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UCLA Journal of Islamic and Near Eastern Law

Title

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Permalink

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Journal

UCLA Journal of Islamic and Near Eastern Law, 15(1)

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Publication Date

2016

DOI

10.5070/N4151032025

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EARLY MODERN CONSTITUTIONALISM IN EGYPT AND IRAN

Mina E. Khalil

There is a growing debate amongst comparative legal scholars and historians regarding the secular nature of the earliest articulations of Middle East constitutions written during the late nineteenth and early twentieth centuries. Saïd Arjomand, for example, argues that these first instantiations, unlike their later twentieth-century counterparts, were not ‘ideological’ or ‘Islamic’ in nature, but rather politically bargained for between different interest groups, including Westernized political elites, religious scholars (the *‘ulema*), and of course, the already existing rulers.¹ Relying on his reading of Iran’s first modern constitution written in 1906, Arjomand further postulates that “Islam” only *limited* state action during this early stage of Middle East “constitution-making”; it did not define it as would come to pass in later stages. In contrast, Janet Afary, in her comprehensive historical study of the “Constitutional Revolution” leading to and following Iran’s 1906 Constitution, argues for the ideological nature of this document and the competition between its actors, who existed along a varied ideological spectrum from merchants to secularists to ‘religious dissidents’ to Iran’s well-established and influential orthodox *‘ulema*.²

While these scholarly debates are fruitful in understanding these early Middle East constitutions in the context of their socio-political history and their specific language, they tend to miss at least three points central to constitutionalism: a philosophical, a political, and a constitutional (or constitutional design) point. First,

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1. Saïd A. Arjomand, *Islam and Constitutionalism since the Nineteenth Century: the Significance and Peculiarities of Iran*, in CONSTITUTIONAL POLITICS IN THE MIDDLE EAST 33-62 (2008); see also SAÏD A. ARJOMAND & NATHAN J. BROWN, THE RULE OF LAW, ISLAM, AND CONSTITUTIONAL POLITICS IN EGYPT AND IRAN 1-13 (2013).
2. JANET AFARY, THE IRANIAN CONSTITUTIONAL REVOLUTION, 1906-1911: GRASSROOTS DEMOCRACY, SOCIAL DEMOCRACY, AND THE ORIGINS OF FEMINISM (1996). Committed to reconstructing this early constitutional period, Afary begins her study by describing the public execution of religious cleric Shaikh Fazlullah Nuri in 1909 after he briefly introduced a supplementary “Article 2” to Iran’s new constitution (*mashruteh*) that required all state laws promulgated by the newly established National Consultative Assembly (*Majlis*) to conform to “Islamic *shari’at* laws” (or simply, the *shari’a*). While this short-lived early Iranian articulation of Article 2 was not the first appearance of religious limits placed on secular state power in the Middle East, it nevertheless, as Afary argues, became an ideological harbinger for later Middle East constitutions not only in Iran, but also in Egypt and eventually almost every Arab nation, in the later twentieth-century.

philosophically, constitutions are ideologically, especially the modern Western constitutions that these early Middle Eastern drafters were emulating or pressured to emulate in the late nineteenth and early twentieth centuries.³ Modern constitutions are ideological in so far as they are committed to a *liberal democratic* notion of limiting absolute state power (irrespective of whether this power is based on secular or religious notions) through rule of law and principles of freedom and equality.⁴ Second, politically, constitutionalism is predicated on state sovereignty: a truism that seems to evade discussions of these early Middle East constitutions. It is hard to imagine a modern constitution leading to the kind of government “of the people, by the people, and for the people” that limits absolute state power if the people are themselves colonized (as the case was for Egypt) or if their politics are controlled by foreign powers (as the case was for Iran).⁵ Third, even when they are colored with principles of liberty and equality, constitutions must still be interpreted and applied to specific laws in order to determine these laws’ constitutionality and to limit the abuse of power.⁶ The

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3. RIFA’A RAFI’AL-TAHTAWI, *AN IMAM IN PARIS* (Daniel L. Newman trans., 2011). In his pivotal description of French society and its constitutional system, the Egyptian religious scholar Rifa’a Rafi’ al-Tahtawī (1801-1873) introduced the relatively new constitutional principles of limited government, liberty, and equality, to his Egyptian readers in the nineteenth century. These ideals, as articulated by al-Tahtawi in Arabic, would in turn become crucial for further articulations of indigenous constitutional systems. At the same time (as discussed further in Footnote 12), al-Tahtawi’s analysis in this work also drew from other ideals of government already extant in the Middle East, not only from the Enlightenment ideals of liberal constitutionalism.
 4. H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 66* (Douglas Greenberg, Stanley N. Katz, et. al. eds., 1993). Okoth-Ogendo identifies a dominant “ideological” view, grounded in the “liberal democratic tradition,” and held especially amongst Western legal scholars, that “the primary function of a constitution is to limit governmental authority and to regulate political processes in the state.” This view, he acknowledges, has subsequently contributed to a “distressing lack of interest in African constitutions.” There appears to be a similar lack of interest in studying the earliest Middle Eastern constitutions, even though the drafters of these constitutions were influenced—both intellectually and politically—by the “liberal democratic tradition,” which saw a fierce debate of its Enlightenment ideals in the process of its translation from Europe to the Middle East.
 5. See TIMOTHY MITCHELL, *COLONIZING EGYPT* (1991); see also FIROOZEH KASHANI-SABET, *FRONTIER FICTIONS: SHAPING THE IRANIAN NATION, 1804-1946* (1999). This American formula of democratic government “of the people, by the people, and for the people,” first articulated in Abraham Lincoln’s famous Gettysburg Address on 19 November 1863, existed during the turn of the nineteenth century when significant political and legal reforms were beginning to take place in the Middle East. Although American notions of democracy do not seem to have heavily influenced Middle East legal reformers who remained within the British and French imperial spheres of influence during this time, American democracy began to be discussed in the Middle East after the First World War, particularly in Egypt when the American University in Cairo was built in 1919, the same year of the Egyptian Revolution and several years before the 1923 Egyptian Constitution.
 6. While it is important to look at constitutional law and courts as foci of legal reform in the Middle East, it is important to avoid associating important civil legal reforms only with constitutional principles and their adjudication, in turn neglecting public, including administrative law, as a viable mechanism of legal reform. In the late Ottoman Empire and Iran, this examining also the individual Tanzimat reforms of 1839 and 1856 alongside the seminal constitutional documents discussed in this paper. See MARTIN SHAPIRO AND ALEC STONE SWEET, *ON LAW, POLITICS AND JUDICIALIZATION* (2002).

basic question of constitutional design regarding the authority over interpretation is hardly addressed in this stage of Middle East constitutionalism.

With these three separate points in mind, the early articulations of Middle East constitutions, therefore, appear to be aspirational to, rather than actually constitutive of, a new ‘liberal democratic’ political order in spite of the labels that may otherwise be attributed to them. Nevertheless, they are worth studying in order to point to both continuities and discontinuities within normative legal systems in the Middle East. These earlier constitutions are also worth studying because even if they did not bring about a complete transformation of existing political systems, they nevertheless enshrined significant legal and social changes, including social and property reforms, that had already begun to take place prior to them in the Ottoman and Qajar dynasties during the early and mid-nineteenth century. Finally, these documents, even if they may not have transformed the lives of the ordinary person living in Middle East states, are still reflective of a milieu of political and legal elites in the early twentieth century—a milieu that in fact exhibited more liberal and secular (if not Western) inclinations than the political systems that preceded them or even those that would later shape the Middle East.⁷

However, the composition of political elites who influenced the drafting of these early constitutions was not the same across the Middle East.⁸ While Egyptian and Iranian political elites both confronted imperial powers, at times defiantly and at other times sycophantically, while drafting their first constitutions, the constitutional monarchies that they struggled to erect were also shaped by the their own distinct interests and political philosophies as much as by their nations’ different histories.⁹ Ignoring this latter point and simply reading these early constitutions through a single focal (‘Islamic’) or bifocal (Sunni and Shi’a, or Arab and Persian) *civilizational* lens would be too reductionist and akin to conflating American and French constitutionalism as “Western constitutionalism.” Nonetheless, Egyptian and Iranian constitutional drafters shared similar reference points, as they looked to the early Ottoman

7. Women, for example, following a global legal trend remained disenfranchised under these early Middle East constitutions. And some religious minorities, particularly in Iran, were prevented from holding ministerial positions in the parliamentary bodies created by some of these early constitutions. Moreover, while slavery was formally abolished in the Middle East at the end of the nineteenth century and while abolition in Egypt was a British condition for granting Egyptian independence and constitutionalism, the emancipation of slaves in the Ottoman and Persian empires was not fully addressed in these earlier Middle East constitutions, as slavery, for example, informally persisted in Egypt and the Sudan (the explicit subjects of the 1923 Constitution).
8. The constitutional politics of Egypt and Iran (or ‘Persia’, as it was called at the time), the largest Arab Sunni and Persian Shi’a nations, respectively, were influenced by different kinds of political elites—with the *‘ulema* undoubtedly playing a larger role in the drafting of Iran’s 1906 Constitution than they did in Egypt’s 1923 Constitution, written a year after its nominal (or legal) independence from British colonial (or ‘protectorate’) rule even though the British remained in control of Egyptian politics.
9. Selma Botman, *The Liberal Age, 1923-1952*, in *THE CAMBRIDGE HISTORY OF EGYPT: VOLUME II 285-308*, 285. (Ed. M. W. Daly, Cambridge: Cambridge UP, 1998). Botman points out: “In 1922, Britain granted Egypt formal independence, limited by four British-imposed conditions: the security of imperial communications, defense of Egypt against aggression, protection of foreign interests and minorities, and continued British administration of the Sudan.” *Id.* at 285.

