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Constitutional Apostasy: The Ambiguities in Islamic Law After the Arab Spring

Brian O’Connell

¶1 In October 2009, Iranian Baptist Pastor Youcef Nadarkhan was arrested for apostasy because he converted from Islam to Christianity.¹ In November 2010, he was sentenced to death. In December 2010, the Pastor’s case was referred to the Supreme Court in Qom, Iran.² On June 12, 2011, the Supreme Court upheld the conviction of “turning his back on Islam, the greatest religion the prophesy of Mohammad at the age of 19,” although the Supreme Court remanded to further investigate whether he committed the crime as an adult as opposed to converting as a child.³ The Court bluntly stated “[I]f it can be proved that he was a practicing Muslim as an adult and has not repented, the execution will be carried out.”⁴

¶2 Although the Iranian penal code does not recognize apostasy, the Iranian Parliament reportedly approved the death penalty for apostasy in 2008, and the U.S. State Department reports that apostasy is now punishable by death.⁵ On September 30, 2011, Iranian state Farsnews reported that Nadarkhan remains in prison for “security-related crimes” and “rape” but has not yet been executed.⁶ The same press release also referred to Youcef as a “Zionist.”⁷ Despite the recent news asserting that he had been punished for

¹ Human Rights Watch, *Evangelical Christians Targets of Religious Persecution*, HUFFINGTON POST (Sept. 29, 2011, 5:58 PM), http://www.huffingtonpost.com/human-rights-watch/evangelical-christians-ta_b_987967.html.

² Jay Sekulow & Jordan Sekulow, *Setting the Record Straight—Pastor Youcef’s Life Still Hangs in the Balance*, AMERICAN CENTER FOR LAW AND JUSTICE, (Nov 4, 2011, 2:47 PM), <http://aclj.org/iran/setting-record-straight-pastor-youcef-life-still-hangs-balance>.

³ *Unofficial Translation of Pastor Youcef Nadarkhan’s Verdict* (September 25, 2011), <http://c0391070.cdn2.cloudfiles.rackspacecloud.com/pdf/youcef-nadarkhani-iranian-supreme-court-verdict-english-translation.pdf> (the brief was obtained by CNN from the American Center for Law and Justice and was translated from its original Farsi by the Confederation of Iranian Students in Washington) (hereinafter “Unofficial Translation”).

⁴ *Id.*

⁵ Michelle A. Vu, *Iran Parliament Approves Death Penalty for Apostasy Bill*, CHRISTIAN POST (Sept. 11, 2008 11:02 AM), <http://www.christianpost.com/news/iran-parliament-approves-death-penalty-for-apostasy-bill-34230/>; *2010 International Religious Freedom Report: Iran*, U.S. DEPARTMENT OF STATE 3 (September 13, 2011), http://www.state.gov/j/drl/rls/irf/2010_5/168264.htm.

⁶ *State Media Reports Iranian Pastor Facing Execution for Rape, Not Religion*, FOX NEWS (Oct 1, 2011), <http://www.foxnews.com/world/2011/10/01/state-media-reports-iranian-pastor-facing-execution-for-rape-not-religion/>; *A Zionist and Dyer’s House Corruption*, FARSNEWS (October 1, 2011), <http://www.microsofttranslator.com/bv.aspx?ref=Internal&from=&to=en&a=http://www.farsnews.com/newstext.php?nn=13900708000751>.

⁷ FARSNEWS, *supra* note 6.

a different crime, translations of the original conviction only mentioned apostasy.⁸ In December 2011, the International Campaign for Human Rights in Iran reported the execution had been delayed.⁹ However, CNN reported on February 23, 2012 that a local court had issued a final verdict ordering the Pastor's execution.¹⁰ His legal team tried to appeal, but according to the report, he could have been executed at any time and without notice to his counsel.¹¹

¶3 On September 8, 2012, Pastor Youcef was released, having his charges lowered from apostasy to "evangelizing Muslims." The "evangelizing Muslims" charge had a three-year sentence, and Youcef was given credit for time served.¹² However, on Christmas Day, Pastor Youcef was reportedly re-arrested to complete the remaining 45 days on his three-year sentence.¹³ Youcef has since been released again, but was reportedly ordered to return to prison again to document his final release.¹⁴

¶4 This case has gained a political following from both religious groups and civil liberties groups in the United States. Republican Congressman Joe Pitts and the first Muslim Congressman, Keith Ellison, co-sponsored a resolution condemning Pastor Youcef's imprisonment and demanding that he be immediately exonerated and released.¹⁵ President Obama, the State Department, and former Republican Presidential candidate Mitt Romney all condemned the imprisonment.¹⁶

¶5 The problem of criminalizing apostasy in Iran is not limited to this single incident. The United States Department of State reported in 2012 that since President Mahmoud Ahmadinejad took office in 2005, the Iranian media have intensified attacks on religious minorities and police raids against such groups have escalated. In addition to Pastor

⁸ Dan Merica, *Iranian Pastor Faces Death for Rape, Not Apostasy—Report*, CNN (September 30, 2011), <http://edition.cnn.com/2011/09/30/world/meast/iran-christian-pastor> (explaining that the 2010 Supreme Court decision where the pastor was sent to death was only on an apostasy charge).

⁹ Roxana Saberi, *Iran Must Stop Persecuting Minority Religions*, CNN (December 21, 2011), http://edition.cnn.com/2011/12/21/opinion/saberi-iran-religion/index.html?hpt=op_t1.

¹⁰ Dan Merica, *White House, State Department Condemn Iran on Pastor's Execution Orders*, CNN (February 23, 2012), <http://religion.blogs.cnn.com/2012/02/23/white-house-state-department-condemn-iran-on-pastors-execution-orders/>.

¹¹ *Id.*

¹² Meredith Bennett-Smith, *Pastor Youcef Nadarkhani Freed: Iranian Pastor Sentenced To Death For Apostasy Reportedly Released*, HUFFINGTON POST, (September 8, 2012), http://www.huffingtonpost.com/2012/09/08/pastor-youcef-nadarkhani-iranian-pastor-freed-reportedly-released_n_1867334.html.

¹³ Kristin Wright, *Youcef Nadarkhani, Iranian Pastor, Reportedly Detained on Christmas Day*, HUFFINGTON POST (Dec. 26, 2012), http://www.huffingtonpost.com/kristin-wright/iranian-pastor-youcef-nad_b_2363155.html.

¹⁴ Paul Marshall, *Iran's Religious Crackdown*, NATIONAL REVIEW ONLINE, (Jan. 25, 2013), <http://www.nationalreview.com/corner/338864/iran-s-religious-crackdown-paul-marshall#>.

¹⁵ Caitlin Burgess, *House Passes Ellison Resolution Condemning Iran's Treatment of Pastor Youcef*, RICHFIELD PATCH (Mar. 5, 2012), <http://richfield.patch.com/groups/politics-and-elections/p/house-passes-ellison-resolution-condemning-iran-s-tre6d96ea1584>.

¹⁶ The White House, *Press Release*, OFFICE OF THE PRESS SECRETARY (Feb. 23, 2012), <http://www.whitehouse.gov/the-press-office/2012/02/23/statement-press-secretary-case-iranian-pastor-youcef-nadarkhani>; Mark Toner, *Execution Order for Iranian Christian Pastor Youcef Nadarkhani*, OFFICE OF DEPARTMENT OF STATE (Feb. 23, 2012), <http://www.state.gov/r/pa/prs/ps/2012/02/184566.htm>; Mitt Romney, *Pastor Youcef Nadarkhani Death Sentence an Outrage Against Humanity*, ROMNEY FOR PRESIDENT (Oct. 3, 2011), <http://www.mittromney.com/news/press/2011/10/mitt-romney-pastor-youcef-nadarkhani-death-sentence-outrage-against-humanity>.

Youcef, the State Department reported that in June 2010, Behrouz Sadegh-Khandjani received a death sentence “for apostasy following his arrest on an unknown date.”¹⁷ Missionary work, or proselytizing Muslims to convert to non-Muslim religions, is illegal.¹⁸ Criminalization has increased in recent years. Between June 2008 and June 2010, Iran arrested 115 individuals for apostasy or evangelism. In the following six-month period, July through December 2010, Iran arrested 161 individuals for the same crimes.¹⁹ The State Department reported that in 2011, 33 of those individuals remained in prison.²⁰ Recently, another Pastor who converted from Islam to Christianity was imprisoned, and reportedly remains imprisoned on charges of evangelizing Muslims.²¹

¶16 The problem of apostasy crime is not unique to Iran, but given Iran’s hostile relationship with the West, this story has drawn much attention. Countries that recognize Sharia law often recognize apostasy as a crime.²² Courts using Sharia law have enforced un-codified apostasy laws in order to protect public policy.²³ However, those countries that have better records on human rights tend to have superior constitutional protections for religious minorities.²⁴

¶17 Apostasy punishment is a serious problem in environments where there is an absence of the rule of law.²⁵ In countries experiencing ethnic and religious tension, the threat of punishment for apostasy outside the scope of law remains a problem. As the case studies that follow will show, those countries with better records on religious freedom tend to have stronger language within their constitutions protecting religious freedom and international norms.

