, from after partition until January 1950 when the new constitution was enacted. The separation of Pakistan did not seem to have a dramatic impact on the image of independent India held by the leadership of the Constituent Assembly. Moreover, the framers of the constitution realized that partition would not resolve the problem of India's religious diversity. As Nehru wrote three years before partition:

Any division of India on a religious basis as between Hindus and Moslems, as envisaged by the Moslem League today, cannot separate the followers of these two principle religions of India, for they are spread out all over the country. Even if the areas in which each group is in a majority are separated, huge minorities belonging to the other group remain in each area. Thus instead of solving the problem, we create several in place of one.<sup>123</sup>

The percentage of Muslims in the Indian population dropped from twenty before partition to ten in post-independence India. Still, it remained the third largest Muslim community in the world (after Indonesia and Pakistan). Other religious minorities in India included Christians (2.5% of the population), Sikhs (almost 2%), and Buddhists, Jains, and Parsis (together comprising about 2.5%). In addition, India was (and remains) one of the richest countries in the world in terms of its linguistic and ethnic diversity.

While the creation of Pakistan did not change the vision of India which the leaders of Congress, and Nehru in particular, wished to promote through the drafting of the constitution, partition increased the dominance of the Congress in the Constituent Assembly, which in turn made it possible for its leadership to incorporate in the constitution elements of its vision of Indian unity. Moreover, under the 1947 Indian Independence Act, the Constituent Assembly assumed full powers for the government of India. It was also mandated to exercise the powers of a federal legislature under the 1935 Government of India Act.<sup>124</sup> On August 29, 1947, the Assembly decided to distinguish between its two functions, and subsequently held morning sessions as a legislature, while sitting as a Constituent Assembly in the afternoons.<sup>125</sup>

During this second stage of drafting one of the central focal points for both the intra-religious and inter-religious debates was the question of per-

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122. For detailed analysis of this exchange, see LERNER, *supra* note 10.

123. JAWAHARLAL NEHRU, *THE DISCOVERY OF INDIA* 528 (1935).

124. Indian Independence Act, 1947, 10 & 11 GEO. 6, c. 30, § 8, [http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga\\_19470030\\_en.pdf](http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga_19470030_en.pdf); see B. SHIVA RAO, *THE FRAMING OF INDIA'S CONSTITUTION: A STUDY* 543 (1968).

125. 5 *Constituent Assembly Debates*, 310, 330 (Aug. 29, 1947) (India).

sonal law.<sup>126</sup> At the intra-religious level, the Constituent Assembly debated whether Hindu family law should be secularized by the state or maintain its traditional and often inegalitarian practices.<sup>127</sup> While Nehru viewed the reform of Hindu traditional family law as essential to advancing India's development and modernization,<sup>128</sup> conservative hard-liners and Hindu fundamentalists within the Congress Party objected to such reforms.<sup>129</sup> At the inter-religious level, the Assembly was harshly divided over the question of the Uniform Civil Code, namely, whether personal law should be unified for all citizens, regardless of religious affiliation.<sup>130</sup>

Ultimately, the Constituent Assembly refrained from making clear-cut decisions on either one of these issues. On the intra-religious front, it avoided the constitutionalization of a Hindu Code and deferred the issue for further discussion by the legislature in future years.<sup>131</sup> On the question of the Uniform Civil Code, the decision was to include it in the constitution. However, in order to pacify the Muslim minority that remained in India after partition with Pakistan and feared cultural Hindu homogenization, the article was included in the Directive Principles for State Policy section and was defined as nonjusticiable, meaning that it would not be enforceable by the courts.<sup>132</sup> The drafters, who preferred to follow an evolutionary rather than a revolutionary constitutional approach, directed the constitution's potential power to rule on the secular identity of the state back to the political arena, leaving future parliamentarians to decide whether and how to implement the recommendations set forth in the constitution.

Indeed, in the 1950s the legislature continued debating the Hindu Code and eventually split the law into four different pieces of legislation that were passed between 1955 and 1961, introducing reforms regarding issues such as marriage and divorce, inheritance laws, and adoption. By contrast, the Uniform Civil Code was never implemented. The result was the maintenance of a separate personal law system in India for each religious group and the implementation of only minor reforms in the tradi-

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126. Another controversial topic related to religious identity which was debated vigorously in the Assembly was the issue of minority rights. See Shylashri Shankar, *Cross-Cutting Rifts in Constitutions and Minority Rights: India, Pakistan and Sri Lanka*, in CONSTITUTION WRITING, RELIGION AND DEMOCRACY (Aslı Bâli & Hanna Lerner eds., forthcoming 2016); see also ROCHANA BAJPAI, *DEBATING DIFFERENCE: GROUP RIGHTS AND LIBERAL DEMOCRACY IN INDIA* (2011).

127. The debate over codification of reformed Hindu law goes back to the Hindu Women's Rights to Property Act (1937) and the 1941 Hindu Law Committee appointed under British rule.

128. See generally Reba Som, *Jawaharlal Nehru and the Hindu Code: A Victory of Symbol over Substance?*, 28 MOD. ASIAN STUD. 165 (1994).

129. See generally CHRISTOPHE JAFFRELOT, *THE HINDU NATIONALIST MOVEMENT IN INDIA* (1996).

130. 7 *Constituent Assembly Debates*, 540-52 (Nov. 23, 1948) (India).

131. Som, *supra* note 128, at 175.

132. See INDIA CONST. art. 44 ("The state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.").



tional Muslim and Christian personal laws.<sup>133</sup>

During their constitutional debates, the Indian framers applied various types of incrementalist strategies in order to address religious conflicts in the assembly, including the deferral of controversial decisions, the use of ambiguous and vague constitutional formulations (e.g., formulations concerning personal law), and the inclusion of non-justiciable provision in the constitution (e.g., Article 44). At the same time, it is important to note that in other discussions of the role of the constitution as a vehicle for social reconstruction, the Indian drafters adopted a more restrictive approach. The reformist function of the constitution was most notably expressed in the context of caste inequality, as B. K. Ambedkar, himself a member of the untouchable caste, pushed for the inclusion of radical provisions such as the abolition of untouchability. The adoption of reformist provisions intended to reduce caste inequality was facilitated by a relatively broad consensus on the issue among the Assembly members. By contrast, there was considerable disagreement over the role of the constitution as a vehicle for reform when it came to the issues of religious or linguistic diversity. As far as these issues were concerned, using the legal powers of the constitution to promote major social reform was more contentious, and many felt that it was necessary to wait for the gradual emergence of a broader consensus.

Contemporary observers often criticize the incrementalist strategies adopted by the framers of the Indian constitution in addressing religious conflicts as an ideological compromise, or even a failure to achieve a more liberal constitution.<sup>134</sup> Yet the incrementalist approach adopted by the Indian drafters offers a viable model that may facilitate the adoption of democratic constitutions in emerging democracies, where conflicts over national identity or religion-state relations are at the heart of the constitutional debate.<sup>135</sup> As we discuss below, drafters in other countries have used similar strategies to address religious conflicts.

#### C. Indonesia: 1945

The first Indonesian constitution was drafted between May and August of 1945. The drafting process was initiated by the Japanese just three months before their surrender to the Allied Forces. Recognizing the imminent end of their rule in Indonesia, the Japanese formed the Investigative Committee for Preparatory Work for Indonesian Independence (BRUPK), comprising sixty-two members selected mainly from the older generation of Indonesian leadership from Java.<sup>136</sup> The main debates in the

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133. Narendra Subramanian, *Making Family and Nation: Hindu Marriage Law in Early Postcolonial India*, 69 *J. ASIAN STUD.* 771, 773 (2010).

134. See generally *THE CRISIS OF SECULARISM IN INDIA* (Anuradha Dingwaney Needham & Rajeswari Sunder Rajan eds., 2007).

135. See Hanna Lerner, *The Indian Founding: A Comparative Perspective*, in *THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION* 55 (Sijut Choudhry et al. eds., 2016).

136. Some claim that committee membership had a strong majority of those who are "known to favor a religiously neutral form of territorial nationalism," while advocates of Islamic ideology constituted about a quarter of committee members. Robert E. Elson,

committee revolved around the role of Islam in the new state. The dispute was between the Islamists, who wished Indonesia to be an Islamic state, and the nationalists, who envisioned an all-inclusive Indonesian national identity rather than an exclusively Islamic identity. Due to Indonesia's sprawling geographical organization, its large non-Muslim minorities, and the different ways Islamic law was understood and interpreted, the committee advocated a state which would unite itself with the largest group but stand above all groups.<sup>137</sup>

The disagreements were bridged by the doctrine of *Pancasila* (literally, five principles) laid down by Sukarno in a famous speech on June 1, 1945, and later included in the constitutional preamble.<sup>138</sup> The first of these five vague principles was "belief in God."<sup>139</sup> In addition, Article 29 of the constitution states that "the state is based upon the belief in one supreme God." By avoiding the name of a particular God, Indonesian identity is defined in religious but not in Muslim terms.<sup>140</sup>

In addition to *Pancasila*, the draft preamble to the constitution, known as the Jakarta Charter, included two short statements which emphasized the Islamic identity of the state: a seven-word sentence according to which all Muslims are obliged to follow Islamic law<sup>141</sup> and a requirement that the president must be Muslim. However, just before the constitution was enacted, these two Islamic statements were removed from the final version. The decision was driven by a concern that predominately Christian eastern Indonesia would not join the unitary republic if the constitution characterized it as an Islamic state. There was also concern about internal division among Muslim leaders, between those who believed Islamic law should be legislated at the national level and those who opposed state-enforced Islamic law.<sup>142</sup> In attempting to base their constitution on a broad consensus, the framers in Indonesia decided to avoid clear-cut constitutional decisions on controversial religious issues. Instead of formulating constitutional principles to guide future generations, they deferred

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*Another Look at the Jakarta Charter Controversy of 1945*, 88 *INDONESIA* 105, 109 (2009); see also MERLE C. RICKLEFS, *A HISTORY OF MODERN INDONESIA SINCE C. 1200*, at 245 (4th ed. 2008).

137. See generally DOUGLAS RAMAGE, *POLITICS IN INDONESIA: DEMOCRACY, ISLAM AND THE IDEOLOGY OF TOLERANCE* (2002).

138. For the text of the speech, see HERBERT FEITH & LANCE CASTLES, *INDONESIAN POLITICAL THINKING 1945-1965*, at 40-49 (Herbert Feith & Lance Castles eds., 2007).

139. The additional four principles are Indonesian unity, humanism, democracy based on deliberation and consensus, and social justice. For detailed discussion of their meaning, see RAMAGE, *supra* note 137, at 12-14.

140. Mirjam Künkler, *Constitutionalism, Islamic Law, and Religious Freedom in Post-Independence Indonesia*, in *CONSTITUTION WRITING, RELIGION AND DEMOCRACY* (Aslı Bâli & Hanna Lerner eds., forthcoming 2016). *Pancasila* was viewed as a "multi-interpretable formula and must be appreciated as providing a real possibility for people to agree while disagreeing." B.J. BOLAND, *THE STRUGGLE OF ISLAM IN MODERN INDONESIA* 39 (1982).

141. Some analysts argue that even Muslim members of BRUPK did not agree on the practical implications of the famous seven words. Elson, *supra* note 136, at 113.

142. RAMAGE, *supra* note 137, at 15; RICKLEFS, *supra* note 136, at 247. For various alternative explanations, see Elson, *supra* note 136, at 122-26.

such decisions to future legislatures. As Sukarno stated in his 1945 speech in Jakarta:

If the Indonesian people really are Muslims for the greater part, and if it is true that Islam here is a religion which is alive in the heart of the masses, let us leaders move every one of the people to mobilize as many Muslim delegates as possible for this representative body . . . . Then automatically laws issuing from this people's representative body will be Islamic also.<sup>143</sup>

Thus, vague formulations concerning Indonesia's religious identity were adopted as a temporary compromise, in order to promote political unity amidst religious and cultural diversity. In a speech on August 18, 1945, Sukarno stated: "[T]he [c]onstitution which has been made now is a provisional [c]onstitution . . . a lightning [c]onstitution . . . in a calmer atmosphere, we will certainly reassemble the People's Consultative Assembly, which can make a more complete and more perfect [c]onstitution."<sup>144</sup> The 1945 Constitution was perceived as a provisional tool on the way to complete independence; the expectation was that it would be followed by a more participatory process of constitution-writing.

For fourteen years following independence, the exact meaning of *Pancasila* and the question of what should be the "philosophy of the state" (Dasar Negara) remained the heart of public and political debates. The ambiguous character of *Pancasila* was preserved in the two constitutions that replaced the 1945 Constitution and were formally in force between 1949 and 1957.<sup>145</sup> Like the 1945 Constitution, the 1950 Constitution, which established Indonesia's parliamentary system, was enacted as a provisional arrangement meant to stand in until such time as a democratically elected constituent assembly (the Konstituante) drafted a permanent and legitimate constitution. The 514-member Konstituante debated the constitution from 1956 to 1959. Intense disputes revolved around the meaning of *Pancasila* and the place of religion in the state's philosophy.<sup>146</sup>

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143. J. Soedjati Djiwando, *Misinterpreted Democracy May Lead to Tyranny*, JAKARTA POST (Oct. 6, 2006), <http://www.thejakartapost.com/news/2006/10/06/misinterpreted-democracy-may-lead-tyranny.html> (translating Sukarno's "The Birth of Pancasila" as originally formulated on June 1, 1945). Along similar lines, in an interview in 1959, Mohammed Hatta, the first vice president, justified the removal of the famous seven words from the constitution by noting that "it was agreed that such a provision relating exclusively to the Muslim population could be established later by law, but that it should not be part of the constitution." Elson, *supra* note 136, at 125.

144. Djiwando, *supra* note 143; see also ADNAN BUYUNG NASUTION, *THE ASPIRATION FOR CONSTITUTIONAL GOVERNMENT IN INDONESIA: A SOCIO-LEGAL STUDY OF THE INDONESIAN KONSTITUANTE 1956-1959*, at 97 (1992).

145. The first, a federal constitution of the United States of Indonesia, was adopted as part of the Hague Agreement between Indonesia and the Netherlands. It survived only a few months, until the summer of 1950 when Indonesia withdrew from the Agreement and enacted a unitary constitution of the Republic of Indonesia.

146. The Konstituante comprised 544 members, of which 514 were elected by free and open elections in December 1955 selected among thirty-four parties that participated in the elections. An additional thirty members of the Konstituante represented minority groups (Chinese, Indo-European, and the Dutch occupied territories of West Irian). NASUTION, *supra* note 144, at 30-35.

Yet hopes for the establishment of a democratic and inclusive constitutional framework failed to materialize. The deteriorating economy, the increasing national conflicts, and the declining support in the government's ability to deal with crisis, led Sukarno to declare martial law in May 1957 and to begin creating the institutional framework of Guided Democracy, with the intent of restoring stability and preventing the disintegration of the republic. The army increased its interference in politics and the economy, and in 1958 demanded a return to the 1945 Constitution, which allegedly provided a legal basis for greater military involvement in civilian affairs.<sup>147</sup> On June 2, 1959, in what became its final session, the Konstituante voted against the proposal, which was supported by the president and the National Council, to reinstate the 1945 Constitution.<sup>148</sup> Sukarno subsequently published a presidential decree dissolving the Konstituante and reinstating the constitution.

The formal wording of the 1945 Constitution was not altered. However, upon the establishment of Guided Democracy in 1959, *Pancasila* would begin to represent a substantively new conception. In 1945 it had been proposed as a vague set of inclusivist principles. It was viewed as a "forum, a meeting point for all the different parties and groups, a common denominator of all ideologies and streams of thought existing in Indonesia."<sup>149</sup> By contrast, in 1959, *Pancasila* became part of the authoritarian regime's justifying ideology, much like Turkey's Kemalism. Invoking the "integralist state," the nationalist camp in the late 1950s presented *Pancasila* as the only political ideology that would guarantee national unity. Rather than serve as a common platform for the different political ideologies in Indonesia, *Pancasila* was reconfigured as an exclusivist ideology standing in opposition to other ideologies and streams of thought. Moreover, it was imposed by the military and by the government through authoritarian means.<sup>150</sup>

During the years of Sukarno's Guided Democracy (1959-1965), as well as Soeharto's New Order (1966-1998), the government maintained its monopoly on the interpretation of *Pancasila* as an ideology of the state that guarantees national unity through various means of indoctrination.<sup>151</sup> While in the 1980s Soeharto's regime was more tolerant toward public expressions of Islam, as late as 1998, the government forbade any public debate on the place of religion in the constitution.<sup>152</sup>

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147. DANIEL S. LEV, *THE TRANSITION TO GUIDED DEMOCRACY: INDONESIAN POLITICS 1957-1959*, at 272 (1966).

148. On the final debates of the Konstituante, see NASUTION, *supra* note 144, at 30-35.

149. *Id.* at 421.

150. *Id.* at 65; see also LUTHFI ASSYIAUKANIE, *ISLAM AND THE SECULAR STATE* (1999); RAMAGE, *supra* note 137, at 20-22.

151. For example, by establishing "The Guidance of Conscientization and Implementation of Pancasila," which was a national program of indoctrination courses for members of the bureaucracy, armed forces, political leaders, businessmen, students, and religious leaders.

152. For example, through the 1963 Anti-subversion Law.

After Soeharto's resignation in 1998, the new political leadership attempted to restore the inclusivist interpretation of *Pancasila* and return to a permissive constitutional approach. The 1945 Constitution was amended in a series of reforms enacted from 1999 to 2002.<sup>153</sup> These reforms established new democratic institutions and strengthened the protection of human rights. During the open and free debates, several Islamic parties renewed the demand to restore the Jakarta Charter and to insert *shari'a* law into the constitution. The debate ended with Parliament's decision to retain the wording of Article 29 and refrain from modifying the definition of the state's religious identity expressed in the constitution.<sup>154</sup> On the constitutional level, the amended democratic constitution of Indonesia enhanced the ambiguous formulations concerning the role of religion by including, for example, Article 28J (2), which guaranteed the protection of "religious values."<sup>155</sup> However, while rejecting the adoption of specific Islamic provisions in the constitution, Islamic practices were introduced in post-democratization Indonesia through state regulations such as an official collection of *zakat* (the Muslim charitable tax) and the regulation of *wakafs* (Muslim charitable endowments and Islamic banking arrangements),<sup>156</sup> or through a variety of local arrangements regulated by provincial administrations.<sup>157</sup> The debate over the place of Islam in Indonesian identity and law is far from over.<sup>158</sup>

#### D. Israel: 1948-1950 and 2003-2006

The debate on the state's religious identity has been central to Israeli constitutional politics since its foundation. Israel is one of only three countries in the world that refrained from adopting a formal constitution. But unlike the other two countries with no written constitutions—the United Kingdom and New Zealand—Israel also refrained from adopting a comprehensive Bill of Rights. Its list of twelve Basic Laws include only two that concern fundamental rights: Basic Law on Human Dignity and Liberty and Basic Law on Freedom of Occupation. Both were adopted in 1992, nearly four and a half decades after independence. One of the central reasons for the Israeli avoidance of enacting additional Basic Laws on human rights is Jewish religious parties' consistent rejection of constitutional recognition of the right of equality, particularly gender equality. Another reason for this avoidance is the consistent failure of large parts of the political system to embrace the protection of liberal rights for the entire population, including the non-Jewish minority of Palestinians, which comprise nearly twenty percent of the population. While by no means the only reason that Israel does not have a formal constitution, religious conflicts on both the

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153. HOROWITZ, *supra* note 11.

