

Introduction

On July 3, 2013, General Abdel Fattah el-Sisi, Egyptian Army Chief, ousted President Mohamed Morsi from power. Morsi, elected in 2013, had been Egypt's first ever democratically elected president. Following the coup, the Chief Justice of the Supreme Constitutional Court of Egypt, Adly Mansour, was installed as interim president; Morsi was put under house arrest and several members of the Muslim Brotherhood – the political party to which Morsi belonged - were either arrested or killed. General el-Sisi also suspended the 2012 constitution, which was promulgated only a few months earlier, and issued a constitutional decree to make amendments to the constitution.¹ The amendments were to be proposed by a constitutional committee composed of fifty members.² The committee had hardly begun its work when foreign observers began to refocus most of their attention on speculating just *how* “Islamic” the amended constitution might be.³ And indeed, the committee was soon in a gridlock over the role of Islam in the new constitution.⁴ Egypt's 1971 and 2012 constitutions had contained clauses entrenching the principles

¹ Shadia Nasralla, “Rows Over Egypt's Constitutional Decree Signal Hurdles Ahead” *Reuters* (July 10, 2013) <www.reuters.com/article/us-egypt-protests-constitution/rows-over-egypts-constitutional-decree-signal-hurdles-ahead-idUSBRE96815R20130709> accessed July 1, 2020.

² Nathan J Brown, “Egypt's Daring Constitutional Gang of 50” *Foreign Policy* (September 20, 2013) <<https://carnegieendowment.org/2013/09/20/egypt-s-daring-constitutional-gang-of-50-pub-53079>> accessed July 1, 2020.

³ Omar El Akkad, “Egypt's Draft Constitution Limits Role of Islam” *The Globe and Mail* (August 30, 2013) <www.theglobeandmail.com/news/world/egypts-draft-constitution-limits-role-of-islam/article14060190/> accessed July 1, 2020.

⁴ Gamal Essam El-Din, “Fierce Debates Over Preamble of Egypt's New Constitution” *AhramOnline* (November 26, 2013) <<http://english.ahram.org.eg/NewsContent/1/64/87562/Egypt/Politics-/Fierce-debates-over-preamble-of-Egypt-s-new-constit.aspx>> accessed July 1, 2020.

of Islamic law as the primary source of legislation; accordingly, some had called the 2012 constitution an “Islamic” Constitution, while others had alleged that it leaned toward “conservative” Islam.

Would the amended constitution be more “Islamic” than its predecessor? As speculation over the “Islamicity” of Egypt’s constitution intensified, one of the members of the constitutional committee was quick to dismiss any suggestion that the amended constitution would be any less Islamic than the previous one and claimed that the committee does not intend to “distort Egypt’s Islamic identity whatsoever,” adding, “What is being said in this regard is nothing more than unfounded speculation.”⁵ It was as if Egypt was experiencing *déjà vu*; with regard to the suspended Egyptian constitution too, much ink had been spilt within and outside the country about the risks of incorporating an Islamic supremacy clause in the new constitution.⁶ Much of the commentary regarding the new constitution again narrowly focused on the treatment of Islam, to the detriment of other substantive issues.⁷ Yet the constitution drafted by the largely secular military regime retains exactly the same clause as did the Muslim Brotherhood constitution.⁸ One commentator argued that “Egypt’s constitutional declaration issued late on July 8 contains more concessions to radical Islam than the constitution drawn up by the deposed President Hosni Mubarak.”⁹

In writing the new Egyptian constitution, drafters confronted now familiar questions about the role of Islam during a constitutional design in the Muslim world: What role will it be given in this newly drafted constitution? How will lawmaking be affected by the adoption of Islam? Are constitutions in the Muslim world establishing theocracies or ostensibly liberal democracies? How does the incorporation of Islam in a constitution affect the adoption of constitutional rights? Will new popularly elected governments be constrained by Islamic law? Will courts be able to set aside laws for incompatibility with the shari’a?