¶18 Part I of this paper will explain Sharia law and the law on apostasy in Islamic and Muslim-majority countries. Part II will describe the international law on freedom of religion with specific emphasis on the United Nations Universal Declaration of Human Rights of 1948 (hereinafter “UDHR”) and the International Covenant on Civil and Political Rights of 1966 (hereinafter “ICCPR”). Part III discusses how this tension between Sharia law on apostasy and the international norms promoting religious freedom is resolved in several Islamic and Muslim-majority countries. This section explains how constitutional ambiguity on international norms and public safety exceptions to human rights can be exploited by radicalized regimes at the expense of those who choose to

¹⁷ U.S. DEPARTMENT OF STATE, *supra* note 5, at 14.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 15.

²⁰ *Id.*

²¹ Jordan Sekulow, *Pastor Saeed’s Trial: Bail Rejected—Will Iran Uphold Its Obligations to Protect Religious Liberty?*, ACLJ (January 21, 2013), <http://aclj.org/iran/pastor-saeed-trial-iran-uphold-obligations-protect-religious-liberty>.

²² Nicholas Garces, *Islam, Till Death Do You Part? Rethinking Apostasy Laws Under Islamic Law And International Legal Obligations*, 16 SW. J. INT’L L. 229, 234 (2010).

²³ Maurits S. Berger, *Apostasy and Public Policy in Contemporary Egypt: An Evaluation of Recent Cases from Egypt’s Highest Courts*, 25 HUM. RTS. Q. 720, 738 (2003).

²⁴ TAD STAHNKE & ROBERT C. BLITT, THE RELIGION-STATE RELATIONSHIP AND THE RIGHT TO FREEDOM OF RELIGION OR BELIEF: A COMPARATIVE TEXTUAL ANALYSIS OF THE CONSTITUTIONS OF PREDOMINANTLY MUSLIM COUNTRIES 10 (2005); *see also Middle East and North Africa*, FREEDOM HOUSE, <http://www.freedomhouse.org/regions/middle-east-and-north-africa>.

²⁵ Timothy G. Burroughs, *Turning Away From Islam In Iraq*, 37 HOFSTRA L. REV. 517, 548 (2009) (“Over the past twenty-five years, Islamic vigilantes have murdered far more apostates and imputed apostates than Islamic regimes have executed.”).

leave Islam. Part IV recommends that new and developing democracies in the Middle East codify a respect for international law and give unqualified grants of religious freedom within their constitutions to avoid any ambiguity that more radicalized future regimes could exploit. By protecting freedom of religion in accordance with international law, the constitution would protect those who change religions from punishment for apostasy and evangelization.

I. THE CRIME OF APOSTASY

¶9 This paper will examine the crime and punishment of apostasy in the Islamic world. Apostasy, (“riddah” in Arabic) is the reverting or turning away from the Islamic faith.²⁶ The word applies only to former Muslims, whereas non-Muslims are just said to “change religion.”²⁷ In the case of Egyptian courts, whether the former Muslim converts to Christianity, becomes an atheist, or converts to any other religion is irrelevant.²⁸ The Pastor Youcef example has gained some attention from the religious right²⁹ in America because of the persecution against Christians, but apostasy is neutral as to what religion the former Muslim becomes after leaving Islam.³⁰

¶10 Under Sharia law, a person born a Muslim has no choice over his or her religion because it is a crime to leave Islam once one becomes a Muslim.³¹ As a result, there is a contradiction in the laws of many Muslim countries that enforce Sharia law. Their constitutions say they allow for freedom of religion, yet the state forbids Muslims from choosing their religions.³²

¶11 There are twenty-two countries that give Islam an official role in their constitution.³³ Although each country provides at least nominal protection for religious minorities in their constitution, in practice, the freedom of religion for individuals is limited. Such limitations generally include restricting the protection to a selected class of religious minorities, having public safety exceptions to the constitutional right, and allowing for normal legislation to trump the constitutional protections.³⁴ Despite these constitutional protections for religious minorities, countries that recognize Sharia law generally consider apostasy to be a crime.³⁵

²⁶ DR. ABM MAHBUBUL, *ISLAM, FREEDOM OF RELIGION IN SHARI’AH: A COMPARATIVE ANALYSIS* 179 (2002).

²⁷ Berger, *supra* note 23, at 721-22.

²⁸ *Id.*

²⁹ Katherine Weber, *Iranian Pastor Youcef Death Sentence: Conflicts Emerge Between US and Iran Media*, CHRISTIAN POST (November 14, 2011, 12:47 PM), <http://aclj.org/iran/christian-post-iranian-pastor-youcef-death-sentence-conflicts-emerge-between-us-iran-media>.

³⁰ Johanna Pink, *A Post-Qur’anic Religion Between Apostasy And Public Order: Egyptian Muftis And Courts On The Legal Status Of The Baha’i Faith*, 10 ISLAMIC L. & SOC’Y 409, 418 (2009) (“Baha’is are also considered apostates. Unlike, Christianity, they are not a recognized faith. Therefore, they are either apostates or Muslims under Sharia law. If their parents are Baha’is, they have until the age of 15 in Egypt to embrace Islam or they are labeled apostates under the law.”).

³¹ Berger, *supra* note 23, at 728.

³² *Id.*

³³ STAHNKE & BLITT, *supra* note 24, at 10.

³⁴ *Id.* at 15.

³⁵ Nicholas Garces, *Islam, Till Death Do You Part? Rethinking Apostasy Laws Under Islamic Law And International Legal Obligations*, 16 SW. J. INT’L L. 229, 234 (2010); MOHAMED S. EL-AWA, *PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY* 61-62 (1982); MAHBUBUL, *supra* note 26, at 207.

¶12 Although there is no explicit requirement in the Quran ordering the death penalty for apostasy, those countries that use the death penalty for apostasy rely on classic Muslim jurists. While the Quran is silent on the death penalty for apostasy, these scholars cite the Hadith, records of the practice of the prophet Mohammed, in which he reportedly said “[w]hoever changed his Islamic religion, then kill him.”³⁶ The Quran itself does not explicitly mention a punishment for apostasy but it does condemn it and threatens a “mighty chastisement.”³⁷ However, the Prophet also reportedly never actually executed anyone for leaving the Islamic faith.³⁸ Furthermore, most religious sources only mention the afterlife as a punishment for conversion from Islam.³⁹

¶13 Proponents of harsh punishments link the strength of Muslim society to the faith of its people, and believe that those who leave the Islamic faith are threatening their security.⁴⁰ In a way, the concern is similar to concerns about treason against the state in secular countries.⁴¹ The Quran also says that those who embrace Islam are obligated to preserve Islam.⁴² Moreover, the strength of Islamic society is tied to the strength of its faith; apostates threaten Islamic society.⁴³ Usually, the accused apostate is invited back into the faith before punishment is dealt out, and the accused is only punished if the person refuses to repent.⁴⁴ This is the current situation in Iran.

II. THE INTERNATIONAL LAW ON FREEDOM OF RELIGION

¶14 International human rights law unequivocally supports the freedom to change religion. The UDHR states that “[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to *change his religion or belief*, and freedom, either alone or in community.”⁴⁵ Despite some of the Islamic nations’ objections to a provision that allowed for people to change their beliefs, the Declaration was unanimously adopted by the 58-member General Assembly.⁴⁶ Under the UDHR, apostasy is a protected right, not a crime.

¶15 That norm of freedom of religion is continued in the ICCPR, which was entered into force in 1976. The ICCPR, unlike the UDHR, is binding in that it is a ratified treaty.⁴⁷ Iran is also a ratified member of the ICCPR. As a member, Iran has accepted

³⁶ EL-AWA, *supra* note 35, at 237. El-Awa questions the validity of this statement, suggesting that taken literally, a Non-Muslim who becomes a Muslim would also need to be killed. *Id.* at 52-53. However, this passage is widely cited as justifying death sentences for apostasy.

³⁷ Garces, *supra* note 35.

³⁸ Donna E. Arzt, *The Role of Compulsion in Islamic Conversion: Jihad, Dhimma and Ridda*, 8 BUFF. HUM. RTS. L. REV. 15, 30 (2002).

³⁹ YUNUSA BAMBALE, *CRIMES AND PUNISHMENTS UNDER ISLAMIC LAW* 74, 80 (2d ed. 2003).

⁴⁰ Garces, *supra* note 35, at 238.