154. HOSEN, *supra* note 11; *see also* HOROWITZ, *supra* note 11, at 120-22.

155. HOROWITZ, *supra* note 11, at 127-28.

156. *Id.* at 247.

157. Bowen, *supra* note 93.

158. *See, e.g., id.*; JEREMY MENCHIK, *ISLAM AND DEMOCRACY IN INDONESIA: TOLERANCE WITHOUT LIBERALISM* (2016); *DEMOCRACY AND ISLAM IN INDONESIA* 149, 161 (Mirjam Künkler & Alfred Stepan eds., 2013).

inter-religious level (between the Jewish majority and the Palestinian minority) and the intra-religious level (within the Jewish population) continue to be one of the main reasons for the blockage in the long-lasting process of constitution-making in Israel.

Formally, two attempts have been made to draft a written constitution in Israel. The first was between 1948 and 1950 immediately after independence. The second was between 2003 and 2006 when the Constitution, Law, and Justice Committee of the Israeli Knesset initiated *The Constitution in Broad Consent Project*. The declared goal of the project was to consolidate a single constitutional document that “will enjoy wide support among Israelis and Jews worldwide.”<sup>159</sup> Both attempts were similar in two important respects. First, in both cases, the constitutional discussion ended with a decision to defer the process of constitution-writing. In June 1950, following a constitutional debate of only nine sessions, the Israeli Knesset (which was initially elected as a constituent assembly) decided to avoid drafting a formal constitution.<sup>160</sup> Known as “the Harari resolution” after its initiator, the Knesset decision stated that the Israeli constitution would be composed in a gradual manner through a series of individual Basic Laws.<sup>161</sup> The resolution did not specify what the content of the Basic Laws or the procedure for their enactment and amendment relative to ordinary legislation should be. In addition, the resolution did not set or propose a timetable for the consolidation of the Basic Laws into a single constitutional document.

Similarly, in 2006, parliamentary, as well as extra-parliamentary, efforts to draft a constitution ended with no written constitutional document. In February 2006, after two years of intensive meetings, the Knesset Committee on Constitution, Law and Justice presented the Knesset plenary with its final report, containing a draft proposal and over 10,000 pages of detailed protocols and background material. The report did not present a

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159. CONSTITUTION, LAW AND JUSTICE COMMITTEE, *CONSTITUTION IN BROAD CONSENT: REPORT OF THE CONSTITUTION, LAW AND JUSTICE COMMITTEE REGARDING PROPOSALS FOR THE CONSTITUTION OF THE STATE OF ISRAEL* (2006), <http://huka.gov.il/wiki/index.php>. All translations from primary sources and archival material in Hebrew (including Knesset debates, Minutes of Constitution, Law and Justice Committee meetings, Supreme Court rulings, newspaper articles, etc.) are by Hanna Lerner.

160. Israel's Declaration of Independence stated that the constitution of the State of Israel would be adopted by an elected constituent assembly. Yet only two days after its first session in January 1949, the Constituent Assembly enacted a Transition Law, and transformed itself into the first Knesset (parliament). The first elected legislature now combined the authority of the Constituent Assembly with the powers of the Provisional Council. But the Transition Law led to uncertainty with respect to the constitution. The law did not explicitly acknowledge the first Knesset's duty to enact a constitution, nor did it limit the time-period for its drafting.

161. The resolution stated as follows:

The first Knesset charges the Constitutional, Law and Justice Committee with preparing a proposed constitution for the state. The constitution will be composed of individual chapters, in such a manner that each of them shall constitute a Basic Law in itself. The individual chapters shall be brought before the Knesset as the Committee completes them, and all the chapters together will form the state constitution.

coherent constitutional draft, rather it contained several versions and suggestions for further deliberation and decision. Instead of resolving the disputes that arose during the constitutional debates, the draft incorporated all of the competing positions. The Constitution, Law, and Justice Committee charged the Knesset with the task of transforming this multi-version document into a comprehensive constitutional formula. At the end of one session discussion, the Knesset passed a declaratory resolution stating that after the coming elections it would “continue this effort, aiming at presenting a proposed constitution, based on broad consent, for Knesset decision and the people’s ratification.”<sup>162</sup> Despite this, the constitutional question disappeared from the political and public agenda in the years that followed.

The second similarity between the two rounds of constitutional debates was that in both cases, the avoidance of drafting a formal constitution was attributed to a large extent to the inability of the framers to bridge deep disagreements regarding the foundational aspect of the constitution, particularly the intra-religious divide within the Jewish majority population.<sup>163</sup> In 1950, these disagreements represented the conflict between a religious and a secular-national definition of Israel’s identity as a Jewish state. The core of the foundational dispute revolved around the relationship between the law of the state and laws of *Halacha*, the comprehensive system of Jewish traditional rules of conduct, which from the perspective of the Orthodox Jew take precedence over the law of the state whenever there is a contradiction between the two systems. Orthodox Knesset members objected to drafting a secular constitution that would define the Jewish state in national, rather than religious terms, and warned this would inflame a *Kulturkampf*.<sup>164</sup> The political leadership did not take lightly threats to destabilize the political order given various challenges to the state’s authority by pre-state paramilitary organizations and underground groups of zealous believers.<sup>165</sup> Under the fragile circumstances of a newly

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5 DIVREI HAKNESSET (KNESSET RECORD), at 1743 (June 13, 1950) (Isr.).

162. DIVREI HAKNESSET (KNESSET RECORD), at 51 (Feb. 13, 2006) (Isr.). The protocol of the Knesset discussion can be found online: [http://www.knesset.gov.il/plenum/heb/plenum\\_search.aspx](http://www.knesset.gov.il/plenum/heb/plenum_search.aspx). This resolution passed with a majority of thirty against nineteen (with one abstainer).

163. This was not the only reason for postponement of constitution-drafting. Nevertheless, many of the other arguments related to deep disagreements over secular and religious visions of the state. For example, the pragmatic argument regarding the need to address the urgent tasks of the young state rather than delve into philosophical discussions regarding the identity of the state; or the need to await the ingathering of the future citizens of the state from the Jewish diaspora to make decisions in such controversial questions. Ben Gurion played a central role in the decision to postpone the constitution. For the various arguments, see Lerner, *supra* note 10, at 58.

164. LERNER, *supra* note 10, at 209. Israel’s first Minister of Justice, Pinchas Rosen, who was one of the fiercest advocates for a written constitution, admitted that “there is only one serious justification for the rejection of constitution writing now, which I don’t ignore, and that is the danger of division.” *Government Meeting Minutes*, ST. OF ISR. ARCHIVES, Dec. 13, 1949 (Isr.).

165. See generally MENACHEM FRIEDMAN, *THE HAREDI ULTRA-ORTHODOX SOCIETY: SOURCES, TRENDS AND PROCESSES* (1991); EHUD SPRINZAK, *BROTHER AGAINST BROTHER: VIOLENCE AND EXTREMISM IN ISRAELI POLITICS FROM ALTALENA TO THE RABIN ASSASSINATION* (1999).

independent state, many in the Knesset feared that writing a constitution would require clear-cut choices regarding the vision of the state and would stir up conflict between religious and secular Jews. Moreover, the government believed that the most urgent task during the state-building period would be the absorption of immigrants. The Jewish population in Israel in 1948 was less than ten percent of world Jewry and the immigrants that were expected to arrive from the Jewish Diaspora were generally religious. Thus, despite a significant majority of secular Jews in the Knesset<sup>166</sup> and a formal commitment in the Declaration of Independence to draft a constitution, the Knesset decided in 1950 to refrain from drafting a constitution. The wish to avoid a greater division between religious and secular Jews was among the chief reasons for the decision.<sup>167</sup>

Similarly, the protocols of the February 2006 Knesset discussion on the *Constitution By Broad Consent Project*, as well as the extensive Constitution, Law, and Justice Committee deliberations throughout 2003 and 2006 reveal that intense division over religious issues remains the central axis around which the Israeli constitutional debate revolves.<sup>168</sup> Knesset members from both Orthodox and liberal-secular polar positions acknowledged the depth of their vast disagreement and admitted that no consensus could be achieved on issues such as personal law, particularly marriage and divorce, conversion to Judaism, and the question of “who is a Jew?” as well as public preservation of the Sabbath.<sup>169</sup>

In the absence of a written constitution, religion-state relations in Israel evolved through ordinary legislation or through informal means during the early years of the state. These arrangements, known as “the religious status quo,” stipulate the nonseparation between religion and state in various areas of life: a religious monopoly on marriage and divorce and the institutionalization of a pluralist personal law system (following the Ottoman *millet* system),<sup>170</sup> kosher food in state institutions, prohibition of public transportation on the Sabbath, autonomy for religious schools, and exemptions from military service for Orthodox yeshiva students and religious women. This religious status quo was never clearly defined. Yet a commitment to maintain it was included in most governing coalition agreements. Thus, although the religious status quo was criticized by both the religious and the secular-liberal camps, by and large the core religion-state

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166. In 1950, only 16 out of 120 Knesset members represented religious parties.

167. On the debates that led to this decision, see Lerner, *supra* note 10, at 60–61.

168. As stressed by Abraham Ravitz, Deputy Minister of Welfare and member of the Orthodox Yahadut Hatorah party during the Constitutional Committee discussions:

The main reason that we could not make any progress towards a constitution for fifty years is that . . . first, the Jewish people already has a constitution and we should implement it in our daily life . . . and second, we cannot compromise on the most fundamental issues that are, from our perspective, essential to our existence as a people.

*Constitution, Law and Justice Committee Discussions: Protocol 658*, in CONSTITUTION IN BROAD CONSENT (2006), *supra* note 159.

169. These Knesset members are Yisachak Levi (National Religious Party), Ofir Pines (Labor), Zehava Galon (Meretz), Nissim Zeev (Shas). *Id.*

170. Civil marriages are recognized only if performed outside of Israel.



arrangements that were formulated in the first decade of the state were preserved.

However, during the 1980s and 1990s, growing judicial intervention in the definition of religion-state relations began to affect discussions concerning the constitution.<sup>171</sup> One of the main differences between the constitutional debates in the early years of the state and those that occurred in the 2000s concerned the increasing relationship between ideational conflict over the religious identity of the state and institutional tensions regarding the allocation of power between the judiciary and the legislature. The authority of the Supreme Court was not considered a controversial issue in 1950. However, between 2003 and 2006, any discussion that touched upon judicial authority ignited harsh debates regarding contentious religious issues, such as the Orthodox monopoly on family law and conversion to Judaism or the prohibition of public transportation on the Shabbat. Similarly, sessions devoted to provisions related to religion in the draft constitution raised intense disputes regarding, for example, judicial appointments procedures, as well as, the role of the Supreme Court as the chief interpreter of the constitution.<sup>172</sup> A good example of this interlinkage between the ideational and institutional tensions concerned the dispute over the question of which constitutional article should include the define the authorities of religious courts: Should this provision appear in the article on the judiciary or in the article on family values to be included in the Principles Chapter?<sup>173</sup> The inability to disentangle disputes over religion from disputes concerning the court's authority stemmed from the religious representatives' concerns about future judicial constitutional interpretation, in light of the secular-liberal approach taken by the Supreme Court's rulings and the Supreme Court's self-empowerment to review Knesset legislation, in what had been known as Israel's "constitutional revolution" led by Chief Justice Aaron Barak during the 1990s. As a result, representatives of religious parties in the Knesset explicitly expressed their opposition to the Court's intervention in issues that concern the religion-state relations.

Another important difference between the two phases of constitutional debates concerned the non-Jewish population. By contrast to the intra-Jewish conflict between a secular and an orthodox perspective which played a central role in both constitutional debates, the inter-religious conflict (between the Jewish majority and non-Jewish minorities) played a more substantive role in 2006 compared with the early debates. In 1950, the Palestinian minority, which comprised around eighteen percent of the country's population, did not take part in constitution drafting. Since the foundation of the state, the non-Jewish minority in Israel has been

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171. Some criticize the Supreme Court for intervening only in minor issues. The Court never challenged the core arrangements of the religious status quo. *See generally* MICHAEL CORINALDI, DINE ISHIM, MISHPAHAH VE-YERUSHAH BEN DAT LE-MEDINAH: MEGAMOT HADASHOT [STATUS, FAMILY, AND SUCCESSION LAW BETWEEN RELIGION AND STATE: NEW TRENDS] 235–95 (2004); PATRICIA WOODS, JUDICIAL POWER AND NATIONAL POLITICS: COURTS AND GENDER IN THE RELIGIOUS SECULAR CONFLICT IN ISRAEL (2008).

172. Constitution, Law and Justice Committee, *supra* note 159, at Protocols 320, 464.

173. *Id.* at Protocol 199.

excluded from Israeli nationhood, which was understood in terms of “the Jewish people.”<sup>174</sup> However, in recent years the Israeli Palestinian minority has strengthened the demand to participate in the redefinition of the identity of the State of Israel, calling for the transformation of the state from its definition as “Jewish and democratic” into a liberal-democratic state “for all its citizens,” one in which Palestinians will be recognized as a national minority.<sup>175</sup> This position was advocated in a series of constitutional proposals published during 2005 by leading Israeli-Arab intellectuals and NGOs.<sup>176</sup> Nevertheless, these attempts to participate in and to influence the constitution-drafting process have had little effect to date. Palestinian constitutional proposals were published, for the most part, as a reaction to the Knesset’s constitutional deliberations and, thus, were not discussed by the Constitution, Law and Justice Committee.<sup>177</sup> Furthermore, few non-Jewish representatives were invited to participate in the Committee’s discussions. Thus, Palestinian efforts to increase their influence on the question of the constitution have not had a significant impact on Knesset deliberations, which remain focused on the Jewish religious-secular divide.

The characterization of the State of Israel as “Jewish and democratic” was formally introduced in the Basic Laws on Human Liberty and Dignity and to the Basic Law on Freedom of Occupation.<sup>178</sup> Yet the debate over the meaning and interpretation of what many consider a self-contradictory definition continues to divide Israeli society.<sup>179</sup>

#### E. Lebanon: 1926, 1989, 2008

While the constitutional debates in most of our cases are largely focused on intra-religious conflicts, in Lebanon, by contrast, inter-religious conflict was the central source of tension. The last census conducted in

174. BARUCH KIMMERLING, CLASH OF IDENTITIES: EXPLORATIONS IN ISRAELI AND PALESTINIAN SOCIETIES 31–32 (2008); Baruch Kimmerling, *Religion, Nationalism and Democracy in Israel*, in 6 CONSTELLATIONS 339, 339–40 (1999); Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 AM. POL. SCI. REV. 432, 434–35 (1992).

175. GERSHON SHAFIR & YOAV PELED, BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP 161 (2005); Amal Jamal, *Strategies of Minority Struggle for Equality in Ethnic States: Arab Politics in Israel*, 11 CITIZENSHIP STUD. 263, 274–75 (2007).

176. Lerner, *supra* note 10, at 101 (citing the “Future Vision” of the National Committee for the Heads of Arab Local Authorities in Israel; the “Haifa Document,” published in the framework of Mada Al-Carmel, The Arab Center for Applied Social Research; and the “Democratic Constitution” published by Adalah, the Legal Center for Arab Minority Rights in Israel); *id.* at 53.

177. Amal Jamal, *The Political Ethos of Palestinian Citizens of Israel: Critical Reading in the Future Vision Documents*, 23 ISR. STUD. 3, 5 (2008).

178. Basic Law: Human Dignity and Liberty, 5752–1992, SH 1391, art. 1a (Isr.), [https://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm); Basic Law: Freedom of Occupation, 5754–1994, SH 1454, art. 2 (Isr.), [https://www.knesset.gov.il/laws/special/eng/basic4\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic4_eng.htm).

179. See, e.g., RUTH GAVISON, MAHPEHKAH HAHUKATIT: TEUR METSIUT O NEVUAH HAMAGSHIMAH ET ASHMAH? [THE CONSTITUTIONAL REVOLUTION: A REALITY OR SELF-FULFILLING PROPHECY?] (1998); MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE (Menachem Mautner et al. eds., 1998) (in Hebrew); Aharon Barak, *The Constitutional Revolution: Protected Human Rights*, 1 MISHPAT UMIMSHAL [LAW & GOV’T ISR.] (1992).

Lebanon was taken in 1932, six years after Lebanon's first constitution was drafted. According to the 1932 census, Lebanon's population then stood at roughly 1.1 million, divided roughly evenly between the Christian population (with the largest single denomination being the Maronites) and the Muslim population (with a predominant Sunni community and a slightly smaller but far less powerful Shi'i community).<sup>180</sup> One of the core issues of contention in the drafting of the Lebanese constitution was how political representation and power was to be distributed in light of the proportional distribution in the population of the seventeen recognized confessional groups.

The 1926 Lebanese Constitution was drafted by a commission appointed by the French government, serving as the supervising mandatory power, in July 1925.<sup>181</sup> Remarkably enough, despite the turbulence of the ensuing ninety years, that basic framework has proven sufficiently resilient to serve as the basis for the contemporary Lebanese constitutional order. While key amendments have been significant—in 1943, 1989, and 2008—they have not called the 1926 order into question, but have sought to recalibrate the sectarian distribution of power to reflect later demographic and other changes. This is particularly surprising because both in 1926 and during the drafting of subsequent amendments, the Lebanese constitution explicitly refers to the relevant confessional arrangements as *provisional* or *transitory*.<sup>182</sup> That is, the institutionalization of confessional representation was self-consciously designed to be temporary and yet has proven to be durable despite multiple rounds of amendment. The pattern of inter-religious conflict that resulted in the idiosyncratic form of state-religion relations in Lebanon offers the best explanation for this apparent contradiction.

