

# Minority Rights Protections in the Post-Arab Spring Egyptian and Tunisian Constitutions

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## Abstract

*The 2011 Arab Spring was an inflection point for the Middle East and North Africa region, representing an opportunity for democracies in countries that have only experienced authoritarianism as sovereign nations. Both Tunisia and Egypt drafted and ratified new constitutions in the wake of their revolutions. Among the chief worries that citizens and onlookers had in their drafting processes was the role that Islamists would have, particularly in human rights and minority protections. As more citizens wanted fundamental rights protected in their constitutions, the drafters had the task of incorporating them with the Islamic identity of the state. Compromises by the Tunisian Islamists and secular groups led to a more well-received constitution by minority groups, while the opposite happened in Egypt. This Comment argues, based on the comparative success of the 2014 Tunisian Constitution, that religious-based democratic states will need to include more protections for minority and historically marginalized groups to increase their acceptance and longevity.*

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## I. INTRODUCTION

The 2011 Arab Spring was an inflection point for the region, representing an opportunity for democracies in countries that have experienced almost continuous authoritarianism since their post-colonial independences.<sup>1</sup> Although political instability and internal strife have led many of these revolutions to be short-lived, the Arab Spring brought many legal changes that raised important questions about constitutional developments.

Both Tunisia and Egypt drafted and ratified new constitutions in the wake of their revolutions. Among the chief worries that citizens and onlookers had in the development process of these constitutions was the role of Islamists—which formed the majority of the Parliaments elected—would have in developing these constitutions, particularly in regards to human rights and protections for religious minorities.<sup>2</sup> In response to these concerns, Tunisia and Egypt took different approaches to protecting minority rights, which, in turn, had an effect on the acceptance and duration of their constitutions.

Today, both post-Arab Spring constitutions have been superseded by new constitutions, reflecting an end to the democratic aspirations of the Arab World. However, it may also reflect the challenges of writing Western-style constitutions in different parts of the world. Additionally, it may reflect different obstacles existing in countries that do not have an explicit separation of church and state, and nations that derive laws from religious bases.

Given the existence of religious political parties worldwide, but particularly in the Middle East, the creation and revision of constitutions in religious states is a pressing issue. While the Arab Spring did not culminate in the establishment of democracy that its people and onlookers had hoped for, it is important to understand how states that enshrine faith as a center of their democracy write their constitutions and how they can not only reflect the desires of the citizenry but also protect the minority groups who do not adhere to the same faith and complying norms. Furthermore, various signs suggest that the Arab dream of democracy is not over, namely, the 2018–19 Sudanese Revolution that overthrew Sudanese 30-year dictator Omar Al-Bashir, the Hirak Movement (2019–21) in Algeria, and the 2024 collapse of the 53-year

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<sup>1</sup> Janine A. Clark & Bassel F. Salloukh, *Authoritarian Regimes and their Perpetuation in the Middle East: The Changing Politics of Class Identities*, EUROPEAN UNIVERSITY INSTITUTE – ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES 1 (2008).

<sup>2</sup> Laith Nasrawin, Protecting the Constitutional Rights of Religious Minorities in the Wake of the Arab Spring, 1 EURO. HUMAN RIGHTS L. REV. 48 (2016).

al-Assad family regime in Syria.<sup>3</sup> Therefore, if there is another opportunity for democratic change in these countries, the lessons of Tunisia and Egypt may prove to be informative.

This Comment argues that the political fears surrounding Islamism and the subsequent reaction to those fears by the Islamist parties affected the comparative success of the 2014 Tunisian Constitution vis-à-vis the 2012 Egyptian Constitution. These fears stemmed from the perception that Islamists would limit the rights of religious minorities and women. This Comment further argues that future successes in constitution rewriting and amending in countries without separation between mosque and state will require compromise between religious and secular parties, as well as clear protection of minority rights.

This Comment will begin in Part II by explaining the relevant historical and demographic backgrounds of Tunisia and Egypt. Part III will explain the drafting process undertaken in Tunisia and Egypt after the Arab Spring and what kinds of groups and political parties led them. Then, Part IV provides an overview of the 1959 Tunisian and 1971 Egyptian Constitutions, which were in force until the Arab Spring revolutions, with a focus on the role of Islam in the state and protections afforded to minorities and women. Part V will provide an overview of the 2014 Tunisian and 2012 Egyptian Constitutions. Part VI will analyze the differences in drafting, enforcement (or lack thereof), and the final product of the 2014 Tunisian and 2012 Egyptian Constitutions. Lastly, this Comment will conclude with what lessons can be learned from the Tunisian and Egyptian constitutional experiences.

## II. HISTORICAL AND DEMOGRAPHIC BACKGROUND OF TUNISIA AND EGYPT

### A. The 2011 Arab Spring

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<sup>3</sup> Zack Medow, *The Spread of Non-Violent Action: The Case of the 2018–2019 Revolution in Sudan*, FREEDOM HOUSE (2022), <https://perma.cc/BX72-ZRJE>; See also M. Tahir Kilavuz & Sharan Grewal, *Algerians have been protesting for a year. Here's what you need to know.*, THE BROOKINGS INSTITUTION (Feb. 26, 2020), <https://perma.cc/47T3-2LQU>; *What happened in Syria? How did al-Assad fall?*, AL JAZEERA (Dec. 8, 2024), <https://perma.cc/GNN3-7Z3C>.

The Arab Spring was a series of anti-government protests and uprisings that swept across the Arab World from late December 2010 until mid-2012.<sup>4</sup> Completely dominated by authoritarian governments, the period immediately preceding the Arab Spring was marked by large corruption, economic stagnation, and despotism.<sup>5</sup> These conditions catalyzed the start of this anti-government movement, which itself started in Tunisia.

The self-immolation of Mohamed Bouazizi, a Tunisian street vendor in Sidi Bouzid, was the first major spark of the Arab Spring. Bouazizi, a street vendor, set himself on fire after facing mistreatment from local police officers nearly every day for years, as they would regularly “confiscate his scale, produce, and fine him for running a stall without a permit.”<sup>6</sup> The morning of December 17, 2010 was his final breaking point, when a policewoman slapped him and, with the help of her colleagues, forced him to the ground and took away his scales.<sup>7</sup> Bouazizi attempted to meet with officials at a local municipal building, but when denied, returned with fuel, and then set himself on fire.<sup>8</sup>

Bouazizi’s death and the conditions leading to the tragedy outraged many Tunisians to the degree that people took to the streets before Bouazizi was pronounced dead.<sup>9</sup> In less than one month, Tunisians successfully overthrew their ruler, then-President Zine El-Abidine Ben Ali, on July 14, 2011.<sup>10</sup> The protests quickly spread to Egypt, where, nine days later, Egyptians also took to the streets to protest their government. Millions of people joined the protests, and seventeen days later, on February 11, 2011, President Hosni Mubarak resigned after 30 years in power.<sup>11</sup>

These shocking and sudden depositions of longstanding Arab leaders inspired many people across the Arab world. Anti-government protests erupted in Libya, Yemen, Syria, and Bahrain.<sup>12</sup> Street demonstrations took place in Morocco, Iraq, Algeria, Lebanon, Jordan, Kuwait, Oman, and

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<sup>4</sup> *What is the Arab Spring, and how did it start?*, AL JAZEERA (Dec. 17, 2020), <https://perma.cc/9KQL-QPJP>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Yasmine Ryan, *The tragic life of a street vendor*, AL JAZEERA (Jan. 20, 2011), <https://perma.cc/H6TC-DEDW>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Tunisia: President Zine al-Abidine Ben Ali forced out*, BBC, (Jan. 15, 2011), <https://perma.cc/C7LQ-EQ5A>.

<sup>11</sup> David D. Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, NY TIMES (Feb. 11, 2011), <https://perma.cc/KQV3-NMPG>.