⁴¹ MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* 124 (2003); EL-AWA, *supra* note 35, at 49-56; S.A. RAHMAN, *PUNISHMENT OF APOSTASY IN ISLAM* (1978).

⁴² Garces, *supra* note 35, at 238.

⁴³ BADERIN, *supra* note 41, at 124.

⁴⁴ BAMBALE, *supra* note 39, at 79.

⁴⁵ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), art. 18 (emphasis added) (hereinafter “UDHR”).

⁴⁶ *A United Nations Priority: Declaration of Human Rights*, UNITED NATIONS, <http://www.un.org/rights/HRToday/declar.htm>.

⁴⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368, 999 U.N.T.S. 171 (1967) (ratified by Iran on June 24, 1975) (hereinafter “ICCPR”).

Article 18.1 which declares that “[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his religion or belief, observance, practice and teaching.”⁴⁸

¶16 Because there were more Muslim states involved in the creation of the ICCPR than in the UDHR, the language of the rights guaranteed was watered-down to reflect a more Sharia-friendly version of human rights law. Unlike the UDHR, the ICCPR does not expressly guarantee the freedom to “change” one’s belief.⁴⁹ However, the Office of the High Commissioner in General Comment 22 interprets the language in Article 18.1 to “necessarily entail[] the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religious belief.”⁵⁰

¶17 Following Article 18.1, the next clause of the ICCPR expressly states that “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”⁵¹ Such a law should presumably bar forcing a former Muslim to return to Islam or face punishment. The General Comment gives some examples of violations including “policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or [other rights] . . . are similarly inconsistent with article.”⁵² The Comment also asserts that Article 18.2 bars penal sanctions.⁵³ Unless these exceptions are read extremely narrowly and without an inference that the threat of penal sanctions includes the threat of execution, the threat of execution would constitute a violation of Article 18.2. In any case, Iran’s incarceration of Pastor Youcef for apostasy is itself a violation of Article 18.2, regardless of the intent to execute him.

¶18 However, Sharia law nations have largely ignored the General Comments and relied on their own narrow interpretation of the text of the ICCPR.⁵⁴ While the UDHR granted all people the right to “change” their beliefs, the ICCPR uses the more ambiguous language “freedom to have or adopt a religion or belief of one’s choice.”⁵⁵ Most Muslim countries are of the opinion that it gives a non-Muslim the freedom to choose a non-Muslim religion or to embrace Islam, but these courts believe that in

⁴⁸ *Id.* at art. 18.1.

⁴⁹ *Id.*

⁵⁰ Office of the High Commissioner for Human Rights, *General Comment No. 22: The right to freedom of thought, conscience and religion*, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (Sep. 30, 1993), [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9a30112c27d1167cc12563ed004d8f15?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument) (on “the right to freedom of thought, conscience and religion, which includes the freedom to hold beliefs”) (hereinafter “General Comment 22”).

⁵¹ ICCPR, *supra* note 47, at art. 18.2.

⁵² General Comment 22, *supra* note 50.

⁵³ *Id.*

⁵⁴ It is worth noting that the General Comments were created in 1993 while the ICCPR text was promulgated in 1966. Iran had signed the ICCPR before these comments were written.

⁵⁵ See, e.g. Donna E. Arzt, *The Application of International Human Rights in Islamic States*, 12 HUM. RTS. Q. 214-18 (1990); Brice Dickson, *The United Nations and Freedom of Religion*, 44 INT’L & COMP. L. Q. 342 (1995).

accordance with Sharia, the ICCPR does not require the freedom to abandon the Muslim faith once someone has embraced Islam.⁵⁶

¶19 Although the ICCPR does have some express limitations on freedom of religion, those limitations are to be interpreted strictly. Article 18.3 allows states to restrict freedom to manifest one's religion "to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of others."⁵⁷ General Comment 22 says Article 18.3 is to be "strictly interpreted" and that exceptions must be spelled out in law rather than applied in an arbitrary manner.⁵⁸ As the Iranian example shows, apostasy crimes can become intertwined with crimes against public order and safety.⁵⁹ However, General Comment 22, paragraph 8 notes that national security concerns are not exempted from the Treaty.⁶⁰

¶20 The "moral" exception must also be construed strictly against allowing religious restriction.⁶¹ The Committee notes that moral restrictions must derive from several factors, including, social, philosophical, and religious traditions. Moreover, a moral exception must rely on more than one religious tradition.⁶²

¶21 Although the ICCPR and the UDHR speak in universal terms, just because human rights laws are written down by international bodies does not mean that nation states will recognize them. Sam Huntington has argued that Western culture and the Islamic culture have been clashing for the last 1300 years.⁶³ He argued that the United Nations and international human rights laws are a Western construct, and that under his theory, Islamic nations would naturally resist international pressures. These cultural differences create policy differences and different interpretations of human rights.⁶⁴ According to Huntington, pressing for Islamic countries to comply with Western norms, such as in the case of apostasy, would instead create an adverse reaction against Western norms.⁶⁵ He refers to this reaction as a resistance to "human rights imperialism" and hastens a regression to indigenous values by the non-Western culture.⁶⁶

¶22 A response to the problem of cultural relativism is to address the conflict during times of transition, particularly when new Constitutions are drafted. Because of this cultural conflict between international norms and national norms, weaving international norms into the constitutions of emerging Islamic democracies might further the goals of human rights laws. The norms become provisions in the Constitutions, which then become the founding documents for the nations, a source of cultural identity, and a

⁵⁶ Berger, *supra* note 23, at 734 ("Egypt, upon ratification of the covenant in 1982, added the following statement: 'Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text [i.e. the Covenant] . . . we accept, support and ratify it.' This could be explained as an exception clause, but is more likely to be an assurance that the ICCPR is consistent with the Islamic Sharia.").

⁵⁷ ICCPR, *supra* note 47, at art. 18.3.

⁵⁸ General Comment 22, *supra* note 50, at ¶ 8.

⁵⁹ See FOX NEWS, *supra* note 6.

⁶⁰ General Comment 22, *supra* note 50.

⁶¹ *Id.* at ¶ 8.

⁶² *Id.*

⁶³ Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFFAIRS 22, 31 (1993).

⁶⁴ *Id.* at 29.

⁶⁵ *Id.* at 40.

⁶⁶ *Id.* at 41.

template for the nations' aspirations.⁶⁷ The Constitutions are generally obeyed because those in power have a stake in maintaining the rules for the Constitution. Undermining any particular rule undermines the greater Constitutional game and the government's legitimacy to power.⁶⁸ As the case studies show, *infra*, the nations with respect for international law tend to be those with superior records in human rights and freedom of religion.

III. THE CONSTITUTIONAL AMBIGUITIES

A. *How a Muslim to Christian Convert can be Imprisoned Despite a Constitution Guaranteeing Freedom of Belief*

¶23 At first glance, it would appear that the Iranian Constitution promotes religious freedom. Article 23 states “[t]he investigation of individuals’ beliefs is forbidden, and no one may be molested or taken to task simply for holding a certain belief.”⁶⁹ Article 26 also suggests that Iran gives the freedom to hold religious societies to non-Muslim groups.⁷⁰ The Article concludes by saying no one can be prevented from participating in such groups. Article 13 recognizes Christians as a religious minority, and Article 14 orders Muslims to “respect the human rights” of non-Muslims that are recognized religious minorities.⁷¹

¶24 While a cursory read of the Iranian Constitution might suggest that the document is innocuous and grants religious freedom, the limiting provisos following the grants of freedom allow for a different interpretation. Following Article 13 of the Iranian Constitution, which recognizes the right of Christians to practice their religion inside Iran, the next Article in the Iranian Constitution states that the principle of protecting non-Muslims’ human rights applies only “to all who refrain from engaging in conspiracy or activity against Islam and the Islamic Republic of Iran.”⁷² Because different

⁶⁷ See Vicki C. Jackson, *Constitution Drafting In Post-Conflict States Symposium: What’s In A Name? Reflections On Timing, Naming, And Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1296 (“Despite the inward focus of much discussion about constitutions, national constitutions also matter to a transnational community: they help define state sovereignty for purposes of recognition, they structure the state’s capacities to deal with other states, and they may affect the capacity of the states to comply with international norms of interest to all member nations, including those against offensive war and those protecting human rights.”).

⁶⁸ Jack Goldsmith and Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1836 (citing RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 82–140 (1999)).

⁶⁹ ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [Amendment to the Constitution], art. 23 [1989] (Iran) (hereinafter “Iranian Constitution”).

⁷⁰ *Id.* at art. 26 (“The formation of parties, societies, political or professional associations, as well as religious societies, whether Islamic or pertaining to one of the recognized religious minorities, is permitted provided they do not violate the principles of independence, freedom, national unity, the criteria of Islam, or the basis of the Islamic Republic.”). Likewise, Egyptian courts have held that apostasy deals not with freedom of belief to the individual, but the practice of belief, which is left to be regulated by the specific religious groups. See Berger, *supra* note 23, at 737.