Appointed in July 1925, by the French, the constitutional commission completed the draft constitution in less than a year and the Representative Council, an elected body of Lebanese leaders, adopted the text on May 23, 1926. At the time of its promulgation, the constitution was a product of the traditional role that the French had played as the protector of the Maronite Christian community. The confessional apportionment of public employment and elected office favored the Maronite community through a separate French decree establishing a 6:5 ratio between Christians and Muslims. Given these origins, the durability of the constitution after the

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180. For a detailed breakdown of the Lebanese census data from 1932, see Rania Maktabi, *The Lebanese Census of 1932 Revisited: Who Are the Lebanese?*, 26 BR. J. MIDDLE E. STUD. 219, 222 (1999). Since 1932, it is widely believed that the Lebanese population has roughly quadrupled with demographic shifts that have reduced the Christian proportion of the population and increased the Shi'i proportion.

181. On the drafting process for the 1926 Constitution, see Paul Salem, *Framing Post-War Lebanon: Perspectives on the Constitution and the Structure of Power*, 3 MEDITERRANEAN POL. 13, 13–14 (Nov. 9, 2007). See also Brenda M. Seaver, *The Regional Sources of Power-Sharing Failure: The Case of Lebanon*, 115 POL. SCI. Q. 247, 255 (2000).

182. John J. Donohue, *Changing the Lebanese Constitution: A Postmodern History*, 30 CARDOZO L. REV. 2509, 2523–24 (2009); Ludsins, *supra* note 46, at 265–67 (discussing the provisional character of the 1926 Constitution confessional system, the 1943 National Pact, and the 1991 system following the Ta'ef agreement).

end of the mandate and the ensuing decades, which witnessed the diminution of the Christian population of Lebanon, is all the more striking.

Yet, to say that the constitution was simply an arrangement favorable to the Maronites would be a misrepresentation. Rather, the constitution was the result of negotiations between three principal stakeholders: the French mandatory authorities, the mercantile Christian elite, and the Muslim bourgeoisie.<sup>183</sup> The French had carved out of the Ottoman territories a patchwork that combined the historically Christian and Druze territory of Mount Lebanon with districts drawn from the Muslim provinces of Greater Syria. For the Muslim representatives, affiliation with the project of establishing a distinctly *Lebanese* republic was fraught. They spent the better part of the mandate period pursuing eventual unification with Syria and questioning the legitimacy of the territorial partition that produced Lebanon.<sup>184</sup> Under these circumstances, the introduction of confessional concessions in the constitution was a strategy to seek buy-in from the leaders and notables of all of the principal religious communities and avoid sectarian conflict.

The principal areas of potential inter-religious conflict that emerged as central to constitution-drafting were representation in elected office and in public employment, the autonomy of the religious communities in personal status matters, and control over the content of education. In each of these domains, the agreement placed religious community ahead of (or above) individual rights and protections.<sup>185</sup> Thus, high elected offices (the presidency, premiership, and the speaker of parliament) were allocated informally on a confessional basis (which was later formalized by amendment: Article 24).<sup>186</sup> Public employment was subject to quotas to reflect the confessional balance embodied in the constitution (Article 95).<sup>187</sup> Personal status matters were left to the religious communities (Article 9) and no provision was made for an alternative secular or civil family law that might have enabled Lebanese citizens to opt out of their confessional identi-

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183. Mark Farha, *Secularism in a Sectarian Society? The Divisive Drafting of the 1926 Lebanese Constitution*, in CONSTITUTION WRITING, RELIGION AND DEMOCRACY 1 (Aslı Bâli & Hanna Lerner eds., forthcoming 2016) (manuscript at 1) (on file with authors).

184. *Id.*

185. ALDDUSTUR ALLLUBNANI [AA] [CONSTITUTION] May 23, 1926, art. 9, 10, 24, 95 (as amended) (Leb.), translated in Lebanon's Constitution of 1926 with Amendments through 2004 (Fouad Fahmy Shafik trans.) (Feb. 18, 2016), [https://www.constituteproject.org/constitution/Lebanon\\_2004.pdf?lang=EN](https://www.constituteproject.org/constitution/Lebanon_2004.pdf?lang=EN).

186. The distribution of public employment was intended to maintain equality between Christians and Muslims and was defined on its own terms as an "interim measure," suggesting that the need for quotas would eventually be phased out. Before the termination of the mandate, the French established by decree a ratio of 6:5 in favor of Maronites for deputies in parliament, which was redistributed on a 1:1 ratio after the 1989 Ta'ef Accords.

187. See Marie-Joëlle Zahar, *Power Sharing in Lebanon: Foreign Protectors, Domestic Peace, and Democratic Failure*, in SUSTAINABLE PEACE: POWER AND DEMOCRACY AFTER CIVIL WARS 219, 226-28 (Philip G. Roeder & Donald Rothchild, eds., 2005). See generally CHARLES WINSLOW, *LEBANON: WAR AND POLITICS IN A FRAGMENTED SOCIETY* 64-70 (1996).

ties.<sup>188</sup> Education, too, remained in the hands of religious communities, preventing a unifying republican curriculum from being developed.<sup>189</sup>

The constitutional order that resulted from these negotiations oddly resembled the French Third Republic in some respects and the Ottoman *millet* system in others. The combination of these two very different political systems yielded a unique hybrid model defined as much by internal contradictions as by external influences. Thus, the 1926 Constitution internalized the constitutional principles of the equal civil rights of citizens, the protection of individual liberties, including freedom of belief, and the norm of non-discrimination in public employment. Yet, the constitution also conferred status on religious communities in ways that produced glaring contradictions between the guarantees of individual equality (Articles 7 and 12) and the communal distribution of political rights (Article 95).<sup>190</sup>

In effect, the constitution produced a sort of federation among the various religious groups that is known as *al-nizam al-taeifi* (or the confessional order) in Lebanon and has been described as “consociational” in the English language literature.<sup>191</sup> At the time the Christian deputies viewed such a federal arrangement as the only way to guarantee robust minority rights. For instance, Bishara al-Khoury, who would later serve as a Maronite president of the republic, stated that parliamentary representation had to be “confessional so as to preserve the rights of the minorities.”<sup>192</sup> Confessional quotas in public employment (Article 95) eventually also won support from the Sunni members of the Council, who were eager to avoid exclusion.

With the departure of the French in 1943, the compromise of the 1926 Constitution might have been revisited but instead a Maronite-Sunni coalition pursued independence through a “national pact” that secured the

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188. Ensuring that the religious communities maintained a monopoly on matters of family law helped reinforce individual affiliation with confessional identity and also worked to the advantage of the leaders of all of the sects, securing broad buy-in.

189. For an English translation of the 1926 Constitution provision regarding education, see ALDDUSTUR ALLUBNANI [AA] [CONSTITUTION] May 23, 1926, art. 10 (as amended) (Leb.), translated in Lebanon's Constitution of 1926 with Amendments through 2004 (Fouad Fahmy Shafik trans.) (Feb. 18, 2016), [https://www.constituteproject.org/constitution/Lebanon\\_2004.pdf?lang=EN](https://www.constituteproject.org/constitution/Lebanon_2004.pdf?lang=EN).

190. FAWWAZ TRABOULSI, A HISTORY OF MODERN LEBANON 90 (2007).

191. On consociationalism see, for example, LIJPHART, *supra* note 37; JAHN MCGARRY & BRANDEN O'LEARY, THE NORTHERN IRELAND CONFLICT: CONSOCIATIONAL ENGAGEMENTS (2004); Branden O'Leary, *Debating Consociational Politics: Normative and Explanatory Arguments*, in FROM POWER SHARING TO DEMOCRACY: POST CONFLICT INSTITUTIONS IN ETHNICALLY DIVIDED SOCIETIES 3, 3–43 (Sid Noel ed., 2005); *supra* text accompanying note 43. On Consociationalism in Lebanon see, for example, MICHAEL KERR, IMPOSING POWER-SHARING: CONFLICT AND COEXISTENCE IN NORTHERN IRELAND AND LEBANON (2006); Samir Makdisi & Marcus Marktanner, *Trapped by Consociationalism: The Case of Lebanon*, 11 TOPICS MIDDLE E. & N. AFR. ECON. 1 (2009); Imad Salamey, *Failing Consociationalism in Lebanon And Integrative Options*, 14 INT'L. J. PEACE STUD. 83, 83–101 (2009), [https://www.gmu.edu/programs/icar/ijps/vol14\\_2/SALAMEY%20-%2014n2%20IJPS.pdf](https://www.gmu.edu/programs/icar/ijps/vol14_2/SALAMEY%20-%2014n2%20IJPS.pdf).

192. Farha, *supra* note 183, at 10. Only Shia representatives objected to the quotas, but as a small and peripheral community in 1926 their objections were readily marginalized.

political balance of power by reaffirming the confessional order.<sup>193</sup> Negotiated between Bishara al-Khoury on behalf of the Maronite community and Riad al-Solh on behalf of the Sunnis, the Pact tackled the national identity crisis created by the perceived artificiality of Lebanon's boundaries.<sup>194</sup> The National Pact emphasized both the Arab (placating Sunnis) and distinctively Lebanese (catering to the Maronites) character of the state. The Pact expanded religious representation in the political order by formalizing the allocation of specific high office by sect (with a Maronite president, a Sunni premier and a Shia speaker of parliament). Yet in the wake of the Pact, Riad al-Solh famously issued a ministerial decree in 1946 underscoring the eventual goal of eliminating the confessional regime.<sup>195</sup> Ambivalence about confessionalism sat uncomfortably beside its durability in the 1940s.

After independence, the Lebanese system strained under the weight of ongoing tensions between the religious communities over the constitutional allocation of power between them. These ongoing tensions eventually exploded into a civil war that lasted from 1975 to 1989, demonstrating that confessionalism had failed to stave off communal strife.<sup>196</sup> The long and bloody civil war eventually gave way to a stalemate followed by a brokered agreement sponsored by the principal regional and international backers of the two sides, Saudi Arabia, Syria, the Arab League, and the United States.<sup>197</sup> Talks between the parties were convened in Taef, Saudi Arabia in 1989 and the resulting agreement was known as the Taef Accord. Despite the high cost of the fifteen year sectarian civil war, the Accords embraced both the confessional order of the 1926 Constitution and its formal pledges to seek eventual political secularization.<sup>198</sup>

The surviving deputies from the parliament elected prior to the war in 1972 met in Taef, seventeen years after they had been elected, and agreed to shift executive power from the Maronite President to the Cabinet under the Sunni premier (Article 17). In addition, they agreed to redistribute seats in parliament equally between Christians and Muslims, replacing the 6:5 ratio with a 1:1 ratio.<sup>199</sup> Alongside these modest changes, the Accord also

193. See Zahar, *supra* note 187, at 228.

194. See TRABOULSI, *supra* note 190, at 105-06.

195. Farha, *supra* note 183.

196. See Richard Hrair Dekmejian, *Consociational Democracy in Crisis: The Case of Lebanon*, 10 COMP. POL. 251 (1978); Michael C. Hudson, *The Lebanese Crisis: The Limits of Consociational Democracy*, 5 J. PALESTINE STUD. 109, 109-22 (1976); Joseph G. Jabbara & Nancy W. Jabbara, *Consociational Democracy in Lebanon: A Flawed System of Governance*, 17 J. DEVELOPING SOCIETIES 71, 71-89 (2001); Brenda M. Seaver, *The Regional Sources of Power-Sharing Failure: The Case of Lebanon*, 115 POL. SCI. Q. 247, 247-71 (2000); Tom Najem, *The Collapse and Reconstruction of Lebanon* (University of Durham, Working Paper No. 59, 1998), <http://dro.dur.ac.uk/96/1/59DMEP.pdf?DDD35>.

197. Farid El Khazen, *Ending Conflict in Wartime Lebanon: Reform, Sovereignty and Power*, 1976-88, in 40 MIDDLE E. STUD. 65 (Jan. 2004); see also Donohue, *supra* note 182.

198. Donohue, *supra* note 182, at 2530, 2523-24; Ludsins, *supra* note 86, at 266-67; Salem, *supra* note 181, at 15-18.

199. See THEODOR HANF, COEXISTENCE IN WARTIME LEBANON: DECLINE OF A STATE AND RISE OF A NATION (2014); JOSEPH MAILA, THE DOCUMENT OF NATIONAL UNDERSTANDING: A

includes new clauses treating the confessional nature of the regime as provisional and acknowledging the need to end religious representation (especially preambular paragraph H).<sup>200</sup> As with the 1926 Constitution, the goal of de-confessionalization was both embraced and deferred by the constitutional text.<sup>201</sup> As with the 1926 Constitution, without a concrete timetable and transition plan, secularization has proven to be strictly aspirational.

A decade and a half after Taef, a new split emerged as salient in the Lebanese context, with an intra-religious Muslim division between the Sunni and Shi'i communities. The perception that the Shi'i community was aligned with the Iranian-backed Syrian Assad regime was the immediate catalyst for the conflict following the assassination of Sunni former-prime minister, Rafik Hariri, and the widespread attribution of the killing to the Syrian regime and its Lebanese Shi'i ally, Hezbollah.<sup>202</sup> During a 2008 cabinet meeting boycotted by the Shi'i deputies, two decrees that were perceived as hostile to Hezbollah were adopted prompting a conflict in the streets of West Beirut. Eventually, the parties were convened in Doha, Qatar to resolve the crisis.<sup>203</sup> The result was the repeal of the decrees and an agreement that no major decisions would be taken without the consent of all the major religious communities. Thus the Doha Agreement,<sup>204</sup> like the National Pact and the Taef Accord before it, produced a recalibration of the confessional system—this time to endow the minority Shi'i community with veto power over cabinet decisions—rather than its reform or repeal.

The 1926 Constitution was basically designed to govern inter-religious conflict. The constitution-drafters' core focus in the area of state-religion relations concerned the allocation of powers according to confessional arrangements, leaving a weak central government and significant power in the hands of autonomous religious authorities. Such a political order, without strong state institutions, is not equipped to conduct top-down reform of the confessional political system. As a result, deconfessionalization is an ever-receding objective. Moreover, the very weakness of the state means that institutional loyalties and benefits of membership flow more

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COMMENTARY (1992); Hassen Krayem, *The Lebanese Civil War and the Taif Agreement*, in *CONFLICT RESOLUTION IN THE ARAB WORLD: SELECTED ESSAYS* (P. Salem ed., 1997).

200. There are actually three measures listed by the Taef Accord to end confessionalism: (1) establishment of a unitary electoral district in place of confessional districts; (2) removing confessional electoral requirements (Article 22); and (3) establishing a roadmap to end sectarianism in stages (Article 95).

201. MAILA, *supra* note 199.

202. Nicholas Blanford, *Did Hezbollah Kill Hariri?*, FOREIGN POL'Y, Apr. 1, 2010, <http://foreignpolicy.com/2010/04/01/did-hezbollah-kill-hariri-2/>; see also Salamey, *supra* note 191, at 93–94.

203. Allegra Statton & Elizabeth Stewart, *Violence escalates between Sunni and Shia in Beirut*, GUARDIAN (May 8, 2008), <http://www.theguardian.com/world/2008/may/08/lebanon>; see also Donohue, *supra* note 182, at 2528; Salamey, *supra* note 191, at 84, 94.

204. For the English text of the Doha Agreement, see *The Doha Agreement*, NOW (May 21, 2008), [https://now.mmedia.me/lb/en/reportsfeatures/the\\_doha\\_agreement](https://now.mmedia.me/lb/en/reportsfeatures/the_doha_agreement).

readily through communal affiliation than through civic ties.<sup>205</sup>

The Lebanese case offers one example of the features of constitution-drafting where inter-religious conflict is the principal axis of division in the underlying society. The Lebanese formula includes: geographic districts drawn that correspond to (and maintain) confessional balance; quotas for public employment and political office; confessional representation in parliament; and federalism in matters of personal status and religious education. The concerns of the drafters and the solutions they designed are quite different than in countries characterized by intra-religious conflict. The constitution-drafters in Lebanon did not seek to define the religious identity of the state, establish a particular religious law, or specify the locus of the power to interpret constitutional provisions—the key issues in contention in cases of intra-religious conflict. Rather, most concrete questions of religious law and interpretation were extra-constitutional, to be determined by each of the religious communities for themselves.

#### F. Tunisia: 2011–2014

Tunisia has one of the longest standing constitutional traditions of any Arab country. The first modern constitution dates back to the Constitution of 1861, which created a constitutional monarchy and remained in force until Tunisia gained independence from France in 1956.<sup>206</sup> The country's first post-independence constitution was promulgated in 1959 under the leadership of Habib Bourguiba, who maintained single party rule from 1956 until he was deposed by his interior minister Zine El Abidine Ben Ali in 1987. The 1959 Constitution established a hybrid presidential parliamentary system and provided some basic rights guarantees, subject to extensive limitation clauses.<sup>207</sup> The constitution was very concise on matters of the identity of the state or its relationship to religion. The preamble stated that the people would “remain faithful to the teachings of Islam”<sup>208</sup> and that the president would be a Muslim. Article 1 specified that the religion of Tunisia is Islam without elaborating whether this provision had legal effect. Whatever the motivations of the constitutional drafters, the provision on Islam proved only symbolic in effect, because Tunisia had only two presidents from independence until 2011, Bourguiba and Ben Ali, both of whom were committed to an ideology of modernization that included assertive secularism. From independence until 2011, the Tunisian state tightly controlled religious institutions, suppressed religious movements and limited the role of Islam in public life.<sup>209</sup>

205. Mark Farha, *Stumbling Blocks to the Secularization of Personal Status Laws in the Lebanese Republic (1926-2013)*, 29 ARAB L.Q. 31, 33 (2014).

206. See Brown, *supra* note 104.

207. *Id.*

208. For the English text of the Tunisian Constitution of 1959, see *The Constitution of Tunisia*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=188948](http://www.wipo.int/wipolex/en/text.jsp?file_id=188948) (last visited Aug. 23, 2015).

209. Farida Ayari, *Ennahda Movement in Power: A Long Path to Democracy*, 2 CONTEMP. REV. MIDDLE E. 135, 136 (2015); Lina Khatib, *Political Participation and Democratic Transition in the Arab World*, 34 U. PENN. J. INT'L L. 315, 322–25 (2013) (noting that “the



Both secular and Islamist opposition groups were forced to operate clandestinely under Ben Ali and much of the opposition leadership relocated overseas. This created an unusual opportunity for opposition groups to enter into expatriate coalitions with one another. One of the remarkable consequences was a meeting process that began in May 2003 in Aix-en-Provence, France between *Ennahda* and the secular Congress for the Republic (Congrès pour la République, or CPR) group, led by the Tunisian human rights lawyer Moncef Marzouki.<sup>210</sup> These meetings allowed the parties to develop habits of trust and compromise despite ideological differences and facilitated the emergence of pragmatic and strategic alliances, particularly around human rights issues. The resulting fabric of political solidarity lay the groundwork that enabled meaningful coalition politics among Tunisian opposition groups during the transition.<sup>211</sup>

Following the uprising that swept Ben Ali from power, *Ennahda*, led by the Tunisian intellectual Rachid Al Ghannouchi, emerged as the largest party in elections for the Constituent Assembly (CA) in 2011.<sup>212</sup> While the party had a strong showing, the elections were not a landslide, and from the outset *Ennahda* showed an appreciation for the fact that it could not govern or control outcomes acting alone. The party also fielded an electoral list compliant with gender parity rules defusing some concerns in the secularist camp about gender issues. Procedurally, the CA adopted a flexible process without a rigid timeline for constitution-drafting. Moreover, any draft would have to be adopted by consensus due to a supermajority requirement. In the end, the CA elections produced a troika government between *Ennahda*, the CPR, and Ettakatol (a secular, social democratic political party).<sup>213</sup>

On questions of state-religion relations, *Ennahda* would draft the constitution together with avowedly secular parties whose constituencies were skeptical of any departure from the traditional Tunisian formula of assertive secularism. Interestingly, *Ennahda*'s Ghannouchi was on record as supporting secularism in principle, but favoring what he termed the "Anglo-Saxon model" of a more passive secularism in which the state played a "neutral" role on matters of religion.<sup>214</sup> Thus, by contrast to other

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leaders of *Ennahda* were persecuted by the government and forced into exile, effectively curtailing the group's activity in the country").