⁵ Safaa Azaab, “In Conversation with Kamal El-Helbawy” *Asharq Al Awsat* (October 12, 2013) <www.aawsat.net/2013/10/article55318241> accessed July 1, 2020.

⁶ Robert Satloff and Eric Trager, “Egypt’s Theocratic Future: The Constitutional Crisis and U.S. Policy” The Washington Institute (December 3, 2012) <www.washingtoninstitute.org/policy-analysis/view/egypts-theocratic-future-the-constitutional-crisis-and-u.s.-policy> accessed July 1, 2020.

⁷ “An Endless Debate Over Religion’s Role” *The Economist* (Cairo, October 6, 2012) <www.economist.com/middle-east-and-africa/2012/10/06/an-endless-debate-over-religions-role> accessed July 1, 2020.

⁸ Draft Constitution of the Arab Republic of Egypt 2013, art. 2.

⁹ Richard Palmer, “Egypt’s New Constitution More Islamic Than the Last” *The Trumpet* (July 13, 2013) <www.thetrumpet.com/10805-egypts-new-constitution-more-islamic-than-the-last> accessed July 1, 2020.

These questions are not only of great importance in the Middle East but have remained an issue during constitution-making processes in the Muslim world. In 2014, the question gained particular prominence in a different international context, when peace talks were being contemplated between the governments of Pakistan and Afghanistan, and the Taliban. In the case of Pakistan, the militant group even refused to accept the offer of peace talks under the framework of a constitution that, in their view, was not sufficiently Islamic.¹⁰ In 2014, as ISIS set about establishing an “Islamic State” in Iraq, attention once again turned to the question of constitutional democracy and Islam. Hence, war and peace can sometimes partly hinge on the question of how Islamic a country’s constitution is.

The question of Islam in political life was propelled to a central position again due to the events of the Arab Spring. In the Middle East, as the zeal of the Arab Spring traveled, talk of writing new constitutions became pervasive; discussions about the future constitutional design of Syria commenced soon after the rebellion began; Jordan amended its constitution in ways designed to preserve its monarchy; Tunisia eventually passed a new constitution that has been hailed as a successful charter in contrast to the chaos that has gripped some of the other Arab Spring countries that also strove to rewrite constitutions – such as Libya and Yemen. Each situation turned out to be very different, but the question of Islam remained of primary salience in each of these constitutional design situations. Even in Tunisia – one of the most secular countries in the Muslim world, this question stood out. Each of these constitution-making situations is very different, involving local politics and various international actors, but Islam entered into these discussions. In fact, more than two years after the commencement of the Arab Spring, the coup in Egypt once again reminded us that the political stakes of resolving the issue of Islam in the constitution remain very high.

And this debate is not new. The status of Islam had also been a major issue for United States foreign policy in the process of producing the Iraqi and Afghan constitutions. Noah Feldman stated while discussing the Bush administration’s involvement in the Iraqi constitution that “[a]ny democratically elected Iraqi government is unlikely to be secular, and unlikely to be pro-Israel. And frankly, moderately unlikely to be pro-American.”¹¹ With regards to

¹⁰ Dawood Ahmed and Tom Ginsburg, “Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy Clauses” (2014) (54(3) *Virginia Journal of International Law* 615.

¹¹ As quoted in Larry Diamond, *Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq* (Holt Paperbacks 2005) 49.