<sup>12</sup> *Id.*

Sudan,<sup>13</sup> with minor protests appearing in Djibouti, Mauritania, Palestine, Saudi Arabia, and Moroccan-occupied Western Sahara.<sup>14</sup> While not all of these protests led to regime change, some governments reacted by adopting new parliamentary provisions or policies to assuage the public.<sup>15</sup> However, Tunisia and Egypt were in revolutionary positions, for, in the first time in their histories, indigenous democratic movements had begun.

In addition to democratic elections, the Arab Spring provided Tunisia and Egypt with yet another unique opportunity: the chance to draft and adopt constitutions that better reflected the peoples' values. Both countries elected assemblies to redraft their respective constitutions. For the first time in both countries, Islamist parties either formed a plurality or a majority of the vote. This raised concerns among non-Islamists, particularly secularists in Tunisia and Coptic Christians in Egypt, about what their constitutions would look like. This fear shaped the drafting process, and, as will be argued below, played a role in each respective constitutions' longevity.

## B. Background and Demographics of Tunisia

The modern history of Tunisia most aptly begins with colonialism, where French interests in Tunisia culminated in an invasion in 1881 and the creation of a protectorate.<sup>16</sup> Agitation for independence in the decades following World War I finally resulted in the French recognizing Tunisia as an independent state in 1956. The country's first president, Habib Bourguiba, established a strict one-party state.<sup>17</sup> He dominated the country for 31 years, repressing Islamic fundamentalism and establishing rights for women.<sup>18</sup> In November 1987, Bourguiba was removed from office and replaced by Zine el Abidine Ben Ali in a bloodless coup.<sup>19</sup> Though Ben Ali initially allowed the Islamist parties to participate in politics, gains in the 1989 election led Ben Ali to falsify the results in order to claim that he won 99% of the vote and to use

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<sup>13</sup> Kali Robinson & Will Merrow, *The Arab Spring at Ten Years: What's the Legacy of the Uprisings?*, COUNCIL ON FOREIGN RELATIONS (Dec. 3, 2020), <https://perma.cc/KK9A-YUBF>.

<sup>14</sup> Malise Ruthven, *How to Understand ISIS*, THE NEW YORK REVIEW (June 23, 2016), <https://perma.cc/FMT7-3L3L>.

<sup>15</sup> Mai El-Sadany, *Human Rights in the Constitution: A Survey of the Arab Uprisings*, ARAB CENTER WASHINGTON DC (May 24, 2017), <https://perma.cc/5DUD-VUU3>.

<sup>16</sup> *Tunisia*, CENTRAL INTELLIGENCE AGENCY (Nov. 6, 2023), <https://perma.cc/7FUX-QAMJ>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

violent factions within the Islamist parties as pretext for launching a crackdown on them.<sup>20</sup>

Tunisia has an estimated population of around 11.6 million people.<sup>21</sup> The population of Tunisia is made up of Arabs (98%),<sup>22</sup> Imazighen (1%),<sup>23</sup> and others (1%). The Imazighen are considered to be the first people to live in Tunisia.<sup>24</sup> Nomadic Arab tribes from the Arabian Peninsula came to the Maghreb in the seventh century and have since settled in Tunisia.<sup>25</sup> Since the time of the Ottomans, there have been other inflows of migration, particularly of Sub-Saharan Africans, Greeks, Romans, Jews, and French settlers.<sup>26</sup>

Around 98% of the population is Muslim.<sup>27</sup> There is a Jewish population on the southern island of Djerba and in Tunis. There also exists a small indigenous group of Christians in Tunisia.<sup>28</sup>

### C. Background and Demographics of Egypt

Egypt's modern history was also shaped by colonialism, as Britain took control of Ottoman Egypt in 1882 before Egypt gained partial independence in 1922 and full independence in 1952.<sup>29</sup> Egypt is the most populous country in the Middle East, with 109.5 million people as of July 2023.<sup>30</sup> Minorities in Egypt include the 27,000 Amazigh-speaking community of the Siwa Oasis (Siwis) and approximately 200,000<sup>31</sup> Nubian people clustered along the Nile in the southernmost part of Egypt.<sup>32</sup> There are also sizable Beja and Dom

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<sup>20</sup> *Tunisia: Bourguiba and Ben Ali*, FANACK.COM (June 30, 2013), <https://perma.cc/C6E8-N6A9>.

<sup>21</sup> *2019 Report on International Religious Freedom*, U.S. DEPARTMENT OF STATE, (2019), <https://perma.cc/H6W8-SJ2G>.

<sup>22</sup> See Tunisia, *supra* note 16.

<sup>23</sup> *Q&A: The Berbers*, BBC (Mar. 12, 2004), <https://perma.cc/98Y9-7EGE>.

<sup>24</sup> *The Maghrib under the Almoravids and the Almohads*, ENCYCLOPEDIA BRITANNICA (June 27, 2008), <https://perma.cc/MJ6J-CZ7X>.

<sup>25</sup> *Id.*

<sup>26</sup> ARNOLD H. GREEN, *THE TUNISIAN ULAMA 1873–1915: SOCIAL STRUCTURE AND RESPONSE TO IDEOLOGICAL CURRENTS* (1978).

<sup>27</sup> See Tunisia, *supra* note 16.

<sup>28</sup> *Id.*

<sup>29</sup> *Egypt*, CENTRAL INTELLIGENCE AGENCY (Nov. 6, 2023), <https://perma.cc/4GVG-VGM6>.

<sup>30</sup> *Id.*

<sup>31</sup> Fady Salah, *The Forgotten Minorities: Egypt's Nubian and Amazigh in the Amended Constitution*, ATLANTIC COUNCIL (Nov. 13, 2013), <https://perma.cc/5FXZ-BHVZ>.

<sup>32</sup> *Id.*

ethnic minorities. The Beja are estimated to be around one million in number.<sup>33</sup>

Based on the contested 2006 Census data, it was estimated that 94.9% of Egyptians are Muslim, 5.1% are Christian, and less than 1% are Jewish, Buddhist, or other religions. However, most recent surveys by the Arab Barometer have estimated the population to be 9.6% Christian and 90.3% Muslim.<sup>34</sup>

Among Muslims, it is estimated that there are 50,000 Ahmadi Muslims and between 800,000 and 3 million Shia Twelver and Ismaili Muslims.<sup>35</sup> Lastly, estimates suggest that there are between 1,500-2,000 to over 7,000 Bahá'ís in Egypt.<sup>36</sup>

#### D. Comparing the Demographics of Tunisia and Egypt

Tunisia and Egypt have different compositions of ethnic and religious minorities. Tunisia is homogenous ethnically and religiously, while Egypt has relatively more ethnic and religious diversity. It should be noted that Tunisia's Imazighen population has traditionally been subsumed within the Tunisian population, which has caused tension among the community seeking more recognition.<sup>37</sup> These differences shape what kinds of political cleavages formed in each country, with Tunisia's main divides being linguistic and ideological (on secular and religious lines), while Egypt exhibits a sharper religious divide. However, it should also be noted that similar to Tunisia, Egypt was also shaped by religious and secular political cleavages, and religious minority groups worked in conjunction with secular and liberal groups and the military (which is portrayed as the defender of secularism) to protect their interests.<sup>38</sup>

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<sup>33</sup> *World Directory of Minorities and Indigenous Peoples – Sudan: Beja*, MINORITY RIGHTS GROUP INTERNATIONAL (June 2018), <https://perma.cc/B4ZM-ET44>.

<sup>34</sup> *Data Analysis Tool*, ARAB BAROMETER (last visited Nov. 11, 2013), <https://perma.cc/8XTD-872L>.

<sup>35</sup> Shashank Bengali, *Egypt's Shiite Muslims Saw the Sunni Hatred Grow Under Morsi*, LOS ANGELES TIMES (Nov. 13, 2013), <https://perma.cc/Z275-HJWN>.