210. See Nadia Marzouki, *Dancing by the Cliff: Constitution Writing in Post-Revolutionary Tunisia 2011-2014*, in CONSTITUTION WRITING, RELIGION AND DEMOCRACY (Ashli Bâli & Hanna Lerner eds., forthcoming 2016).

211. See Alfred Stepan, *Tunisia's Transition and the Twin Tolerations*, 23 J. DEMOCRACY 89 (2012).

212. The elections, held in October 2011, had a disappointing voter turnout of between 50%-55%. *Ennahda* won the largest proportion of seats (89 of 217). The governing "troika" that emerged from the elections selected CPR's leader, Marzouki, as interim president, Ettakatol's leader as president of the CA, and an *Ennahda* candidate as premier.

213. See generally Sami Semni, *The Extraordinary Politics of the Tunisian Revolution: The Process of Constitution Making*, 20 MEDITERRANEAN POL. (2015).

214. See Nathan J. Brown, *Do Tunisians Agree to More Than They Realize?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Aug. 9, 2011), <http://carnegieendowment.org/2011/08/>

Islamist parties, *Ennahda's* goal was not Islamizing the constitution so much as it was preventing a return to the state's erstwhile aggressive role in regulating religious practice, expression, and identity. This position, in turn, gave rise to skepticism among *Ennahda's* base, which questioned why electoral victory could not be translated into more extensive constitutional provisions formalizing and institutionalizing the role of Islam and *shari'a*. Extensive internal debates within the party eventually facilitated the rejection of these calls for Islamizing the constitutional order.<sup>215</sup>

Elected in October 2011, the CA took office in November and, after months of consultations with civil society groups and institutional stakeholders, began the drafting process in February 2012. Although they opted to develop a *de novo* constitution rather than beginning from the text of the 1959 Constitution, in the end they largely reverted to the 1959 Constitution's formulations on matters of religion-state relations. While no timeline was initially set for a first draft, eventually the CA president called for a draft to be completed in July 2012, and in the end the first draft was produced by mid-August. The working process of the CA was to divide the provisions amongst six subcommissions whose proposals would then be submitted to a single drafting commission to revise and unify the text.<sup>216</sup> In addition, there were mechanisms embedded in the process to seek and incorporate civil society input, including through an online consultative mechanism and several rounds of national dialog that provided contemporaneous feedback to the CA on draft provisions under discussion.<sup>217</sup>

With respect to state-religion relations, there were five core areas of contention among the drafters. These were (1) the identity of the state vis-à-vis religion, (2) the constitutional status of *shari'a*, (3) protections for the freedom of conscience and religion, (4) the framing of gender equality pro-

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09/do-tunisians-agree-on-more-than-they-realize. For an alternative analysis of Ghanouchi's approach to religion-state relations, see Malika Zeghal, *Competing Ways of Life: Islamism, Secularism, and Public Order in the Tunisian Transition*, 20 CONSTITUTIONS 254, 261-62 (2013).

215. Monica L. Marks, *Convince, Coerce, Or Compromise?: Ennahda's Approach To Tunisia's Constitution*, BROOKINGS DOHA CTR. ANALYSIS PAPER 10 (2014).

216. The relative balance of power between the subcommissions and the drafting commission was never fully specified, at times leading at times to conflict over which party had the final authority to approve and finalize revisions. For more on the CA procedures, see Bill Proctor & Ikbāl Ben Moussa, *The Tunisian Constituent Assembly's By-laws: A Brief Analysis*, INT'L IDEA (2012).

217. JASON GLUCK & MICHELE BRANDT, U.S. INST. OF PEACE, PARTICIPATORY AND INCLUSIVE CONSTITUTION MAKING: GIVING VOICE TO THE DEMANDS OF CITIZENS IN THE WAKE OF THE ARAB SPRING 10 (2015), <https://www.usip.org/sites/default/files/PW105-Participatory-and-Inclusive-Constitution-Making.pdf>. Some observers, though, criticized the lack of official role for law experts and civil society groups in the drafting process. See 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-see>; see also Maha Yahya, *Beyond Tunisia's Constitution: The Devil is in the Details*, CARNEGIE MIDDLE E. CTR. (Apr. 28, 2014), <http://carnegie-mec.org/2014/04/28/beyond-tunisia-s-constitution-devil-in-details>.

tections, and (5) the status of international treaty commitments.<sup>218</sup> Some of these areas might not appear to concern religion-state relations at first blush. For instance, debates about the status of international treaty commitments were related to issues of religion as a result of highly contingent factors peculiar to the Tunisian debate involving concerns about the tension between international human rights treaty commitments and Islamic tradition. Only a handful of provisions of the constitution were ultimately related to religion-state relations. These included: the Preamble, Articles 1 and 2 concerning the identity of the state and the status of *shari'a*, Article 6 on freedom of conscience,<sup>219</sup> Article 20 on international treaties, and Articles 21 and 45 on matters of gender equality.<sup>220</sup>

The work of the CA ultimately yielded four constitutional drafts that were presented to the public before the final draft was adopted in January 2014.<sup>221</sup> The first draft was simply a compilation of the initial work of the subcommissions in August 2012. After these initial drafts were reviewed by the drafting commission for inconsistencies, gaps, and redundancies, the subcommissions were given from September to December to produce revisions, yielding a second draft in December 2012. This draft was subjected to a public consultation process, with meetings held in all twenty-four governorates. The subcommissions then made additional revisions based on public input and produced a second version of the December draft (widely referred to as Draft 2 bis). The drafting commission received Draft 2 bis and produced its own draft this time making substantive changes. This text was prematurely leaked in May 2013, resulting in another round of public consultations on what was seen as Draft 3. Eventually a fourth and final draft, taking account of the additional public input following the leak, was made public in June 2013, and was deliberated on for six months culminating in the promulgation of the constitution in January 2014.

The constitution that emerged from this process establishes a fundamentally secular political order, albeit one that makes repeated, largely symbolic references to Islamic identity embedding some ambiguity in the

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218. See THE TUNISIAN CONSTITUTIONAL PROCESS: MAIN ACTORS AND KEY ISSUES (Mathieu Rousselin & Christopher Smith, eds., 2015); Marzouki, *supra* note 210.

219. See Asma Ghribi, *The Problem with Tunisia's New Constitution*, FOREIGN POL'Y (Jan. 9, 2014), <http://foreignpolicy.com/2014/01/09/the-problem-with-tunisia-s-new-constitution/>.

220. There were two other issues that might have been more contentious but yielded relatively easily to consensus formulae. These were the requirement that candidates for president be Muslim (accepted by secular opposition parties) and a debate about the number of non-lawyers permitted to serve on the Constitutional Court (a proxy for the number of religious law scholars that might be included). On the latter point, *Ennahda* paved the way for a compromise of two-thirds of the Court being composed of lawyers with at least fifteen years of practice experience.

221. For an overview of provisions related to religion in the four drafts, see Markus Böckenförde & Omar Hamady, *From Constructive Ambiguity to Harmonious Interpretation: Religion-Related Provisions in the Tunisian Constitution*, AM. BEHAV. SCIENTIST (Apr. 19, 2016).

text.<sup>222</sup> On many issues that might have been expected to prove stumbling blocks for *Ennahda*'s participation in the constitution-drafting process, the party showed flexibility and willingness to compromise. In February 2012 a leaked draft provision that was allegedly authored by *Ennahda* cited *shari'a* as the main source of legislation. The ensuing debate fully aired the fears of the secular camp that the party would use constitution-drafting as a means Islamizing the post-authoritarian transition. Instead, the leaked draft provoked a major internal debate within the party that eventually resulted in an embrace of the chief demand of the secular camp: the retention of the language of Article 1 from the 1959 draft. That formulation itself was famously ambiguous, stating that "Tunisia is a free, independent and sovereign state; its religion is Islam."<sup>223</sup>

What other compromises were eventually incorporated into the text of the Constitution? The debate about the preamble centered on how the role of Islam in the identity of Tunisian society would be referenced. The text as adopted provides:

Expressing our people's commitment to the teachings of Islam, to their spirit of openness and tolerance, to human values and the highest principles of universal human rights, inspired by the heritage of our civilization . . . based on the foundations of our Islamic-Arab identity and on the gains of human civilization . . . .<sup>224</sup>

The explicit balance struck between references to Islamic identity and teachings, and the broader civilizational achievements of humanity and the distinctively Tunisian place in that heritage reflects a compromise amongst the camps about the hierarchical ordering of Islamic identity, Arab identity, and Tunisian nationalism in defining the identity of the Tunisian people. Beyond the preamble and Article 1, Article 2 states that "Tunisia is a civil state based on citizenship, the will have the people and the supremacy of law," definitively excluding any interpretation that Tunisia had adopted an Islamic state model.<sup>225</sup>

The 2014 Constitution stipulates that both Articles 1 and 2 are unamendable.<sup>226</sup> In light of the history of the Article 1 formulation and the explicit language of Article 2, this lack of amendability might be read as the constitutional entrenchment of secularism. Yet, elsewhere the 2014 Constitution provides that "[t]he state is the guardian of religion . . . . The state undertakes to disseminate the values of moderation and tolerance

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222. This understanding was expressed by Yadh Ben Achour, the head of the High Commission for Political Reform. Zentrum für interdisziplinäre Forschung [Center for Interdisciplinary Research], *Yahd Ben Achour: Drafting a Constitution at the Time of the Revolution*, YOUTUBE (Dec. 17, 2014), <https://www.youtube.com/watch?v=NBCnO7j1fVo> (see especially final five minutes).

223. For the English language text of the 2014 Tunisian Constitution, see CONSTITUTION OF TUNISIA, Jan. 27, 2014, [https://www.constituteproject.org/constitution/Tunisia\\_2014?lang=EN](https://www.constituteproject.org/constitution/Tunisia_2014?lang=EN).

224. *Id.*

225. Böckenförde, *supra* note 221.

226. CONSTITUTION OF TUNISIA, Jan. 27, 2014, arts. 1-2, [https://www.constituteproject.org/constitution/Tunisia\\_2014?lang=EN](https://www.constituteproject.org/constitution/Tunisia_2014?lang=EN).

and the protection of the sacred” (emphasis added) (Article 6). This language introduces a tension with the definition of Tunisia as a civil state, but at the same time it reflects another important compromise. On the one hand, the text of Article 6 certainly suggests a non-neutral state tasked with guarding religion and playing a role in protecting religious belief from offense.<sup>227</sup> But this was a softened provision, which dropped an earlier effort to criminalize offenses to the sacred in the Constitution.

In another compromise, *Ennahda*, which had originally proposed an interpretation of gender equality centered on complementarity of gender roles (consistent with Islamist interpretations) in the first draft, dropped that condition in subsequent drafts (Article 21). By contrast, Islamist drafters were keen to limit the constitutional status of international treaty commitments that might impose human rights commitments incompatible with Islamic interpretations of the constitutional text. Here, the final draft embraced a midpoint whereby treaties are superior to ordinary legislation but inferior to the constitution (Article 20). The chief human rights commitments that animated these concerns were related to gender equality (notably Tunisia’s undertakings as a party to the Convention on the Elimination of Discrimination Against Women), thus to fully appreciate the compromise on gender equality, Articles 20 and 21 should be read together.<sup>228</sup>

The final stages of public constitutional deliberation from July 2013 to January 2014 unfolded against the backdrop of the assassinations of two prominent opposition figures in Tunisia<sup>229</sup> and accelerating counter-revolution in Egypt.<sup>230</sup> This context may have predisposed *Ennahda* constituents to accept far-reaching compromises that might have been anathema earlier in the transition. But in the end the pragmatism and coalition-building that the party embraced permitted the promulgation of a draft that resolved many of the contentious issues concerning state-religion relations through compromise and constructive ambiguity. The constitution-drafting process permitted extensive consultation and deliberation without the artificial pressure of a strict timeframe. This was a great advantage but also resulted in a process that was extended, continuing for more than three years, and hence vulnerable to reversal at many junctures. Narrowly avoiding stalemate, largely through habits of compromise, the parties suc-

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227. Amna Guellali, *The Problem with Tunisia’s New Constitution*, WORLD POL’Y BLOG (Feb. 3, 2014), <http://www.worldpolicy.org/blog/2014/02/03/problem-tunisia%E2%80%99s-new-constitution>.

228. In addition, the Constitution includes gender sensitive provisions, such as Article 40 which recognizes the right to work as “a right for every citizen, male and female” and Article 73 which provides that “every male and female voter” had a right to be elected as President. The Tunisian Constitution is the first in the region to recognize such rights. Al-Ali & Romdhane, *supra* note 217, at 5.

229. Carlotta Gall, *Second Opposition Leader Assassinated in Tunisia*, N.Y. TIMES (July 25, 2013), [http://www.nytimes.com/2013/07/26/world/middleeast/second-opposition-leader-killed-in-tunisia.html?\\_r=0](http://www.nytimes.com/2013/07/26/world/middleeast/second-opposition-leader-killed-in-tunisia.html?_r=0).

230. Michael Bachir Ayari, *Tunisia: Avoiding the Egyptian Scenario*, TUNISIALIVE (Aug. 12, 2013), <http://www.tunisia-live.net/2013/08/12/tunisia-avoiding-the-egyptian-scenario/>.

ceeded in producing a text that incorporates relatively strong rights protections while still garnering buy-in from across the political spectrum. The constitution was ultimately adopted on January 26, 2014, by a very wide margin, with a vote of two hundred in favor, twelve against, and four abstentions in the Constituent Assembly.

#### G. Turkey: 1982–2016

Turkey has a long history of constitutionalism, dating back to the first Ottoman Constitution of 1876 to the current constitution, written as part of a transition out of military rule in 1982.<sup>231</sup> All of these constitutions have been written in top-down, elite-led processes that entrench a repressive model of state-religion relations lacking popular support. Nevertheless, the basic configuration of state regulation of religion has proven fairly durable, even under pressure from an elected government commanding a majority in favor of constitutional revision. Over time, the durability of the constitutional formula governing religion has been modified gradually through piecemeal amendments rather than wholesale constitutional reform on questions of religion. More recently, the state's orientation on matters of religion has been transformed by means of regulatory and legislative change even as the constitutional text defining the state as secular has remained static.

Following the collapse of the Ottoman order, the Turkish republic was founded in 1923 and adopted its first republican constitution in 1924. While that constitution was adopted by an elected legislature, the 1923 elections were so dominated by the party of the founding statesman, Mustafa Kemal, that opposition voices had almost no role in the drafting of the text or the vote for its adoption. In the ensuing two decades, the constitution permitted the emergence of single party rule. Following the end of World War II, Turkey was brought under external pressure—connected to its receipt of Marshall Plan assistance—to liberalize its political order. As a result, the country transitioned to a multiparty system in 1946, but escalating tensions between the two principal parties resulted in a military intervention in 1960.<sup>232</sup>

Following the 1960 military coup, the 1924 Constitution was repealed and replaced by a new constitution, drafted by an appointed committee of legal scholars and submitted to a partly indirectly elected Constituent

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231. Turkey has had four different constitutions in the post-Ottoman period: the national liberation constitution of 1921, the first republican constitution of 1924, the post-military coup constitution of 1961 (revised in 1971 and 1973), and the post-military coup constitution of 1982. None of the three republican era constitutions were written by a broadly representative constituent assembly. Rather, they were each imposed top-down by elite drafters and in the cases of the 1961 and 1982 constitutions, the drafters were selected by the military. The 1982 Constitution has undergone over a dozen rounds of amendments since its adoption—the most recent amendment package having been passed in 2010—but it remains a text rooted in its semi-authoritarian origins.

232. FERÖZ AHMED, *THE MAKING OF MODERN TURKEY* 102–31 (1994); ERIC J. ZÜRCHER, *TURKEY: A MODERN HISTORY* 206–40 (2004).

Assembly, the composition of which was largely dictated by the governing military.<sup>233</sup> Despite the method by which drafters were selected, the resulting draft was more liberal than the 1924 text with stronger protections for civil liberties and a new Constitutional Court, serving as a check on the state organs. These positive features were partially offset by the fact that the 1961 Constitution also ensured greater institutional autonomy for the military to serve as a self-appointed guardian of the Turkish constitutional principles of nationalism and secularism. Following a decade of political polarization and violence, and a military coup in 1980, the 1961 Constitution (which had already been amended to limit some of its more liberal features in 1971 and 1973) was repealed and replaced by a far more repressive new text in 1982.

The 1982 Constitution was written under military supervision in a tightly-controlled, top-down drafting process. The Constituent Assembly was comprised of a military and a civilian chamber, with the former maintaining ultimate control of the draft. The military drafting council comprised the five highest-ranking generals who carried out the September 12, 1980 military coup and then constituted themselves as the country's National Security Council (NSC).<sup>234</sup> The second, civilian branch was designated the Consultative Assembly and its members were appointed by the NSC. Following the coup, all political parties had been banned and anyone who had previously held elected office was disqualified from serving in the Consultative Assembly. As a result, the civilian branch was restricted to state elites selected by the NSC and was highly unrepresentative of the preferences of the electorate. Further, the NSC retained the power to amend or reject aspects of the draft produced by the civilian branch further ensuring top-down control of the constitutional text. Once the draft was completed, it was put to a public referendum in a restricted political process. A military decree banned public debate or criticism of the draft while the NSC itself led a pro-constitution campaign.<sup>235</sup> Moreover, a vote in favor of the constitution was presented as the only means to transition back to civilian rule, leaving the electorate with the choice of accepting a repressive constitution or maintaining military rule. As a result, despite the fact that a constitutional referendum was undertaken, the processes for drafting and adopting the constitution were deeply unrepresentative.