Iraq, Senator Richard Lugar went so far as to publicly state that the United States could not accept “a popularly elected theocracy,” while John Voll dismissively referred to the newly written constitutions of Iraq and Afghanistan – due to their incorporation of Islamic clauses – as impositions of “theocracy.”¹² As Voll notes, “implicit in these concerns is an assumption that an ‘Islamic’ state, even if democratically established, would be transformed into an illiberal and undemocratic ‘theocracy.’”¹³ Anxiety about constitutional Islam seems to stem from the prevalent – and now, rather old – assumption that a constitution that incorporates Islam cannot provide for democracy and human rights. Indeed, some Western constitutionalist thought has historically tended to view the Islamic world as the “antithesis of constitutional government.” As Ran Hirschl reminds us, “like early writings about the postcolonial world that tended to view postcolonial countries as a homogeneous bloc, populist academic and media accounts in the West tend to portray the spread of religious fundamentalism in the developing world as a near monolithic, ever accelerating, and all-encompassing phenomenon. The frequent formulation of this supposed dichotomy is that the West is largely secular and modernist, whereas the non-West is largely religious and traditionalist.” Scholars including Samuel Huntington claimed that not only is “Islam” a violent religion, but that “Islamic civilization” was destined to “clash” with “Western civilization” in the name of authoritarian politics.¹⁴ This narrative has penetrated not only academic but also policy thinking in the United States and Europe. The House of Lords in the United Kingdom stated that shari‘a was “wholly incompatible” with human rights legislation.¹⁵ A number of states in the US have attempted to enact laws that forbid state courts from considering Islamic law when deciding cases. For instance, Oklahoma has attempted to ban state courts from considering Islamic law when deciding cases¹⁶ and thirteen states in the United States have introduced bills to circumvent the application of shari‘a.¹⁷ For these critics, the choice between the constitutional

¹² John O Voll, “Islam and Democracy: Is Modernization a Barrier” (2007) 1(1) *Religion Compass* 170, 171.

¹³ Voll, “Islam and Democracy.”

¹⁴ Samuel Huntington, “The Clash of Civilizations” (1993) 72(3) *Foreign Affairs* 22, 22.

¹⁵ Afia Hirsch, “Sharia Law Incompatible with Human Rights Legislation, Lords say” *The Guardian* (October 23, 2008).

¹⁶ “Oklahoma Sharia Law Blocked by Federal Judge” *HuffPost* (May 25, 2011) <www.huffpost.com/entry/oklahoma-sharia-law-struck-down_n_780632> accessed July 1, 2020.

¹⁷ Zaid Jilani, “Report: At Least 13 States Have Introduced Bills Guarding Against Non-Existent Threat of Sharia Law” *ThinkProgress* (February 8, 2011) <<https://archive.thinkprogress.org/report-at-least-13-states-have-introduced-bills-guarding-against-non-existent-threat-of-sharia-law-49c0ab42be1f/>> accessed July 1, 2020.

inclusion of Islam and democracy or rights was a zero-sum game: a constitution then, would have to make a choice between the two. To be sure, the concern is not completely misplaced. Self-proclaimed Islamic governments do have the potential to be undemocratic and oppressive, as the experiences of Iran since 1979 and Afghanistan under the Taliban show.

If these critics and their depictions of the “Islamic” regimes are accurate, then the question of including Islam in constitutions should be a forgone conclusion: it should be met with deep unpopularity in Muslim countries. However, in contrast, rather than downplaying the Islamicity of their constitutions, leaders in the Muslim world seem to be boasting about *how* Islamic their constitution will be. Sudan’s leader, Omar al-Bashir, promised his constituents a “100% Islamic” constitution;¹⁸ the Syrian opposition wants a constitution based on Islam;¹⁹ Libyan leaders have suggested that the constitution will be “Islamic” and “half of the debates” in the Tunisian National Constituent Assembly have been about the status of Islam in Tunisia’s constitution.²⁰ Indeed, one of the promises of the Islamic parties is the full implementation of shari’a in their respective societies. And the constitution, as arguably the most important legal document in most states, becomes the primary focal point of exercising this promise.

So rather than religion being marginalized, it is clear that religion seems to have witnessed a marked resurgence in law and government.²¹ This revival has been witnessed across the globe, in regions spreading “from central and southeast Asia to north and sub-Saharan Africa and the Middle East.”²² In the case of Muslim countries, beginning in the 1970s, widespread calls for the

¹⁸ “Sudan Constitution to be ‘100 Percent Islamic’: Bashir” Reuters (July 8, 2012) <<https://uk.reuters.com/article/uk-sudan-constitution/sudan-constitution-to-be-100-percent-islamic-bashir-idUKBRE8660IB20120707>> accessed July 1, 2020.