(and Tunisian) constitutions and legal reforms written in the late nineteenth century, while emulating (or building upon) Western constitutionalism and giving life to new social and political ideas and practices in the Middle East.

In this paper, I will compare the Iranian Constitution of 1906 and the Egyptian Constitution of 1923 in the context of their specific socio-political histories and the Middle East legal systems in which they emerged. In Part One I will examine the theoretical underpinnings of these early Middle East constitutions in light of the theories of Muslim government that preceded them. In Part Two I will compare the political forces and actors underlying the drafting of these early constitutions, pointing to both similarities and differences in the composition of Iranian and Egyptian political elites in the late nineteenth and early twentieth centuries. In Part Three I will analyze these constitutional texts and their designs in light of their unique constitutional theories and respective drafters. The final part brings together this three-part comparison to draw some conclusions about this early stage of Middle East constitutionalism.

Therefore, this paper examines Egyptian and Iranian constitutional legal histories in the early twentieth century and understands them in the context of shifting legal and political landscapes taking place in the Middle East during this time.

TOWARDS A CONSTITUTIONAL THEORY

Scholarly debates exist on the nature of Egypt and Iran's early modern constitutions, but they also exist on the theories of government that preceded them. Some scholars have called attention to the persistent logic of government policy in the Middle East throughout time immemorial, noting a special relationship between the ruler and his subjects. Linda Darling, for example, examines this special relationship through her discussion of the "Circle of Justice," a concept which supposedly circumscribed the actions taken by Middle East rulers and the obligations imposed on their subjects.¹⁰ Darling contends that the Circle of Justice, as a *descriptive* theory of government, originated with the Persian emperor Khusrau I (d. 579) and was adopted by subsequent Islamic governments throughout the Middle East after the death of the Prophet Muhammad—also guiding the administrations of the Abbasid,¹¹ Ottoman,¹²

10. Simply put, the Circle of Justice is a descriptive theory of government whereby "[t]here can be no government without men, no men without money, no money without prosperity, and no prosperity without justice and good administration." Linda T. Darling, *Islamic Empires, the Ottoman Empire and the Circle of Justice*, in CONSTITUTIONAL POLITICS IN THE MIDDLE EAST 11-32, 11(2008).

11. *Id.* at 17. Darling gives the example of Abbasid chief justice Abu Yusuf under the rule of Harun al-Rashid, who "linked the caliph's dispensation of justice with accuracy and fairness in taxation, employing the concept of shepherd over the flocks of God, the responsibility of rulers for the welfare of their people and the resulting increase of the yield of the land tax (*kharaj*), and the prosperity of the subjects which came from the prevention of oppression and injustice. The Circle of Justice clearly lay behind these ideas, even though they were not explicitly attributed to the Persians." At the same time, the Abbasid jurist Abu'l-Ḥassan al-Mawardī makes clear in his famous *Al-Aḥkām al-Sultāniyya*, that the *kharaj* which was to be taken from non-Muslims was rationally derived from Islamic doctrine. He does not refer to the Circle of Justice as the justification for imposing this special tax on non-Muslims.

12. *Id.* at 27-28. Darling finally gives several examples of Ottoman legal reforms in the nineteenth century who borrowed from the Circle of Justice in justifying a constitutional theory of government,

and Safavid empires.¹³ Thereby, Darling postulates that “historically, most Muslim governments have been patterned not only on the example of Muhammad. . . . These monarchies preserved ancient traditions of political organization and ethics, adapting them to the needs of a Muslim state.”¹⁴

However, as important as it is in highlighting Middle Eastern governments’ reliance on pre-Islamic notions of justice to legitimize their rulers’ interests, Darling’s discussion of the theoretical limits of Middle East government does not fully account for the Islamic notions of justice that limited state action.¹⁵ The writings of the famous Abbasid Muslim jurist and scholar Abu’l-Ḥassan al-Māwardī (d. 1058) make these limitations clear. Although al-Māwardī used the Circle of Justice to “legitimize the Muslim ruler’s interventions into the regular judicial system by granting *mazalim* [or equity] decisions upon petitions by subjects who felt unjustly treated by the administration of courts,” his theory of a just Muslim government, or *siyāsa shar‘iyya*, depended on a commitment to the application of God’s law as prescribed by the schools of classical Islamic jurisprudence (*qāḍī’s fiqh*).¹⁶ And while al-Māwardī’s first articulation of *siyāsa shar‘iyya*, in his famous political treatise on government, saw further infusion of a ruler’s secular law (or positive law) with the Mamluk jurist Ibn Taymiyya (d. 1328) and even further secularization and rationalization under

including the famous Egyptian religious scholar Rifa‘a al-Tahtawi (1801-1873) who studied in Paris under the auspice of Muhammad Ali and witnessed the 1830 French Revolution. Darling contends: “The Egyptian social commentator Rifa‘a al-Tahtawi, in his report on his trip to Paris, began a description of French government by quoting the Circle [of Justice] [. . .] He evaluated the clauses of the French constitutional charter of 1814 against the Circle’s concept of justice, noting that the French observed justice through equality before the law: ‘What they hold dear and call liberty is what we call equity and justice, for to rule according to liberty means to establish equality through judgments and laws, so that the ruler cannot wrong anybody.’” Nevertheless, applying this secular version of the Circle of Justice to all the Sultan’s subjects (Muslims and non-Muslims alike), for al-Tahtawi, was not very simple. As Albert Hourani describes in *Arabic Thought in the Liberal Age, 1798-1939*: Al-Tahtawi saw Egypt as “part of the Islamic *umma*, but she has also been a separate *umma*, in ancient and modern times alike . . . Although Muslim, she is not exclusively so, for all who live in Egypt are part of the national community.” It becomes clear here as well that even though Western secular ideas definitely influenced Egyptian reformers, including religious scholars like al-Tahtawi, they were still quite attached to Islamic notions of justice and envisioned Egypt primarily as a Muslim state.

13. *Id.* at 22. Darling contends: “The early modern Ottoman (1299-1923), Safavid (1501-1722) and Mughal (1526-1867) dynasties were the inheritors of this process. For these later dynasties, the Circle of Justice was an integral part of the heritage of Islamic rulership which they had from prior regimes; they began their rule with the concept of the Circle of Justice rather than having to learn it later from their advisors like the earlier Turks and Mongols.”
14. *Id.* at 11.
15. Here, I am arguing that Islamic ‘notions of justice’ contributed significantly to, if not defined, a “theory of government” in which certain, exact obligations were owed to the ruler and a certain rights were also invested in his subjects.
16. Tilman J. Röder, *The Separation of Powers in Muslim Countries: Historical and Comparative Perspectives*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 321-372 (Rainer Grote and Tilman J. Röder eds., 2012); see also CLARK B. LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI‘A INTO EGYPTIAN CONSTITUTIONAL LAW 50 (2006) (explaining that “Under the theory of *siyāsa shar‘iyya*, a ruler can require his courts to find their rules of decision in a body of *fiqh*”, which will always be consistent with the universal rulings of the *shari‘a* and will, presumably, be beneficial for society).

Ottoman law (*qanun*), there was no point in the history of Muslim governments—even the most secular ones—where Islamic notions of justice did not, at least theoretically, ground the positive law.¹⁷ Even a cursory reading of Ottoman criminal law points to the retention of specific crimes traditionally punished under Islamic criminal jurisprudence (*hudud*), such as the offense of false accusation for fornication.¹⁸ But perhaps the most obvious continuity of Islamic notions of justice into modern Middle East legal regimes is the persisting treatment of non-Muslim minorities and the proffered Islamic justification for such treatment well into the nineteenth century.¹⁹ Notwithstanding the separation of powers between the ruler and the judiciary (*al-quḍā*) articulated by Muslim jurists and theorists, the treatment of minorities and attendant notions of equality and liberty became one of the major sticking points amongst scholars in adapting traditional theories of Islamic government to modern-day constitutionalism.