The 1982 Constitution has undergone eighteen rounds of amendment in the over thirty-three years it has been in force, replacing more than a third of its original text. While many of its most repressive features have been eliminated, the constitutional order in Turkey is still described by a prominent Turkish constitutional law scholar as semi-democratic with a number of authoritarian and tutelary features.<sup>236</sup> This description cap-

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233. ERGUN ÖZBUDUN, *THE CONSTITUTIONAL SYSTEM OF TURKEY: 1876 TO THE PRESENT*, at 10 (2011).

234. ÖZBUDUN & GENÇKAYA, *supra* note 11, at 19–20.

235. *Id.* at 20.

236. ÖZBUDUN, *supra* note 231, at 151.

tures important characteristics of the Turkish constitutional order.<sup>237</sup> First, it is a highly statist constitution, privileging the prerogatives of the state and “Turkish national interests” ahead of the protection of individual rights, as is evident in the Constitution’s preamble.<sup>238</sup> Second, the constitution establishes a set of tutelary institutions designed to check the powers of the elected branches of government. These institutions include the National Security Council (with a strong military presence and broad policy-making powers), the Higher Education Board (including representatives of the military in decisions concerning academic appointments and the regulation of higher education), and the judiciary with an appointments procedure that, for the higher echelon courts, is largely controlled by the executive (albeit less so following the constitutional amendments of 2010), among others.<sup>239</sup> In addition, the constitution secures significant institutional autonomy for the military and strikingly broad jurisdiction for the military courts.

The Turkish republic has been a formally secular state since 1928.<sup>240</sup> But Turkey’s repressive definition of secularism, informed by the founding republican ideology of Kemalism, sets it apart from most other secular constitutional systems. Secularism in Turkey is not the constitutional principle of separation of state and religion (or even state neutrality on questions of religion) but rather state control and regulation of religion in the interest of maintaining the autonomy of the political realm.<sup>241</sup> Under this definition, secularism has been the basis for intrusive state policies governing many aspects of private religious expression and practice throughout much of the republic’s history. This conception of secularism has also enabled the state to monopolize the domain of religious education, producing a state-sanctioned orthodoxy on Islam, excluding the beliefs and practices of

237. Turkey is regularly ranked as “partly free” by Freedom House despite regularly convening free and fair elections, largely due to the limited protections afforded to individual rights and political freedoms. For Turkey’s 2015 Freedom House scores see *Turkey*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2015/turkey?gclid=CIX97cuDnscFUFNhfgod-z0KLQ#.VchXiPIVhBd> (last visited June 21, 2016).

238. The preamble provides, *inter alia*, that “no protection shall be afforded to an activity contrary to Turkish national interests, Turkish existence and the principle of its indivisibility with its State and territory” and “that all Turkish citizens are united in national honor and pride . . . in their rights and duties regarding national existence.” The English language text of the Turkish Constitution (as amended through 2011) is available online. CONSTITUTION OF THE REPUBLIC OF TURKEY Nov. 7, 1982, [https://www.constituteproject.org/constitution/Turkey\\_2011?lang=EN](https://www.constituteproject.org/constitution/Turkey_2011?lang=EN). All subsequent citations in English to provisions of the constitution are based on this translation.

239. The text of the Turkish Constitution’s provides for the NSC at Article 118, the Council of Higher Education at Articles 130 and 131 and the mechanism for judicial appointments and promotions through the High Council of Judges and Prosecutors is provided for by Article 159.

240. The Turkish republic’s first constitution made reference to Islam as the religion of the state. That provision was removed by constitutional amendment in 1928 and in 1937 a further constitutional amendment enshrined the principle of secularism—or *laiklik*—as an unamendable feature of the republic. See Yaniv Riznai & Serkan Yolcu, *An Unconstitutional Constitutional Amendment*, 10 INT’L J. CONST. L. 175, 175–207 (2012).

241. For a discussion of constitutional secularism in Turkey, see ÖZBUDUN & GENÇKAYA, *supra* note 11, at 27–32.



heterodox Muslim communities, like the Alevis. This Kemalist definition of secularism was retained and entrenched by the 1982 Constitution, which listed secularism as one of the unamendable characteristics of the Republic in Article 2.<sup>242</sup> In addition, the constitution protected freedom of religion while maintaining the Directorate of Religious Affairs—the state-controlled administrative apparatus for regulating Muslim religious institutions and affairs—under Article 136 and according special protection to the eight principal reform laws dating to the founding of the Republic that enshrined the Kemalist conception of secularism through public education, civil marriage, and language and dress reforms.<sup>243</sup> Thus, the 1982 Constitution maintained the half-century old conception of secularism that required intrusive state regulation and control of religion.

The 1990s witnessed the emergence of Islamist political parties in Turkey that performed well in national elections. In 1983, the Welfare Party (*Refah*) was formed with the restoration of civilian government, and came to national prominence with its electoral performance in 1991. By 1996, Welfare had increased its share of the popular vote sufficiently to become the largest party seated in parliament and to catapult the party's leader, Necmettin Erbakan, to the premiership. The party's electoral success proved to be its undoing as Erbakan's coalition government was forced out of power by the Turkish military in 1997 on the grounds of its allegedly anti-secular political platform. The successor party to Welfare, the Virtue Party (*Fazilet*), was similarly subjected to constitutional closure on the same grounds, generating a split within the Turkish Islamist movement. Following that split, two parties emerged—the Justice and Development Party (known by its Turkish acronym, AKP for *Adalet ve Kalkınma*) and the more conservative Felicity Party (*Saadet*). From the first time it participated in national elections in 2002, the AKP dominated the Turkish political scene, winning the plurality of votes in four successive national elections.

The AKP's election platform promised to address the widespread demand to replace the 1982 Constitution through a broadly representative constitution-drafting process. Yet electoral victories have not translated into successful constitutional revision as of 2016. The key stumbling blocks to constitutional reform have been deep divisions over three facets of Turkey's constitutional order: state-religion relations, a civic versus ethnic conception of citizenship, and the statism that prioritizes a strong and centralized executive over the protection of individual rights. Under the AKP's rule, these obstacles have resulted in a stalemate over constitutional secularism, Kurdish rights, and the AKP-favored proposal for a presidential system. While the AKP has successfully modified the state's interpretation of secularism using its political majority to alter regulatory and legislative

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242. CONSTITUTION OF THE REPUBLIC OF TURKEY Nov. 7, 1982, art. 2, [https://www.constituteproject.org/constitution/Turkey\\_2011?lang=EN](https://www.constituteproject.org/constitution/Turkey_2011?lang=EN). Article 4 specifies that “the characteristics of the Republic in Article 2 . . . shall not be amended, nor shall their amendment be proposed.”

243. *Id.* at art. 174.

frameworks in favor of its constituents' preferences—permitting for the first time the wearing of headscarves on university campuses, in secondary schools, and government offices, as one example<sup>244</sup>—it has not yet secured a durable constitutional change that would entrench its preferred order of state-religion relations.

The first attempt by the AKP to replace the 1982 Constitution occurred after contentious parliamentary elections in 2007 from which they emerged with a plurality of the vote and a majority of seats in parliament.<sup>245</sup> The party sought to translate its parliamentary majority into an initiative to repeal and replace the constitution. A constitution-drafting committee comprised of prominent constitutional law scholars was convened by the AKP to prepare an initial draft that would serve as a starting point for legislative debate.<sup>246</sup> This approach proved to be a non-starter.

The eventual constitutional text produced by the committee was the most liberal draft for a constitution that had ever been proposed in Turkey. That draft, which was leaked to the media, jettisoned the ideological baggage of the previous three constitutions, cleaving instead to European human rights standards and guidelines for the rule of law. Yet, because the committee had been selected by the AKP rather than through an all-party consensus and precisely because the draft represented a radical departure from its Kemalist forebears, it was met with instant suspicion. In the end, the secularist and modernizing Kemalist opposition rejected a liberal draft constitution out of anxieties that a more pluralist and liberal order might diminish the assertive secularism they deemed essential to Turkey's constitutional identity.

The collapse of the 2007 effort to adopt a new constitution was largely the result of intra-religious conflict between the secularist and the religious camps in parliament. Following the failed 2007 constitutional initiative, the AKP drafted a package of constitutional amendments in 2010, once again with little input from the other parties. This time, however, the amendments were put directly to a general referendum and thus the AKP was able to avoid obstacles to its preferred path within parliament through appeal to majoritarianism. The content of the amendments served to civilianize the constitution—reducing the autonomy and jurisdiction of the military over civilian affairs—while introducing a small set of new individ-

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244. See Ece Toksabay & Ibon Vilelabeitia, *In quiet revolution, Turkey eases headscarf ban*, REUTERS (Oct. 17, 2010), <http://www.reuters.com/article/us-turkey-headscarf-idUSTRE69G0DX20101017> (on regulatory changes allowing headscarves on university campuses); Sebnem Arsu & Dan Bilefsky, *Turkey Lifts Longtime Ban on Head Scarves in State Offices*, N.Y. TIMES (Oct. 8, 2013), <http://www.nytimes.com/2013/10/09/world/europe/turkey-lifts-ban-on-head-scarves-in-state-offices.html> (on lifting of headscarf ban in government buildings); Tulin Daloglu, *Turkey allows headscarves for young students*, AL-MONITOR (Sept. 24, 2014), <http://www.al-monitor.com/pulse/originals/2014/09/turkey-headscarves-early-education-allowed.html> (on regulatory changes allowing students to wear headscarves in middle and high schools).

245. For a discussion of the 2007 constitution-drafting project see Bâli, *The Perils of Judicial Independence*, *supra* note 11.

246. ÖZBUDUN & GENÇKAYA, *supra* note 11, at 103–05.

ual rights protections and reducing the tutelary role of the judiciary.<sup>247</sup> The secularist, Kemalist camp viewed the amendments as introducing a Trojan horse to facilitate stealth Islamization of the constitutional order by limiting the ability of the judiciary to check the AKP's majoritarian policies. The next general election in 2011 witnessed a third consecutive victory for the AKP. Even as the vote tally was coming in, the AKP signaled that it would use its renewed electoral mandate to "build the new constitution through consensus and negotiation" with the other parties.<sup>248</sup>

In the months after the election, the AKP led the Turkish Grand National Assembly in the formation of a Constitutional Reconciliation Committee (CRC) including all four of the parties seated in parliament. The secular Republican People's Party (CHP), the far-right Nationalist Movement Party (MHP), and the pro-Kurdish Peace and Democracy Party (BDP) together with the AKP were each afforded equal representation on the CRC, which was to deliberate by consensus on revisions to each of the 175 articles of the Constitution. The CRC certainly corrected for the complaints that the 2007 process had excluded opposition parties from input on the initial draft of the constitution. However, in light of the polarization of the parties on the CRC—with the pro-secular CHP opposing the moderate Islamist AKP and the pro-Kurdish BDP facing the deep hostility of the ultra-nationalist MHP—the consensus rule all but guaranteed stalemate over the most contentious articles at issue in constitution-drafting.

The CRC began meeting in October 2011 and for the first seven months it held meetings with civil society representatives to solicit public input on constitutional reform. Drafting work began in May 2012 and continued for over seventeen months.<sup>249</sup> One year into the deliberations of the CRC, the outbreak of large-scale protests across the country—known as the Gezi protests, named after the Istanbul park where they began—highlighted the urgent need for a new constitution but also deepening political polarization.<sup>250</sup> The CRC voting rules were never conducive to compromise on contentious issues—by virtue of the veto power held by each party—but the

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247. For a discussion of the amendments, see Bâli, *The Perils of Judicial Independence*, *supra* note 11, at 295–309. After the amendments were enacted, the composition of the judiciary changed significantly, but in ways that proved displeasing to the AKP, yielding heavy-handed executive intervention in judicial affairs beginning in 2013. *EU report criticizes Turkey over judicial independence, press freedom*, TODAY'S ZAMAN (Oct. 8, 2014), <https://www.cihan.com.tr/en/turkey-eu-cyprus-media-freedom-2014528.htm>; Oya Yegen, *Turkey Rolling Back the 2010 Reforms?*, ICONNECT BLOG (Oct. 24, 2014), <http://www.iconnectblog.com/2014/10/turkey-rolling-back-the-2010-reforms/>.

248. *Turkey ruling party wins election with reduced majority*, BBC (June 12, 2011), <http://www.bbc.com/news/world-europe-13740147>.

249. For a detailed discussion of the CRC's work, see TAYLAN BARIN, *TÜRKİYE'NİN YENİ ANAYASA ARAYIŞI: 2011–2013 TBMM ANAYASA UZLAŞMA KOMİSYONU TECRÜBESİ* (2014) (in Hebrew).

250. On the Gezi Park protests and political polarization in Turkey, see Tim Arango, *Turkish Liberals Turn Their Backs on Erdogan*, N.Y. TIMES (June 19, 2013), <http://www.nytimes.com/2013/06/20/world/europe/turkish-liberals-turn-their-backs-on-erdogan.html>; Constanze Letsch, *Turkey protests spread after violence in Istanbul over park demolition*, GUARDIAN U.K. (May 31, 2013), <https://www.theguardian.com/world/2013/may/31/istanbul-protesters-violent-clashes-police>.

likelihood of compromise and consensus declined following the Gezi protests. By November 2013, the CRC had been able to forge consensus on only 60 out of 175 articles under discussion and was unable to make progress on the remaining issues.<sup>251</sup> The inability to come to any consensus over state-religion relations, Kurdish rights or the AKP's proposal for a presidential system meant that after over two years of work, the CRC process ended with a whimper as the Committee was dissolved in late November 2013.<sup>252</sup>

The repeated failure of efforts to repeal the military-authored 1982 Constitution and replace it with a civilian-authored draft illustrates the limitations of democratic consolidation in Turkey. While the country has held consistently free and fair elections under the present constitutional order, it has secured ballot box democracy without adequate individual rights protections. Deep social cleavages in Turkey over ethnic and religious identity have hindered the development of a widely shared consensus concerning the constitutional identity of the state. Competing conceptions of constitutional secularism, rival notions of civic versus ethnic citizenship, and fundamental disagreement about the allocation of power between the branches of government suggest that Turkey's constitutional model has remained durable due to political stalemate rather than popular support. In the meantime, an Islamist agenda has been pursued by the AKP, either by regulatory and legislative means<sup>253</sup> or by instrumentalizing the state's control over religion to their own ends.<sup>254</sup> The constitutional text on secu-

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251. *AK Parti'nin '60 Maddeyi Geçirelim' Taklifine CHP'den Ret*, *MİLLİYET* (Nov. 7, 2013), <http://www.milliyet.com.tr/ak-parti-nin-60-maddeyi-siyaset/detay/1788622/default.htm>.

252. *Anayasa Uzlaşma Komisyonu feshedildi: TBMM Anayasa Uzlaşma Komisyonu Resmen dağıldı* [Constitutional Reconciliation Commission was abolished: Constitutional Reconciliation Commission was formally dissolved], *MİLLİYET* (Dec. 25, 2013), <http://www.milliyet.com.tr/anayasa-uzlasma-komisyonu/siyaset/detay/1812914/default.htm>.

253. Beyond the changes pertaining to the headscarf described above in note 244, the AKP has also introduced new restrictions on the sale of alcohol, vastly expanded the number of religious Imam-Hatip secondary schools, and has announced plans to build an Islamic university in Turkey to rival Egypt's al-Azhar. Alexander Christie-Miller, *Erdogan launches Sunni Islamist revival in Turkish schools*, *NEWSWEEK* (Dec. 16, 2014), <http://www.newsweek.com/2014/12/26/erdogan-launches-sunni-islamist-revival-turkish-schools-292237.html>; Michael Kaplan, *Turkey plans to establish an Islamic university with a broader Muslim curriculum*, *WASH. POST* (Dec. 23, 2014), [https://www.washingtonpost.com/national/religion/turkey-plans-to-establish-an-islamic-university-with-a-broader-muslim-curriculum/2014/12/23/a902f030-8adb-11e4-ace9-47de1af4c3eb\\_story.html](https://www.washingtonpost.com/national/religion/turkey-plans-to-establish-an-islamic-university-with-a-broader-muslim-curriculum/2014/12/23/a902f030-8adb-11e4-ace9-47de1af4c3eb_story.html); Güneş Kömürçüler, *Restrictions on alcohol sales go into effect today in Turkey*, *HURRIYET DAILY* (Sept. 9, 2013), <http://www.hurriyetdailynews.com/restrictions-on-alcohol-sales-go-into-effect-today-in-turkey.aspx>.

254. The Directorate of Religious Affairs is the principal executive organ through which the state regulates religion under Turkey's constitutional order. Under the AKP, the Directorate (known as Diyanet in Turkish) has quadrupled its budget and become an engine of Islamization, rather than serving the goal of controlling and limiting religion, which had been its role under earlier governments. Svante Cornell, *The Rise of Diyanet: the Politicization of Turkey's Directorate of Religious Affairs*, *TURKEY ANALYST* (Oct. 9, 2015), <http://www.turkeyanalyst.org/publications/turkey-analyst-articles/item/463-the-rise-of-diyanet-the-politicization-of-turkey%E2%80%99s-directorate-of-religious-affairs.html>.

larism may remain unaltered but the regulation of religion by the state has been profoundly transformed through other means.

Since constitutional reform has only been possible through piecemeal amendments adopted by public referenda, Islamist actors have resorted increasingly to a politics of bare majoritarianism to use the ballot box to achieve constitutional transformation without forging consensus or addressing underlying social cleavages. This strategy, in turn, has produced greater political polarization and a decline in individual freedoms and rights-protections. Arguably, one cost of entrenching Kemalist secularism through top-down constitution-making has been to raise the stakes of constitution-drafting. Today, the AKP is pursuing its own electoral strategy of imposed constitutionalism, one reacting against but also inspired by the country's legacy of repressive constitution-drafting processes.

#### IV. Lessons from the Case Studies

The seven case-studies described above reveal the limitations of the liberal paradigm in addressing religious conflicts through constitution-making means. To begin with, in all of these cases, the drafters are split over the question of the appropriate relations between religious law and the secular law of the state, or the relation between particular religious identity of certain religious groups and the general identity of the state which applies for the entire citizenry. In many of the cases, liberal constitutional arrangements are not seen as a neutral solution to allow for further deliberation but rather as a victory of one side in the debate. This is particularly the case where religious divisions are characterized by intra-religious identity lines.