¹⁹ Oren Dorell, “Syrian Rebels Said to Seek Islamic Democracy” *USA Today* (September 24, 2012) <<http://usatoday30.usatoday.com/news/world/story/2012/09/24/syrian-rebels-said-to-seek-islamic-democracy/57826584/1>> accessed July 1, 2020.

²⁰ Robert Joyce, “Tunisia’s Neglected Constitution” *Cairo Review of Global Affairs* (October 14, 2013) <www.aucegypt.edu/GAPP/CairoReview/Pages/articleDetails.aspx?aid=439> accessed July 1, 2020.

²¹ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007); Peter Berger, *The Desecularization of the World: Resurgent Religion and World Politics* (Eerdmans 1999); Gilles Kepel, *The Revenge of God: The Resurgence of Islam, Christianity, and Judaism in the Modern World* (Penn State University Press 1993).

²² Ran Hirschl, “The Theocratic Challenge to Constitution Drafting in Post-Conflict States” (2008) 49 *William and Mary Law Review* 1,179.

implementation of Islamic law were observed.²³ Yet the issue is particularly important for Muslim countries because while a number of constitutions globally contain a state religion clause, constitutions in some Muslim-majority countries privileged religion most robustly.²⁴

With this in mind, and as the idea of an “Islamic constitution” where state and religion are fused gains even more popular traction and can in some countries divide entire polities, it becomes immensely important to understand “constitutional Islamization” from an empirical and historical perspective and alongside its relationship to human rights in constitutional design and judicial decision making. But, there had been little empirically grounded comparative scholarship on constitutional Islamization.²⁵ In particular, there was no account as to why we observe variations throughout the Islamic world regarding whether or not the constitution is Islamized or which constitutions are most Islamized and how that relates to human rights. This gap exists despite the fact that the “Muslim world’s desire for enacting these clauses shows no sign of abating.”²⁶ And this is precisely where this book comes in: It seeks to elaborate how the incidence of Islam in a constitution correlates with the inclusion of human rights provisions, the link with colonialism and the effects of these clauses.

This is not to say that there has been no literature on the topic prior to this. Certainly, there is already a large body of literature discussing whether Islamic

²³ Sami Zubaida, *Law and Power in the Islamic World* (I. B. Tauris 2003) 1; Said Amir Arjomand (ed), *Constitutional Politics in the Middle East: With Special Reference to Turkey, Iraq, Iran and Afghanistan* (Hart Publishing 2008) 3.

²⁴ Danmarks Riges Grundlov 1953 (The Constitutional Act of the Kingdom of Denmark 1953), s. 4.; Stjórnarskrá lýðveldisins Íslands 1944 (The Constitution of the Republic of Iceland 1944), art. 62.

²⁵ Some exceptions include: Nathan J Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (State University of New York Press 2001) 107–10, 161–93 (tracing the historiography of the idea that the origin of Western constitutionalism lies in Christianity and the history of the role of shari’a in Middle Eastern governance); Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton University Press 2008) 103–40 (exploring the emergence of modern Islamism and its constitutional proposals); Jan-Michel van Otto, “Sharia and Law in a Birds Eye View: Reform, Moderation and Ambiguity. In Jan Michiel Otto and Hannah Mason (eds), *Delicate Debates on Islam: Policymakers and Academics Speaking with Each Other* (Leiden University Press 2011) (examining the changing role of shari’a over time in twelve Muslim countries); Ahmed and Ginsburg, “Constitutional Islamization and Human Rights” 615.