<sup>36</sup> *Egypt Bahá'í*, MINORITY RIGHTS GROUP INTERNATIONAL (last visited Nov. 11, 2023), <https://perma.cc/EG6R-VFQB>.

<sup>37</sup> Elizabeth McSheffrey, *We Are Still Here: Indigenous Tunisians Still Fighting for Rights 1,300 Years After Colonization*, GLOBAL NEWS (Mar. 21, 2023), <https://perma.cc/QL48-TEQB>.

<sup>38</sup> Maged Mandour, *Egypt: the Islamist Military*, OPENDEMOCRACY (Oct. 16, 2013), <https://perma.cc/6LVC-B2EQ>.



### III. THE PROCESS OF DRAFTING A NEW CONSTITUTION

#### A. Tunisia

In the wake of the overthrow of Ben Ali, Prime Minister Mohamed Ghannouchi formed a caretaker government with the goal of maintaining the state and providing a legal framework for new elections.<sup>39</sup> This caretaker government only lasted around a month and a half as protestors demanded a new interim government completely free of association with the old regime.<sup>40</sup> Beji Caid Essebsi was then appointed prime minister, and elections to a Constituent Assembly were held on October 23, 2011.<sup>41</sup> The formerly banned Islamist party, Ennahda, which was legalized in March of that year, won with 41% of the total vote.<sup>42</sup>

Before the first session, the Ennahda, Congress for the Republic (CPR, a center-left secularist party), and Ettaktol (a center-left secularist, social democratic party) agreed to share the top three positions.<sup>43</sup> A provisional constitution was adopted on December 10, 2011, which required the President to have exclusive Tunisian nationality (excluding citizens with dual nationality), Tunisian parentage, religious affiliation to Islam, and an age of 35 years or more.<sup>44</sup> The National Constituent Assembly elected human rights activist and CPR leader Moncef Marzouki as the interim President of the Tunisian Republic, winning 75.7% of the vote.<sup>45</sup>

The drafting of the new Constitution started on February 13, 2012. The assembly established six committees, each in charge of one of the individual themes of the Constitution.<sup>46</sup> Each committee consisted of twenty-two lawmakers and mirrored the relative strength of the political groups in the

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<sup>39</sup> *Tunisian PM Forms 'Unity Government'*, AL JAZEERA (Jan. 17, 2011), <https://perma.cc/CQ2R-WQXH>.

<sup>40</sup> Kim Willsher, *Tunisian Prime Minister Mohamed Ghannouchi Resigns Amid Unrest*, THE GUARDIAN (Feb. 27, 2011), <https://perma.cc/FL3M-Q4ZA>.

<sup>41</sup> *Id.*

<sup>42</sup> *Final Tunisian Election Results Announced*, AL JAZEERA (Nov. 14, 2011), <https://perma.cc/3VA9-DYNY>.

<sup>43</sup> *Tunisia Coalition Agrees Top Government Posts*, BBC (Nov. 21, 2011), <https://perma.cc/CYX9-DE9V>.

<sup>44</sup> Sana Ajmi, *Discriminatory Qualifications for Tunisia's President Cause Controversy*, TUNISIALIVE.NET (Dec. 11, 2011), <https://perma.cc/37CF-SGFS/>.

<sup>45</sup> *Tunisian Constituent Body Holds First Session*, AL JAZEERA (Nov. 22, 2011), <https://perma.cc/G9A7-ABAA>.

<sup>46</sup> Wafa Ben Hassine, *Process of Writing Tunisia's New Constitution Begins*, TUNISIALIVE.NET (Feb. 13, 2011), <https://perma.cc/AW4N-ZAPB>.

assembly.<sup>47</sup> The new Tunisian Constitution was passed and enacted on January 26, 2014.

## B. Egypt

The Supreme Council of Egypt dissolved Egypt's parliament and suspended the 1971 Constitution in response to demonstrators' demands on February 13, 2011.<sup>48</sup> The Council said that it would wield power for the next six months until elections could be held.<sup>49</sup> The army—where Hosni Mubarak was a career officer—declared it would not field a candidate in the next election. This decision was notable because it would be the first time in Egypt's history as a sovereign state that there would be no military rule.

To decide how to proceed with adopting a new constitution, the Egyptians first voted on a referendum. The referendum would delay the writing of a new constitution and would propose amendments to limit the powers of the presidency, a commission to draft a new constitution following the parliamentary elections, and promote easier access to presidential elections by candidates.<sup>50</sup> This vote showed a religious divide: The Muslim Brotherhood approved the referendum while the Coptic Church opposed it.<sup>51</sup> Each group actively advocated for their position throughout the election, foreshadowing for many what the constitutional drafting process would look like.

The constitutional referendum was approved on March 19, 2011 with 77.2% of the vote.<sup>52</sup> The Coptic Church still opposed the referendum even though the Islamists suggested that Article 2 of the Constitution—which stated that “Islam is the Religion of the State. Arabic is its official language, and the principal source of legislation is Islamic Jurisprudence”—would be removed or altered if the proposed changes were not approved.<sup>53</sup> This indicated strong distrust before the constitution drafting process even began.

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<sup>47</sup> *Id.*

<sup>48</sup> Egypt's Military Leaders Dissolve Parliament, Suspend Constitution, New Strikes Begin, PBS NEWS HOUR (Feb. 14, 2011), <https://perma.cc/838R-4HT8>.

<sup>49</sup> *Id.*

<sup>50</sup> Noha El-Hennawy, *Commission Announces Proposed Changes to Egyptian Constitution*, EGYPT INDEPENDENT, (Feb. 26, 2011), <https://perma.cc/HJQ9-5AEC>.

<sup>51</sup> *Religious Propaganda, Vote-Buying Flourish in Egypt Ahead of Vote*, EGYPT INDEPENDENT (Mar. 18, 2011), <https://perma.cc/CUC7-LXCX>.

<sup>52</sup> Neil MacFarquhar, *Egyptian Voters Approve Constitutional Changes*, N.Y. TIMES (Mar. 20, 2011), <https://perma.cc/R9JH-SVN9>.

<sup>53</sup> *Id.*

Parliamentary elections were held November 28, 2011–January 11, 2012, which were considered to be the first (and only) honest election in Egyptian history.<sup>54</sup> The Democratic Alliance for Egypt (led by the Freedom and Justice Party formed by the Muslim Brotherhood) captured 37.5–44.9% of the vote.<sup>55</sup> The Islamist Bloc, an alliance among Islamist parties that the Brotherhood led, won 25.0–27.8% of the vote.

As novel as these elections were, they did not go without conflict, and obstacles from the previous regime remained. The Supreme Constitutional Court of Egypt had ruled that the election was unconstitutional but later reinstated the Parliament by presidential decree after President Mohamed Morsi was sworn into office.<sup>56</sup> The Constituent Assembly was originally elected by Parliament in March 2012 before a court deemed it unconstitutional, dissolving it in the following month.<sup>57</sup> Political factions tentatively agreed on June 3, 2012 to a deal to form a new constitutional assembly, consisting of one hundred members who will draft a new constitution.<sup>58</sup>

In the first democratic election in Egypt's history, Muslim Brotherhood candidate Mohamed Morsi, the first Islamist elected head of an Arab state, was declared the winner of the presidential election on June 24, 2012, and was sworn into office a week later.<sup>59</sup> He was sworn into office on June 30, 2012. Regarding the constitution drafting, the Constituent Assembly produced a 234-article draft constitution and approved each article individually during a 19-hour meeting starting on November 29, 2012.<sup>60</sup>

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<sup>54</sup> *Egypt to Hold Parliamentary Elections in September*, MONSTERS & CRITICS (Mar. 28, 2011), <https://perma.cc/KM9S-RR9S>.

<sup>55</sup> The inconsistency of reporting is because many independents and appointed MPs are party members or joined established parties.

