

# Comparing the Religion-State Divide in the Arab World: Constitutions

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# Summary

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Religion appears in the constitutions of the Arab world, almost all with Muslim majorities, in a variety of ways. But aside from ensuring a public role for religion, these states are far from theocratic and show considerable though subtle diversity within them.

### Constitutions in the US Context

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*When the American constitution was originally written, it mentioned religion in only one clause. Article VI insists that “no religious test shall ever be required as a qualification to any office or public trust under the United States.” That was not enough, however, so the first amendment to the constitution adds a second provision on religion: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” (First Amendment). While the language is fairly specific, these provisions seem to bespeak two far broader principles: a separation of religion and state; and a guarantee of religious freedom. And that is how they are increasingly read—by citizens and by courts.*

## Arab Constitutions Are Not Abnormally Religious

Constitutions in the Arab world might initially startle an American reader used to a strict separation between church and state. The Arab constitutions are often populated with all kinds of religious clauses, some of them specific and others apparently quite sweeping. For Americans who insist on some kind of implementation of Thomas Jefferson’s “wall of separation,” or, more broadly, those in a variety of societies who expect constitutions to be based on one of the many varieties of “secularism,” such constitutions seem to mix religion and politics to a problematic degree. This may be the case. But if it is, the Arab approach of incorporating religion is far less unusual than such readers might suppose. The majority of constitutions in the world today do make some special provision for a religion—generally Islam, Christianity (in several denominations), or Buddhism. Of the 104 constitutions contained on the Constitution Project (the source for all constitutions quoted here), 56 give official status to some religion.

The constitutional and legal attitude of the United States—in which the state is friendly to religion and religious freedom in general but not to any specific religion in particular—is less than common around the world. But even when it is practiced, it involves the state in deciding what a religion is and what aspects of religious belief and practice need some form of state protection; mere neutrality involves continued state activity rather than total silence and passivity. As schol-

ars of secularism often point out, even building a wall of separation between state and religion involves the state in religious matters—for it is the supreme document of the state that decrees that the wall must be built and where it must be located. Such decisions generally become encoded in all areas of law, regulation, and practice, and set off policy debates about their nature, location, and enforcement (religious garb in public schools, ritual slaughter of animals, tax exemptions for religious institutions, etc.). Strongly secular constitutions are the exception, not the rule.

Arab constitutions are thus following a global trend when they venture onto religious ground with such enthusiasm. But they do so in some distinctive ways and in distinctive political, social, and religious contexts. Thus it is not the fact that they mention religion but the way that they do so that is noteworthy. As we probe the religious clauses of these constitutions and their applications, we will see that their true impact lies not just in what they say, but also in whom they authorize.

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## Digest

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*Six Ways Arab Constitutions Invoke Religion*

*1. Islam Is Mentioned and Made Official.*

*2. Religion is Part of Public Policy.*

*3. Authoritative Religious Teachings Can Come from State Bodies.*

*4. Islamic law—or its Principles— Can Be a Reference Point.*

*5. Personal Status (marriage, divorce, guardianship, and inheritance) is a Frequent Constitutional Use of Islamic Law.*

*6. Almost All Arab Constitutions Provide for Religious Freedom in Some Way.*

## Six Ways Arab Constitutions Invoke Religion

1. *Islam Is Mentioned and Made Official*: Arab constitutions generally grant Islam some kind of official status. But they generally give no guidance whatsoever as to what that means in practical terms. Such provisions are often among the first in the document and seem in that respect to be similar to a preamble in spirit: a declaration of principle of uncertain legal meaning. A few constitutions do go a bit farther in their bestowal of an official status of Islam by invoking a religious description or requirement for the position of head of state. [Article 3 of Syria's Constitution](#) proclaims that “The religion of the President of the Republic is Islam,” which seems as much a declaration of fact as a requirement—and indeed, that is probably how it should be read in the current Syrian context, given the disputed nature of the 'Alawi sect (whether or not it is a form of Islam, as its leading adherents claim or not, as some Islamic religious scholars have suggested).