⁷¹ Iranian Constitution, *supra* note 69, at art. 14.

⁷² *Id.* at art. 14; See also *id.* at art. 26 (providing freedom of association provided they do not “violate . . . the basis of the Islamic Republic”).

viewpoints disagree⁷³ on whether apostasy, the act of leaving Islam as an adult as opposed to simply being born Christian, is a punishable activity against Islam,⁷⁴ there is uncertainty as to the Iranian Constitution's stance on apostasy. Unlike the UDHR and the General Comments to the ICCPR, the Iranian Constitution is silent on whether one can change religions.

¶25 The Iranian Constitution is ambiguous as to protections for religious minorities. Because Article 13 and Article 14⁷⁵ are in tension with each other, a radicalized Iranian regime is free to take aggressive steps against its citizens when they renounce Islam. In other nations of Islamic faith, populist democracy is likely to be a threat rather than a cure to the problem of apostasy because in many nations over eighty percent of the population favors the death penalty for those who leave Islam.⁷⁶ This problem persists despite a theological debate over whether the Quran permits the death penalty or imprisonment for apostasy.⁷⁷ The solution going forward for nations of Islamic faith is to provide more explicit protection for religious freedom within their Constitutions so legislatures and courts are constrained from exercising a radicalized interpretation of Islam. In addition, demanding respect for international law within the text of the Constitution would be helpful.

¶26 Because the Iranian Constitution's ambiguities are problematic, a comparison of other Muslim majority countries' Constitutions with superior human rights records could be beneficial. Turkey, Lebanon, and Morocco, while not possessing perfect records on human rights, are examples of Muslim countries with a significant level of respect for the human rights community⁷⁸ that emerging Arab Spring democracies could look to while drafting and amending their own Constitutions. This section will engage in a comparison of Iran's Constitution to those of nations that have recently experienced unrest: Syria and Libya. The section will conclude with a discussion of how constitutional courts can undermine constitutional freedom of religion in order to show that vague, though seemingly innocuous, grants of religious freedom can be manipulated by the courts.

⁷³ Harris Zafar, *Iran's Death Penalty for Christian Pastor Violates Treaties, Koran*, HOUSTON CHRONICLE (Oct. 4, 2011), <http://blog.chron.com/spiritedchat/2011/10/iran%E2%80%99s-death-penalty-for-christian-pastor-violates-treaties-koran/>.

⁷⁴ Dan Merica, *Pastor's Possible Execution Reveals Nuances of Islamic Law*, CNN (October 7, 2011), <http://religion.blogs.cnn.com/2011/10/07/pastors-possible-execution-reveals-nuances-of-islamic-law/>.

⁷⁵ The Iranian constitution has several limiting provisos following a guarantee of rights. For example, Article 26 also limits Freedom of Association to those that "do not violate . . . the criteria of Islam, or the basis of the Islamic Republic."

⁷⁶ *Most Embrace a Role for Islam in Politics*, PEW RESEARCH CENTER (Dec. 2, 2010), <http://www.pewglobal.org/2010/12/02/muslims-around-the-world-divided-on-hamas-and-hezbollah/>.

⁷⁷ Qashim Rashid, *'Muslim' Nations and The Problem of Christian Persecution*, HUFFINGTON POST (Oct. 19, 2011), http://www.huffingtonpost.com/qasim-rashid/the-problem-of-christian-persecution_b_1012010.html.

⁷⁸ Case studies are based on Freedom House Rankings. For information on their methodology, see *Freedom in the World 2011*, FREEDOM HOUSE (2011), <http://www.freedomhouse.org/report/freedom-world-2011/methodology> ("The methodology of the survey is grounded in basic standards of political rights and civil liberties, derived in large measure from relevant portions of the Universal Declaration of Human Rights.").

B. The Turkish Constitution: Muslim Majority and Partly Free

¶27 The Turkish example is noteworthy, given its above average Freedom House ranking with regards to political and civil rights.⁷⁹ Although Turkey has recently had political turmoil, its rankings have consistently been average or above average for the last decade.⁸⁰ As a percentage of population, Turkey is actually more Muslim than Iran, with 99.8 percent of the population in Turkey consisting of Muslims,⁸¹ while Iran is only 98 percent Muslim.⁸² The two nations are also nearly identical in terms of population.⁸³ However, their constitutions are different, as are their human rights records.

¶28 The Turkish Constitution provides more protection to freedom of religious thought than does its Iranian counterpart. The Turkish Constitution says that “no one may be compelled to reveal his or her religion, conscience, thought or opinion, nor be accused on account of them.”⁸⁴ This clause falls under Part II of the Turkish Constitution, which is titled “Fundamental Rights and Duties.”⁸⁵

¶29 However, like Iran’s Constitution, the Turkish Constitution does allow for the suspension of rights under certain circumstances. The Turkish Constitution allows for partial or entire suspension of fundamental rights in times of “war, mobilization, martial law, or state[s] of emergency.”⁸⁶ Yet, that paragraph appears before the guarantee that no one may be compelled to reveal his religion. Under the construction that the general should not detract from the specific guarantee of protection, the Turkish Constitution would be more protective of religious freedom than the Iranian Constitution. The Turkish Constitution says when referring to those times of emergency “[e]ven under the circumstances indicated in the first paragraph . . . no one may be compelled to reveal his or her religion.”⁸⁷ While the Iranian Constitution restricts its grants of freedoms, the Turkish Constitution actually restricts its restrictions of freedoms.

¶30 Another difference is that the Turkish Constitution seems to protect specific *people*, while the Iranian Constitution protects mainly religious *groups*. The Iranian Constitution says in Article 13 that it protects Zoroastrians, Jews, and Christians, but leaves out other minority faiths such as Bahais.⁸⁸ That protection in the Iranian Constitution given to those three faiths can be viewed more as a protection of ethnic groups as opposed to religions because the enumerated protection would not apply to a Muslim who decides to leave his or her faith for another or when one decides to abandon his or her religion. Although Iran

⁷⁹ *Id.* Turkey has ranked above average worldwide in both civil and political Rights. *Turkey: Freedom in the World 2011*, FREEDOM HOUSE (2011), <http://www.freedomhouse.org/report/freedom-world/2011/turkey>. By contrast, Iran is near the bottom in both civil and political rights, ranking below Mubarak’s Egypt in civil liberties. *Iran: Freedom in the World 2011*, FREEDOM HOUSE (2011), <http://www.freedomhouse.org/report/freedom-world/2011/iran>.

⁸⁰ *Id.*

⁸¹ *Turkey*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html>.

⁸² *Iran*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html>.

⁸³ *Country Comparison: Population*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html>.

⁸⁴ Constitution of the Republic of Turkey, art. 15 (1982) (hereinafter “Turkish Constitution”).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at art. 15(2).

⁸⁸ U.S. DEPARTMENT OF STATE, *supra* note 5 (the Iranian government considers Baha’i, a religion of five to six million people founded in Iran, to be apostates).

does have a section of its Constitution devoted to the rights of the people, the provisions on religion fall outside that section.⁸⁹ By contrast, the Turkish requirement that no one be compelled to reveal his religion is under the Fundamental Rights section.⁹⁰ The rights fall under Chapter II of Part II, the Rights and Duties of the Individual.⁹¹

¶31 Unlike Turkey, many of the Iranian grants of religious freedoms are written in limiting terms: “Zoroastrian, Jewish, and Christian Iranians are the *only* recognized religious minorities.”⁹² Article 20 of the Iranian Constitution provides specific equality to people, as opposed to groups, but the language implies that the protections are subordinate to Islamic law.⁹³ Contrast this with the Turkish Constitution, which states: “[e]veryone possesses inherent fundamental rights and freedoms which are inviolable and inalienable.”⁹⁴ In the Turkish Constitution, there is no qualification that the freedom of religion must be “in conformity with Islamic law.”

¶32 Turkey also goes further than Iran by providing remedies within the Constitution for violations of fundamental rights. Article 40 of the Turkish Constitution allows for the “right to request prompt access” to authorities when such rights have been violated, and also gives the injured person a right to receive damages for the injury, which will be paid for by the State.⁹⁵ The Iranian Constitution provides no such right to sue for damages for infringements on these rights.

¶33 Beyond respect for religious minorities, the Turkish Constitution contains more respect for international law than its Iranian counterpart. The Turkish Constitution says that even when fundamental rights must be suspended, they are limited by a proviso, which requires that “obligations under international law are not violated.”⁹⁶ The Iranian Constitution does not possess a similar command that international treaties or law be respected. Rather, it demands that Islamic law be complied with in order to restrict rights, rather than expand them.⁹⁷ This greater protection for international law in the Turkish Constitution contains the lesser protection for religious minorities.