For that reason, in the constitutional debates under examination here, defining the distinctive elements of the state-religion relationship did not reproduce the classic liberal distinction between "freedom from" (non-establishment) or "freedom of" (free exercise) religion. Several of the constitutions under study elect incremental constitutional formulae to provide provisional solutions to deep-seated conflicts over the appropriate role of religion in the constitutional order. Hence, they do not produce texts that neatly correspond to the two dimensions of freedom from/freedom of religion. For instance, beyond the question of an established religion (and often in the absence of such establishment) there are numerous institutional dimensions of state-religion relations that represent shades of gray worthy of study in their own rite such as: state regulation, taxation, or subsidy of religious education; rules governing the political participation of religious political parties; and institutional arrangements to formally include religious personal status laws in a constitutional order that embraces legal pluralism. Similarly, consociational formulae in multi-confessional societies offer a variety of mechanisms for incorporating religious laws and recognizing the formal status of religious communities while maintaining a stance of state neutrality among them. These and other strategies reflect the sociological role of the state in managing religious

plurality in ways that exceed the categories of freedom from/freedom of religion.

Given the high degree of instability in the context of religiously divided societies, what we can clearly see from the cases under study in this Article is that the presence of deep religious divisions in these cases requires different institutional, political and judicial mechanisms for conflict resolution than the formulae prescribed in liberal models. Indeed, as we further elaborate below, rather than relying on the prevalent techniques of institutional design choices from Western models, constitutions drafted in societies lacking cohesion around values or religious identity often develop conflict-mitigation mechanisms which allow for an incrementalist and gradual resolution of the religious conflict through constitutional means. These include, for example such strategies as deferral of clear decisions, the use of ambiguous language, the inclusion of conflicting provisions or principles in a written constitution, or the adoption of non-justiciable clauses. In other cases, constitutionalism itself is deferred either by not adopting a written constitution or by using ordinary legislative procedures to amend an existing text when broader repeal and revision prove unworkable. These strategies are under-emphasized in the liberal constitutional toolkit.

The discussion in the following sections reveals the limitations of constitutional expectations grounded in the six feature of the liberal model which we have defined above,<sup>255</sup> when drafters are faced with the complex political reality of religiously divided societies. As many of the cases analyzed above illustrate, drafting constitutional arrangements concerning the role of religion, or concerning the religious identity of the state, does not always represent a moment of “new beginning” in the long-lasting relations between religion and state. Given the deep disagreements over the religious/secular identity of the state that characterize religiously divided societies, drafters often refrain from formally defining a set of supreme constitutional principles which are intended to guide future generations. The expectation that constitutions would establish clear legal limitations on governmental power often fails to be realized when political actors adopt more flexible constitutional arrangements which allow greater freedom for political decisions on divisive religious issues.

In what follows we highlight a set of lessons drawn from constitutional practices that defy the existing categories of constitutional theory rooted in the liberal paradigm. We have organized the common themes and lessons that we address under four categories: (a) the difference between intra-religious and inter-religious conflicts in the context of constitution-writing; (b) the role of constitutional incrementalism or strategies that defer clear constitutional definitions in situations of religious conflict; (c) the relationship between the process and outcome of constitution writing in contexts of religious controversies; and (d) factors affecting variation in the durability of constitutions after promulgation. In the discussion

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255. See discussion *supra* section II.A.

below, we take up each of these common themes to offer some initial thoughts on what comparative analysis of the cases reveals about the potential value of broadening the spectrum of paradigms on which comparative constitutional design prescriptions draw.

#### A. Inter- Versus Intra-Religious Conflict

A close examination of various constitutional debates on religion reveals that the character of the underlying divisions—whether defined by a clear majority-minority dynamic or by a more balanced plurality—as well as the content of the competing positions are relevant to the design choices adopted by the framers. More particularly, the comparative approach taken by this Article reveals a distinctive difference between two types of religiously divided societies: those that are divided along inter-religious lines and those characterized by intra-religious conflicts.

In cases characterized by inter-religious conflict, the relative representational balance between different religious groups was the core debate and here religiously divided societies most closely resembled those divided along other identitarian lines. A good example of such a case is Lebanon and its consociational formula for representation.<sup>256</sup> Constitutional debates in societies divided along inter-religious lines resemble to a large degree the constitutional debates in ethnically or linguistically divided societies and the type of constitutional solutions adopted in these cases tends to be similar. As with conflicts between ethnic or linguistic groups, inter-religious conflicts are often resolved by constitutional formulae that incorporate mechanisms to accommodate religion in ways that either ensure the equidistance of the state from all religious communities or allocate public resources along identitarian lines with a view to conflict resolution or offer special protections to religious minorities.<sup>257</sup> Similarly, in a case where a particular religious community is geographically concentrated, constitutional formulas of federalism or devolution developed in cases of ethnically-divided societies, might also work well for religiously-divided societies, though we found few examples of such geographically concentrated religiously-identified communities among our cases.<sup>258</sup>

By contrast, in cases where religious divisions were primarily intra-religious, namely between more orthodox/conservative/observant and more secular/liberal/non-observant camps within a particular religion, the nature of the conflict was distinctive to the intra-religious context. Here, the principal debates were not about the allocation of office amongst relig-

256. Consociationalism, or power-sharing institutional mechanisms of conflict-mitigation, are among the common solutions to multi-ethnic or multi-national societies, such as Belgium, for example. See generally FROM POWER SHARING TO DEMOCRACY: POST-CONFLICT INSTITUTIONS IN DEEPLY DIVIDED SOCIETIES (Sidney Noel ed., 2005); Lijphart, *supra* note 10.

257. For summary of this literature, see discussion *supra* Section II.B.

258. Generally, we have found that religious groups are rarely geographically concentrated. One example of such a geographically concentrated religious community may be the case of Aceh in Indonesia. See *supra* text accompanying note 94. Sometimes intra-religious divisions may have an urban-rural dimension, as in the case of Turkey.

ious communities or geographic representation or even the precise distribution of powers amongst different levels or branches of government. In these cases, the most heated debates involved relatively expressive provisions concerned with defining the religious character of the society. Examples include cases where the principal debate focused on nonjusticiable preambular language or on defining the religious or secular identity of the state. Where debates did concern the institutional distribution of power at the constitutional level, they were often in connection with determining whether a civil branch of government or a religious body would have authority to interpret the religious aspects of the constitution.<sup>259</sup> These kinds of conflicts are distinctive to societies characterized by religious cleavages where divisions are over the normative identity of the state and whether political institutions will facilitate or repress particular social expressions of religiosity.<sup>260</sup>

Such intra-religious conflicts have been pronounced in the Muslim-majority cases of religiously divided societies considered in this Article. The Muslim-majority cases were characterized by two common sources of debate, both of which were connected to intra-religious (secularist versus Islamist) conflict rather than inter-religious tensions. First was the question of whether the constitution would specifically reference Islam as the religion of the state, for example, in Egypt, Tunisia, Morocco, Pakistan, and Indonesia.<sup>261</sup> Where these debates emerged, they largely culminated in the inclusion of the article despite intra-religious disagreement over the meaning of such a reference and the opposition of the Muslim secularist camp.<sup>262</sup> Yet, in many of these cases, to equate the inclusion of such a

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259. On the role of debates about al Azhar in the Egyptian case, see discussion *supra* Section III.A. In Pakistan, as another example, the main constitutional debate concerned the allocation of the power to define Islamic law between the parliament and the courts. The question of who defines Islamic law, and the institutional balance between the interpretive authority of the parliament, the executive, and the courts, was a key locus of debate, which mostly occurred between three critical groups of actors: the traditional *ulema*, a nationalist coalition of political and religious leaders, and Islamist ideologues. See Nelson, *supra* note 23.

260. Turkey is a good example here. Recent constitutional debates in Turkey connected tensions over the religious/secular identity of the state with institutional issues related to the allocation of power between governmental branches. While these conflicts did not occur in the context of a full-blown constitution-drafting process, they were embedded in debates over constitutional amendments that led to the passage of a package of amendments in 2010, part of which altered the composition of the judiciary and the procedures for judicial nominations. See Aslı Bâli, *Courts and Constitutional Transition: Lessons from the Turkish Case*, 11 INT'L J. CONST. L. 666, 666–701 (2013).

261. See, e.g., Clark Lombardi, *The Challenges and Opportunities of Islamic Review: Lessons from Afghanistan from the Experiences of other Muslim Countries*, U.S. INST. PEACE (2012), <http://www.usip.org/sites/default/files/ROL/USIP%20Paper%20KAS%20CBL.pdf>. This was also the case in Afghanistan and in Iraq. See Nathan J. Brown, *Debating Islam in Post-Baathist Iraq*, CARNEGIE ENDOWMENT FOR INT'L. PEACE (2015), <http://carnegieendowment.org/files/po13.brown.final2.pdf>.

262. Among the cases examined in this study, Indonesia represents an exception. For a Large-N study on Islamic provisions in formal constitutions of Muslim-majority countries, see Dawood I. Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions*, 54 VA. J. INT'L. L. 615 (2014).



provision with the establishment of a state religion would miss important nuances. In the absence of a hierarchically organized system of clerical authority, the statement that Islam is the religion of the state in a country like Tunisia may prove to be largely symbolic despite the heated debates during the drafting process. Indeed, the overall constitutional order established in Tunisia may actually be more comparable to that of Turkey—which firmly rejected reference to Islam in its constitutional order—than to other societies that include a provision referencing Islam as the state religion in their constitutions.<sup>263</sup>

The second common debate was whether to include reference to *shari'a* as “a” source of law or “the” source of law for those societies that constitutionally identify Islam as the religion of the state. The fact that *shari'a* is not referenced in the Tunisian constitution sheds light on the limited sense in which Islam is an established religion under that constitution. Even in cases where a reference to *shari'a* is incorporated, there is a clear spectrum of meaning associated with such provisions from the purely symbolic,<sup>264</sup> to those that impose substantive constraints on constitutional interpretation, effectively entrenching one faction’s preferred religious vision of the state (as in the 2012 Egyptian Constitution).<sup>265</sup>

Where both intra- and inter-religious divisions exist (e.g. in Israel and in India), different devices were adopted to address each variant, producing a variety of forms of constitutional debate about religion. Interestingly, although as a sociological and political matter inter-religious divisions may have been the source of greater friction in these societies, in terms of the constitutional debates, it was generally intra-religious divisions that were the most significant. For instance, in India and Israel inter-religious conflict—Hindu–Muslim and Jewish–Muslim/Christian respectively—have been the more divisive line of political cleavage.<sup>266</sup> And yet in both coun-

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263. See discussion *supra* Section III.F.

264. Descriptions of provisions as “purely symbolic” is meant to convey that the primary purpose of the provision is expressive. Of course, the meaning of such provisions may shift over time to have concrete constitutional effects that are constraining. We do not mean to suggest that a provision that is purely symbolic is *merely* symbolic, in the sense that it does not have significance. On the contrary, such provisions will almost surely influence future constitutional interpretation. We mean, rather, that provisions are not connected in the text to mechanical rules or clear institutional forms that produce immediate concrete effects as soon as the Constitution is adopted.

265. As discussed above, Article 4 in the 2012 Egyptian Constitution recognized Al-Azhar as an interpretive authority of *shari'a*. Article 219 tied the constitution to Sunni traditional jurisprudence. Both provisions were removed from the 2014 Constitution.

266. The number of people who died in the inter-religious conflicts in Israel (where the conflict overlapped with inter-ethnic and inter-national fault-lines, between the native Arab Palestinians and the Jews who mostly immigrated from outside Israel) and in India throughout the decades since independence was dramatically higher than those who lost their lives in the intra-religious conflict in the majority population of both countries (these numbers were close to zero); intra-Jewish in Israel and intra-Hindu in India. In contrast to intra-religious conflicts, which usually involved non-violent demonstration and were mostly resolved by political or legal means, inter-religious conflicts in both Israel and India involved bloody riots. In 2002, for example, approximately 2,000 Muslims died in Gujarat, India. See Christophe Jaffrelot, *Communal Riots in Gujarat: The State at Risk* (Heidelberg Papers in South Asian and Comparative Politics, Working Paper

tries it was intra-religious conflict within the majority religious group that dominated the constitutional debates, with the minority religious groups marginalized in the constitution-drafting processes. Thus, the sociological fact of inter-religious diversity and even inter-religious conflict was not necessarily correlated to the key divisions that were most charged in the constitutional debate. In contrast, where there was no clearly predominant religious community—as with Lebanon—sociological inter-religious diversity corresponded more directly to the divisions that dominated the constitutional debate.

Finally, a striking dimension of constitution-drafting processes where religion is a central axis of conflict is the intertwining of the ideational and institutional dimensions of the constitutional debates. Contrary to the expectations of a liberal constitutional paradigm, it is remarkably difficult to distinguish between those provisions of a constitution that are strictly limited to questions of identity and those that are related to institutional support of religion. For example, in the Israeli and Egyptian contexts, the invocation of religion for identitarian purposes—defining the religion of the state—is intrinsically connected to the debates over who may interpret the constitution and thus decide on the practical meaning of such. This was also the case during the constitutional debates in Tunisia.<sup>267</sup> Once ideational provisions expressing the normative commitments of the society in keeping with particular religious precepts or traditions are adopted, the institutional question of the allocation of authority to express, or not express, such commitments becomes inevitable. Whether the institutional question is resolved through devices of legal pluralism that accommodate religious personal status law (as in Israel and India), nonjusticiability provisions (as in Pakistan), or by constitutionalizing clerical authority (as in Egypt in 2012), the inseparability of the institutional from the ideational dimension of constitutional debates in the context of intra- or inter-religious divisions is a distinctive feature of these cases.

## B. Incrementalism

What do we learn from the various case studies on the importance of the constitutional text itself as a reflection of the debates under study? Many of the cases under study involve the promulgation of constitutions while neither developing a clear consensus on the most divisive questions nor imposing the preferences of one side of the debate. Such an approach is expressed in the various cases through different types of mechanisms, which generally correspond to an incrementalist approach to constitution-making.

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No. 17, 2003). In Israel, in October 2000, thirteen Arab citizens died by police shooting in what is known as the “October riots.” See OR COMMISSION, STATE COMMISSION OF INQUIRY TO CLARIFY CONFLICTS BETWEEN SECURITY FORCES AND CIVILIANS IN OCTOBER 2000 (2003), [http://elyon1.court.gov.il/heb/veadot/or/inside\\_index.htm](http://elyon1.court.gov.il/heb/veadot/or/inside_index.htm) (in Hebrew).

267. Markus Böckenförde, *From Constructive Ambiguity to Harmonious Interpretation: Religion-Related Provisions in the Tunisian Constitution*, 60 AM. BEHAV. SCIENTIST (July 2016).

At times, ambivalence in a constitutional text may be the product of the evolution of constitutional interpretation in directions not contemplated by the drafters. In contrast, the four strategies of incrementalism identified below result from the drafters' deliberate decision to avoid clear-cut choices between competing perceptions concerning religious issues.<sup>268</sup> Such a "dilatory compromise," to use Carl Schmitt's terminology, presumes a consensus amongst the parties to refrain from deciding on contentious questions.<sup>269</sup> Such compromises reflect the interrelationship between the religious and non-religious dimensions of constitutional arrangements. An underlying consensus on some matters—often those that do not touch upon religious divisions—facilitates a dilatory compromise among the parties that defers or leaves ambiguous points of contention that remain unresolved. Thus, the use of various incrementalist strategies in these cases reflects a drafting choice to leave open the meaning of contentious terms, or to incorporate contradictory provisions to be reconciled through subsequent legislative or judicial interpretation. In those cases, the constitutional drafters preferred an evolutionary, rather than a revolutionary, constitutional approach, and passed onto future parliamentarians the authority to resolve the particular questions concerning religious identity or religious law.

We found evidence of four distinct strategies for proceeding incrementally rather than opting for clear resolution in the most contentious debates. These four strategies are: (1) ambiguity; (2) deferral; (3) conflicting principles/provisions; and (4) non-justiciability.

Of course, we recognize that all constitutions are drafted at a level of abstraction that involves some degree of ambiguity and incrementalism. We employ here the terms incrementalism, in general, and ambiguity (the first strategy listed above) in a more specific sense. Ambiguity resides not in the abstract framing of a provision, but in the deliberate decision not to define terms. In some cases, for example, constitutional debates produced clear decisions concerning the institutional structure of the government, but a more incrementalist approach towards the definition of state-religion relations. The use of ambiguous language is a device that facilitates such an approach. Ambiguous constitutional arrangements have the effect of transferring contentious questions to the arena of ordinary politics where contingent resolutions of deep-seated disagreements can be made and remade with a degree of flexibility that would be foreclosed by an entrenched and restrictive constitutional formulation. Ambiguous wordings were deliberately included, for example, in the 1945 Constitution of Indonesia, where one of the five principles defining the identity of the

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268. On the uses of ambiguity and deferral in constitution-drafting, see generally MICHAEL FOLEY, *THE SILENCE OF CONSTITUTIONS: GAPS, 'ABEYANCES' AND POLITICAL TEMPERAMENT IN THE MAINTENANCE OF GOVERNMENT* (Routledge 2012) (1989); CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO?* (2001); DAVID MARTIN TOMAS, *WHISTLING PAST THE GRAVEYARD: CONSTITUTIONAL ABEYANCES, QUEBEC, AND THE FUTURE OF CANADA* (1997); Rosalind Dixon & Tom Ginsburg, *Deciding not to Decide: Deferral in Constitutional Design*, 9 INT'L J. CONST. L. 636 (2011); Lerner, *supra* note 12.

269. CARL SCHMITT, *CONSTITUTIONAL THEORY* 85–86 (Duke U. Press 2008) (1928).

state—*Pancasila*—was “a belief in God” without specifying either a specific deity, such as Allah, or any other particular religion.<sup>270</sup> Another illustrative example is contained in the 2014 Constitution of Tunisia, where Article 1 declares that “Tunisia is a free, independent and sovereign state: its religion is Islam.” This formulation had long been criticized on all sides for failing to specify whether the state or the society of Tunisia were being qualified as Muslim. Rather than resolving this ambiguity, the drafters, in 2014, decided to adopt it from the earlier order, despite having earlier rejected the prior constitution as a starting point for the new draft. Moreover, proposals to include explicit provisions concerning the role of *shari’a* law were dropped during the constitutional debates.<sup>271</sup>

The second strategy for proceeding incrementally is deferral. In some cases, constitutional debates enabled framers to realize that a particular dispute was intractable, leading to decisions to defer controversial choices to a post-drafting stage, until greater consensus can be forged. The case of Israel exemplifies an outright deferral of the entire process of constitution-writing. Another example of the use of deferral as an incrementalist strategy was in India, where the Constituent Assembly deferred the decision on the Hindu Code and transferred it from the constitutional level to that of ordinary legislation.<sup>272</sup>

Third, a common feature across several case studies was that drafting processes frequently embedded competing constitutional logics in the same constitutional text, by deliberate design or as a consequence of ad hoc compromises. Reliance on contradictory provisions, rather than deferring issues from the constitutional arena altogether, may best serve to reconcile the competing demands for constitutional supremacy and constitutional compromise on core issues of normative contention. Particularly in cases where the constitutional status of religious law was an important axis of debate, the outcome documents frequently embraced, intentionally or not, two approaches commonly considered to be mutually exclusive in the comparative constitutional literature: an integrationist and an accommodationist approach.<sup>273</sup> In the comparative politics literature these strategies are often mentioned in the context of ethnic or national

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270. See UNDANG-UNDANG DASAR REPUBLIK INDONESIA [UUD ‘45] [CONSTITUTION] Aug. 18, 1945.