<sup>56</sup> *Egypt Supreme Court Calls for Parliament to Be Dissolved*, BBC (June 14, 2012), <https://perma.cc/RT7V-WWGA>; See also *Egyptian President Mursi Reverses Parliament Dissolution*, BBC (Jul. 8, 2012), <https://perma.cc/H5RZ-GF4K>.

<sup>57</sup> *Egypt Court Suspends Constitutional Assembly*, BBC (Apr. 10, 2012), <https://perma.cc/3UCG-7W7W>.

<sup>58</sup> *Tentative Deal on Egypt Constituent Assembly*, AL JAZEERA (June 8, 2012), <https://perma.cc/B2JA-KLGB>.

<sup>59</sup> *Muslim Brotherhood's Mursi Declared Egypt President*, BBC (June 24, 2012), <https://perma.cc/CT23-9D7X>; *Egypt Assembly Adopts Draft Constitution*, AL JAZEERA (Nov. 30, 2012), <https://perma.cc/L47F-PN8D>.

<sup>60</sup> *Egypt Assembly Adopts Draft Constitution*, AL JAZEERA (Nov. 30, 2012), <https://perma.cc/L47F-PN8D>.

#### IV. OVERVIEW OF THE 1959 TUNISIAN AND 1971 EGYPTIAN CONSTITUTIONS

To analyze the changes and development of the constitutions adopted by the Tunisian and Egyptian governments in 2011, respectively, one must understand what the previous constitutions looked like as they relate to the religious and ethnic identity of the states and minority groups. Part A will analyze the 1959 Tunisian Constitution which, despite the secular nature of the drafters, still enshrined the Islamic and Arab identities of the state. Part B will provide an overview of the 1971 Egyptian Constitution, which also recognized Egypt's Islamic and Arab identities despite its hostility to Islamists.

##### A. 1959 Tunisian Constitution

Though the governments of Habib Bourguiba and Zein Al-Abidine Ben Ali were known to be secular, the Constitution of their country had many articles that described an Islamic and Arab identity of the state. There are four articles in particular, as well as text in the preamble, that directly references the Islamic identity of the state and the religious requirements of people holding public office.

In the Preamble, the Constitution proclaims to remain faithful to the teachings of Islam, to the unity of the Great Maghreb, and to its membership within the Arab community.<sup>61</sup> The first article of the Constitution states that “Tunisia is a free, independent and sovereign State” and that “its religion is Islam, its language is Arabic and its type of government is the Republic.”<sup>62</sup> The 22nd and 42nd Articles regard the way that members of the Chambers of Deputies and Chambers of Advisors and the President are to be sworn into their position, stating that they must both swear by “God the Almighty.”<sup>63</sup> Lastly, the 40th Article requires a presidential candidate in Tunisia to exclusively have Tunisian nationality, be Muslim, and for their father, mother, and paternal and maternal grandfathers and grandmothers to all have Tunisian nationalities, remaining Tunisians without discontinuity.<sup>64</sup>

The Preamble and these amendments show that Tunisia had specific religious and nationality requirements for those who held positions in their legislature and who held the highest office. Although the state's practices may have been more secular, the presence of this Article indicates that these

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<sup>61</sup> (١٩٥٩) دستور الجمهورية التونسية [Constitution] June 1, 1959, pmbl. (Tunis.)

<sup>62</sup> *Id.* at art. VI.

<sup>63</sup> *Id.* at art. XXII, XLII.

<sup>64</sup> *Id.*

identities were important enough that they still had to be reflected in the Constitution. Though the Presidency is the only office that requires the officeholder to be Muslim, the other oaths of office are Islamically-styled and imply that those swearing them in must be Muslim.

## B. 1971 Egyptian Constitution

Like the 1959 Tunisian Constitution, the 1971 Egyptian Constitution also had many statements that described the country as Islamic and Arab. The Constitution was adopted under President Anwar Sadat during a period of pan-Arabism. Sadat succeeded President Gamal Abdel Nasser, one of the main propagators of pan-Arabism, and his ideology was still popular. It is worth noting that Egypt's formal name, the Arab Republic of Egypt, effectively makes the national identity of Egypt Arab. The Constitution supports this identity, as well as the nation's Islamic identity, in its text.

The Constitution first refers to its Islamic identity in its Preamble, stating, "We, the Egyptian people, in the name of Allah and with His assistance, pledge indefinitely and unconditionally to exert every effort to realize."<sup>65</sup> The Constitution also had a nationality requirement, as the 154th Article stated that an appointed Minister or deputy-Minister should be an Egyptian.<sup>66</sup>

The Articles of the Constitution then address the role of Islamic law and the Arab identity through the declaration of the state's language. In the 2nd Article, the Constitution stated that "Islam is the religion of the state and Arabic its official language. Principles of Islamic law (Shari'a) are the principal source of legislation."<sup>67</sup> In addition to Islam being the basis of law, the Constitution addresses its role in religious education, where Article 19 states that "religious education shall be a principal topic of general education curricula."<sup>68</sup>

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<sup>65</sup> (١٩٧١) دستور جمهورية مصر العربية [CONSTITUTION] Sept. 11, 1971, pmbl. (Egypt). The Preamble also continues to cement its Islamic identity, stating, "we, the people of Egypt, out of determination, confidence and faith in all national and international responsibilities, and in acknowledgment of Allah's right and His Heavenly Messages, and in the right of the country and nation, as well as of the principle and responsibility of mankind, and in the name of the Almighty and His assistance, declare on the 11<sup>th</sup> of September, 1971 that we accept and grant to ourselves this Constitution, affirming our determination to defend and protect it, and asserting our respect for it in letter and spirit."

<sup>66</sup> *Id.* at art. CLIV.

<sup>67</sup> *Id.* at art. II.

<sup>68</sup> (١٩٧١) دستور جمهورية مصر العربية [CONSTITUTION] Sept 11, 1971, *supra* note 65 at art. XIX (Egypt).

Unlike the 1959 Tunisian Constitution, the 1971 Egyptian Constitution acknowledges religious freedom rights. The 46<sup>th</sup> Article states, “the State shall guarantee the freedom of belief and the freedom of practice of religious rites.”<sup>69</sup> This is likely an acknowledgment of the sizeable Coptic minority, which does not have an equivalent in Tunisia.

However, the Constitution still requires top officials to take Islamically-styled oaths. The President,<sup>70</sup> Vice-President,<sup>71</sup> Cabinet,<sup>72</sup> and members of the People’s Assembly<sup>73</sup> must swear by “the Almighty God” before taking their offices.

### C. Takeaways

As seen in both earlier constitutions, there are many explicit references to the Islamic and Arab identities of the Tunisian and Egyptian States. The Egyptian Constitution reflects the country’s religious diversity by guaranteeing freedom of belief. This is likely present in the Egyptian Constitution as opposed to the Tunisian one because of the large Coptic minority in Egypt. This also may be a reason why the Egyptian Constitution does not require a Muslim to hold its highest office in the same way Tunisia’s did. However, the Tunisian Constitution also did not center the Shari’a as its source of law. This appears to indicate while the Constitution acknowledged there are non-Muslims in Egypt, it further emphasized that the character of the state will remain Muslim.

What makes these constitutions particularly notable is that these were drafted and enforced under Presidents who embraced secularism. Both countries’ leaders outlawed Islamists from wielding political power and undermined Islamic religious leaders to maintain their own authority. This is most evidently seen under the reign of Habib Bourguiba, who implemented policies such as the unified education system, which eliminated religious schooling.<sup>74</sup> Even making the “principles of Shari’a the principal source of law” in Egypt was itself a compromise. The role of the Shari’a in the 1971 Constitution was heavily debated, with some calling for the Shari’a to be the

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<sup>69</sup> *Id.* at art. XLVI.

<sup>70</sup> *Id.* at art. LXXIX.

<sup>71</sup> *Id.* at art. CXL.

<sup>72</sup> *Id.* at art. CLV.