¶34 Although both countries are under equal obligation to obey international law, Turkey has a better record of doing so. The Turkish Constitution also contains more explicit respect for international law than the Iranian Constitution, suggesting why one country is more in accord with international norms than the other, even though both

⁸⁹ Iranian Constitution, Part III (the section on the rights of people begins with Article 19, while the recognizing of religious groups is earlier, in Article 13).

⁹⁰ Turkish Constitution, Part II.

⁹¹ *Id.* at Part II, Chapter II, art. 24.

⁹² Iranian Constitution, *supra* note 69, at art. 13 (emphasis added).

⁹³ Iranian Constitution, *supra* note 69, art. 20 (“All citizens of the country, both men and women, equally enjoy the protection of the law and enjoy all human, political, economic, social, and cultural rights, in conformity with Islamic criteria.”).

⁹⁴ Turkish Constitution, *supra* note 52, at art. 12.

⁹⁵ *Id.* at art. 40.

⁹⁶ *Id.* at art. 15.

⁹⁷ *See* Iranian Constitution, at art. 26 (“The formation of parties, societies, political or professional associations, as well as religious societies, whether Islamic or pertaining to one of the recognized religious minorities, is permitted provided they do not violate the principles of independence, freedom, national unity, the criteria of Islam”); *see also id.* at art. 21 (“The government must ensure the rights of women in all respects, in conformity with Islamic criteria”).

countries have ratified the ICCPR.⁹⁸ Article 90 of the Turkish Constitution states that, “[i]nternational agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional.”⁹⁹ Article 90 also adds emphasis to Article 15, which provides for the supremacy of international law when there is a tension between international human rights law and the need to suspend fundamental rights in a time of war or emergency.¹⁰⁰ The Turkish Constitution maintains that, “[i]n the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.”¹⁰¹ The Iranian Constitution contains no such provision.

C. Lebanon: A Muslim-Majority Country in Favor of the UDHR

¶35 Respect for religious minorities and international law in the constitutions of Muslim majority nations is not limited to the Turkish Constitution. The Lebanese Constitution likewise respects religious freedom and the supremacy of international human rights law.¹⁰² According to the CIA Factbook, 59.7 percent of the Lebanese population is Muslim, although it does not consider itself an Islamic nation.¹⁰³ Freedom House ranks Lebanon with an above average worldwide score in civil liberties, and Lebanon is the highest ranked Muslim-majority country in the Middle East.¹⁰⁴ In Lebanon, only six percent of Muslims surveyed by Pew Research supported the Death Penalty as punishment for apostasy.¹⁰⁵

¶36 The Lebanese Constitution is different from its Iranian counterpart in that the Lebanese version is framed around the importance of human rights law. The Lebanese Constitution’s preamble establishes that it is a “founding and active member of the United Nations Organization and abides by its covenants and by the Universal Declaration of Human Rights.”¹⁰⁶ The next sentence requires that the government abide by these principles “without exception.”¹⁰⁷

⁹⁸ Turkey ratified ICCPR on September 23, 2003. *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION (Aug. 8, 2013),

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

⁹⁹ Turkish Constitution, *supra* note 84, at art. 90.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Lebanese Constitution (1990), Preamble

http://www.servat.unibe.ch/icl/le00000_.html.

¹⁰³ *Lebanon*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/le.html#>.

¹⁰⁴ Middle East and North Africa, FREEDOM HOUSE, (The only regional country ranked higher is Israel. Turkey is tied with Lebanon, but classified as part of Southern Europe)

<http://www.freedomhouse.org/regions/middle-east-and-north-africa>. ; *See also*, COUNTRY REPORT:

LEBANON, <http://www.freedomhouse.org/report/freedom-world/2012/lebanon>.

¹⁰⁵ Survey Report, *Most Embrace a Role for Islam in Politics*, PEW RESEARCH CENTER, (Dec. 2, 2010)

<http://www.pewglobal.org/2010/12/02/muslims-around-the-world-divided-on-hamas-and-hezbollah/>

¹⁰⁶ Lebanese Constitution (1990) (Lebanon) (hereinafter “Lebanese Constitution”).

¹⁰⁷ *Id.*

¶37 Both Lebanon and Iran have a titled article of their respective Constitutions guaranteeing equality before the law.¹⁰⁸ The Lebanese Constitution, after guaranteeing that everyone will be equal, says that all Lebanese citizens “equally enjoy civil and political rights and equally are bound by public obligations and duties *without any distinction*.”¹⁰⁹ Compare that provision with the counterpart in the Iranian Constitution: rather than emphasize that equality is guaranteed without distinction, equality is guaranteed only if it is “in conformity with Islamic criteria.”¹¹⁰ Once again, the Iranian Constitution provides limiting language where its counterpart Constitution, which is more liberal, inserts language that puts emphasis on the freedom given earlier in the provision.

¶38 Article 9 of the Lebanese Constitution then guarantees “absolute” freedom of religion, with the “guarantees that the personal status and religious interests of the population, to whatever religious sect they belong, is respected.”¹¹¹ While Article 23 of the Iranian Constitution does provide for freedom of religious belief, the Constitution contains several limiting statements whereby the regime limits rights to those who do not “engage in conspiracy or activity against Islam.”¹¹² Moreover, as the Egyptian discussion will show, *infra*, Sharia courts have justified apostasy punishments despite guarantees of freedom of belief because the laws of Islam require obedience to the faith once someone decides to join that faith.¹¹³ Since Iran is an Islamic Republic, and the state and the religion are intertwined, to betray one’s religion in Islam would be similar to treason or “engag[ing] in conspiracy” against Islam.¹¹⁴

¶39 Meanwhile, Lebanon, like Turkey, is not an Islamic republic, and even provided in its first Parliament that there would be equal representation between Muslims and Christians and therefore does not have this entanglement of the religion and the state that allows for religious abandonment to be conflated with a threat to the state’s authority.¹¹⁵

D. Morocco: A Sharia Law Constitution

¶40 Although the Lebanese and Turkish examples exhibit higher-rated levels of civil rights success than that of Morocco, the Moroccan example might have more in common with Iran because Morocco has declared Islam the state religion.¹¹⁶ Morocco scores a middle ranking of 4 out of 7 under the Freedom House civil liberties category, and is the

¹⁰⁸ Lebanese Constitution, *supra* note 107, at art. 7.

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ Iranian Constitution *supra* note 69, at art. 20 (“All citizens of the country, both men and women, equally enjoy the protection of the law and enjoy all human, political, economic, social, and cultural rights, in conformity with Islamic criteria”).

¹¹¹ Lebanese Constitution, *supra* note 106, at art. 9.

¹¹² Iranian Constitution, *supra* note 69, at art. 14.

¹¹³ Berger, *supra* note 23, at 736.

¹¹⁴ Iranian Constitution, *supra* note 69, at art. 14.

¹¹⁵ Lebanese Constitution, *supra* note 106, at art. 95.

¹¹⁶ Constitution of Morocco (1992) (Morocco) (hereinafter “Moroccan Constitution”). The Constitution of Morocco was amended in 2011-2012 as a response to the Arab Spring. However, this analysis will focus on the 1992-1996 amended Constitution. For a discussion of the 2012 Constitution, see INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, THE 2011 MOROCCAN CONSTITUTION: A CRITICAL ANALYSIS (2012), http://www.constitutionnet.org/files/the_2011_moroccan_constitution_english.pdf.

highest-rated officially Muslim nation in the Middle East region.¹¹⁷ While the nation does have sectarian problems with respect to religion, and has had power concentrated in the monarchy, it scores significantly higher than Iran in terms of civil liberties and is worth comparing constitutionally.

¶41 Although the 1992 Moroccan Constitution declares the nation a “Muslim Sovereign State,” the Moroccan Constitution contains some key differences from its Iranian counterpart.¹¹⁸ Unlike the Iranian Constitution, which uses Islam to limit freedom of religion, the Moroccan Constitution asserts that Islam “guarantees to all freedom of worship.”¹¹⁹ Article 6 of the Moroccan Constitution guarantees an unqualified freedom of religion. Article 9 then guarantees the rights of citizens “freedom of opinion, freedom of expression under all its forms, and freedom to assemble,” and orders that no restrictions can be imposed on such freedoms other than by law.¹²⁰ Article 44 indicates that “law” is that which is voted on by the Chamber of Representatives, rather than something imposed by an administrative agency.¹²¹ While the “by law” exemption does have some vagueness, it contrasts with the Iranian grants of liberties that are qualified by imposed Islamic criteria. The Moroccan equality article is different from its Iranian counterpart in that its grant is not qualified.¹²² The Moroccan equality article simply states that “[a]ll Moroccans are equal before law.”¹²³ The Iranian counterpart contains the proviso that the equality must be “in conformity with Islamic criteria.”¹²⁴

¶42 The Moroccan Constitution is far from perfect. The Moroccan Constitution does have religious limitations for government officials,¹²⁵ but no restrictions on freedom of religion for lay people. Article 37 suggests that members of the Chambers of Representative can be imprisoned for questioning the Muslim religion.¹²⁶ However, that limitation applies only to the Chamber of Representatives under Title III of the Moroccan Constitution.