[Article 74 of the Tunisian Constitution](#) goes a bit farther, granting to all voters who have held Tunisian nationality since birth the right to run in presidential elections—provided their religion is Islam. This clause has clear legal meaning but could be read as politically superfluous in a country in which much less than one percent of the citizenry professes a faith other than Islam.

2. *Religion is Made Part of Public Policy*: Arab constitutions often write religion

### Islamic Constitutionalism

*“Islamic constitutionalism is a Muslim-majority state’s way of engaging with Islam and its values. It, therefore, necessarily has implications on political equality. After all, [t]he substance of Islamic conceptions of equality would be important to discussion only insofar as it would serve as a guide in the attempt to produce a coherent theory about how the interaction between state and religion should proceed.”*

- Noah Feldman, “Political Equality and the Islamic State,” *Philosophical Topics* 30 (2002): 253–72, 255.

into public policy. Sometimes this is done in a general way, such as with the family.

The [Egyptian Constitution](#)'s article 10 reads "Family is the basis of society and is based on religion, morality, and patriotism. The state protects its cohesion and stability, and the consolidation of its values." The [Iraqi Constitution](#)'s article 29 similarly tries to guide the state: "The family is the foundation of society; the state shall preserve it and its religious, moral, and national values."

But at other times, the tie between policy and religion goes far beyond the level of hortatory: many provide for religious education as well. The [Egyptian Constitution](#)'s article 24 states "The Arabic language, religious education, and national history in all its stages are core subjects of pre- university public and private education."

The [Tunisian Constitution](#)'s article 39 obliges the state to "work to consolidate the Arab-Muslim identity and national belonging in the young generations." Most Arab constitutions are not so explicit, however—even Saudi Arabia's Basic Law does not link education and religion in any specific way. But some Arab constitutions do mention social needs and morality in a manner that most citizens would see as perfectly consistent with state-mandated religious education. The [Constitution of the Palestinian National Authority](#), one Arab political entity with aspirations to statehood, has gone so far as to convene all recognized Christian denominations to author a common set of textbooks

#### Term: shari'a

*Shari'a literally means "path." It technically refers to the relationship between an individual and God, and is thought of as God's law to "promote human welfare". Theologically, most Muslims believe that "the path" cannot be definitively known by human reason. Instead, it can only be derived through interpretations of sacred texts. Interpretations of shari'a—that is human understandings of God's law—are called fiqh.*

for Christian students' religious education.

3. *Authoritative Religious Teachings Can Come from State Bodies*: Almost all Arab states require students to go to school, direct states to provide education (and to regulate those non-state alternatives that it allows), and mandate that schools include religious instruction in their curriculum. Is the result of this to write religion into the state apparatus? Yes—but there is another effect that should not be missed. The state apparatus, and more specifically, the Ministry of Education (often consulting other state bodies), decides what the essential elements of religious doctrine and practice are. The state teaches children about the unity of God, how to pray, divine injunctions to respect parents, and the requirements to fast during Ramadan, be kind to strangers, and pay alms. Sometimes it examines them and grades their preparation for higher education based in part on their religious knowledge (other systems specifically exclude religion from a student's overall evaluation). In short, when children hear religious truth, it is often the voices of state bodies that are speaking.