<sup>73</sup> (1971) دستور جمهورية مصر العربية [CONSTITUTION] Sept. 11, 1971, *supra* note 65 at art. XC (Egypt).

<sup>74</sup> Marion Boulby, *The Islamic Challenge: Tunisia Since Independence*, 10 *THIRD WORLD Q.* 590, 592 (Apr. 1988).

main source of legislation.<sup>75</sup> One possible implication of this is that the Islamic references and requirements of these constitutions were not included to embrace Islam but rather to placate oppositions that could have formed serious political challenges to the governments of the time. These anti-Islamist attitudes will significantly impact the drafting processes of the post-Arab Spring constitutions, with specific articles introduced to counter decades of political repression.

## V. OVERVIEW OF THE 2014 TUNISIAN AND 2012 EGYPTIAN CONSTITUTIONS

The Arab Spring ushered in a new era of democracy, where, for the first time, civilians had input in how their nations' constitutions were formed. However, like many democracies in the world, these constitutional committees had to face the question of minority rights that may not be protected by majority rule. To deal with this question, the Tunisian and Egyptian constitutional committees took similar approaches in creating representative constitutional bodies. However, while Tunisia's assembly reflected a compromise in power between the secularists and the Islamists, the Egyptian assembly was dominated by the Islamists who did little in terms of concessions. This resulted in the Tunisian Constitution being better received than its Egyptian counterpart.

### A. 2014 Tunisian Constitution

In contrast to Egypt, the 2014 Tunisian Constitution resulted from a heavier compromise between the Islamist Ennahdha Party, the head of the government at the time, and the opposition forces.<sup>76</sup> The opposition forces were mainly comprised of the secular parties in Tunisia. The 2014 Tunisian Constitution is a product of this compromise and reflects many of the ideals that are important to both groups.

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<sup>75</sup> Gabriel R. Warburg, *Islam and Politics in Egypt: 1952-80*, 18 MIDDLE EASTERN STUDIES 131, 138 (Apr. 1982).

<sup>76</sup> Sarah Mersch, *Tunisia's Compromise Constitution*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Jan. 21, 2014), <https://perma.cc/QVL8-RQ65>.

## 1. The Arab and Muslim Identity of the State

The Preamble both affirms the republican and democratic civil state and the Arab-Muslim identity of the country.<sup>77</sup> The republican and democratic civil state is important to Islamists, as they were shut out of the political system for many decades, but also to secular groups who believed that their rights were threatened.

However, the references to the Arab and Muslim identity of the state from the 1959 Constitution remained. The 1st Article reaffirms this identity, stating, “Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican.”<sup>78</sup> It enforces the importance of this article by stating that “this article in particular is not allowed to be amended.”<sup>79</sup>

The Constitution also aimed to center the Arab-Muslim identity of Tunisia through other institutions, specifically its education system. The Constitution discusses the role of education in the 39th Article, explaining how it will instill the Arab-Muslim identity of the state in the youth through free public education.<sup>80</sup>

Like in its predecessor, the current Constitution recognizes the importance of the Arab-Muslim identity in the requirements for holding public office in Tunisia. In the 58th Article, the Constitution explicitly states that every member of the Assembly must take a religious oath, stating, “every member in the Assembly of the Representatives of the People shall, upon assuming their functions, swear the following oath: ‘I swear, by God Almighty, that I will diligently serve the nation, that I will respect the provisions of the Constitution, and that I will bear full allegiance to Tunisia.’”

The Constitution also clarifies that one must have been Muslim and Tunisian since birth to hold public office. It continues to uphold women’s rights by affirming the right of all women and men to stand for election.<sup>81</sup> Presidents,<sup>82</sup> Heads of Governments, and members<sup>83</sup> must still take oaths swearing to an “Almighty God” to take office. The President also has a role in appointing the General Mufti, or the final authority on Islamic law, in the

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<sup>77</sup> (٢٠١٤) دستور الجمهورية التونسية [CONSTITUTION] Jan. 26, 2014 (Tunis.).

<sup>78</sup> *Id.* at art. I.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at art. XXXIX.

<sup>81</sup> (٢٠١٤) دستور الجمهورية التونسية [CONSTITUTION] Jan. 26, 2014, *supra* note 77, at art. LXXIV (Tunis.).

<sup>82</sup> *Id.* at art. LXXXVI.

<sup>83</sup> *Id.* at art. LXXXIX.



country.<sup>84</sup> This shows the direct relationship that the State has in shaping Islamic law in the country through the office of the President. While this illustrates the lack of separation between mosque and state, it also shows that the President supersedes the power of the General Mufti and can almost be considered as a final arbiter of what is Islamic law in Tunisia. Lastly, the Tunisian Constitution did guarantee freedom of religion but prohibited apostasy.<sup>85</sup>

## 2. Women's Rights

One of the larger fears of the secular groups was that Islamist groups were going to call for interpretations of the faith that would limit the rights of women. Once again, the compromise between the Islamists and the secular groups is evident here.

There are many articles in the Constitution explicitly declaring men and women to be equal.<sup>86</sup> The 21st Article states that “all citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination.”<sup>87</sup> This explicit equivocation between men and women before the law is supported with additional text in the Article, stating that “the state guarantees freedoms and individual and collective rights to all citizens, and provides all citizens the conditions for a dignified life.”<sup>88</sup> Though this supplementary text is more general, it reaffirms the status of women by asserting that these freedoms and rights are afforded to all citizens.

There are other articles that also reinforce the equality between men and women in the 2014 Constitution. The 40th Article discusses the right to labor and women's rights within that right.<sup>89</sup> It also discusses the right to work and receiving a fair wage, stating “all citizens, male and female, shall have the right to decent working conditions and to a fair wage.”<sup>90</sup> The 46th Article specifically discusses the state's role in protecting women's rights, stating, “the state commits to protect women's accrued rights and work to strengthen and

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<sup>84</sup> *Id.* at art. LXXVIII.

<sup>85</sup> *Id.* at art. VI.

<sup>86</sup> دستور الجمهورية التونسية (٢٠١٤) [CONSTITUTION] Jan. 26, 2014, *supra* note 77 at art. XXI (Tunis).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* The Article states, “work is a right for every citizen, male and female” and “the state shall take the necessary measures to guarantee work on the basis of competence and fairness.”

<sup>89</sup> *Id.* at art. XL.

<sup>90</sup> دستور الجمهورية التونسية (٢٠١٤) [CONSTITUTION] Jan. 26, 2014, *supra* note 77 at art. XL (Tunis).

develop those rights.”<sup>91</sup> The Article goes on to say that “the state guarantees the equality of opportunities between women and men to have access to all levels of responsibility in all domains,” “the state works to attain parity between women and men in elected Assemblies,” and that “the state shall take all necessary measures in order to eradicate violence against women.”

These articles are generally understood as one of the most respectful of women’s statuses in the Arab World since the 1959 Constitution.<sup>92</sup> They represent a compromise not because these rights present a conflict for Islamists per se, but because there were fears by the secularists that women’s rights would be stripped in favor of stricter interpretations of Islam. The 2014 Constitution built on previous statutes passed by previous presidencies to support women’s rights, particularly the Personal Status Law (CSP) of former president Habib Bourguiba.<sup>93</sup> However, the status of women in that era was a statutory guarantee, not a constitutional one.

### 3. The New Human Rights Commission

In addition to the explicit provisions relating to women’s rights, the 2014 Constitution also included new provisions relating to human rights. In the 128th Article, the Constitution details the role of a new Human Rights Commission, stating that the Commission “oversees respect for, and promotion of, human freedoms and rights, and makes proposals to develop the human rights system. It must be consulted on draft laws that fall within the domain of its mandate.”<sup>94</sup> Additionally, “the Commission conducts investigations into violations of human rights with a view to resolving them or referring them to the competent authorities” and “the Commission shall be composed of independent and impartial members with competence and integrity.”<sup>95</sup> These final two clauses make this Article even more novel than its predecessor. The Constitution limits its discussion of a Human Rights Commission to its formation, term limits, function, and enforcement mechanisms. It signifies the state’s pursuit of a more concerted effort to uphold human rights embedded in the very document meant to frame the nation.