271. A third example is the 2011 Constitution of Morocco, where the preamble allows for both Islamist and pluralist interpretations:

The pre-eminence accorded to the Islamic religion in this national reference point goes along equally with the attachment of the Moroccan people to values of open-ness, moderation, tolerance and dialogue in the service of mutual comprehension among all of the cultures and civilizations of the world.

Mednicoff, *supra* note 23.

272. The Indian legislators continued to deliberate the Hindu Code and eventually split it into four different bills, including the Hindu Marriage Act (1955), the Hindu Adoption and Maintenance Act (1956), the Hindu Succession Act (1956), and the Dowry Prohibition Act (1961). See Som, *supra* note 128, at 17.

273. John McGarry, Brendan O’Leary & Richard Simeon, *Integration or Accommodation? The enduring debate in conflict regulation*, in CONSTITUTIONAL DESIGN, *supra* note 10, at 41–88.

divisions, and tend to imply the use of various institutional mechanisms (e.g. electoral rules, devolution, or power-sharing).<sup>274</sup> Similar approaches can be identified in the context of religiously divided societies, where an integrationist approach is one that supports constitutional strategies that promote a common public identity while an accommodationist approach permits the coexistence of multiple public identities formally recognized in the constitutional arrangements of the state. While these two strategies appear to call for entirely different constitutional approaches, several Muslim-majority countries seeking to accommodate *shari'a* law while protecting religious minorities exhibit both integrationist and accommodationist features. The 2014 Egyptian Constitution, for example, guarantees freedom of belief (Article 64), allows Christian and Jewish communities to govern their own personal status law (Article 3), and commits to the principles of equality (Article 9) and non-discrimination (Article 53) among Egyptian citizens, while simultaneously proclaiming that *shari'a* is the principal source of legislation in Egypt (Article 2). Such constitutional arrangements are integrationist on the question of religious freedom, embracing religious minorities as members of a common national political project, while accommodationist with respect to the status of Islamic law.

The use of conflicting principles/provisions introduces a tension that constitutional theory would expect to be unstable. Yet, resisting demands for coherence in the constitutional text has resulted in a *modus operandi* in countries as diverse as Indonesia, Senegal, Tunisia, Lebanon, and Morocco that provides an immediate, practical (if provisional) compromise to avoid further polarization. In the case of Indonesia, this formula has proven durable for over sixty years.

Another example for constitutional framers' decisions to include contradictory provisions and not seek internal coherence is in Lebanon. While constitutional drafters and post-independence politicians all expressed a strong commitment to a secular, non-confessional Lebanon, in practice, all three major texts defining the Lebanese constitutional order—the 1926 Constitution, the 1943 Lebanese National Pact, and the 1989 Taef Accords—referenced this republican ideal while retaining the core features of a confessional constitutional order, albeit in the guise of “provisional” measures that were intended to lapse but came to be entrenched.

Lastly, the strategy of non-justiciability was employed by the drafters in India and Pakistan. In both cases, the framers included controversial provisions concerning particular questions of religious law in the formal constitutions; however, they defined these provisions as non-binding, that is, not enforceable by courts. In India, the harsh debate over the unification and secularization of personal law ended with the drafters' recommendation to adopt a Uniform Civil Code (Article 44); however, the provision was included in the Directive Principles of State Policy (part IV of the con-

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274. See discussion *supra* Section III (discussing institutional solutions to ethnically or nationally divided societies).

stitution), which were defined as nonjusticiable.<sup>275</sup>

Of course, the incrementalist strategies of deferral, ambiguity, and conflicting constitutional principles may also have the effect of empowering particular institutions—notably apex courts that assert a predominant role in the interpretive exercises that produce constitutional evolution—and generating institutional conflict, particularly between the legislative and judicial branches in democratizing contexts.<sup>276</sup> Yet, in societies deeply divided over religious issues, an attempt to resolve state-religion relations by adopting an entrenched and clearly defined constitutional formula may run the greater risk of exacerbating polarization while limiting the institutional channels for conflict-mitigation. Moving away from constitutional paradigms that emerged from the seminal revolutionary experiences of the United States and France affords fresh perspective on the question of whether constitutionalism must operate as a form of higher lawmaking definitively set apart from the day-to-day politics of the underlying society.<sup>277</sup> For societies marked by deep and foundational divisions, a more incremental and evolutionary conception of constitutionalism may allow for gradual convergence around normative commitments and frequent renegotiation through informal reinterpretations in the course of ordinary politics. As the chairman of the drafting committee in the Indian Constituent Assembly, B. K. Ambedkar noted during the constitutional discussion on the non-justiciable Directive Principles for Social Policy:

We have deliberately introduced in the language that we have used in the Directive Principles something which is not fixed or rigid . . . . It is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing and must, having regard to the circumstances and the times, keep on changing.<sup>278</sup>

These observations may lend some weight to those scholars who would suggest that too much importance has been attached to constitutionalism tout court. This line of reasoning suggests that constitutions are sometimes drafted by framers who intend for the document to be either ineffective or symbolic.<sup>279</sup> While we find little evidence for the strongest version of this claim (deliberate production of constitutions intended to be merely symbolic), there are certainly forms of constitutional design that

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275. Article 44 of the Indian constitution states: “The state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.” Similarly, in the 1956 Constitution of Pakistan, detailed religious provisions such as compulsory teaching of the Qur’an were included in a series of *non-enforceable* articles known as the “Directive Principles of State Policy.” Nelson, *supra* note 23.

276. In contrast, the strategy of nonjusticiability also has an impact on the distribution of power amongst the branches of government. Here, by disempowering the judiciary, specifically apex courts.

277. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

278. 7 *Constituent Assembly Debates*, (Nov. 19, 1948) (India), <http://indiankanoon.org/doc/682692/>.

279. See *CONSTITUTIONS IN AUTHORITARIAN REGIMES* (Tom Ginsburg & Alberto Simpser eds., 2013); David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CAL. L. REV. 863, 865–70 (2013); Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 861 (1962).

defer the interpretation of relatively ambiguous or open-ended language to resolution through ordinary politics. Indeed, even where language seems more binding—as when *shari'a* is specified as *the* source of law, for instance—the implementation of constitutional provisions may impose subtle (or extensive) constraints on otherwise unambiguous provisions.

In sum, many of the religiously divided societies examined in this Article manage to draft a publicly supported constitution while avoiding the articulation of a clear consensus around controversial issues concerning religion. As discussed, these mechanisms include the drafting of deliberately ambiguous constitutional provisions; simple omission of particular questions that are deferred during the drafting process to subsequent iterations of constitutional politics; the inclusion of conflicting constitutional principles in the formal constitution; or defining certain constitutional provisions as non-justiciable, permitting future generations to revisit the question through ordinary politics. By building sufficient flexibility into the constitutional mechanisms, compromises struck during the drafting process may be revisited, revised, and renegotiated through subsequent deliberation through legislative or judicial interpretation. The emphasis would be on consensual processes enabling ordinary politics to determine particular open-ended outcomes on an iterated basis. In contrast, constitutions that seek to entrench decisive and permanent constitutional formulae, ones that clearly structure the state's role over religious matters, typically adopt restrictive constitutional approaches that limit the range of options for ordinary legislators and future leaders to pursue, at times channeling ongoing divisions towards extra-political expression. Identifying these two distinctive constitutional strategies and highlighting the benefits of an incremental approach in cases of religiously-divided societies is an important cross-case theoretical lesson of our study.

### C. Relationship Between Process and Outcome

The comparative approach taken by this Article advances our understanding of the relationship between the methods by which constitutions have been drafted and the outcome in the shape of constitutional arrangements concerning religious issues. We have looked at the decision-making processes adopted by the various constituent assemblies and the degree to which decision rules may have encouraged convergence or exacerbated polarization in cases of disagreement. The cases represent a variety of processes from highly representative and inclusive deliberations (e.g. in India, Israel, 2011–2014 Tunisia, and 2012 Egypt) to elite-led, closed-door drafting sessions with little public participation (e.g. in 1926 Lebanon, 1945 Indonesia, and 1982 Turkey). We define representative constitution-drafting processes as those involving elected constituent assemblies rather than elite-led drafting committees composed by appointment or processes marked by external imposition or authoritarian domination. Even among elected constituent assemblies, however, the level of organization across the spectrum of political tendencies in a particular country, legacies of political party structures from the pre-constitutional period, and a host of other

factors may determine the level of actual inclusiveness of the ultimate assembly formed.<sup>280</sup> Nor does a representative constitution-drafting process necessarily yield a constitutional order marked by representativeness or inclusiveness as the outcome of the drafting process.<sup>281</sup>

The degree to which various methods of constitution drafting affect the content of the constitution is a question which, so far has not been the subject of significant empirical investigation and remains subject to debate amongst researchers.<sup>282</sup> There are, however, some common intuitions about outcomes that can be gleaned from the existing literature. While the number of cases canvassed in our study is not sufficiently large to permit the testing of alternative hypotheses, several of the cases represent outliers from expected trends, suggesting that some expectations grounded in the existing literature on constitutional design may need to be revisited.

On the most general level, the variation in the relationship between process and outcome exhibited in the case studies demonstrate the degree to which the binary treatment of constitution-drafting process as either elite-led or broadly-participatory is too black and white. Across the board we found that a dichotomous treatment of processes as top-down imposition or bottom-up participation is less helpful than a more contextual appreciation of the factors impacting both process and outcome. Instead of treating elite-led and representative processes as dichotomous, paying attention to processes that show overlapping approaches or reflect a continuum may be more productive. For instance, in India there was a decades-long period of elite-led consultation prior to the constitution-drafting process that determined which groups would be included and struck a series of bargains on core areas of disagreement including on matters of religion. Already in 1928 a Committee appointed by the All India Conference published the Nehru Report, which determined the principles of a future constitution for India.<sup>283</sup> When a constituent assembly was elected, prior to partition, it was broadly representative—in that various component groups of the society were represented and the members were elected by provincial representative bodies. At the same time, the drafting process was to a large

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280. For an example of the difference between compositions of the constituent assemblies in India and in Israel, see discussion *supra* Section III.

281. Pakistan is a good example because its constituent assembly was elected prior to partition with India, yet represented the various provinces of the newly founded state. The deliberations ended in 1956 with the enactment of a constitution that failed to secure the democratic aspirations of Pakistan's founders.

282. See, e.g., Tom Ginsburg et al., *Does the Process of Constitution Writing Matter*, 5 ANN. REV. L. & SOC. SCI. 201 (2009); see also Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 CARDOZO L. REV. 191 (2000); John Carey, *Does it Matter How Constitutions are Created?*, in IS DEMOCRACY EXPORTABLE? 155, 155-77 (Zoltan Barany & Robert G. Moser, eds., 2009); Vivien Hart, *Special Report: Democratic Constitution Making*, U.S. INST. PEACE (July 2003), [http://www.peacemaker.un.org/sites/peacemaker.un.org/files/DemocraticConstitutionMaking\\_USIP2003.pdf](http://www.peacemaker.un.org/sites/peacemaker.un.org/files/DemocraticConstitutionMaking_USIP2003.pdf); Jennifer Widner, *Institutions and Procedures in Constitution Building: Draft Proceedings*, PRINCETON U. (March 2008), <http://www.princeton.edu/~pcwcr/papers/Proceedings2008.pdf>.

283. 6 MOTILAL NEHRU, SELECTED WORKS OF MOTILAL NEHRU 27 (Ravinder Kumar & Hari Dev Sharma eds., 1995).



extent dominated by elites; the members themselves were primarily upper-class, urban, and educated elite. Particularly after partition, the drafting process was led by prominent figures in the Congress party.<sup>284</sup> The outcome was an innovative solution that was made possible by the forging of a pre-constitutional consensus on key issues amongst an elite, but that nonetheless gained widespread popular acceptance and proved durable.

A second preliminary observation is that identifying clear patterns of correlation between process and outcome in constitution-drafting is deeply complicated by the sheer number of variables.<sup>285</sup> Even empirical work that relies on large-N comparisons has produced little evidence concerning the impact of particular procedures or methods of drafting on the content of the enacted constitution. One important factor, for example, that undermines conclusive correlations among our selection of case studies concerns the variation in size of the different countries and the scale of the different religious groups. At the time of independence, Israel's population was around 800,000, while 1947 India had a population nearly three hundred times larger, with more than 250 million inhabitants. James Madison once speculated that a country with a large population and territory might be advantageous in mitigating the risk of factionalism.<sup>286</sup> Whether or not that conjecture proved accurate, the insight that size of population may matter is one of many factors that requires additional empirical investigation.

Nevertheless, the comparison between our seven case studies does reveal some deviation from expected trends concerning the relation between process and outcome derived from the existing literature on constitution-making. The first such expectation is that broadly participatory and inclusive processes are expected to yield constitutional texts more attentive to rights-protections.<sup>287</sup> This claim is supported by some of the cases under study. For example, the Tunisian Constitution of 2014 was the product of an elected and highly representative constituent assembly and was widely praised for its rights-protections.<sup>288</sup> However, in other cases—

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284. See AUSTIN, *supra* note 119.

285. See Ginsburg et al., *Does the Process of Constitution Writing Matter*, *supra* note 282; Widner, *Institutions and Procedures in Constitution Building*, *supra* note 282; Carey, *supra* note 282.

286. See JAMES MADISON, THE FEDERALIST NO. 10 (1787); James Madison, *The Same Subject Continued: The Union as a Safeguard Against Domestic Faction and Insurrection*, N.Y. DAILY ADVERTISER, Nov. 22, 1781. We thank Sam Bray for raising the specific question of the potential significance of variation amongst our case studies in terms of size of population.

287. See COMMONWEALTH HUMAN RIGHTS INITIATIVE, PROMOTING A CULTURE OF CONSTITUTIONALISM AND DEMOCRACY IN COMMONWEALTH AFRICA: RECOMMENDATION TO COMMONWEALTH HEADS OF GOVERNMENT (1999), [http://www.humanrightsinitiative.org/publications/const/constitutionalism\\_booklet\\_1999.pdf](http://www.humanrightsinitiative.org/publications/const/constitutionalism_booklet_1999.pdf); Carey, *supra* note 282, at 1531; Jon Elster, *Forces and Mechanisms in Constitution Making*, 45 DUKE L.J. 364, 395 (1995); Hart, *supra* note 282; Kirsti Samuels, *Post Conflict Peace Building and Constitution Making*, 6 CHI. J. INT'L L. 663, 668 (2005-06); Widner, *supra* note 86.

288. For example, after the passage of the Tunisian Constitution, the transnational human rights organization, Human Rights Watch, issued a press release in which the deputy director for the Middle East region, Eric Goldstein, noted that "The National

especially when the constitutional divide concerns intra-religious conflicts—inclusive processes of constitution-drafting may yield greater protection of freedom of religion for some religious groups (including minorities), while also generating violations of gender-equality and protections of freedom *from* religion in other parts of the constitution. This is the case, for example, in Israel, where the inclusion of religious parties in the constitutional debates prevented the entrenchment of constitutional protection of gender equality, and even the option of civil marriage.<sup>289</sup> Similarly, this was the case in Egypt, where the relatively inclusive constituent assembly of 2011 to 2012 issued a constitutional draft that was seen as reducing protections for women's rights.<sup>290</sup>

This observation suggests a more nuanced analysis of the effects of inclusive constitution-making procedures on rights protection. Specifically, our case studies suggest a distinction between the protection of collective rights for religious minorities which allows them the freedom to maintain their religious practices and beliefs, and the protection of individual rights for women and other individuals whose freedom and equality may be jeopardized by some religious beliefs and practices. As described above,<sup>291</sup> these two types of rights may be in tension with each other.

Another common expectation concerns the relationship between the type of constitution-drafting process (top-down versus participatory and inclusive) and the degree of “secularism” or “religiosity” of the constitutional provisions adopted. The expected trend amongst those drafting processes that were more inclusive, consensual, and participatory was that they would yield a tendency to allow a greater role for religion in the constitutional system and understand the state as reflecting the religious character of the underlying society.<sup>292</sup> We expected, therefore, that constitutional processes driven by popular movements and drafted in highly representative and inclusive constituent assemblies were more likely to be correlated with the accommodation of religion. Such accommodation was expressed across a spectrum of constitutional designs including the adoption of legal pluralism to accord a role for civil and religious law (in India<sup>293</sup> and in

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Constituent Assembly (NCA) [of Tunisia] voted for a constitution that contains bold language in favor of human rights.” *Tunisia: Let Constitution Herald Human Rights Era*, HUMAN RIGHTS WATCH (Feb. 1, 2014), <http://www.hrw.org/news/2014/02/01/tunisia-let-constitution-herald-human-rights-era>.

289. See discussion *supra* Section III.D.

290. In response to the draft constitution approved on November 29, 2012, Human Rights Watch issued a press release arguing that the text failed to protect fundamental rights including rights against gender-based discrimination. *Egypt: New Constitution Mixed on Support of Rights*, HUMAN RIGHTS WATCH (Nov. 30, 2012), <https://www.hrw.org/news/2012/11/30/egypt-new-constitution-mixed-support-rights>.

291. See *supra* notes 247–48 and accompanying text.

292. Nathan Brown makes this claim with regard to the inflation of Islamic provisions in Arab constitutions. See Nathan Brown, *Islam and Constitutionalism in the Arab World: The Puzzling Course of Islamic Inflation*, in CONSTITUTION WRITING, RELIGION AND DEMOCRACY (Aslı Bâli & Hanna Lerner eds., forthcoming 2016).

293. In India, the Constituent Assembly decided to include Article 44 on the Uniform Civil Code in a non-justiciable part of the Constitution (Directive Principles of State Policy), thus allowing for the emergence of a plural legal system in the area of personal

Egypt<sup>294</sup>), consociational arrangements that define the relationship between the state and citizenry in confessional terms (Lebanon), or accommodation of religion in the absence of a written constitution (Israel). Alternatively, there were cases where a state religion is established, but is combined with strong protections for the rights and practices of religious minorities (Tunisia). The expected trend was not as pronounced as anticipated since a number of top-down imposed constitutional processes yielded similar results of a degree of religious accommodation and protection of religious minorities (Egypt in 2014, and also Morocco).<sup>295</sup>

At the same time, generally, various cases suggest that single-party dominated constitution-drafting processes—many of which exhibited elements of imposition—tended to emphasize secular mechanisms and institutions as the means of resolving underlying religious conflict through constitutional arrangements. A range of “secular mechanisms” emerged in the case studies. At the extreme end of top-down imposition is a strong substantive constitutional commitment to secularism, as in the case of Turkey,<sup>296</sup> but other, less repressive models of relatively secular formulae are also present among the cases, including ones that were not necessarily imposed in a single-party dominated drafting position. For instance, there are several cases in which the constitution provides for institutions that enable the state to serve as an arbiter between, or at least remain equidistant from, the plurality of religious communities in the underlying society—as in the Indian and Indonesian cases.