#### Of note

*In most (but not all) countries, giving recognition to Islamic law in matters of family law entails writing codes of personal status for Muslims. In doing so, legislative drafters consult religious scholars, or jurists, as authorities before codifying their own interpretation of God's instructions for family relations in the form of legislation.*

4. *Islamic law—or its Principles— Can Be a Reference Point*: The most famous provision in this regard is the [Egyptian Constitution's](#) article 2: “The principles of Islamic Sharia are the main source of legislation.” Such clauses generally contain no implementing structures or language. (A brief experiment in Egypt's short-lived 2012 Constitution did give a bit more guidance but the more detailed provisions were never tested in the document's six-month lifespan.) These clauses occasion tremendous debate—the Tunisian con-



stitutional deliberations after the 2011 uprising were stalled partly over this issue until the leading Islamist party accepted that there would be no such provision in the final document. But for all the heat of the arguments they provoke, these clauses shed little light on what parts of the enormous corpus of Islamic jurisprudential scholarship should inform law. They do effectively (though not explicitly) suggest that constitutional courts and parliaments shall determine the meaning of Islamic law—the first responsible for interpreting the constitution; the second for passing legislation. Together, the constitutional courts and parliament are typically the bodies that have some authority in putting whatever legal meat might go on the very bare bones of the constitutional language.

5. *Personal Status (marriage, divorce, guardianship, and inheritance) is a Frequent Constitutional Use of Islamic Law.* The [Jordanian Constitution](#)'s article 103 states: "Matters of personal status are the matters specified by law and in accordance therewith fall within the sole jurisdiction of the shari'a courts when the parties are Muslims." But they hasten to allow other religious communities to have their family matters adjudicated according to their own religious teachings.

The [Iraqi Constitution](#)'s article 41 provides: "Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law."

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The [Egyptian Constitution](#)'s article 3 instructs: "The principles of the laws of Egyptian Christians and Jews are the main source of laws regulating their personal status, religious affairs, and selection of spiritual leaders."

As with education, the effect of writing such provisions is not merely to incorporate some religious elements into the state structure but also to make state officials arbiters of religious teachings.

In many countries, regular courts, staffed by judges trained in state law schools, adjudicate cases. In a few cases, the law is not codified, and shari'a courts—staffed with those trained (generally also in state institutions) in the Islamic jurisprudential tradition are charged with applying the law. In a few countries, Sunnis and Shi'is have separate law or courts systems. And all countries recognize that family matters involving non-Muslims of the same religion are to be adjudicated according to the teachings of their own faith, sometimes in courts staffed by officials of that faith and sometimes in the regular court system.

Once again, the effect is to make religious law the law of the state—but also to make the state the authority in the way religious teachings are applied between husbands and wives and between children and parents. While the way that the state interprets and applies such teachings is the topic of discussion and the object of political contestation, the idea that religion should inform family law occasions far less controversy. Few Muslims argue that the state should

### Term: Applications of Islamic Law

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*Islamic law has historically been "applied" through interpretations of muftis—expert jurists—who are considered the experts on fiqh. Their fatwās may have influence but are rarely binding. Qādis—judges—adjudicate cases and legal questions in shari'a courts (for countries that have them), but muftis interpret and advise both individuals and courts on the principles behind these cases.*

ignore religion when making family law; most non-Muslim leaders embrace the communal autonomy these arrangements give them.

6. *Almost all Arab Constitutions Provide for Religious Freedom in Some Way:* Through their wording and context the constitutions suggest that they be read as providing for a measure of communal freedom and general state support for religion rather than a strong statement of individual freedom of conscience.

Constitutional language often protects freedom of “creed,” “practice,” or “rites.”

The [Jordanian Constitution](#)’s article 14 requires the state to “safeguard the free exercise of the rites of religions and creeds in accordance with the customs observed in the Kingdom, if such is not inconsistent with public order or morality.”

The [Kuwaiti Constitution](#)’s article 35 does insist that “freedom of belief is absolute” but then hastens to explain that in terms of observance and rites: “The State shall protect freedom in the observance of religious rites established by custom, provided such observance does not conflict with morals or disturb public order.”

The [Egyptian Constitution](#)’s article 64 follows the same pattern: “Freedom of belief is absolute. The freedom of practicing religious rites and establishing places of worship for the followers of revealed religions is a right organized by law.”