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<sup>91</sup> *Id.* at art. XLVI.

<sup>92</sup> Antonio-Martín Porras-Gómez, *The New Arab Bills of Rights: A Study on the Constitutions of Egypt, Morocco and Tunisia*, 9 *GLOB. J. COMP. L.* 49, 71 (2020).

<sup>93</sup> (٢٠١٤) دستور الجمهورية التونسية [CONSTITUTION] Jan. 26, 2014, *supra* note 77 at art. XLV (Tunis).

<sup>94</sup> *Id.* at art. CXXVIII.

<sup>95</sup> (٢٠١٤) دستور الجمهورية التونسية [CONSTITUTION] Jan. 26, 2014, *supra* note 77 at art. CXXVIII. (Tunis).

Finally, in a phrase with a strong symbolic meaning, the Constitution ends with “And God is the guarantor of success.”<sup>96</sup> This phrase is not only common throughout the Muslim World but also affirms the vital role that Islam plays in framing the state.

## B. The 2012 Egyptian Constitution

As was previously mentioned, the Egyptian Constitution’s drafting process involved fewer compromises than the Tunisian one. Egypt also had a history of shutting out the Islamist parties from their political processes—in this case, the Muslim Brotherhood—and allowed them to return after the Arab Spring. However, even though there were secular political parties in Egypt, Egypt’s Coptic Church was also a political entity that opposed many of the Islamist’s positions. While some concessions were made, many of the Islamist coalition’s beliefs were reflected in the 2012 Constitutions.

### 1. The Arab and Muslim Identity of the State

The 1st Article of the 2012 Constitution starts by referencing Egypt's Arab Islamic identity. The 1st Article states, “the Arab Republic of Egypt is an independent sovereign state, united and indivisible, its system democratic. The Egyptian people are part of the Arab and Islamic nations, proud of belonging to the Nile Valley and Africa and of its Asian reach, a positive participant in human civilization.”<sup>97</sup>

Notably, the 1st Article of the 1971 Constitution only referenced the Arab identity of Egypt, stating, “the Arab Republic of Egypt is a democratic state based on citizenship. The Egyptian people are part of the Arab nation and work for the realization of its comprehensive unity.”<sup>98</sup> Though there were references to Islam in the 1971 Constitution, the inclusion in the very first article sets a strong tone about the new Islamism to be found in the Constitution and the Egyptian state.

The Constitution continues by stating that the principles of Islamic law are the main source of legislation, essentially the same language of the former Egyptian constitution.<sup>99</sup> Found in the 2nd Article, the text states that “Islam

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<sup>96</sup> *Id.* at art. CXLIX.

<sup>97</sup> دستور جمهورية مصر العربية (٢٠١٢) [Constitution] Dec. 26, 2012, art. I (Egypt).

<sup>98</sup> دستور جمهورية مصر العربية (١٩٧١) [CONSTITUTION] Sept. 11, 1971, *supra* note 65 (Egypt).

<sup>99</sup> *Id.* at art. II. *See also*, Stephanie McCrummen & Ingy Hassieb, *Egyptian Assembly Rushes to Vote on New Constitution*, THE WASHINGTON POST (Nov. 29, 2012), <https://perma.cc/D2R2-HHXL>.

is the religion of the state and Arabic its official language. The principles of Islamic Shari'a are the principal source of legislation."<sup>100</sup>

The Islamists added another article defining the principles of Shari'a in terms of Muslim Sunni jurisprudence.<sup>101</sup> This is elaborated on in the 219th Article, which states that "the principles of Islamic Sharia include general evidence, foundational rules, rules of jurisprudence, and credible sources accepted in Sunni doctrines and by the larger community."<sup>102</sup> This article is notable because it provides an explanation of what is considered to be the sources of law that the government can draw from. This not only has logical implications but also signifies the prominence of the Islamic Shari'a in the Egyptian state.

The 2012 Constitution underscores the importance of Islam in the Egyptian state by recognizing Al-Azhar, a notable religious institution<sup>103</sup> that has influence across the Muslim world, for the first time in an Egyptian Constitution. The 4th Article notably stated that Al-Azhar was an independent institution, whose Grand Sheikh was independent and Senior Scholars were appointed by law.<sup>104</sup>

This text is noteworthy because Al-Azhar previously could not openly contradict the government's actions without facing some sort of repression or scholars being removed from the institution entirely.<sup>105</sup> In some cases, scholars would reportedly issue *fatwas*, or religious decrees, at the instruction of the Egyptian government to enforce their position further.<sup>106</sup> Therefore, to

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<sup>100</sup> McCrummen & Hassieb, *supra* note 99; (٢٠١٢) دستور جمهورية مصر العربية [CONSTITUTION] Dec. 26, 2012, *supra* note 97 at art. II (Egypt).

<sup>101</sup> Michael Lipin, *Egypt's New Constitution: How it Differs from Old Version*, VOICE OF AMERICA NEWS (December 25, 2012), <https://perma.cc/NN98-62WF>.

<sup>102</sup> *See* (٢٠١٢) دستور جمهورية مصر العربية [CONSTITUTION] Dec. 26, 2012, *supra* note 97 at art. CCXIX (Egypt).

<sup>103</sup> Founded in the 1970s, Al-Azhar University is Egypt's oldest degree-granting institution and is known across the Muslim world as one of the most, if not the most, prestigious institutions of Islamic learning.

<sup>104</sup> (٢٠١٢) دستور جمهورية مصر العربية [CONSTITUTION] Dec. 26, 2012, *supra* note 97 at art. IV (Egypt). The article states, "Al-Azhar is an encompassing independent Islamic institution, with exclusive autonomy over its own affairs, responsible for preaching Islam, theology and the Arabic language in Egypt and the world. Al-Azhar Senior Scholars are to be consulted in matters pertaining to Islamic law. The post of Al-Azhar Grand Sheikh is independent and cannot be dismissed. The method of appointing the Grand Sheikh from among members of the Senior Scholars is to be determined by law. The State shall ensure sufficient funds for Al-Azhar to achieve its objectives. All of the above is subject to law regulations."

<sup>105</sup> *See* Steven Barraclough, *Al-Azhar: Between the Government and the Islamists*, 52 MIDDLE EAST J. 236 (1998).

<sup>106</sup> *Id.*

recognize the role of Al-Azhar, the independence of the Grand Sheikh, and give the institution full independence in appointing the Grand Sheikh, the state allows for a check on the Egyptian government that has never existed at the Constitutional level.

## 2. Women's Rights

The Islamists centered the role of the family as one of the important values of the 2012 Constitution, and that can be best seen in the 10th Article, which states that “the family is the basis of society and is based on religion, morality and patriotism” and that “the state and society oversee the commitment to the genuine character of the Egyptian family, its cohesion and stability, and the consolidation and protection of its moral values.”<sup>107</sup> However, the 81st Article, the limitations clause, limited all rights inconsistent with the Chapter on the State and Society in this Constitution, a chapter which included Article 10.<sup>108</sup>

The limiting position of this Article was concerning for some of the opposition, for it appeared to be very general. Some understood the Article to mean that it could limit the rights of women, as women are perceived to have a primary role raising the children and maintaining the family. This concern was present even though Article 10 guaranteed maternal and child services free of charge and support for the reconciliation between the duties of a woman toward her family and her work.<sup>109</sup>

The concern for women's rights extended to the fact that the new Constitution no longer forbids discrimination based on gender, but calls for freedom from discrimination generally.<sup>110</sup> This was considered to be a blow for women's rights, as there was an implication that explicitly recognizing women's rights, particularly as a group that has historically been oppressed, was no longer a priority, and in particular, not a priority that outweighed objectives recognized in the Constitution like ‘maintaining the family.’