¶43 The more acute difference between the Moroccan and the Iranian Constitutions is that the Moroccan version respects international law.¹²⁷ The Moroccan Constitution, although endorsing Sharia, demonstrates that a Sharia law country is capable of endorsing international norms. In its third sentence, the preamble of the Moroccan Constitution declares that Morocco is an “active and energetic member” of international organizations and that it is “aware of the necessity of setting its actions” within the

¹¹⁷ *Freedom in the World 2011*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-world/2011/morocco> (the report mentions, however, that religious intolerance is a problem in the country).

¹¹⁸ Moroccan Constitution, *supra* note 117, at Preamble.

¹¹⁹ *Id.* at art. 6.

¹²⁰ Moroccan Constitution, *supra* note 117, at art. 6.

¹²¹ *Id.* at art. 44 (“The law is voted on by the Chamber of Representatives. The same may authorize the Government, for a limited period and determined objective, to take measures that are normally in the legislative domain. Decrees come into force as soon as they are published; however, they have to be referred to the Chamber of Representatives for ratification on the expiry date determined by habilitation law. The habilitation law becomes inoperative if the Chamber of Representatives is dissolved.”).

¹²² *Id.* at art. 6.

¹²³ *Id.*

¹²⁴ Iranian Constitution *supra* note 69, at art. 20.

¹²⁵ Moroccan Constitution, *supra* note 117, at art. 37.

¹²⁶ *Id.*

¹²⁷ *Id.* at Preamble.

context of such organizations.¹²⁸ Further, the preamble “subscribes to the principles, rights, and obligations resulting from the charters of the aforesaid organizations and reaffirms its attachment to the Human Rights as they are universally recognized.”¹²⁹

¶44 While not a perfect document with respect to religious freedom, the Moroccan Constitution is distinguishable from the Iranian Constitution in its explicit respect for international human rights and its unqualified grant of religious freedoms.¹³⁰ Despite being an Islamic country, the Moroccan Constitution asserts a respect for international human rights treaties like the more liberal non-Muslim, Muslim-majority nations of Turkey and Libya.

E. *Bad Constitutional Examples: Libya and Syria*

¶45 The Iranian Constitution more closely resembles that of countries that are experiencing unrest at the moment. Neither Syria, a country experiencing civil war, nor Libya, another country in transition, allows unqualified freedom of religion.¹³¹ Furthermore, neither country’s Constitution expresses respect for international organizations or international norms.¹³²

¶46 The Syrian and Libyan Constitutions are like the Iranian Constitution in that each country expressly limits its grants of religious freedom in their respective constitutions. For example, the Syrian Constitution guarantees freedom to hold any religious rites “provided they do not disturb the public order.”¹³³ The Libyan Constitution under Colonel Qaddafi gave religious freedom, but “in accordance with established customs.”¹³⁴ However, the previous sentence notes that Islam is the religion of the state.¹³⁵

¶47 Syria and Libya are also like Iran in that neither Constitution asserts a respect for international human rights law. Not surprisingly, the word “international” does not even appear in the Libyan Constitution, making it similar to the Iranian Constitution in that neither gives explicit support to abiding by international treaties. Likewise, in the Syrian Constitution, the word “international” only appears in the context that the People’s Assembly must approve such treaties.¹³⁶

F. *Sharia Courts*

¶48 Admittedly, there is more to constitutional interpretation than the text itself. Some constitutions give nominal protection to religion, but also give deference to courts to interpret Sharia law.¹³⁷

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Constitution of Syria (1973) (Syria) (hereinafter “Syrian Constitution”); Constitution of Libya (1969) (Libya) (hereinafter “Libyan Constitution”).

¹³² *Id.*

¹³³ Syrian Constitution, *supra* note 132, at art. 35.

¹³⁴ Libyan Constitution, *supra* note 132, at art. 2.

¹³⁵ *Id.*

¹³⁶ Syrian Constitution, *supra* note 132, at art. 71.

¹³⁷ STAHNKE AND BLITT, *supra* note 33, at 959 (“In Egypt, the role of interpreting the meaning of Sharia has fallen to the Supreme Constitutional Court.”).

¶49 There is a dispute over the breadth to which apostasy laws are intended to apply under Sharia law. Some argue that under the Quran, apostasy was only meant to apply to national security concerns such as treason or rebellion.¹³⁸ When drafters create ambiguous constitutional language, legislatures, agencies, and courts are given more room to make assertions, such as the Iranian regime is now doing, that the apostate is a threat to national security and the Islamic state. Article 14 of the Iranian Constitution gives interpreters discretion if they can successfully argue that the person is a threat against the state.¹³⁹ Likewise, in the Pastor Youcef case, the Iranian regime has declared Youcef a Zionist and a threat to national security.¹⁴⁰

¶50 The sanctioning of some Sharia courts also undermines private law and order with respect to apostasy. In Palestine, for instance, Sharia courts have frequently publicized an act of apostasy and named the guilty party a threat to the community.¹⁴¹ The courts further declare the apostate to be an outcast.¹⁴² The Sharia courts do not have legal effect, but instead rely on their tradition and popularity in carrying out their decrees.¹⁴³ Although they do not order private killings, Sharia courts generally do not prosecute instances of private punishment for apostasy, meaning that those individuals outside the government who take issue with a person choosing to leave Islam are generally free to punish those persons.¹⁴⁴ Given the public support for such acts of punishment, there are no negative legal consequences for such acts of vigilante justice.

¶51 Simply because a constitution protects different religious groups does not mean a court will protect an individual from apostasy punishment. For example, in Egypt, the Constitution prior to the Arab Spring guaranteed freedom for “religious rites.”¹⁴⁵ While it protected the rite or the group, its protection for the individual was not as broad. Like Iran, the courts have often read acts of apostasy as threats to the national security of the nation and a threat to the religion of Islam.¹⁴⁶

¶52 While the Egyptian Constitution did preserve the “freedom of belief,” the interpretation by the courts has been that the freedom of belief only applies to non-Muslims.¹⁴⁷ In 1980, the Egyptian Administrative Court reasoned that the “State’s religion is Islam . . . Since the plaintiff has embraced Islam, he must then submit to its

¹³⁸ MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* 124 (2003) (“It constitutes a politico-religious rebellion.”).

¹³⁹ Iranian Constitution, *supra* note 69, at art. 14 (“[T]his principle [of non-Muslims’ Rights] applies to all who refrain from engaging in conspiracy or activity against Islam and the Islamic Republic of Iran”).

¹⁴⁰ Patrick Goodenough, *Case of Pastor Sentenced to Death for Apostasy Referred to Iran’s Supreme Leader*, CNSNEWS (Oct. 11, 2011), <http://cnsnews.com/news/article/case-pastor-sentenced-death-apostasy-referred-iran-s-supreme-leader>.

¹⁴¹ Justus R. Weiner, *Human Rights Trends in the Emerging Palestinian State: Problems Encountered by Muslim Converts to Christianity*, 8 MICH. ST. U.-DCL J. INT’L L. 539, 567-69 (1999).

¹⁴² *Id.*

¹⁴³ *Id.* at 568.

¹⁴⁴ *Id.* at 569.

¹⁴⁵ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, at art. 46 (hereinafter “Egyptian Constitution”).

¹⁴⁶ Berger, *supra* note 23, at 736.

¹⁴⁷ The Egyptian Courts have differentiated the freedom of belief from the freedom of practice within the faith. For instance, Muslim women are obligated to wear the veil. *See* Berger, *supra* note 23, at 736 (“[T]he freedom of belief implies that one could never be forced to become a Muslim, once a person is a Muslim, he has to submit to the rules of Islam as a matter of the practice of that religion.”).

law which does not condone apostasy.”¹⁴⁸ Likewise, Egypt’s highest court, the Court of Cassation,¹⁴⁹ has said that a prohibition on apostasy does not violate “freedom of belief.”¹⁵⁰ Rather, the Constitutional Court has interpreted “freedom of belief” as the right to practice one’s religion, rather than the right to change such a religion.¹⁵¹

¶53 Egypt ratified the ICCPR and believes it is in compliance with the international law. When Egypt ratified the ICCPR, it did so only on the belief that it did not conflict with Sharia, so it still believes it can enforce apostasy laws under international law.¹⁵² Therefore, the Egyptian constitutional courts have said that Sharia trumps freedom of belief.¹⁵³ However, the ICCPR makes no allowance for reservations on the norms of the treaty.¹⁵⁴

¶54 Although democracy is often seen as a protector of individual rights,¹⁵⁵ the Arab Spring could actually threaten the rights of those who choose to leave the Muslim faith. The threat of punishment for apostasy could become more acute in Muslim countries experiencing unrest. As mentioned, *supra*, over three quarters of Muslims in Egypt and Pakistan favor the death penalty for those who leave Islam.¹⁵⁶ Up until the Egyptian revolution of 2011, apostasy was in a status of “limbo” in Egypt.¹⁵⁷ Although Egyptian statutory law is silent on apostasy, the Egyptian Court of Cassation has understood there to be a ban on apostasy.¹⁵⁸ In 1980, the Egyptian Administrative Court also said that “[i]t

¹⁴⁸ Case No. 20/1980/Court of Cassation.