Lastly, while the small sample of cases included outliers from several expected trends, our cases did confirm another expectation in the literature concerning a degree of path dependence in constitutional formulae. The role of contingency remains significant, of course, particularly in cases where institutional openness to a variety of design choices emerges at a specific (critical) juncture. In India, such a critical juncture was seized

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law. The Assembly also decided to avoid secularizing the Hindu family laws. It is often argued that both decisions were made due to the inclusionary character of the Assembly discussions, despite the intentions of India's leaders such as Jawaharlal Nehru, India's first prime minister. See Som, *supra* note 128.

294. In Egypt, the 2012 Constitution was drafted by a democratically elected 100-member constituent assembly under the presidency of Mohammed Morsi and approved by a popular referendum. Similar to Egypt's previous constitution, the 2012 Constitution recognized *shari'a* as the main source of legislation (Article 2), yet it also introduced a new Article 4, which gave an interpretive role to Al-Azhar, and new Article 219, which tied the constitution to Sunni traditional jurisprudence. See Brown & Lombardi, *supra* note 11.

295. In Morocco, the 2011 Constitution was drafted by a committee appointed by the king, in response to the Arab Spring. The constitutional drafting process took place behind closed doors and yielded a document that Moroccans could choose only to accept or reject. Yet the document itself increased pluralist rights and watered down the official political establishment of Islam. See Mednicoff, *supra* note 23.

296. See AHMET T. KURU, *Westernization and the Emergence of Assertive Secularism (1826–1997)*, in *SECULARISM AND STATE POLICIES TOWARD RELIGION: THE UNITED STATES, FRANCE AND TURKEY* 202, 202–35 (2009); Bâli, *supra* note 11; Ergun Özbudun, *Constitution Writing and Religious Divisions in Turkey*, in *CONSTITUTION WRITING, RELIGION AND DEMOCRACY* (Aslı Bâli & Hanna Lerner eds., forthcoming 2016).

upon in the immediate aftermath of independence to forge a new constitutional arrangement that was original in several respects.<sup>297</sup> In other cases, however, the pull of the default arrangements grounded in earlier legacies may prevail at such junctures, yielding a marked similarity across multiple constitutional periods. While earlier legacies—colonial or otherwise—do not explain, in themselves, subsequent constitutional outcomes, their influence remains palpable.<sup>298</sup> Across several cases we found that one of the most important predictors of the substantive outcome of the constitution-drafting process was the prior constitutional models available in the country's political history. Even where these prior texts were associated with colonial, authoritarian, or ideological legacies that had since been repudiated a degree of continuity with prior constitutional arrangements was evident. The cases of Tunisia, Egypt, and Turkey—each with legacies of constitution drafting dating back to the 19th century and among the oldest examples in the Middle East—are representative of this tendency.<sup>299</sup> Similarly, systems of legal pluralism which evolved during the pre-independence period in India (under British rule) and Israel (under Ottoman rule) were maintained after independence.<sup>300</sup>

#### D. Durability

The final question this Article addresses is how the various constitutional formulae considered have held up since promulgation or ratification. The question of constitutional durability was the subject of recent empirical research, which studied the overall endurance of formal modern constitutions.<sup>301</sup> Zachary Elkins, Tom Ginsburg, and James Melton have examined the effects of various factors on the survival or death of written constitutions in their entirety. However, their study did not focus on the durability of particular constitutional arrangements which survived the replacement of a constitutional text. In other words, we have little comparative knowledge on whether, and why, constitutional solutions to religious conflicts are maintained by drafters of subsequent constitutions. A large-N study is required in order to provide comprehensive conclusions concerning the durability of constitutional solutions in the area of religion. By contrast, we offer here three central observations based on our selected case-studies. With the exception of the very recent post-Arab uprising constitutions of Egypt and Tunisia, (that have not been in place long enough to permit analysis of durability), we were interested in assessing the durability of the constitutional settlement, as much as possible, by examining the relationship of the drafting process to constitutional outcomes in terms of the stability and adaptability of the constitutional text.

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297. See THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Sujit Choudhry et al. eds., 2016).

298. ARJOMAND, *supra* note 12.

299. See ARJOMAND, *supra* note 14; Brown, *supra* note 104.

300. See YÜKSEL SEZGIN, HUMAN RIGHTS UNDER STATE-ENFORCED RELIGIOUS FAMILY LAWS IN ISRAEL, EGYPT AND INDIA (2013).

301. ELKINS ET AL., *supra* note 8.

Durability here is not defined as “success.” For instance, repressive constitutions that have normatively undesirable features may be durable but not successful by many metrics. Nor do we define durability to mean that the actual text of the constitution remains unchanged or largely stable. Rather, by durability we are referring to the degree to which the bargain struck during constitution-drafting proved sustainable. We would further consider such a sustained bargain to be *successful* if it facilitated coexistence out of deep divisions. Thus, for example, the Egyptian constitutional bargain of 2012 proved not to be durable. We draw this conclusion not because the text itself was revised, but rather because the basic underlying compromise was undone and parties that had been included in the 2012 drafting process (under Prime Minister Morsi) were excluded in the rewriting of the constitution during 2013 and 2014 (under General Al-Sisi).

One of our more surprising findings has been the degree of durability of top-down constitutional formulae whether imposed by external actors or on a non-consensual basis by a dominant actor during a constitution-drafting period, as in the cases of Turkey and Indonesia.<sup>302</sup> We believe that durability in these cases is related to the ability of a single group or actor to dominate the constitutional process at a critical juncture, taking advantage of a temporarily favorable balance to impose a top-down vision.<sup>303</sup> In such cases, the imposed order may then have produced a degree of path dependent durability even as the underlying balance of power between groups divided along inter-religious or intra-religious lines shifted or as democratization processes took hold. A corollary of this finding is the troubling correlation between inclusive and consensual processes in periods of instability or post-authoritarian transition and low durability. This phenomenon was exemplified by the case of Egypt in 2012 where a comprehensive constitution-drafting process by an elected constituent assembly produced a text that was overturned following a military coup within a year of the promulgation of the text through public referendum. The Turkish case is another example, where electoral outcomes repeatedly solidified the AKP’s democratic credentials, yet the context of political transition undermined the party’s repeated attempts in 2007 and again in 2011 to 2013 to initiate a new constitution-drafting process. By contrast, Tunisia is a notable exception to this trend where the post-authoritarian transition heralded a three-year-long process of elite settlement and constitution drafting that yielded a constitutional text that appears to command broad support. In cases where no single group was sufficiently dominant in the

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302. In Turkey, the two constitutions of 1961 and 1982 maintained the secular Kemalist ideology established by the 1924 Constitution and subsequent amendment packages have not revised the constitutional commitment to that conception of secularism. In Indonesia, the 1945 Constitution remained the constitution of the state despite dramatic regime changes and was amended only after democratization in 1998. Another example reflecting this trend is that of Senegal. The provisions concerning the secular identity of the state which were included in Senegal’s first constitution were not changed in all three subsequent constitutions. Diagne, *supra* note 23.

303. See Giovanni Capoccia & R. Daniel Kelemen, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutions*, 59 *WORLD POL.* 341 (2007).

constitutional process to successfully impose their preferred formula, consensus-based processes at best required protracted iteration to arrive at a viable *modus vivendi* or at worst failed to produce a durable outcome.<sup>304</sup> In between are cases where an elite pact emerged amongst competing groups in the absence of a single dominant actor and the pact remained sufficiently robust to yield a basis for durability, as in the case of Lebanon. Strikingly, Lebanon is the case most characterized by inter-religious rather than intra-religious divisions and the one where such pacts yielded the most durable formula, which has even largely withstood (while failing to forestall or prevent) bloody civil conflict.

A second interesting finding has been the difficulty of reversing a formal decision of deferral of constitutional questions, with the Israeli example being the principal case for this insight.<sup>305</sup> This finding is also related to and further illuminates the perhaps unexpected durability of “provisional” articles (e.g. Lebanon).

A third finding is that the constitutional orders created in the context of state-building (as a result of decolonization or post-imperial transition) have proven more durable than constitution-making processes that occur after the initial founding moment of the polity.<sup>306</sup> While many of these constitutions have evolved in the period since independence, the initial constitutional formula defining (or deferring) the relationship between religion and state has proven relatively durable. This is especially true because we define durability as the persistence of the bargain struck between parties during the constitution-drafting process rather than retention of a particular text. Such bargains have proven remarkably consistent in that initial constitutional choices have continued to show strong influence on the structure and substance of subsequent constitutional exercises.

## Conclusion: Critical Questions of Constitution-Drafting

If constitutions are understood to emerge from an exceptional moment of higher-order law-making under the liberal constitutional paradigm—as

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304. The abortive attempts at constitution-drafting in Turkey, between 2007 and 2013, involved experimentation with different models of inclusivity in the process of negotiating the text, but ultimately resulted in failure. Özbudun, *supra* note 296. Pakistan represents an example where the absence of consensus on the question of who should interpret *shari'a* law yielded a *modus vivendi* in the balance of power between Parliament and the *ulema*. See Nelson, *supra* note 23.

305. Between 2002 and 2005 a vast public and political effort was made by the Knesset committee on Law, Constitution and Justice, as well as various NGOs, to draft a formal constitution. See *Constitution in Wide Consent*, KNESSET, <http://main.knesset.gov.il/Activity/Constitution/Pages/ConstProtocol11.aspx> (last visited Oct. 31, 2014). Nevertheless, the writing of the constitution was never completed and disappeared from the public agenda. See ARYE CARMOM, BUILDING DEMOCRACY ON SAND: THE CONSTITUTION QUEST IN A JEWISH STATE (2012) (in Hebrew); Lerner, *supra* note 10.

306. Among the cases we have examined, this finding is exemplified in the durability of the Turkish constitutional commitment to secularism and the Indonesian formula of *pancasila* as much as it is in durability of the Israeli choice of deferring a precise constitutional definition of the religious character of the state.

in Bruce Ackerman's "constitutional moments"<sup>307</sup>—our work suggests the need for a more deflated conception of constitution-drafting exercises. Rather than entrenching shared normative commitments, constitution-drafting in religiously divided societies is often characterized by striking upon provisional solutions and crafting relatively flexible constitutional arrangements. These arrangements are characterized by shades of gray to accommodate religious law while simultaneously committing the state to various forms of neutrality or to protect the religious freedom of minorities in a text that otherwise embraces religious establishment for the majority.

Much of the comparative constitutional literature reflects the view that liberal constitutionalism is normatively better than the alternatives. In contrast, we understand strategies of incrementalism to be devices that represent the best solution where the prerequisites of the liberal constitutional paradigm are not available. In other words, where these constitutions depart from liberal expectations, they nevertheless provide what may well be first best institutional arrangements for the polities they govern.<sup>308</sup> Coming to shared norms or defining a shared conception of the collectivity constituting itself in the drafting process may be an aspirational ideal, but in the absence of the capacity to forge such a shared set of commitments, incrementalist strategies may well be better than available alternatives.

The risks of incrementalism are also significant. Perhaps foremost is the risk that by failing to resolve questions concerning the state's relationship to religion, divisions in the realm of ordinary politics may persist or deepen setting in motion processes that exacerbate existing cleavages. For instance, deferral may set the stage for a conflict between the legislature and the judiciary over defining the state's role in regulating religion.<sup>309</sup> Or it may produce political strategies that promote communities' definition of themselves in increasingly insular ways that undermine the emergence of any common public sphere in which compromises can be negotiated.<sup>310</sup> Incrementalism is also often a conservative strategy, one that may provide stability at the expense of the entrenchment of specific rights protections. Yet the risks associated with insisting upon restrictive constitutional con-

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307. See BRUCE ACKERMAN, *THE FUTURE OF THE LIBERAL REVOLUTION* 46–68 (1992).

308. Many of the countries that endorsed an incrementalist constitutional approach managed to establish a democratic regime at independence, or democratized in following decades. India and Israel have been relatively successful democratic orders since independence (with the exception of three years during the emergency regime in India in the 1970s). Senegal has been widely referenced as a partially democratic order in the period from 1967 to 2002, and a more consolidated democracy for most of the years since 2003. Indonesia was established as a democratic state. After 1957, it became authoritarian under the "guided democracy" and "new order" regimes, which ended in 1998, with an on-going democratization process. Lebanon has one of the most robust civil society sectors in the Arab world, allowing relatively free political association and organizing and was deemed democratic prior to the onset of the civil war of the 1970s that altered the course of the country's political trajectory.

309. As happened in Israel. See Lerner, *supra* note 10.

310. This has been the case to a large extent in Lebanon, producing one of the main critiques of the model of consociationalism. See Brian Barry, *The Consociational Model and Its Dangers*, 3 *EUR. J. POL. RES.* 393 (1975).

cepts and the entrenchment of strong normative commitments is the creation of permanent insiders and outsiders and channeling conflict away from the constitutional institutions towards extra-political violence.<sup>311</sup>

It is worth noting that while we offer theoretical insights drawn from under-studied cases, we do not do so with a view to promoting a single alternative constitutional paradigm to the liberal constitutionalism prevalent in the English-language literature. Rather than endorsing the view that hegemonic paradigms encompass a range of cases, we seek to explore the diversity among cases to identify the variety of models excluded from consideration in the conventional literature. At base, we believe that the attempt to define a single prescription of best practices is futile. Instead, we hope that our theoretical discussion helps expand the toolkit for thinking about the processes employed by constitution-drafters, including deferential mechanisms and alternative institutional arrangements that embed contradiction in their strategies of coexistence. Such an expansion suggests that there are no uniquely paradigmatic cases or straightforward prescriptions that travel across time and space. This approach equally implies that rule-of-law programs or advisors who offer lessons for countries in transition that purport to reflect best practices must take care to temper their recommendations. Where such advice requires adherence to particular models or comes attached to conditional lending requirements, there is the risk of doing more harm than good even when attempting to promote good governance or democratization. Similarly, where democracy comes to be defined by the presence or absence of particular provisions in a constitutional draft or aid is contingent on a particular constitutional formula, such issue linkage may actually complicate the process of building consensus rather than encouraging transition.

The Egyptian case, in particular, exemplifies some of these concerns. Even beyond cases with some of problems that beset Egyptian constitution drafting, giving due attention to questions of constitutional design or seeking to undertake constitutional revision through consensual processes may not yield democratizing transition or shield a society against rapid democratic reversal. This is yet another factor in support of our call for constitutional deflation. Where social consensus is absent, a well-crafted constitutional process alone may not yield the minimum requirements to secure stable governance. Constitutions do a better job of reflecting societal consensus than forging it. As a result, we would not necessarily predict successful avoidance of religious conflict through better constitutional design. While considerations of constitution-drafting processes and their relationship to outcomes and design choices are important, they do not offer a panacea for democratization, conflict mitigation or peace building.

It is true, especially in post-colonial cases, that quite nearly everyone in a society undergoing transition cares about the constitution, but they

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311. A notable example of the relationship between a top-down restrictive constitutional formula and the onset of extra-political violence has been illustrated by Egypt's trajectory in 2014.



may care about it for very different reasons. For some, constitutions are imbued with the markers of sovereignty and a break with a past that has fallen into disgrace. For others, constitutions may be valued for the relationship between constitution-making and political autonomy from external forces. Very often, symbolic provisions become the focal point for debate rather than the more substantive provisions such as those allocating power between the branches. Understanding the relationship between symbolic and substantive provisions in constitutions,<sup>312</sup> and how the balance between the two might enable incrementalist strategies to forge minimal levels of consensus,<sup>313</sup> is an important element in distinguishing cases of irreducible division from those where compromise formulae—even provisional ones—stand a chance of producing a functional outcome.

Beyond these insights, there are a number of additional research questions revealed by our case studies that require further examination and development. The first is the impact of the international context on constitution-drafting processes. In particular, the influence of transnational harmonization pressures around international human rights standards and the constitutional repertoires that they have engendered is an important new area of inquiry we do not address. For constitution-drafting processes undertaken in the twenty-first century, the influence of human rights norms and the transnational expert consultants who advocate their inclusion in constitutional drafts is undeniable.<sup>314</sup> Studying the extent to which constitution-drafters are attendant to the already ratified international human rights obligations of the state and are influenced by expert advice concerning the requirements of human rights law is an important future avenue that will shed further light on the constraints under which constitution-drafting processes unfold.

Relatedly, the role of sequencing in constitution-drafting processes that occur against a backdrop of similar recent experiences in the region, as with the aftermath of the Arab uprisings and the regional sequences they produced, is a dimension of contemporary drafting exercises that requires additional study. In addition, the numerous other legacies that influence or constrain constitution-making exercises merit further research. We see clearly in the cases under study that constitution-making in the twentieth and twenty-first centuries is almost never a *sui generis* exercise of founding or invention. Rather, most of these societies take as

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312. Symbolic provisions may state, for example, that Islam is the religion of the state, while substantive provisions may define *shari'a* as enforceable by empowering the *ulema* to engage in judicial review.

313. See, e.g., discussion of Tunisia, *supra* Section III.D.

314. See SUJIT CHOUDHRY, *THE MIGRATION OF CONSTITUTIONAL IDEAS* (2006); MICHAEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT* (2010); Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61 (2013); Benedikt Goderis & Mila Versteeg, *Transnational Constitutionalism: A Conceptual Framework*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 103, 103–32 (Denis Galligan & Mila Versteeg eds., 2013); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163 (2011).

their starting point earlier texts and legacies from prior colonial or authoritarian periods even as they mark a break from a fraught past by undertaking the drafting of a constitution. As a result, whatever the transition that occasions a new constitutional exercise, most of the drafting processes draw on a range of existing texts borrowed from domestic, regional, and international—including everything from treaties to transnational models and best practices—sources and reshape them for their own purposes. The influence of transnational and local textual borrowings, the constraining effect of prior constitutional legacies and the role of regional sequencing are common features across the cases we study and constitute a cluster of topics for further research beyond the scope of the questions we address here.

Finally, this Article rests on a comparative study of several important and understudied cases that illustrate a range of strategies and issues in the area of constitution drafting and religion that merit further attention and study. Yet, there are many additional case studies that provide significant examples of constitution drafting in religiously-divided societies that we were unable to address. We hope that some of the theoretical insights we have drawn from the cases we did examine will motivate a future research agenda that extends to more detailed exploration of additional cases.