While Article 10 affirms the right to health services and that a woman has a right to work, the value of these rights—and later the limitation of them—stems from the role of the woman in the family. It is also the same issues raised by the 81st Article, regarding what health coverage is provided for women who are yet to be mothers or choose not to be. The state offers benefits to female breadwinners, divorced women, and widows, but those

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<sup>107</sup> (٢٠١٢) دستور جمهورية مصر العربية [CONSTITUTION] Dec. 26, 2012, *supra* note 97 at art. X (Egypt).

<sup>108</sup> *Id.* at art. LXXXI.

<sup>109</sup> *Id.* at art. X.

<sup>110</sup> *Id.* at art. XXX.

rights seem to be afforded to those who possess or have attempted to create a nuclear family. It is also unclear what the special care and protection entails.

It should be noted that this language from the 10th Article is very similar to that of the 1971 Constitution, which also cited the family as the central unit, with two additional articles that also seek to protect women's rights, although the latter focuses on women's right as it relates to Islamic jurisprudence. The 9th Article states, "the family is the basis of the society and is founded on religion, morality and patriotism. The state is keen to preserve the genuine character of the Egyptian family— together with the values and traditions it embodies—while affirming and developing this character in the relations within the Egyptian society."<sup>111</sup> The difference here was that the state recognized in 2012 the right to maternal and healthcare and offered special benefits to female breadwinners, divorced women, and widows.

The large divergence between the two Constitutions comes from the elimination of the 11th Article. The Article in question states, "the State shall guarantee harmonization between the duties of woman towards the family and her work in the society, ensuring her equality status with man in fields of political, social, cultural and economic life without violation of the rules of Islamic jurisprudence."<sup>112</sup> As previously mentioned, the drafters felt that it was sufficient to guarantee equality to all people, rather than to explicitly guarantee that right to women. This exclusion is especially interesting as the previous Constitution sought to grant these principles without violating the rules of Islamic jurisprudence, so it is unclear why the 2012 drafters thought it would not fit in the new Constitution.

### 3. Religious Freedom

Regarding freedom of religion, only the believers of Islam, Christianity, and Judaism are guaranteed freedom of worship.<sup>113</sup> The 43rd Article states that "freedom of belief is an inviolable right. The State shall guarantee the freedom to practice religious rites and to establish places of worship for the divine religions, as regulated by law."<sup>114</sup> Here, it is important to note that the divine religions are considered by the drafters to be only Islam, Christianity, and Judaism. As previously noted, there are minority faith groups that are not considered to belong to any of these three faiths, so they are not afforded the same religious protections as those who are Muslim, Christian, or Jewish.

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<sup>111</sup> (١٩٧١) دستور جمهورية مصر العربية [CONSTITUTION] (Egypt), *supra* note 65 at art. IX.

<sup>112</sup> *Id.* at art. XI.

<sup>113</sup> (٢٠١٢) دستور جمهورية مصر العربية [CONSTITUTION] Dec. 26, 2012, *supra* note 97 at art. XLIII (Egypt).

<sup>114</sup> *Id.*

In addition to guaranteeing their freedom of worship, the Constitution also recognizes that the sources of law for Egyptian Christians and Jews are their own. The 3rd Article states that the “canon principles of Egyptian Christians and Jews are the main source of legislation for their personal status laws, religious affairs, and the selection of their spiritual leaders.”<sup>115</sup> However, once again, minority faiths are not recognized to have their own sources of legislation, which not only denies them the same rights, but also leaves open for interpretation which religious law they may be required to uphold. It should be noted that this was the first time the Egyptian Constitution acknowledges a freedom of worship.

#### 4. Right to Participate in Government

The 1971 Constitution forbade the formation of religious parties. The 5th and 6th Articles of the 2012 Constitution specifically addresses this previous prohibition, expressly permitting religious political parties and bans discrimination based on religion.<sup>116</sup>

These Articles not only reflect the sociopolitical movements that allowed Islamist parties to engage in government and lead the drafting of the Constitution, but also demonstrated how a democratic system in Egypt could not exist with the exclusion of religious parties, which previously led to the exile of many members of the Muslim Brotherhood.

#### 5. Enforcement of Rights Violations

One of the other additions to the 2012 Constitution was that it provided an enforcement mechanism for the first time for rights violations. The 80th Article states that any rights violations would be a criminal offense which The National Council for Human Rights shall inform the Public Prosecution of.<sup>117</sup> This Article not only lays out a path for someone to hold a person or an entity accountable for violating their rights but also signals that the Constitution values the rights mentioned enough to set out a procedure for their protection.

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<sup>115</sup> *Id.* at art. III.

<sup>116</sup> *Id.* at art. V. The Article states, “Citizens have the right to establish political parties according to the law and no political activity shall be exercised nor political parties established on a religious referential authority, on a religious basis or on discrimination on grounds of gender or origin.”; *Id.* at art. VI. This article states, “the political system is based on the principles of democracy and shura (counsel), citizenship (under which all citizens are equal in rights and duties), multi-party pluralism, peaceful transfer of power, separation of powers and the balance between them, the rule of law, and respect for human rights and freedoms; all as elaborated in the Constitution. No political party shall be formed that discriminates on the basis of gender, origin or religion.”

<sup>117</sup> *Id.* at art. LXXX.

## VI. 2014 TUNISIAN AND 2012 EGYPTIAN CONSTITUTIONS COMPARISONS

While there are textual differences between the Tunisian and Egyptian post-Arab Spring Constitutions, there were also differences in how the two were drafted, implemented, and enforced. This section explains the key differences between the two constitutions in these processes and how they impacted the reception and understanding of the constitutions.

### A. The Drafting Process

In the process of drafting the 2014 Constitution, Tunisia was lauded for the transparent and participatory way in which its National Constituent Assembly drafted the document over the course of two years.<sup>118</sup> In particular, Tunisia was praised for the compromises made by all involved parties. While these compromises were praised as an example of negotiation, Ennahda's position was 'softened' by the violent clashes between the Muslim Brotherhood and the military in nearby Egypt.<sup>119</sup>

The drafting processes themselves were also different in terms of their starting points. Tunisia elected to start from scratch, altogether abandoning its 1959 Constitution.<sup>120</sup> Egypt, on the other hand, ploughed through several amendments to its 2012 Constitution during six months of political turmoil and violence.<sup>121</sup> Egypt attempted to build its Constitution from the 1971 Constitution.<sup>122</sup> As Zaid Al-Ali notes, "[t]he effect is that while the new constitution claims to be a product of the people's will, it is heavily influenced by the preceding decades of autocratic rule."<sup>123</sup> The result, according to Noha Aboueldahab, is a mix of the preservation of legal loopholes from previous constitutions, the creation of new loopholes, and the elimination of only a few.<sup>124</sup>

Reflecting a growing norm for constitutions to uphold fundamental rights, the Tunisian and Egyptian people also wanted human and civil rights protections. In her report, Melek Saral noted that "human rights became the number one political and social topic in the country, and post-uprising Tunisia

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<sup>118</sup> Noha Aboueldahab, *A Tale of Two Constitutions: The Divergent Paths of Egypt and Tunisia*, E-INT'L RELATIONS (Feb. 17, 2014), <https://perma.cc/E34E-SR5P>.

<sup>119</sup> *Id.*

<sup>120</sup> Aboueldahab, *supra* note 118.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Aboueldahab, *supra* note 118.



experienced an extensive use of rights discourse, regardless of ideology or religious differences.”<sup>125</sup> These ideals became central to how Tunisians and Egyptians viewed the constitutional process and what rights citizens and political party members wanted to see imbued in them.

## B. Implementation of the Constitutions

In addition to the drafting process and its final product, a constitution's actual implementation and enforcement can render a different meaning altogether for its individual articles. Tunisia had seven years after the Constitution was promulgated to put the document into practice. Egypt had one. Both countries faced various obstacles to fully enforcing their constitutions. However, there were some developments that indicated how the rule of law changed in both countries after promulgation.