At the same time, some Middle East scholars argue that in spite of the classical Islamic separation of powers between the executive and the judiciary, no such political theory or subsequent rights derived from it actually came to define Middle East governments. Homa Katouzian contends that neither a political theory resembling a Western separation of powers nor a Lockean notion of individual property rights existed under the Qajar government in nineteenth-century Iran.²⁰ Rather, there was no logic underlying state action, which could only be defined as “arbitrary rule.”²¹ Katouzian further contends that despite the allocation of property from the Iranian state to individuals in the nineteenth century, individuals did not possess legal title or “automatic rights of bequest.”²² And while some families did end up holding title for generations, this occurred only if the state did not wish to intervene and transfer title to others.²³ Moreover, with regards to the notion of separation of powers in Iranian government, Katouzian also describes the illusion of an independent judiciary that

17. See also AL-MĀWARDĪ, ABU’L-HASSAN. *AL-AHKĀM AL-SULTĀNIYYA*. CAIRO: DAR AL-FIQR 51 (1983) (arguing that “As early as the eleventh century C.E., jurists such as al-Mawardi asserted that a caliph or his properly appointed political delegates could legitimately order his subjects to follow statutes applying rules that had not been developed by classical jurists applying their traditional methods of *ijtihad* [legal interpretation] or *taqlid* [legal precedent].”).

18. See COLIN IMBER, *EBU’S-SU’UD: THE ISLAMIC LEGAL TRADITION* (1997).

19. The question of equality for religious minorities marked early modern constitutional politics in the Middle East as it did classical Islamic jurisprudence. In Iran, for example, although equality of all subjects before the law was enshrined in the new constitution, non-Muslims and non-Persians (including former slaves) could not hold ministerial positions in the newly established parliamentary bodies. In Egypt, as the 240-page document “Collection of the Memoranda of the General Assembly” chronicling the debates on the drafting of the 1923 Constitution makes clear, the question of whether religious minorities would be given equal civil and political rights was fiercely debated, even if the latter were ultimately granted such rights (as enshrined in Article 3 of the 1923 Constitution). Nader Habib, *Once Upon a Time: Writing the Country’s First Constitution?*, 29 *AL-AHRAM WEEKLY* 109 (2012).

20. HOMA KATOZIAN, *STATE AND SOCIETY IN IRAN: THE ECLIPSE OF THE QAJARS AND THE EMERGENCE OF THE PAHLAVIS 1-20* (2000).

21. *Id.* at 1.

22. *Id.* at 2.

23. *Id.*

applied varied interpretations of Islamic jurisprudence but “only insofar as they did not conflict with the wishes of the state.”²⁴

Echoing Katouzian’s description of an arbitrary nineteenth-century Iranian government, some Ottoman legal scholars have similarly denied the existence of a separation of powers in the adjacent Ottoman Empire in which Egypt formally remained a province until 1914. In his legal historiographical study of the Ottoman jurist Ebu’s-su‘ud, Colin Imber acknowledges that a judiciary did independently apply Ottoman law (*qanun*), yet he ultimately contends that “[w]hat gave Ottoman legal practice its unity was the authority of the Sultan. Anyone who exercised legal power, whether Muslim judges, Christian ecclesiastics, rabbis or secular governors, did so by virtue of appointment by the Sultan, from whom all authority in the Empire flowed.”²⁵ And while Egypt exhibited a unique bureaucratization in its adjudication and application of an evolving Egyptian law, it is hard to deny the persistence through the nineteenth century of a vertical constitutional structure of government in which political and legal authority was the sole prerogative of the ruler.²⁶

However, despite the increasing secularization of Iranian and Ottoman Egyptian laws throughout the nineteenth century, Katouzian and Imber fail to fully acknowledge the extent of the embeddedness of Iranian and Egyptian legal systems within Islamic notions of law and justice. Accordingly, Katouzian seems to discount the role of Islamic law (*shari‘a*) in shaping the nature of Iranian law because of what he perceives as its arbitrariness or lack of “systemic interpretation” compared to Western (or European) models.²⁷ Yet the application of different interpretations of Islamic law to specific cases does not make the application of law itself arbitrary. If that were the case, then almost all modern constitutional legal systems would be arbitrary as judges (even those sitting on the same bench) routinely disagree on the correct interpretation of the same law.²⁸ Imber similarly discounts the role of *shari‘a* in molding a separate system of Ottoman secular law (*qanun*), claiming “occasional similarities between *qanun* and *shari‘a* are, however, entirely superficial, the result of sporadic efforts by the compilers of the *qanun* to bring it into the sphere of the Holy Law. In reality, the *two systems of law* [emphasis added] had grown up independently of one another.”²⁹ From a constitutional standpoint, however, since the *shari‘a* “reached its maturity two centuries before the emergence of the Ottoman Empire” and even “influenced the substance of the *qanun*,” Islamic notions of law and justice did in fact ground Ottoman state actions despite increasing secularization and bureaucratization through the modern period.³⁰

Whether Egyptian Ottoman governors and Persian kings felt beholden to the *shari‘a* in defining their respective countries’ legal systems out of personal conviction

24. *Id.* at 5.

25. Imber, *supra* note 18, at 6.

26. Khaled Fahmy & Rudolph Peters, *The Legal History of Ottoman Egypt*, in 6 ISLAMIC LAW AND SOCIETY 129-135 (1999).

27. KATOUZIAN, *supra* note 20, at 5.

28. JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

29. IMBER, *supra* note 18, at 51.

30. *Id.*

or a desire to appear legitimate in the eyes of their Muslim subjects or influential *'ulema*, the political systems that Egyptian and Iranian reformers inherited in the late nineteenth and early twentieth centuries can be described as secularizing Islamic monarchies.³¹ Compared to Iran, the speed of secularization in Egypt appears to have been faster with a mixed court system replacing the traditional *shari'a* court system established in 1876 along with a new French-modeled Civil Code.³² One year into British occupation, Egypt—officially still part of the Ottoman Empire—erected a national court system and another Civil Code in 1883.³³ These secular legal reforms dovetailed earlier legal reforms ushering in new notions of equality between Muslim and non-Muslim Ottoman *subjects*, manifested in Muhammad Ali's Egypt as early as the 1820s and again in 1856 across the Ottoman Empire, thereby abolishing the Islamic *jizya* tax traditionally paid by Egyptian non-Muslims.³⁴ Despite these important constitutive changes, the Arabic word for 'constitution' (*dustur*) did not appear in Egypt until the drafting of its 1923 Constitution.³⁵ Similarly in Iran, the Persian word for 'constitution' (*mashruteh*) or 'legality' (*qanuniyat*) did not replace the traditional framework between the ruler and his subjects (*estebdad*) until the drafting of Iran's 1906 Constitution.³⁶

The ideas that eventually defined the first Iranian *mashruteh* and the first Egyptian *dustur* originated in a political context in which Egyptians and Iranians legally remained as subjects of their Muslim rulers. The idea of redefining this traditional relationship and shifting the powers of legislation to the subjects met resistance not

31. It is important to recognize this as the political context in which Egypt and Iran's first constitutional reformers and drafters negotiated power in order to appreciate the magnitude of the notions they introduced in their nations' foundational documents, but also to understand the continuity of the text of these documents within already existing political and legal systems.
32. T. Khattab, *Civil Law, in EGYPT AND ITS LAWS* 1-17 (Nathalie Bernard-Maugiron & Baudouin Dupret eds., 2002).
33. Nathalie Bernard-Maugiron & Baudouin Dupret, *A General Presentation of Law and Judicial Bodies, in EGYPT AND ITS LAWS* xxiv-lii (2002). Dupret and Bernard-Maugiron describe the mixed-court system in the late nineteenth Egypt as "complex: mixed codes were applied by the Mixed Courts and national codes by the National Courts, Islamic *shari'a* was applied by the *shari'a* courts, religious provisions of the different non-Muslim communities were applied by their respective religious councils in personal status matters and foreign law was applied in certain cases by the consular courts."
34. EUGENE ROGAN, *THE ARABS: A HISTORY* 92 (2009) ("The Ottomans were not the first Muslim rulers to decree equality between Muslims, Christians, and Jews. Muhammad 'Ali had done this in Egypt in the 1820s; however, this earlier decree had more to do with Muhammad 'Ali's wish to tax and conscript all Egyptians on an equal basis, without distinction by religion, than with any concern to liberate minority communities."); see also Thomas Philipp, *Copts and Other Minorities in the Development of the Egyptian Nation-State, in EGYPT FROM MONARCHY TO REPUBLIC: A REASSESSMENT OF REVOLUTION AND CHANGE* 131-150 (Shimon Shamir ed., 1995) (Philipp explains: "The abolition of the obligation to pay *jizya* in 1855 is commonly considered to have formalized [Copts'] full integration into Egyptian society. . . Yet, the relations between Copts and Muslims, and between Copts and the state, were not quite as harmonious as some writers have suggested.").
35. Adel Sherif, *Constitutional Law, in EGYPT AND ITS LAWS* 315-324 (Nathalie Bernard-Maugiron and Baudouin Dupret eds., Kluwer Law International, 2002) (Sherif clarifies: "Egypt came to know the word 'Constitution' with the promulgation of the first Egyptian Constitution on 29 April 1923. There had been, however, since the era of Muhammad Ali, organic laws dealing with the regulation of some aspects of the system of government.").
36. Arjomand, *supra* note 1, at 35.

