

# Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales

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Over the past few decades, principles of theocratic governance have gained enormous public support in developing polities worldwide. The countries experiencing this resurgence of religious fundamentalism are diverse, spanning the globe from Central and Southeast Asia, to North and Sub-Saharan Africa and the Middle East. While populist Western academic and media accounts tend to portray the spread of religious fundamentalism as a monolithic and ever-accelerating phenomenon, in practice most countries that have recently experienced a fundamentalist revival have long been caught between secular and religious identities, worldviews, and commitments.

The growing popular support for principles of theocratic governance poses a major threat to the cultural propensities and policy preferences of secular and relatively cosmopolitan elites in these countries. An increasingly common strategy undertaken by political powerholders representing these secular voices has been the transfer of fundamental collective identity, or “religion and state” quandaries, from the political sphere to the constitutional courts. Drawing upon their disproportionate access to and influence over the legal arena, social forces in polities facing deep division along secular-religious lines aim to ensure that their secular Western views and policy preferences are less effectively contested. The results have been an unprecedented judicialization of foundational collective identity, particularly in the realm of religion and state questions, and the consequent emergence of constitutional courts as important guardians of secular interests in these countries. In this Article, I explore the scope and nature of this phenomenon.

This Article is divided into four Parts. In the first three Parts, I explore the crucial secularizing role of constitutional jurisprudence in three countries facing a secular-religious divide—Egypt, Israel, and Turkey. These three countries have witnessed a considerable increase in the popular support for, and influence of, theocratic political movements. At the same time, these three countries differ in their formal recognition of, and commitment to, religious values. For example, Article 2 of the Egyptian Constitution, as

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amended in 1980, states that principles of Muslim jurisprudence (the *Shari'a*) are the primary source of legislation in Egypt,<sup>1</sup> while Israel defines itself as a “Jewish and Democratic” state;<sup>2</sup> modern Turkey, conversely, characterizes itself as secular, adhering to the Western model of strict separation of state and religion.<sup>3</sup> Accordingly, there are considerable differences in the interpretive approaches and practical solutions adopted by the three countries’ respective high courts in dealing with core religion and state questions. Egypt’s Supreme Constitutional Court has developed its own moderate “interpretation from within” of religious rules and norms.<sup>4</sup> The Israeli Supreme Court has tackled the tension between these conflicting values by curtailing the jurisprudential autonomy of religious courts and tribunals and by subjecting their jurisprudence to general principles of administrative and constitutional law.<sup>5</sup> The Turkish Supreme Court, on the other hand, has opted for the outright exclusion of religious values and policy preferences from legitimate political discourse.<sup>6</sup> Despite these dissimilarities, there are striking parallels in the way constitutional courts in these and other similarly situated countries have positioned themselves as important secularizing forces within their respective societies. I conclude by suggesting that the ever-accelerating reliance on national high courts in constitutional theocracies for dealing with core religion and state questions provides important insights for understanding the political origins of judicial power and the conditions under which political deference to the judiciary is likely to occur.

## I. Egypt

Under the guidance of the Muslim Brotherhood, the largest multinational Islamic movement which was founded in Egypt in the early twentieth century, Islamism has enjoyed an astounding growth in that country over the last three decades.<sup>7</sup> Egyptian Islamism has consistently

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1. EGYPT CONST. pt. I, art. 2. For further discussion, see NATHAN J. BROWN, *THE RULE OF LAW IN THE ANCIENT WORLD: COURTS IN EGYPT AND THE GULF* 125 (1997).

2. The Basic Law: Human Dignity and Liberty (art. 1(a)), 1992, S.H. 150, at [http://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm) (last visited Apr. 11, 2004).

3. See *infra* Part III.

4. See, e.g., BROWN, *supra* note 1, at 125–26 (discussing the Supreme Constitutional Court’s practice of distinguishing between “fixed” and “contestable” religious principles when they determine whether positive law contradicts *Shari’a* law); see also *infra* notes 29–30 and accompanying text.

5. See discussion *infra* Part II.

6. See discussion *infra* Part III.

7. For two recent accounts of the continuing growth of Islamism in Egypt, see NOAH FELDMAN, *AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY* 162–73 (2003) (noting that Islamism continues to spread in Egypt because it speaks to people’s most basic concerns) and CARRIE ROSEFSKY WICKHAM, *MOBILIZING ISLAM: RELIGION, ACTIVISM, AND POLITICAL*