The focus on rituals, practice, public order,

*“The focus on rituals, practice, public order, and implementing legislation suggests that what the state is obligated to do is protect how communities practice religion—but to do so within a regulatory framework that ensures that it does not disrupt what it defines as general social needs...”*

and implementing legislation suggest that what the state is obligated to do is protect how communities practice religion—but do so within a regulatory framework that ensures that does not disrupt what it defines as general social needs for security and context guides interpretation in the same direction. In a social and legal context in which one’s religious affiliation defines the framework for family life, there must be some recognition given that religion is not merely a matter of individual belief but also of which faith-based community one chooses to be affiliated with.

In a different context, I described the resulting attitude of Arab constitutions and legal systems:

Believe whatever you wish. When it comes to practicing religion, choose any one of a menu of state-recognized faiths—or rather have your parents (especially your father) select yours for you. Changing your mind about your faith can get a bit complicated and even dangerous (especially if it is away from Islam), but we would prefer not to specify the consequences in clear legal form. Changing within sects of the same religion is generally much easier; sometimes you may be allowed to switch sects simply to change the provisions of family law that gov-

ern you—though sometimes we will obstruct that path. The state is there to help you, your family, and your community practice your religion within certain bounds; it is also there to help ensure that it is taught to your children. When you marry, divorce, or inherit, you will do so according to the way that state officials interpret and apply the teachings of your own religious community; they have generally consulted with scholars versed in your religion in coming up with their interpretations. The state favors the religion of Islam by sponsoring a significant role for the religion—as state-supported religious officials define it—in public life. And it takes it as a duty to protect Islam as a religion deserving rights and respect. But other recognized religions obtain protection as well.<sup>1</sup>

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<sup>1</sup> See my “Citizenship, Religious Rights, and State Identity in Arab Constitutions Who is Free and What Are They Free to Do?” in Nehal Bhuta (ed.), “Freedom of Religion, Secularism and Human Rights,” Collected Courses of the Academy of European Law, Volume XV, (forthcoming).

### Quote Summary

*The state administers the law through a specific, preferred religion, as religion is the foundation of public life. Although the state prefers one religion over others, it will protect other religions.*

### In Short

*Arab Constitutions use religion as a mechanism of governance, legislation, and public policy. Decisions regarding administrative and personal law are determined by consulting Islamic principles, but these principles are often not strictly codified. Instead, the constitution typically establishes these principles as a guiding legal force of the state in a general way. Although other religions are practiced and protected by law, social stability depends on Islam and accommodation of certain forms (largely ritual law and private family law) of Islamic law.*

# Takeaway

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## State Authorities Continually Contextualize Religion

In sum, Arab constitutional provisions for religion make it necessary for state authorities to decide what is a religion and what is not; who speaks for a religious community; and whether and how religious issues, rites, and instructions will be given some kind of legal protection and policy expression. This very process involves the state in religious affairs and folds religion into the state. The result is a complex set of obligations and protections—for states, religious communities and religious leaders, specific religious rights and freedoms, and, to a lesser extent, individual freedom of conscience. The end result is neither liberal nor secular but instead a complicated intertwining of religion and state that has some parallels with other political orders even as it has its own distinctiveness.

### Mentioned (in order)

*Syrian Constitution: Article 3*

*Tunisian Constitution: Article 74*

*Egyptian Constitution: Article 10*

*Egyptian Constitution: Article 24*

*Tunisian Constitution: Article 39*

*Egyptian Constitution: Article 2*

*Egyptian Constitution of 2012*

*Jordanian Constitution: Article 103*

*Iraqi Constitution: Article 41*

*Egyptian Constitution: Article 3*

*Jordanian Constitution: Article 14*

*Kuwaiti Constitution: Article 35*

*Egyptian Constitution: Article 64*

# Related Bibliography

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## Portal resources

- Constitution of Egypt  
<https://beta.shariasource.com/documents/2755>
- Constitution of Iraq  
<https://beta.shariasource.com/documents/2812>
- Constitution of Jordan  
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