only from the existing rulers, but also from the *'ulema* who generally saw a more democratic (or secular) political system as encroaching on their traditional authority to interpret and apply Islamic law—or at least what part of it remained enforceable within an increasingly secularizing legal system.³⁷ In Iran, for example, where the traditional *'ulema* still held their sway, the pan-Islamist Sayyid Jamal al-Din Asadabadi (1839-1897), well known outside his native Iran as al-Afghani, questioned the extent of Western secularization across Muslim governments, insisting that Islamic notions of law and justice govern the latter.³⁸ His Egyptian student and confidant Muhammad Abduh (1849-1905) who would become Grand Mufti of Egypt, even though he was not theoretically opposed to the secularization that took place in Ottoman Egyptian law during his time, also warned against 'blind secularization' and insisted upon the traditional reliance on the *'ulema* to determine whether *qanun* embraced divine prescriptions and prohibitions articulated, or articulable, in the *shari'a*.³⁹ While neither Asadabadi nor Abduh lived to witness the promulgation of the first Iranian or Egyptian constitutions, their ideas nevertheless influenced later thinkers who would criticize what they viewed as the Western imposition of secular notions of constitutional government on traditional understanding of Muslim government constrained by divine law.

Still, while some reformers like Asadabadi and Abduh took issue with the rapid secularization of Middle East governments, other Iranian and Egyptian thinkers took issue with these governments' monarchial or religious form. By the late nineteenth century, Western models had already influenced the significant Ottoman legal reforms, known as the *Tanzimat* reforms, as well as the drafting of the short-lived Tunisian Constitution of 1876 and the Ottoman Constitution of 1876—the so-called "first wave" of Middle East constitutions.⁴⁰ While establishing a secular parliamentary body to limit the absolute power of the monarch and enshrining the principle of equality between subjects under the law, these earliest Middle East constitutions still preserved a role for Islamic law to impact laws subsequently by this parliamentary

37. HADI ENAYAT, *LAW, STATE, AND SOCIETY IN MODERN IRAN: CONSTITUTIONALISM, AUTOCRACY, AND LEGAL REFORM, 1906-1941* 38-48 (2013) (In Iran, as Enayat explains: "[T]he nature of state-religion relations in which the Shi'i Ulama had considerable autonomy and power and could also scupper any attempts at reform that threatened their interests. Along with the native attitude of Shi'ism toward secular judicial authority and the codification of secular law—there was no equivalent of the Ottoman *qanunnamehs* in Qajar Iran—this made legal and judicial reform much more difficult."). Contrastingly, in Egypt, the *'ulema* could not really affect the avalanche of legal reforms taking place in Ottoman Egypt. DUPRET & BERNARD-MAUGIRON, *supra* note 34.

38. ALBERT HOURANI, *ARABIC THOUGHT IN A LIBERAL AGE, 1798-1939* 119 (1983) ("for Muslims no sort of natural solidarity, not even patriotism, can replace the bond created by Islam"); see AFARY, *supra* note 3.

39. HOURANI, *supra* note 38, at 140 (while Abduh's aim was "to show that Islam contained in itself the potentialities of this rational religion, this social science and moral code which could serve as the basis of modern life, he "did not of course intend to imply that Islam would approve of everything that was done in the name of progress [. . .] Islam as he conceived it was a principle of restraint: it would enable Muslims to distinguish what was good from what was bad among all the suggested directions of change.").

40. Arjomand, *supra* note 1, at 36.

body.⁴¹ For example, the drafters of the 1876 Ottoman Constitution also called upon the Ottoman *'ulema* to determine whether subsequent laws issued by secular legislatures conformed to the *shari'a*, thereby placing the *shari'a* as a "limitation" on, if not a foundation of, all state laws.⁴² Still, the new principle of equality between Muslim and non-Muslim Ottoman subjects under the law became a staple insertion in these earliest Middle Eastern models.⁴³ This principle of equality would come to influence both Egyptian and Iranian reformers in drafting their own constitutions.

Interestingly, in Iran, both secular and religious-minded thinkers envisioned a secular government, borrowing from both Western ideas and Ottoman legal reforms. Most notable amongst them who "played a great role in the development of constitutional theory in Iran" was Mīrza Malkum Khan (1833-1908).⁴⁴ An Armenian-Iranian intellectual who 'nominally' converted to Islam, Khan was influenced by the English liberal thinker John Stuart Mill who theorized a government that did not intrude on individual freedoms and did not enforce morality.⁴⁵ After returning from a trip to France, Khan was appointed to the faculty at the Dar al-Funun, established in 1851 as Iran's first modern university.⁴⁶ Further influenced by the Ottoman legal reforms, Khan "drew on his support within the court to begin a series of reforms known as *Daftar-i Tanzimat* [or 'Book of Reforms'], modeled after the Ottoman Tanzimat reforms of 1839 and 1856."⁴⁷ For Khan, the ideal government was not entangled with religion, but rather promulgated laws through a Western-modeled legislative body.⁴⁸ As such, Khan's ideas naturally became an affront to an established political system built on exclusive executive authority and Islamic jurisprudence even if some scholars argue that his secular constitutionalism did not go far enough.⁴⁹ Although he ini-

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41. See SUPPLEMENTARY FUNDAMENTAL LAWS OF PERSIA 1325 [1907] (Iran); see also BUILDING A CONSTITUTIONAL SYSTEM FOR THE EGYPTIAN STATE, 19 Apr. 1923 (Arabic) [hereinafter EGYPT 1923 CONSTITUTION], Art. 149.
42. Arjomand, *supra* note 1, at 44 ("From the beginning to the end of this process of constitution-making, the *shari'a* thus appears as a limitation on the constitution, implying the necessity of judicial review of legislation by the *ulema* for conformity to the *shari'a* as was eventually required by Article 2 of the Iranian Supplementary to the Fundamental Law." While Arjomand insists on this distinction between limitation and foundation in defining subsequent secular laws, it may not be all that important; what is, however, worth noting is that so-called "limitation" in the early Iranian Constitution and its Supplementary to the Fundamental Law do not appear in the Egypt's 1923 Constitution. Therefore, there does appear to be a markable difference between the "first" (Ottoman), "second" (Iranian), and presumably, the "third" (Egyptian) waves of constitution-making in the Middle East.
43. See SUPPLEMENTARY FUNDAMENTAL LAWS OF PERSIA 1325 [1907] (Iran), Art. 8; see also EGYPT 1923 CONSTITUTION, Art. 3.
44. ABDUL-HADI HAIRI, SHI'ISM AND CONSTITUTIONALISM IN IRAN, 37 (1977).
45. AFARY, *supra* note 2, at 26; see also *Id.* at 39.
46. HAIRI, *supra* note 44.
47. AFARY, *supra* note 2, at 46; see also HAIRI, *supra* note 44, at 37-39 (during his stay in Istanbul (1863-1871), Khan experienced the events that led to the short-lived Ottoman Constitution of 1876 and had been in contact with important nineteenth-century Ottoman reforms including Kamil Paşa, Ali Paşa, and Fuad Paşa).
48. HAIRI, *supra* note 44, at 38.
49. *Id.* at 39-41 (Hairi concludes that "Malkam. . . realized that Western constitutional theory was at variance with Islam in several areas, especially the position of religion in the state; but. . . he never made this matter clear and, consequently, made contradictory remarks. His approach to constitutionalism

tially welcomed some of Khan's ideas, Persian king Nasir al-Din Shah (1848-1896) ultimately banned Khan's Freemason-modeled organization called Faramushkhanah (or 'House of Oblivion') and exiled him in 1861. Khan, however, continued to advocate for secular liberal government and "began to publish the dissent liberal journal *Qanun* (Law) from London" from 1890 to 1898.⁵⁰

Yet, in Iran, there also appears to have been an ongoing debate amongst Shi'ite *'ulema* themselves regarding the ideal distance between religious institutions and the state. This debate initially involved the two main schools of Shi'a Islam, the Usulis and Akhbaris. By the late eighteenth century, however, the Usulis appear to have set the precedent for determining divine law.⁵¹ The Akhbaris, however, "argued that mujtahids [qualified Islamic jurists] were not necessary for the interpretation of the Shi'ite doctrines since the Traditions (Akhbar) left by the Prophet Muhammad and the imams were sufficient and could guide individual believers in spiritual and worldly matters."⁵² While it seems that Akhbaris were sidelined by the early nineteenth century, their ideas for a more democratic interpretation of Islamic legal doctrine persisted throughout the nineteenth-century and influenced "religious dissidents" who secretly held Akhbari views and also participated in the drafting of the 1906 Iranian Constitution.⁵³