²⁶ Clark B Lombardi and Nathan J Brown, “Do Constitutions Requiring Adherence to Shari’a Threaten Human Rights? How Egypt’s Constitution Reconciles Islamic Law with the Liberal Rule of Law” (2006) 21(1) *American University of International Law Review* 379.

law is in tension with human rights and democracy.²⁷ Similarly, in comparative constitutional law scholarship, scholars have described how courts have moderated this potential tension, specifically focusing on the “benign” judicial interpretation of Islamic supremacy clauses. For example, Nathan Brown and Clark Lombardi, citing the example of Egypt, suggest that constitutions that incorporate Islam may not in fact threaten human rights since a modern judiciary and strong courts can interpret laws in a progressively compatible way.²⁸ Ran Hirschl has written extensively about the means by which judges across the Muslim world have mitigated the potential illiberal effects of incorporating religion within constitutions or “constitutional theocracy.”²⁹ On the other hand, Intisar Rabb has critiqued some of these positions.³⁰

Yet, even as the concept of an “Islamic” constitution is bandied about with increasing frequency today by policy makers, commentators, and scholars alike, only a handful of studies have to date surveyed the constitutional landscape to exhaustively identify the prevalence of Islamic features in constitutions. Few scholars have raised some important questions, such as *how* Islamic are the constitutions of Muslim countries, does colonial history impact the variance of Islam in constitutions of Muslim countries, were some colonisers more tolerant of Islam than others or which Muslim country has the most Islamic constitution? That is, there is little empirical and historical analysis of Islamicity in constitutions, despite the immense political importance of the question. Most importantly, there is limited analysis of the relationship between constitutional Islam and rights from an empirical perspective.

This book begins with a different assumption about constitutional Islam and rights than is often assumed in the popular imagination, or rather it intends to question and verify some assumptions about how Islamic constitutions are and whether the incorporation of Islam in a constitution is necessarily antithetical to the pursuit of human rights. This book is careful not to assume there is only one paradigm of “constitutional democracy” or that simply because many of the Arab states were dictatorships, there is any

²⁷ Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Routledge 1991); Abdulaziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford University Press 2014); Syed Khatab and Gary D Bouma, *Democracy in Islam* (Routledge 2007); John L Esposito and John O Voll, *Islam and Democracy* (Oxford University Press 1996).

²⁸ Lombardi and Brown, “Do Constitutions Requiring Adherence to Shari’a Threaten Human Rights?” 379; Clark B Lombardi, “Designing Islamic Constitutions: Past Trends and Options for a Democratic Future” (2013) 11(3) *International Journal of Constitutional Law* 615, 627.

²⁹ Ran Hirschl, *Constitutional Theocracy* (Harvard University Press 2010).

³⁰ Intisar Rabb, “The Least Religious Branch: Judicial Review and the New Islamic Constitutionalism” (2013) 17 *UCLA Journal of International Law and Foreign Affairs* 75.

essentialist connection between Islam and rights. Indeed, it calls for a more nuanced approach to understanding democratization in Muslim countries and as it explores deeper connections between politics, colonial history, and constitutional Islam, it argues that the incorporation of Islamic law in constitutions and in fact, its application in law, is not necessarily antithetical to human rights and democracy. Alternatively, read in a different way, the arguments advanced in this book could be interpreted to mean that when Muslim countries democratize, it may not be the paradigm of Western democracy that should be viewed as the benchmark they strive for; rather they may chart their own trajectory of democracy. It is this question of constitutional democracy and Islam; and understanding modernity from a constitutional Islam perspective that has motivated the research that forms the core of this book. To be clear, it should not be read as making broad causal claims about constitutional Islam and constitutional democracy; rather, it should be read as proposing a different, modest lens through which to view the question of Islam and constitutional democracy and its relationship to colonialism. Further, its approach is in line with scholarship that views constitutions empirically, and its theoretical framework is by design narrow and simple: in analyzing the world of constitutional Islam, this book defines “constitutions” as the formal, *de jure*, large-C constitution of various countries and not the wider, *de facto*, small-c definition that would include the structural corpus of rules, decisions, understandings, traditions, and practices that make up the informal or small-c constitutions. This choice is not only consistent with the methodology deployed in the empirical literature on constitutions but also appropriate to the conceptual research questions tackled in this book and its ambitions.