### 1. Tunisia

Both countries suffered from the inability to implement their respective constitutions properly. In Tunisia, the Constitutional Court, which would have enforced the provisions of the Constitution, was unable to be formed; by March 2019, the Parliament had met five times to elect members of the Court but failed because of “a lack of consensus between the parliamentary blocs and the party members.”<sup>126</sup>

This has translated, for example, into claims of the government’s inability to enforce religious freedom provisions. In an act to protest these laws, some individuals attempted to break their fast during the day in public during Ramadan. Though not a crime in Tunisia, there have been men who broke their fast and smoked in public and received one-month jail terms.<sup>127</sup> However, despite these experiences, many have praised the Tunisian Constitution for its protection of women’s rights, and there has been hope that entities like the Human Rights Commission can serve to protect these rights and freedoms. Tunisia improved on many indices regarding its freedom and human rights metrics. For example, two years after the protests began, “Freedom House upgraded Tunisia’s status from ‘Not Free’ to ‘Partly Free’ because of its significantly improved human rights record.”<sup>128</sup> These are signs that even though there have not been direct Constitutional Court

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<sup>125</sup> Melek Saral, *The Protection of Human Rights in Transitional Tunisia*, MUSLIM WORLD J. OF HUM. RTS. (Oct. 19, 2019), <https://perma.cc/NFF9-A4PJ>.

<sup>126</sup> *Tunisia: Ennabda Movement Calls for Constitutional Court Amendment*, MIDDLE EAST MONITOR (July 2, 2019), <https://perma.cc/P698-HSYR>.

<sup>127</sup> Conor Gaffey, *To Fast or to Eat? These Tunisian Protesters Want the Right to Do Either During Ramadan*, NEWSWEEK (June 12, 2017), <https://perma.cc/VV69-SFV6>.

<sup>128</sup> Saral, *supra* note 125.

enforcements, there has been a positive change in how the government has approached protecting the human and minority rights enumerated in the Constitution.

## 2. Egypt

The developments in Egypt were much less positive than those in Tunisia regarding the implementation and enforcement of the 2012 Constitution. The Egyptian Constitution was superseded in 2014 following a military coup in 2013 that put the Muslim Brotherhood and Mohamed Morsi out of power.<sup>129</sup> Given how short the Constitution lasted and the tumultuous period that followed, very few cases that can be observed where the Constitution could be applied, let alone in the realm of human and minority rights. However, organizations like Human Rights Watch raised concerns about how the Constitution could be implemented.

Firstly, there was concern that rights protections were limited, as rights and freedom of religion were limited so far as they did not contradict the principles set out in the Constitution's Chapter on State and Society.<sup>130</sup> There were also concerns regarding the State's commitment to make the Egyptian family the center of the state.<sup>131</sup> The Constitution did not clarify how broad the state's power would be concerning family rights and to what extent other rights could be limited.

Secondly, there was concern about limited protection for religious minority groups, as the Constitution only guaranteed religious rights for Muslims, Christians, and Jews. This is important to consider in the context of Egyptian history of discriminating against these much smaller religious minorities, like Egyptian Bahá'ís. Additionally, under formerly deposed President Hosni Mubarak, security forces would frequently arrest religious minorities, including Shias, Ahmadis, and Quranists.<sup>132</sup> This is particularly notable as these groups classify themselves as Muslims, but they were not granted their full religious rights. So, there is an additional question of how minority sects in these faith groups would be treated.

Lastly, though there were concerns about women's rights within this nuclear family centered paradigm, there were positive developments for women's rights during the drafting process. The final draft of the 2012 Constitution no longer included draft articles that stipulated that equality for

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<sup>129</sup> Ben Wedeman et al., *Coup Topples Egypt's Morsy; Deposed President under 'House Arrest'*, CNN WORLD (July 3, 2017), <https://perma.cc/2KAP-D23R>.

<sup>130</sup> *Egypt: New Constitution Mixed on Support of Rights*, HUM. RTS. WATCH (Nov. 30, 2012), <https://perma.cc/MC4A-9QPV>.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

women would be subject to conformity with rulings of Islamic law, a provision strongly promoted by Salafi members of the assembly who had more conservative views on women's rights. However, it has become a very generalist provision referring to all citizens. So, there is an argument that the generalist provision could have been interpreted more favorably should the Constitution have been enforced.

### C. Positives and Negatives of the Tunisian and Egyptian Constitutions

There is not a large variation between most of the articles when comparing each country's constitution to its own previous iteration. However, what can be seen across a few of the constitutions' articles is a strengthening of the position of Islam. For one, rarely do articles disallow other faiths or practice groups; however, all the constitutions strongly emphasize the Arab-Muslim identity of the state. Like their predecessors, the 2014 Tunisian and 2012 Egyptian Constitutions both named Islam as the religion of the state and required government officials to take Islam-based oaths. In Tunisia, the President had to be Muslim, or they could not take office. Both countries made the people the guardians of the faith and though they guaranteed religious freedoms, Islamic law still served as a limiting principle. In Tunisia, the Constitution does recognize religious freedom protections; however, it comes in contrast to the prohibition of apostasy.<sup>133</sup> In Egypt, the basis of all law is the Islamic Shari'a, which formally also does not allow apostasy. While it is unclear how these laws will be enforced, it is worth noting how these constitutional provisions could potentially contradict.

However, the global movement of fundamental rights recognition in modern constitutions certainly did not leave Egypt and Tunisia disaffected. Despite their contradictions, Tunisia and Egypt both recognized religious freedom rights, though Egypt's rights were more limited as they only extended in full to Muslims, Christians, and Jews. Tunisia has been praised for protecting women's rights, with its Constitution not only protecting previously recognized rights but also promising to promote the development of those rights. The Egyptian Constitution generally acknowledged that all citizens were equal under the Constitution—a compromise after wanting to include an article stating that women's rights could not contradict Islamic jurisprudence. However, other women's rights provisions were tied to that of the family, such as maternal healthcare and rights that divorced, widows, or female breadwinners had in the state.

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<sup>133</sup> (٢٠١٤) دستور الجمهورية التونسية [CONSTITUTION] Jan. 26, 2014, *supra* note 77 at art. VI (Tunis).

In terms of ethnic minorities, both Constitutions affirmed the Arab identity of the state. The Egyptian Constitution went further, recognizing the country's position among the broader Muslim world and the African continent, but did not recognize the Nubian ethnic group, for example.

However, the most significant test for the enforcement of these provisions and how women and minority groups would have been affected has never truly been actualized in Egypt and was never scrutinized by a constitutional court in Tunisia. Given that the Egyptian Constitution was short-lived, it is hard to analyze its enforcement. Tunisia's lack of a constitutional court made it difficult to see how court decisions would have challenged or affirmed the Constitution. However, Tunisia experienced a rise in its freedom ratings and improvement in the protection of fundamental rights.

## VII. CONCLUSION

This Comment provides a detailed analysis of all the provisions that explicitly or implicitly discuss the rights of religious minorities, women, and non-Arabs. It showed the problems that the Tunisian and Egyptian governments, represented by elected bodies, conceived of and drafted their respective constitutions. This Comment sought to consider how states that claim a religion, particularly Islam, as the state's religion should consider women and minority rights in their constitutions. With a growing interest in protecting fundamental rights, more citizens are looking to see those rights protected in their constitutions, particularly by those not adherent to the faith or susceptible to interpretations that limit their rights, like women. Though these lessons cannot be implemented currently in Tunisia, Egypt, or the broader Arab and Muslim World, this Comment provides more information on how to consider rewriting or amending constitutions should new opportunities for democracies arise. The recent 2019 revolutions and democracy movements in Sudan and Algeria, and the collapse of the al-Assad regime may prove that the current Arab Winter may become Spring again.