In Egypt, on the other hand, similar debates amongst the Sunni *'ulema* regarding the interpretation of Islamic law did not resurface in the late nineteenth century to the extent they did in Iran. While modern "reformers" like Muhammad Abdou and his student Muhammad Rashid Rida (1865-1935) envisioned a revolutionary re-mapping of the traditional Sunni sources of authority in Islamic legal interpretation, neither went as far as the Iranian Akhbari scholars as to hand over the mantle of legal interpretation from the religious scholars to individual believers.⁵⁴ Nevertheless, it

was. . .to reconcile it with Islam." At the same time, Hairi argues that Khan's conservatism (potentially a result of his realization) ultimately caused him to advocate for a constrained constitutionalism in which he did not employ the word *mashrutiyyat* (or 'constitutionalism') itself nor did he "elaborate on the concept of sovereignty of the people in Western constitutional terms, which he claimed to have been advocating." Hairi's criticism against Malkam Khan, however, does not appreciate that even in the Ottoman and Egyptian contexts, which Hairi considers, constitutionalism was still in its embryonic stage; for example, while Hairi notes the usage of the word 'constitution' by Tahtawi "in the French pronunciation" in Egypt, the Arabic word for constitution *dustur* does not itself appear until the Egyptian Constitution of 1923 much later than Tahtawi or Khan. And even then, the traditional ruler-subject relationship, or its remnants, is still presumed. Therefore, it is important to evaluate the introduction of the concept of limited government and popular sovereignty during this time period aside from the absence of terminology ordinarily associated with these concepts in the liberal democratic tradition. Otherwise, we can easily miss the intellectual innovation for lack of its conventional marker.)

50. AFARY, *supra* note 2, at 26.

51. *Id.* at 24. The Usulis invalidated an Islamic jurisprudence that was not based on *usul al-fiqh*, or the principles of Islamic jurisprudence, determined only through legal interpretation (or *ejtehad*) carried out by a qualified Islamic jurist (or *mujtahid*).

52. *Id.* See also HARI, *supra* note 44, at 66-67.

53. AFARY, *supra* note 2, at 24.

54. *Id.* at 25. If this push for democratic interpretation of the *shari'a* amongst modern Sunni religious clerics ever took place, it would not occur until much later in the late twentieth century with contemporary Egyptian religious scholars like Shaikh Yusef al-Qaradawi. See ANDREW F. MARCH, ISLAM

is important to stress that the religious institutions that shaped Egyptian society in the late nineteenth and early twentieth centuries, including the highest institution of religious learning Al-Azhar, had become a part of the Egyptian state: however independent their interpretation of Islamic doctrine may have been, religious scholars in Egypt remained financially dependent on the state treasury.⁵⁵ For Iran's *'ulema*, their independence from the state was much more potent.⁵⁶

Egyptian intellectuals, like their Iranian counterparts, were no less immune to secular and liberal Western ideas of political governance. These ideas enveloped the young nation not only from its modernizing rulers to its British colonizers, but also through burgeoning political elites. In addition to the Western-modeled Ottoman *Tanzimat* reforms that took place in Egypt, earlier efforts by Muhammad Ali Pasha, Egypt's Ottoman ruler in the first half of the twentieth century, exposed Egypt to Western (especially French) ideas of science, engineering, and architecture, thereby paving way for the avalanche of legal secularization that fell in the later nineteenth century.⁵⁷ By the early twentieth century, political and legal elites already well-versed in Western languages, political history, and legal systems were already distancing themselves from the Ottoman legal system and embracing European-modeled codes and courts.⁵⁸ Ahmad Fathī Zaghlūl (1862-1914), the Egyptian lawyer and the famous estranged brother of Egypt's first nationalist constitutional leader Sa'ad Zaghlūl, exemplifies this transformation among Egypt's political elite. In his *al-Muhāmāh* (Advocacy) published in 1900, Ahmad Zaghlūl admonished the pre-existing Ottoman Egyptian legal system as arbitrary, corrupt, and lacking any commitment to rule of law or separation of powers.⁵⁹ Zaghlūl's criticisms of local Ottoman governance helped pave the way for such secular principles to find their place in Egypt's 1923 Constitution. However, it should be noted that even during this period of secularization of Egyptian law, Islamic notions of law and justice still prevailed. Even for political elites, Islam never lost its central role in defining the young Egyptian nation's culture and politics.⁶⁰

AND LIBERAL CITIZENSHIP: THE SEARCH FOR AN OVERLAPPING CONSENSUS (2009).

55. Nelly Hanna, *Culture in Ottoman Egypt*, in 2 THE CAMBRIDGE HISTORY OF EGYPT 87-112 (M. W. Daly ed., 1998) (as Hanna describes, "In both Mamluk Egypt and Egypt under the rule of Muhammad 'Ali and his descendants (nineteenth century), the state was very centralized and played an active role in financing and shaping culture and in [sic] education." Moreover, while the Egyptian *'ulema* and their central institution, Al-Azhar, continued to play an important intellectual role in Egyptian society across the eighteenth and nineteenth centuries, they did not "monopolize all forms of intellectual or cultural activity, either of those who were attached to the institution or, more broadly, those who were not.").
56. BEHROOZ MOAZAMI, STATE, RELIGION, AND REVOLUTION IN IRAN, 1796 TO THE PRESENT 79 (2013).
57. See KHALED FAHMY, *The Anatomy of Justice*, in ISLAMIC LAW AND SOCIETY 6 224-271 (1999); see also KHALED FAHMY, *The Birth of the Secular Individual*, in REGISTRATION AND RECOGNITION: DOCUMENTING THE PERSON IN WORLD HISTORY 335-36 (Keith Breckenridge & Simon Szerter eds., 2012); Rudolph Peters, *Divine Law or Man-Made Law? Egypt and the Application of Shari'a*, 3 ARAB L. Q. 231 (1988).
58. See AHMAD FATHĪ ZAGHLŪL, *AL-MUHĀMĀH* (1900).
59. *Id.*
60. This appears to have been the case even more for those political elites in proximity to the Egyptian Ottoman royal palace for which the predominant monarchial and Islamic elements that defined the

POLITICAL ACTORS IN THE DRAFTING

While Western liberal ideas influenced the emergence of new theories of government in Egypt and Iran, it was ultimately Western impositions in both countries that fueled the experimentation with these new theories. The Qajar dynasty granted special privileges and consequent control of the Iranian economy to British and Russian companies and envoys, often at the expense of the local Iranian merchants and artisans, led to revolts from a broad-based section of Iranian society during the late nineteenth century.⁶¹ The most important of these and precursor to the Iranian Constitutional Revolution several years later was the Tobacco Protest of 1891 and 1892. The Tobacco Protest witnessed an important alliance between local Iranian merchants, secular nationalists, and traditional *'ulema*, all of whom stood up against the number of tobacco concessions given to the British by Nasir al-Din Shah.⁶² Because their financial security depended on the well-being of the Iranian economy, the *'ulema* “could not be indifferent to the grievances of the landlords, small cultivators, guild members, merchants, and ordinary people who could, at least theoretically, refuse to pay the portion of Imam to the ulama if they did not feel that their interests were being represented.”⁶³ Aligning the interests of a broad spectrum of Iranian society, the Tobacco Protest also foreshadowed the creation of local political assemblies, or “new forms of direct democracy,” called *anjumans*, modeled after the Russian *soviets* that appeared during the Russian Revolution of 1905.⁶⁴ These *anjumans* would eventually play a crucial role in Iranians’ call for a House of Justice (*'adālat-khāna*) and the establishment of constitutional government and rule of law.⁶⁵

While the major impetus for the drafting of a modern Iranian constitution was a nationalist desire to thwart foreign economic intervention, the driving force behind the drafting of the first Egyptian constitution in 1923 was nationalist opposition to British colonial rule. The 1919 Egyptian Revolution was led by anti-colonial nationalist leader Sa'ad Zaghlul and a broad section of Egyptians, including Coptic Christians and Muslims.⁶⁶ These revolutionaries demanded their national indepen-

ancién regime would remain a priority, if not a precondition, in any transition to a parliamentary democratic system. The poetry of Ahmed Shawki (1868-1933) makes this point clear. Studying law in Cairo and later in France under the auspice of the Khedive Ismail, the famous Egyptian royal poet who was exiled to Spain by the British in 1915, returned to his native Egypt following the 1919 Revolution when he was given the title “the prince of the poets.” Shawki’s most famous classical Arabic poems (*qassidahs*)—*Nahj al-Burda* (1910) and *Zikr al-Mulid* (1914)—which he wrote under the auspice of the royal palace were praises to the Prophet Muhammad.

61. AFARY, *supra* note 2, at 29-33.

62. *Id.*

63. MOAZAMI, *supra* note 56.

64. AFARY, *supra* note 2, at 37.

65. *Id.* at 39 (“The prerevolutionary societies played an important role in the events of the years 1905-1906 and the series of protests that culminated in the nationalists’ obtaining the sanctuary in the city of Qum and in the garden of the British legation in Tehran in 1906.”).