Accordingly, relying on unique data sets based on the coding of constitutions of countries that are members of the Organisation of Islamic Cooperation (OIC), the book constructs its arguments through an empirical analysis of constitutions: it surveys the global landscape of constitutions of Muslim-majority countries – from Uzbekistan to Saudi Arabia, from Iran to Somalia – and charts out the universe of “constitutional Islamization.” In doing so, it also develops a novel index – the Islamic Constitutions Index (ICI) – that measures and ranks the constitutions of all Muslim-majority countries according to “Islamicity.”³¹ It seeks to measure not only how well countries’ constitutions live up to the popular ideal of being an Islamic

³¹ Dawood Ahmed, Moamen Gouda, and Tom Ginsburg, “Islamic Constitutionalism Project” (SHARIASource, Harvard Law School, 2018) <<https://beta.shariasource.com/projects/islamic-constitutionalism>> accessed May 1, 2021.

constitution but also verifies the popular assumption that the incorporation of Islamic law in constitutions is antithetical to human rights and democracy. It also specifically focuses on the question of how the incorporation of Islam or shari'a as a source of law impacts the human rights content of the constitution and judicial practice. In doing all of this, it also seeks to explain Islamic doctrine regarding constitutionalism, the origins of and reasons for the continuing popularity of constitutional Islam. Other questions this book tackles include the following: *How* Islamic are the constitutions of Muslim-majority countries today? Does the adoption of Islam in constitutions depend on the identity of the dominant colonizer? What types of Islamic clauses exist in those constitutions? How do constitutions incorporate Islam? Which country has the most Islamic constitution and which constitutions are secular? What types of constitutional clauses relating to Islam are most popular in the Muslim world? What regions have the most Islamic constitutions and most importantly, how do constitutional rights correlate with constitutional Islamization in design?

In a nutshell, the goal of this book is to illuminate the world of constitutional Islamization for academics and policy makers alike, so as to resolve a major tension during constitution making in the Muslim world and further, to lay, in some small way, the foundations for a research agenda that illuminates the broader relationship between Islam, colonialism and rights in constitutional design. Further, we hope, perhaps rather optimistically, that providing empirical evidence on the Islamicity of constitutions will assist fragile democracies during peacemaking efforts with groups such as the Afghan and Pakistani Taliban, whose central goal is to establish an Islamic constitution and who deny that the state they are fighting has Islamic credentials.

The book is structured around five chapters contained within three parts. Part I sets out by explaining the origins and theoretical foundations of Islamic constitutions and captures the universe of constitutional Islam. Chapter 1 introduces the religious theory of Islamic constitutionalism and examines the popularity of Islam in political life and how it originated along with constitution making in the Muslim world. Chapter 2 introduces a model Islamic constitution. Using this model constitution empirically illustrates the universe of constitutional Islamization, providing data on which countries and regions have adopted constitutional Islam and in what form. It also ranks these countries in an index according to their Islamicity and then observes how the incidence of all forms of Islam in a constitution correlates with demography, geography human rights and in particular, colonial history.

Part II deals with Islamic supremacy clauses. In Chapter 3, we delve into a deeper analysis of a particular form of clause that almost half of all Muslim

countries have in their constitutions and which we argue is the most important Islamic clause in constitutions. The Islamic supremacy clause subjugates all law making to Islam, shari‘a, or Islamic precepts. It traces the origins and incidence of this clause and its correlation to human rights in constitutional design. Chapter 4 uses case studies and some empirical analysis related to the Islamic supremacy clause.

In Part III, Chapter 5 draws upon the existing literature to analyze the effects of Islamic constitutionalism; that is, how the rights and Islamic supremacy clauses play out in court battles in Pakistan and Egypt; the fundamental question for that chapter is then, unsurprisingly, one of judicial decisions: in court cases, does constitutional Islam override constitutional rights as is sometimes popularly assumed?