¹⁴⁹ *Court of Cassation*, EGYPTIAN STATE INFORMATION SERVICE, <http://www.sis.gov.eg/En/Story.aspx?sid=473>.

¹⁵⁰ Berger, *supra* note 23, at 737 (citing Case Nos. 475, 478, 481/1996/Court of Cassation).

¹⁵¹ Berger, *supra* note 23, at 736 (citing Case No. 8/1996/Constitutional Court). See Kilian Balz, *The Secular Reconstruction of Islamic Law: The Egyptian Supreme Constitutional Court and the ‘Battle over the Veil’ in State-Run Schools*, in LEGAL PLURALISM IN THE ARAB WORLD 229-244 (Baudoin Dupret et al. eds., 1999). Before the case came before the Supreme Constitutional Court, the Supreme Administrative Court had ruled that the decree did not conflict with the freedom of belief, but declared the decree void because it contravened the personal freedom to dress oneself according to one’s wishes (Case No. 4237/1994/Supreme Administrative Court).

¹⁵² Berger, *supra* note 23, at 734 (“Egypt, upon ratification of the covenant in 1982, added the following statement: ‘Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text [i.e. the Covenant] . . . we accept, support and ratify it.’ This could be explained as an exception clause, but is more likely to be an assurance that the ICCPR is consistent with the Islamic Sharia.”); Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT’L L. J. 397 (1996).

¹⁵³ *Freedom of Religion and Human Rights Law*, EGYPT INITIATIVE FOR PERSONAL RIGHTS <http://eipr.org/en/report/2009/12/06/261/275> (The Human Rights Committee further stated “Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant.”).

¹⁵⁴ General Comment 22, *supra* note 50.

¹⁵⁵ See generally, MICHAEL MCFAY, *ADVANCING DEMOCRACY ABROAD: WHY WE SHOULD AND HOW WE CAN* (2010).

¹⁵⁶ PEW RESEARCH CENTER, *supra* note 76 (reporting that at least three-quarters of Muslims in Egypt and Pakistan say they would favor making each of the following the law in their countries: stoning people who commit adultery, whippings and cutting off of hands for crimes like theft and robbery and the death penalty for those who leave the Muslim religion).

¹⁵⁷ Berger, *supra* note 23, at 722.

¹⁵⁸ Case No. 28/1966/Court of Cassation; Case No. 240/1973/Supreme Administrative Court. See also Berger, *supra* note 23, at 723.

is completely acceptable for non-Muslims to embrace Islam but by consensus Muslims are not allowed to embrace another religion or to become of no religion at all.”¹⁵⁹

¶55 Courts have applied apostasy punishments in Egypt in the context of family law. Since there are co-existing legal structures for different religions in Egypt and no civil marriages, apostasy results in “civil death” when one leaves the Muslim faith.¹⁶⁰ An act of apostasy renders marriage between a former Muslim and a Muslim null, requires separation, and severs all inheritance rights.¹⁶¹ Moreover, the apostate is forbidden from remarrying, and all blood ties with existing family members, including children, become null and void.

¶56 Egyptian apostasy punishments often have a political motive.¹⁶² Egyptian law has routinely imposed punishment for apostasy in the past. The most public example occurred in 1996, when Egyptian Scholar Nasr Hamed Abu Zayd was implicated by his fellow scholars for his revisionist writings on the Quran.¹⁶³ The court of Cassation ruled that his writings constituted apostasy, which led to a divorce from his wife, since a Muslim could not be married to a non-Muslim.¹⁶⁴ The ruling forced Zayd to flee Egypt to avoid civil death.¹⁶⁵

¶57 Despite Zayd’s attempt to argue that he could not be an apostate because he still claimed to be a Muslim, the Court ruled that because he affirmed his belief in his writings, which were non-Muslim, he was an apostate:

[h]e is an apostate, because he has revealed his unbelief after having been a believer, even if he claims to be a Muslim . . . An apostate cannot be excused when he claims to be a Muslim, because he has adopted a stance contrary to Islam. But then a heretic (al-zandiq) usually talks about his infidelity and proclaims his wrong faith while at the same time claiming that he is a Muslim.¹⁶⁶

¶58 Accusations and punishments of blasphemy have been leveled against revisionist scholars.¹⁶⁷ However, this case was the first in Egypt where a scholar was branded an apostate for his writings.

¹⁵⁹ Case No. 20/1980/Supreme Administrative Court (discussed by Ahmed Seif al-Islam Hamad, *Legal Plurality and Legitimation of Human Rights Abuses: A Case Study of State Council Rulings Concerning the Rights of Apostates*, in *LEGAL PLURALISM IN THE ARAB WORLD* 222-24 (Baudouin Dupret et al. eds., 1999)).

¹⁶⁰ Berger, *supra* note 23, at 723.

¹⁶¹ *Id.*

¹⁶² *Id.* at 728-29 (“It appears that the Abu Zayd case served no other purpose than settling personal or political scores.”).

¹⁶³ *The Battle For A Religion’s Heart: In An Ideological Contest Between Radicals, Populists And Moderates, Speaking Out Can Still Carry A Heavy Personal Cost*, *THE ECONOMIST* (Apr. 6, 2009), <http://www.economist.com/node/14179219>.

¹⁶⁴ Case Nos. 475, 478, 481/1996/Court of Cassation (hereinafter “1996 Court of Cassation”).

¹⁶⁵ Berger, *supra* note 23, at 722.

¹⁶⁶ 1996 Court of Cassation, *supra* note 164.

¹⁶⁷ Berger, *supra* note 23, at 730.

IV. THE NEW CONSTITUTIONS IN THE AFTERMATH OF ARAB SPRING SHOULD EXPLICITLY RECOGNIZE INTERNATIONAL HUMAN RIGHTS LAW AND GIVE UNQUALIFIED FREEDOM OF RELIGION

¶59 The Arab world's constitutions are currently under construction in the aftermath of 2011's Arab Spring. Tunisia, the first Arab Spring nation, is currently drafting a new Constitution.¹⁶⁸ In Egypt, a newly elected parliament in 2012 drafted the new Constitution, which is now in doubt after the July 3, 2013 ouster of Mohamed Morsi.¹⁶⁹ Likewise, the new Libyan parliament was scheduled to draft a new Constitution following June 2012 elections.¹⁷⁰ Given the volatility of the region, the next decade could see several additional constitutional amendments if more regimes fall.¹⁷¹

¶60 Although the Arab Spring brought about great optimism in the world, the outcome of the Constitution of Egypt and ultimately its future as a democracy remains uncertain, as the version that passed under Morsi was ambiguous. The Egyptian military has scheduled revisions for the constitution in the coming months.¹⁷² On March 30, 2011, Egypt's military leadership announced a provisional Constitution, which was set to remain in effect until after the 2012 Parliamentary elections.¹⁷³ However, the language of the provisional Egyptian Constitution read similarly to that of the pre-revolution 1971 Constitution. Article II declared Islam as the State religion. Article 6 declared there would be no religious inequality.¹⁷⁴ Article 11 granted the "freedom of creed."¹⁷⁵

¶61 When matched with other Muslim Constitutions, it would appear that the provisional Egyptian Constitution more closely resembled the Iranian Constitution than

¹⁶⁸ Patrick Goodenough, *Shari'a Rises in Tunisia's Constitution-Drafting Process*, CNSNEWS (March 2, 2012),

<http://cnsnews.com/news/article/Sharia-rises-tunisia-s-constitution-drafting-process>.

¹⁶⁹ Egyptian Government, *Constitutional Declaration 2011*, at art. 60 (2011),

<http://www.egypt.gov.eg/english/laws/Constitution/> ("The members of the first People's Assembly and Shoura Councils (except the appointed members) will meet in a joint session following an invitation from the Supreme Council of Armed Forces within 6 months of their election to elect a provisional assembly composed of 100 members which will prepare a new draft constitution for the country to be completed within 6 months of the formation of this assembly. The draft constitution will be presented within 15 days of its preparation to the people who will vote in a referendum on the matter. The constitution will take effect from the date on which the people approve the referendum.") (hereinafter "Provisional Egyptian Constitution"); *Egypt's Old Guard Takes the Reins After Overthrow of Mohamed Morsi*, THE GUARDIAN (July 23, 2013), <http://www.theguardian.com/world/2013/jul/23/egypt-old-guard-mubarak-ruler>.