66. Philipp, *supra* note 34, at 133 (Philipp explains: “Although the 1919 revolution and the enthusiastic participation of Copts in it nourished Muslim-Coptic collaboration, the other minorities were worried by the expected loss of British control and were frightened by the upheavals of 1919.” At the same time, however, the privileged legal position that foreign religious and ethnic minorities

dence and within three years had successfully terminated British protectorate rule. Although Egyptian independence in 1922 was nominal in that it was conditioned upon continued British control of key aspects of Egyptian politics, the British agreed to formally hand over power to a thirty-two member Constitutive Assembly.⁶⁷ This Assembly consisted of former ministers, legislators, former presidents of the Lawyers' Syndicate, and public figures, and while this Constitutive Assembly included religious figures like Shaikh Muhammad Bekhit, it was predominantly composed of secular-minded nationalists.⁶⁸

Unsurprisingly, the establishment of legislative democratic bodies in Egypt and Iran, although preserving their predecessor monarchies, did not sit well with the *ancién* regimes in either country.⁶⁹ For the first time, the absolute power of Persian kings and Ottoman sultans would be constrained by assemblies comprised of political elites with varying degrees of popular support.⁷⁰ More so, the arbitrariness of monarchical rule would be constrained by rules of law grounded in a constitutional framework that protected individual rights and formal equality before the law. This new democratic momentum, however, was counterbalanced by a strong monarchical inertia, whereby the new parliamentary bodies would have to negotiate legislative authority with established monarchies in both Egypt and Iran.

The compositions of Iranian *anjumans* and the Egyptian Constitutive Assembly differed considerably. While both bodies consisted of nationalists and liberal constitutionalist elites in the vein of Malkam Khan and Ahmed Fathī Zaghlul, religious scholars did not take a central role nor were the critical viewpoints of Jamal al-Din Asadabadi or Muhammad Abduh on blind secularization represented in the writing of Egypt's constitution as was the case in Iran. In fact, at the time of the writing of Egypt's 1923 Constitution, Egypt's Muslim Brotherhood founded in 1928 by Hassan al Banna (1906-1949) was not yet in existence, let alone a major political force to criticize constitutional reforms that fastened the young Egyptian nation on a more secular trajectory. A schoolteacher and a student of Muhammad Rashid Rida, al-Banna, however, would eventually become a grassroots organizer, a shrewd politician, and a staunch critic of the liberal democratic system established

enjoyed under British control of Egypt directly undermined Egyptian state sovereignty.).

67. Habib, *supra* note 19.

68. *Id.*

69. In Egypt "[f]rom the outset, King Ahmad Fu'ad disdained the constitution and intensely resented sharing power." Botman, *supra* note 9. And in Iran, even though the ruling Muzaffar al-Din Shah (1896-1907) remained ill and idle during this constitutional transition period, "it is unlikely" that he would "have supported the nationalist movement and responded more quickly to the demands for a house of justice if he had been well." AFARY, *supra* note 2, at 53.

70. It is important to note, however, that in both Egypt and Iran, the legislative authority of newly proposed legislative bodies was not theorized as absolute. For example, as Hairy points out, even Malkam Khan's theorized parliamentary bodies were potentially beholden to the Persian king (the sovereign): "He empowered, of course, some of the above-mentioned assemblies [administrative assembly, grand consultative assembly, and legislative assembly] to be the only rulers and made the ministers responsible only to the *majlis* [the People's Assembly], not the king, but he did not say how these assemblies should have been chosen. . . . Should they be elected by the electorate [a proxy for the people] or be selected by the sovereign?" HAIRI, *supra* note 44, at 42.

in his youth by the 1923 Constitution. In Iran, however, traditional Shi'ī *'ulema* who played an important role in Iranian *anjumans* openly criticized Western secular constitutional models. Nevertheless, these traditional clerics did not always monopolize religious thought in Iran, as they met competition from liberal and even radical religious scholars who supported Iranian secular legal reforms, mirroring the earlier Ottoman secular reforms.⁷¹ Some of these 'religious dissidents' who often held their viewpoints secretly, still followed Akhbari notions of religious interpretation. Still, others ascribed to the less traditional religious thought, most notably that of Mirza 'Ali Muhammad (1819-1850). The followers of Mirza 'Ali Muhammad came to be called Babis or Bahā'is, and were often comprised of low-ranking clerics, "argued for a progressive notion of revelation that would attempt to respond to the problems of the new age and initiated a break with the otherworldliness of religious orthodoxy by insisting on a better life in this world for his believers."⁷² Bahā'is posed a serious challenge to both government authority as well as the dominant Usuli clerics (*mojtaheds*), and were eventually targeted and forced to flee to Egypt in the 1860s.⁷³ Even though traditional religious clerics and the Iranian state have historically had "different goals, interests, and institutional forms," they both have "negotiate[d] common ground and share constituencies."⁷⁴ This common ground and shared constituencies, however, included only Islamic jurisprudence and Iran's Muslim Shi'a majority, ultimately excluding Iran's religious and ethnic minorities.⁷⁵

The absence of this entangled relationship between the *'ulema* and the already secularizing Egyptian state, while it narrowed the inclusion of Egyptian religious clerics in the constitutional process, nevertheless allowed for greater inclusion of Egyptians irrespective of their religion. On the eve of Egypt's 1923 Constitution, two political parties represented the anti-colonial nationalist movement and the subsequent drafting of Egypt's first constitution. The major party was the nationalist secularist Wafd Party led by Sa'ad Zaghlul.⁷⁶ The Wafd Party reigned as the predominant party until the 1952 Revolution that finally ended Egypt's monarchy and removed the remnants of British control in Egypt.⁷⁷ Although hierarchal in structure, the Wafd

71. MOAZAMI, *supra* note 56, at 64 (Moazami explains that on the eve of the Qajar dynasty, "[t]he line between orthodoxy and heterodoxy was not yet clear—both were still in the making. Only with the consolidation of the Qajar dynasty starting in 1848 with Naswer al-Din Shah's rule, and with the suppression of the Babi movement, did orthodoxy define itself. In this process, the orthodox ulama were reorganized as the primary institutional body of the religious sphere.")

72. AFARY, *supra* note 2, at 25.

73. *Id.* at 44; see Johanna Pink, *A Post-Qur'anic Religion Between Apostasy and Public Order: Egyptian Muftis and Courts on the Legal Status of the Bahā'ī Faith*, in ISLAMIC LAW AND SOCIETY 409-34 (2003).

74. MOAZAMI, *supra* note 56, at 1.

75. The latter's inclusion in Iran's Constitutional Revolution and the institutions it established, therefore, was vague at best. Iranian "Armenians, Jews, and Zoroastrians were initially given the right to elect representatives to the Majlis, but soon afterward told that if they exercised this right the nationalist movement would be jeopardized." AFARY, *supra* note 2, at 70.

76. Formed in 1918, the Wafd Party led both the first Egyptian delegation to Europe demanding Egypt's independence from British colonial rule as well as the 1919 Revolution. JAMES L. GELVIN, *THE MODERN MIDDLE EAST* 197 (2011).

77. *Id.* at 197 (while Egypt, led by nationalists like Sa'ad Zaghlul, became legally independent in 1922,

enjoyed popular support from a wide range of Egyptians. Seeing itself as the “embodiment of liberal democracy in Egypt,” the Wafd “claimed to represent people of all social classes and from all geographical areas. It attracted Muslims and Copts into its ranks, which was a notable accomplishment at the time.”⁷⁸ In reality, however, “it operated as a coalition of the rural middle class and high-status urban groups such as lawyers, doctors, financiers, industrialists, intellectuals, and students.”⁷⁹ Unlike the Iranian *anjumans* comprised of both secularists and their opponents, the Wafd “was secularist on the issue of church-state relations, and generally hostile to the king and his allies.”⁸⁰

A second minority party known as the Liberal Constitutionalist Party split off from the Wafd. The Liberal Constitutionalists shared Wafdists’ nationalist and secular liberal commitments.⁸¹ This minority party differed from the Wafdists in that it “had little connection to the masses,” drawing membership instead from “distinguished intellectuals, large landlords, and notable political figures.”⁸² Liberal Constitutionalists were also less enthusiastic about an immediate transition to electoral parliamentary politics, as their interests remained aligned with those of the Egyptian monarchy. Over the next decades, the Wafdists and the Liberal Constitutionalists would continue to distance themselves from the anti-secular viewpoints of the newly established Muslim Brotherhood, as well as from those of communist groups and women’s associations.⁸³

Early twentieth century constitutional democracies in both Iran and Egypt exhibited similar and different trends that were reflected in their different political, legal, and religious actors who ultimately shaped the trajectory of their new constitutional democracies. Common to both were (Western) secular ideas of individual freedom and civil rights, legal equality, and separation of powers between different branches of government. One of those branches housed the royal monarchies that governed Iran and Egypt throughout the nineteenth century in spite of the resistance by revolutionaries against the latter’s monopoly of power. The dissimilarities between the two constitutional experiments ents included the composition of political elites and the political or religious philosophies they carried with them in their drafting of the respective constitutions. Iran’s traditional *‘ulema* continued to mold their nation’s

the “British continued to control Egyptian defense and foreign policy, protect minorities and the Suez Canal, maintain their role (alongside the Egyptians) in the governance of the Sudan to the south, and safeguard the capitulations. Independence indeed. Making conditional independence into unconditional independence would be the focus of nationalist efforts for the next three decades, even after the British sought to placate Egyptian public opinion by negotiating a new treaty on the eve of World War II.”).

78. Botman, *supra* note 9, at 285-308.

79. *Id.* at 288.

80. *Id.* at 287.

81. *Id.* at 289.

82. *Id.*

83. *Id.* at 287 (“Organization outside the political mainstream such as the Muslim Brotherhood, Young Egypt, communist groups, and women’s associations also contributed to the shaping of Egypt’s political culture. But these groups were intentionally excluded from systematic parliamentary life in the country.”).

politics and to resist the complete secularization of Iran's legal system. Egypt's religious scholars and thinkers bore less influence on their nation's first constitutional document almost two decades later. Another dissimilarity between the two lay in the roles played by religious minorities. Coptic Christians—Egypt's largest religious minority—appear to have had their interests represented in this early constitution, even though other Egyptian religious and ethnic minorities did not.⁸⁴ Iran's smaller religious and ethnic minorities, including Armenians, Jews, and Zoroastrians, occupied a more contested position during this early period.⁸⁵ In both Egypt and Iran, women were disenfranchised, and they would not secure their respective suffrages until the second half of the twentieth century (1956 in Egypt and 1963 in Iran).⁸⁶

CONSTITUTIONAL DESIGN IN THE TEXT

The texts of both the earliest Iranian and Egyptian constitutions reflect the similar and different political ideas and actors that led to the drafting of these separate documents. Both texts endeavored to create a bicameral parliamentary body holding the right (*haq*) to initiate legislation.⁸⁷ Yet, both governments would maintain their monarchial forms along with the prerogatives of Persian and Egyptian kings, thereby making them constitutional monarchies. The traditional Arabic and Persian words for “monarchy,” *mamlaka* and *sultanat*, respectively, were retained in these new constitutional documents.⁸⁸ This linguistic retention suggests that the traditional relationship between the ruler and his subjects was not immediately replaced with the modern relationship between citizens and their state.

Egypt's 1923 Constitution, which was officially titled “The 1923 Constitution for Egypt and the Sudan,” began with the following epithet: “We, the King of Egypt and the Sudan [*nahnu malik-u misra wa al-sudan*]” while in Article 1 declared: “Egypt is a sovereign nation, and it is free and independent. Its monarchy is an indivisible and alienable part of it. Its form of government is a hereditary monarchy.”⁸⁹ Similarly, the Iranian Constitution begins by admitting that final legal authority lay exclusively with the Persian king: “The fundamental Law of Persia promulgated in the reign of the late Muzaffaru'd-Din Shah and ratified by him on Dhu'l-Qa'da 14, A.H. 1324 (December 30, 1906).”⁹⁰ In describing the form of the newly established

84. It should still be noted that the question of granting religious minorities equal civil and political rights to Muslims was contentious even in the comparatively more secular constitutional politics of Egypt. As the minutes of the debates held by the Constitutive Assembly on the eve of the 1923 Constitution suggest, equal citizenship was not advocated unanimously by the Constitution's drafters. See also Philipp, *supra* note 34, at 131-150 (discussing the limits of rights granted to religious minorities during this early constitutional period).

85. MOAZAMI, *supra* note 56.

86. LEILA AHMED, *WOMEN AND GENDER IN ISLAM: HISTORICAL ROOTS OF A MODERN DEBATE* (1993). See also Nikki Keddie, *Iranian Women's Status and Struggles since 1979*, J INT'L AFF. (2007).

87. FUNDAMENTAL LAW OF PERSIA 1324 [1906] (Iran); SUPPLEMENTARY FUNDAMENTAL LAWS OF PERSIA 1325 [1907] (Iran).

88. EGYPT 1923 CONSTITUTION, art. 1; see FUNDAMENTAL LAW OF PERSIA 1324 [1906] (Iran), Art. 11.

89. EGYPT 1923 CONSTITUTION, art. 1.

90. FUNDAMENTAL LAW OF PERSIA 1324 [1906] (Iran).

“National Consultative Council” (*Majlis Shuri Mili*), the document also included the “Form of the Oath”, or *Surat Qism Namih*, which was mandatory upon all the Councilmembers. This Oath stipulated that all members shall “act loyally and truthfully towards our just and honoured Sovereign, commit no treason in respect to the foundations of the Throne [*asas sultanat*] or the Rights of the People [*huquq millat*].”⁹¹

The Iranian and the Egyptian constitutional texts differed primarily with regards to the role of Islamic jurisprudence in the newly established constitutional monarchies. These differences stemmed from differences in the roles played by religious scholars in their respective projects. The 1906 Iranian Constitution (*qanun-e asasi mashruta*) and its Supplementary to the Foundational Law (*mutmim qanun-e asāsī*) (hereafter SFL), gives Islamic jurisprudence a central role to play in the formulation of new legislation. Even the Oath in the original constitution called on all Council members to “take God to witness, and swear on the Qur’an” in fulfilling their obligations.⁹² If the early marriage between (Shi’a) Islam and the constitutional monarchy was not explicit in the Oath, then the SFL made this marriage unequivocally clear. Articles 1 and 2 of the SFL stipulated that Islam “according to the orthodox Ja’fari doctrine” is the official religion and prohibited any legislation introduced by the “Sacred National Consultative Assembly” or the king to “be at variance with the sacred rules of Islam” established by the Prophet.⁹³ Article 2 went even further to create a constitutional role for Iranian ‘*ulema* in determining the legality of laws

91. Of course, while the Iranian foundational document did not specify what constituted “treason to the Throne”, it intended to keep the Monarch’s authority intact. Iranian Constitution of 1906 [in Persian]. Article 11: “Form of the Oath.”

92. FUNDAMENTAL LAW OF PERSIA 1324 [1906] (Iran), art. 11.

93. SUPPLEMENTARY FUNDAMENTAL LAWS OF PERSIA 1325 [1907] (Iran), art. 1-2 (“Art. 1. The official religion of Persia is Islam, according to the orthodox Ja’fari doctrine of the Ithna ‘Ashariyya (Twelve Imams), which faith the Shah of Persia must profess and promote. Art. 2. At no time must any legal enactment of the Sacred National Consultative Assembly, established by the favour and assistance of His Holiness the Imama of the Age (may God Hasten his glad Advent!), the favour of His Majesty the Shahinshah, of Islam (may God multiply the like them!), and the whole people of the Persian Nation, be at variance with the sacred rules of Islam or the laws established by His Holiness the Best of Mankind (on whom and on whose household be the Blessings of God and His Peace).

It is hereby declared that, it is for the learned doctors of theology (the ‘*ulama*) – may God prolong the blessing of their existence! – to determine whether such laws as may be proposed are or are not conformable to the rules of Islam; and it is therefore officially enacted that there shall at all times exist a committee composed of not less than five mujahids or other devout theologians, cognizant also of the requirements of the age, [which committee shall be elected] in this manner. The ‘*ulama* and Proofs of Islam shall present to the National Consultative Assembly the names of Twenty of the ‘*ulama* possessing the attributes mentioned above; and the Members of the National Consultative Assembly shall, either by unanimous acclamation, or by vote, designate five or more of these, according to the exigencies of the time, and recognize these as Members, so that they may carefully discuss and consider all matters proposed in the Assembly, and reject and repudiate, wholly or in part, any such proposal which is at variance with the Sacred Laws of Islam, so that it shall not obtain the title of legality. In such matters the decision of this ecclesiastical committee shall be followed and obeyed and this article shall continue unchanged until the appearance of His Holiness the Proof of the Age (may God hasten his glad Advent!).”).

issued by the new *Majlis*, assigning at least five traditional *'ulema (mujtahids)* to its ranks.⁹⁴

In Egypt, this early twentieth-century marriage between Islam and the state was less pronounced, reflecting the influences of secular nationalist Egyptian politicians and lawyers who drafted the 1923 Constitution. Reference to Islam appeared once in the document, in Article 149, which states: "Islam is the religion of the state and Arabic is its official language."⁹⁵ The document contained no equivalent to the SFL's Article 1, specifying Sunni Islam as Egypt's official brand of Islam, or the SFL's Article 2, requiring all laws to comport to rules of the *shari'a* or assigning a constitutional role for the Egyptian *'ulema* in determining constitutionality of future laws (judicial review). Nevertheless, Article 149's articulation of Islam as the state's official religion indicates the continuity of Islamic notion of law and justice even in the face of increasing secularization occurring in a pluralistic Egypt at this time.