¹⁷⁰ Ali Shuaib, *Libya's Muslim Brotherhood Sets up Political Party*, CHI. TRIBUNE (Mar. 2, 2012), <http://www.chicagotribune.com/news/sns-rt-us-libya-islamists-partytre8211xi-20120302,0,5853441.story>.

¹⁷¹ Wikistrat, an international consultancy group projects Algeria, Bahrain, Iran, Uganda, and the greater Kurdistan region as at-risk areas for Arab Spring. Wikistrat, *Five Countries That May Rise Up Next*, CNN (Mar. 9, 2012), <http://globalpublicsquare.blogs.cnn.com/2012/03/09/five-countries-that-may-rise-up-next/>.

¹⁷² Maggie Fick and Noah Browning, *Egypt starts amending constitution despite political divisions*, REUTERS (July 21, 2013), <http://www.reuters.com/article/2013/07/21/us-egypt-protests-idUSBRE96JOBZ20130721>.

¹⁷³ Amir Ahmed, *Egypt To Announce New Working Constitution*, CNNWORLD (Mar. 30, 2011), http://articles.cnn.com/2011-03-30/world/egypt.constitution_1_new-constitution-emergency-laws-egypt?_s=PM:WORLD.

¹⁷⁴ Provisional Egyptian Constitution, *supra* note 169, at art. 7 ("Law applies equally to all citizens, and they are equal in rights and general duties. They may not be discriminated against due to race, origin, language, religion, or creed.").

¹⁷⁵ *Id.*

those of Lebanon and Turkey in that the provisional Constitution declares Islam to be the state religion. Moreover, it declared Sharia the “principal source of legislation.”¹⁷⁶ Furthermore, there was nothing in the provisional Constitution recognizing international treaties or the supremacy of international human rights law.¹⁷⁷ Like the 1971 Constitution, the Egyptian Constitution affords protection to “religious rites” but does not protect the right for individuals to practice or change their beliefs.¹⁷⁸

¶62 However, the Constitution uses broader language in favor of religious freedom than Iran’s Constitution uses. Unlike the Iranian Constitution, the Egyptian Constitution does not have qualifying language that the grants of rights must be in accordance with “Islamic criteria.”¹⁷⁹ The grant of equality in Article 6 of the provisional Egyptian Constitution is unqualified, and says that citizens may not be discriminated against based on religion.¹⁸⁰ However, without a respect for international law and an unqualified grant of freedom of religion, the Egyptian Constitution could be more like those of Turkey and Lebanon.

¶63 With prominent Islamists being released from prison under the provisional government, there exists a danger that the apostasy laws could become worse in a new constitutional regime.¹⁸¹ On October 9, 2011, Christian protests in Egypt resulted in a clash with police that left 24 dead.¹⁸²

¶64 On December 26, 2012, Egyptian President Mohamed Morsi replaced the provisional Constitution when he signed the new Constitution into law, following the Constitution passing a referendum and being approved by the Constituent Assembly.¹⁸³ The Constitution would likely not protect against apostasy punishment. The Constitution forbids “[i]nsult or abuse of all religious messengers and prophets.”¹⁸⁴ The Constitution declares that Islam is the state religion and that Sharia is the main source of legislation.¹⁸⁵ However, there is some encouraging language about the “respect for human rights and freedoms” and a ban on political parties from discrimination based on religion.¹⁸⁶ The Constitution also allows freedom of belief, but “as regulated by law” and for “divine religions.”¹⁸⁷ The Iranian example shows that those could imply limitation and a selective view on which religions are acceptable. The legality of apostasy is ambiguous as the right

¹⁷⁶ *Id.* at art. 2

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *But see* Egyptian Constitution, *supra* note 145, which contained the same language.

¹⁸⁰ *Id.*

¹⁸¹ *About And Tarek El-Zomor Amongst Released Prisoners*, AHAM ONLINE (March 11, 2011), <http://english.ahram.org.eg/NewsContent/1/64/7445/Egypt/Politics-Aboud-and-Tarek-ElZomor-amongst-released-prisoners.aspx>.

¹⁸² David D. Kirkpatrick, *Church Protests in Cairo Turn Deadly*, N.Y. TIMES (Oct. 9, 2011), http://www.nytimes.com/2011/10/10/world/middleeast/deadly-protests-over-church-attack-in-cairo.html?_r=1.

¹⁸³ Salma Abdelaziz, *Morsy Signs Egypt’s Constitution into Law*, CNN (Dec. 26, 2012), <http://www.cnn.com/2012/12/25/world/africa/egypt-constitution>.

¹⁸⁴ *Egypt’s Draft Constitution Translated*, EGYPT INDEPENDENT, at art. 44 (Dec. 2, 2012), <http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated>.

¹⁸⁵ *Id.* at art. 2.

¹⁸⁶ *Id.* at art. 6.

¹⁸⁷ *Id.* at art. 43.

to change one’s religion is not enumerated, nor is there an affirmation of international treaties and declarations such as the UDHR or the ICCPR.

¶165 Likewise, Sharia law and the issue of religious freedom are being debated in the Tunisian constitutional convention. As CNS reports, the first draft under consideration used Sharia law.¹⁸⁸ The draft, released in August 2012, was subsequently redone in December 2012. However, human rights concerns continue to abound.¹⁸⁹ Moreover, it does not affirm a commitment to international treaties, the UN, or the ICCPR like the Turkish and Lebanese Constitutions. Rather, it says that “[r]espect for international conventions is compulsory if they do not contravene this constitution”—potentially subordinating the international conventions to domestic interpretations of the Constitution.¹⁹⁰

¶166 The Constitution of Libya remains uncertain, as the Libyan Transitional Council has been mired in sectarian conflict and its own allegations of human rights abuses.¹⁹¹ While constitutional change can be effective, it is not easy. The drafting of the constitution has been mired in delays, although currently the Libyans will directly elect a committee to draft its new constitution.¹⁹²

¶167 On November 24, 2011, Yemeni President Ali Abdullah Saleh resigned after nine months of protests. However, the Parliament remained.¹⁹³ On March 18, Yemeni political factions met to begin drafting a new constitution.¹⁹⁴

V. CONSTITUTIONAL CHANGE

¶168 If the Middle East continues to transform with more young people demanding freedom, economic upward mobility, and equality, changes to their constitutions will be demanded. These emerging democracies should keep in mind that unqualified grants of religious freedoms as well as specifically enumerated human rights consistent with international law could be beneficial in framing their new national identities.

¶169 Changing the text of a constitution will not immediately change a culture, but it can guide it in future generations as legislatures and courts look to their founding documents in interpreting the laws. While a future radicalized regime could try to ignore the constitution, granting human rights in accordance with international law makes those rights more difficult to take away since the population then becomes used to exercising them. Disobeying the constitution and laws would likely result in stronger outrage and reprimand from the public, relevant interest groups, and political opponents.

¹⁸⁸ Goodenough, *supra* note 140.

¹⁸⁹ Tunisia Draft Constitution Still Slights Rights, HUMAN RIGHTS WATCH (Jan 23, 2013), <http://www.hrw.org/news/2013/01/22/tunisia-draft-constitution-still-slights-rights>.

¹⁹⁰ *Id.*

¹⁹¹ Umar Khan, *Libya Has Made Great Progress—The Acts Of A Few Don’t Change That*, THE GUARDIAN, (Mar. 9, 2012), <http://www.guardian.co.uk/commentisfree/2012/mar/09/libya-great-progress>.

¹⁹² Christopher Stephen, *Libyans to Vote for Constitutional Drafting Committee*, BLOOMBERG (Feb. 7, 2013), <http://www.bloomberg.com/news/2013-02-07/libyans-to-vote-for-constitutional-drafting-committee.html>.

¹⁹³ Brian Whitaker, *Yemen’s Ali Abdullah Saleh Resigns—but it changes little*, THE GUARDIAN (Nov. 24 2011), <http://www.guardian.co.uk/commentisfree/2011/nov/24/yemen-ali-abdullah-saleh-resigns>.

¹⁹⁴ Mohammed Ghobari, *Yemen factions to mull constitution, reforms in March*, REUTERS (Feb 6, 2013), <http://www.reuters.com/article/2013/02/06/us-yemen-dialogue-idUSBRE9150YD20130206>.

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While there is more to a nation than the text of its constitution, as its founding document, it can specify its norms and values for coming generations. Although apostasy is a difficult issue in the Arab world, these emerging democracies will want to maintain their good standing in the international community while also retaining their identities as Muslim nations. These coming years could slowly undo the tension between those two goals. If a nation wants human rights and the freedom of religion to be promoted, now is the time to codify those aspirations.