Egypt's changing legal treatment of Iranian Bahā'īs, who first fled to Egypt in the 1860s, illustrates this point. Joining Jewish, Catholic, Maronite, and other ethnic immigrants in Egypt, Iranian Bahā'īs initially enjoyed more religious freedom and the right to own property. However, due to Article 149's articulation of Islam as the official state religion, further defined by numerous fatwas rebuking the Bahā'ī faith as an affront to Islam,⁹⁶ as issued by Egyptian religious scholars and muftis in the 1920s and 1930s, including Islamic 'reformer' Muhammad Rashīd Rida, the legal status of Bahā'īs even in Egyptian national courts remained precarious even during the nation's "liberal age."⁹⁷ Still, in light of the overwhelmingly secular nature of the 1923 Egyptian Constitution, which was born in a social and cultural milieu bearing religious diversity across the three monotheistic faiths as recognized by Islam (Islam, Christianity, and Judaism), the religious *limitations* that the 1923 text placed on secular legislation appeared negligible or less problematic to its secular-minded designers.

Moreover, even if Islamic notions of law and justice colored them, principles of equality and liberty modeled after Western constitutional models notably shaped the early Egyptian and Iranian constitutions. Articles in the Iranian SFL detailed some of these principles, including equality before the law even if it also enshrined inequality in enjoying civil and political rights.⁹⁸ These articles also included the right of privacy in a person's home or dwelling, mail, and telephones, and the inviolate right to a person's property.⁹⁹ Moreover, other articles sought to allow for the right of limited association, allowing for *anjumans* and *ijtimad'ats* (associations) "which are not productive of mischief to Religion or the State, and are not injurious to good order."¹⁰⁰ Similarly, the right of the press was guaranteed "except [for]

94. SUPPLEMENTARY FUNDAMENTAL LAWS OF PERSIA 1325 [1907] (Iran), art. 2.

95. EGYPT 1923 CONSTITUTION, art. 149.

96. Such fatwas were issued by Egyptian religious scholars and muftis in the 1920s and 1930s, including Islamic 'reformer' Muhammad Rashīd Rida,

97. Pink, *supra* note 73, at 409-34.

98. SUPPLEMENTARY FUNDAMENTAL LAWS OF PERSIA 1325 [1907] (Iran), arts. 8, 58.

99. *Id.* arts. 13, 15-18, 22, 23.

100. *Id.* art. 21.

heretical books and matters hurtful to the perspicuous religion [of Islam].”¹⁰¹ With regards to citizenship, immigrants or “foreign subjects” under the SFL held the right to be naturalized but only according to a “separate law.”¹⁰² Finally, the SFL attempted to curb the arbitrary rule that characterized the Qajar state not only through the inviolable right to property, but also through a right against arbitrary punishment and rights of due process of law.¹⁰³

Reflecting this new genre of rights contained in the Iranian Supplementary, Egypt’s 1923 Constitution also enshrined a corpus of rights, not as an amendment to, but in the core body of the original document. Article 3 did not call for principles of *shari’*a to ground legislation, but rather ensured equality of all Egyptians before the law, as well as equality of their enjoyment of civil and political rights without regard to their “origin, language, or religion.”¹⁰⁴ Unlike the SFL’s limitation of ministerial positions only to Muslims and Persians (Article 58), Article 3 of the Egyptian text allowed—legally, at least—for a religiously and ethnically diverse ministry. Furthermore, equality and freedom along with principles for representative government and the monarchical succession “shall not be proposed for revision.”¹⁰⁵ This restrictive clause on potential future amendment, therefore, applied not only to Article 3 but arguably also to the right of protected “personal freedom” and the inviolable right to a person’s property or assets and rights of privacy of in a person’s home, mail, telegraphs, and telephone.¹⁰⁶ It also would have applied to the right of belief and opinion, as well as a limited right of the press and religious practice in accordance with “Egyptian traditions” and “public order.”¹⁰⁷ This liberal corpus of unamendable rights finally included rights to curb excessive abuse of the *ancien* regime, which like its Iranian counterpart, included the right to due process of law, the right against arbitrary punishment, and the right against forced exile.¹⁰⁸

These first Egyptian and Iranian “bills of rights” were transformative compared to the legal systems prior to them, which did not grant these kind of rights to the subjects they governed. Equally transformative was the principle of the separation of powers, namely between the newly established representative assemblies and the monarchy. While specific rules stipulated which of these branches of government possessed the right to present, amend, or ratify new laws, rules for establishing the new constitutional systems’ respective judiciaries were less specified. In the SFL, the judicial power is spelled out briefly in Article 27, whereby “the judicial power, by which is meant the determining of rights . . . belongs exclusively to the ecclesiastical tribunals in matters connected with the ecclesiastical law, and to the civil tribunals in matters connected with ordinary law.”¹⁰⁹ This Iranian bifurcation between religious

101. *Id.* art. 20.

102. *Id.* art. 24.

103. *Id.* art. 10-12

104. EGYPT 1923 CONSTITUTION § 3.

105. *Id.* art. 156.

106. *Id.* arts. 4, 8-11.

107. *Id.* arts. 12-15.

108. *Id.* arts. 5-7.

109. SUPPLEMENTARY FUNDAMENTAL LAWS OF PERSIA 1325 [1907] (Iran), art. 27. *See also* ENAYAT, *supra*

and secular tribunals and judges, however, did not address the basic question of which court possessed the legal authority to interpret the Constitution itself. Did interpretation of the new Constitution fall under the jurisdiction of Islamic courts or the newly established civil courts? The new constitutional text did not answer this lingering question. The Egyptian constitutional text, even more evasive than the Iranian, did not acknowledge the judiciary as a separate branch of government, even though it expounded on the rights and duties of Egyptians (in Part II), the powers of the Monarch and the Parliament (in Part III), as well as the Army (in Part V).¹¹⁰

CONCLUSION

The early Iranian and Egyptian constitutions highlight a period of increasing secularization. This secularization began experimenting with different forms of government. In contact with and under pressure from imperial powers, political actors in both Egypt and Iran aspired to a more secular form of government that would be limited from absolute power and that would be sovereign from foreign powers. These constitutional visions fell short for several reasons and excluded women and religious minorities. Nevertheless, these periods of secularization successfully brought about, at least for some period, a parliamentary form of government that served as a check against absolute power. These new governments retained, in part, the same form of their predecessor Islamic monarchies whereby they became constitutional monarchies.

Although both the early Iranian constitution and its Egyptian counterpart envisioned governments that deployed secular principles of individual liberty and equality before the law, these new governments, in line with their Ottoman and Qajar predecessors, were still built upon Islamic notions of law and justice. The extent of this reliance on *shari'a* principles certainly differed between the two states. Iranian drafters enshrined a limiting clause that forced all secular laws—*qanun*—to be compatible with Islamic (Shi'i) jurisprudence while Egyptian drafters who were drawn mainly from Egypt's secular nationalist political and legal elites hardly envisioned these religious constraints on their new form of government. Nevertheless, Egyptian drafters still left considerable space for Islamic notions of law and justice to factor in their new 'liberal' democracy, as they declared Islam the official state religion and the hereditary Muhammad 'Ali dynasty remained vested in a Muslim since conversion from Islam was legally prohibited, if not politically impossible. In any case, it

note 38, at 64-65 (2013) (As Enayat explains: "The articles of the Supplementary Fundamental Law concerning the judiciary were the first laws on judicial affairs introduced after the Constitutional Revolution. Based like the rest of the law on the Belgian constitution, they laid down the framework of a modern civil law judicial system and incorporated all the safeguards and citizen rights of the original. [. . .] The most important direct modification to the Belgian original appeared in Article 27, which established the division of powers. The article reads . . . Second, the judicial power, by which is meant the determining of rights. This power belongs exclusively to the *shar'* courts in matters connected with the sacred law (*shar'iyat*), and to the state (*'adliyah*) courts in matters connected with customary/public law (*'orfiyat*).").

110. EGYPT 1923 CONSTITUTION §§ 2-4.

is important to realize that the higher speed of secularization of Middle East legal systems, as in early twentieth-century Egypt, did not signify greater diminution of Islamic notions of law and justice in them. Rather, the process of legal change appears to have been gradual and complex, if not outright confusing, as Islamic, mixed, national, and ecclesiastical court systems heard cases from a diverse range of Egyptians of various religious and ethnic backgrounds, as well as foreigners.¹¹¹

Despite their serious limitations, these early constitutions are nonetheless remarkable. Their drafters successfully envisioned and subsequently created new forms of limited government in place of the absolute governments that preceded them and even some of the governments that would follow them. The early twentieth century's so-called "liberal period" was officially born out of these early constitutions, marked by secular nationalist (if not Westernized) political and legal elites. But increased secularization of traditional Islamic legal and political systems was not favored by all Iranians, and in fact, saw resistance by many, including Iran's traditional *'ulema*. Egypt's trajectory immediately after the promulgation of its 1923 Constitution was met with similar resistance. Yet in both Egypt and Iran, if the political actors behind these early twentieth-century constitutions accomplished anything, it was—quite simply—a new framework for government.

111. Bernard-Maugiron & Dupret, *supra* note 34.