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**Religion, Courts, and Constitutional Reasoning:**

**The Efficacy of Constitutional Courts' Jurisprudence in Religiously**

**Divided Societies**

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This paper looks at one of the most critical sources of division in the Middle East,

i.e., the polarization of secular and religious forces and contemplates on the role that constitutional courts play in addressing these divisions. The adoption of two constitutions in the span of two years in Egypt - one strengthening the legal position of Islam in the constitution and the other revoking all of the changes - and the battle of religious and secular groups over drafting the Tunisian constitution best illustrates the ongoing social, political and legal battle between these groups fighting over their competing visions of the state and their aspirations for shaping the constitutional systems of MENA countries.

Although, occasionally one group might triumph over the other, in the absence of a robust legal system addressing the concerns of both groups in this transitional time, there will be no prospect of political stability and we will keep witnessing the oscillation between the two extremes. In a region with not such strong tradition of judicial review, I argue that constitutional courts should take up a more activist and effective role in mediating intra-religious tensions. The question posed here is twofold: the “why” and the “how”. The first part of the paper advances a case for incremental constitutionalism with regard to the role of religion in these divided societies. It argues that by removing the pressure to solve this issue, which is entangled with religious, political and identarian complexities, at the constitutional moment and transferring it to the constitutional adjudication phase, these countries avoid deepening their intra-religious rifts and keep the door for further compromises open. I argue it is better to situate the controversy over the right vision of the state with respect to religion and the exact formulation of its role somewhere between the constitutional entrenchment and the ordinary politics of legislatures, which runs the higher risk of being captured by one extreme group. In the spectrum of potential parliaments moving toward more secular or more religious ends, the courts can act as a counterforce to draw the institutional lines (governmental agencies v. religious institutions, parliament v. other constitutional organs) and protect the individual rights.

Putting other factors involved in a well-functioning judicial system aside, this paper focuses on the constitutional reasoning of these courts and concludes that a shift toward a more standard-based method such as *balancing* as opposed to the more prevalent tradition of formalist reasoning in these countries is a way to perform the mediatory role more effectively. The paper does a critical study of the jurisprudence of the Egyptian Supreme Constitutional Court and decisions brought before the Turkish Constitutional Court and the jurisprudence of ECtHR on Turkey to see how effectively they have engaged with such questions that bring intra-religious tensions in these countries to the fore. The two courts demonstrate two very different models: the Egyptian court has to operate against a backdrop of a sharia clause entrenched in the constitution itself, while the Turkish constitutional court is operating in the context of constitutional secularism. This has generated different types of cases that are ended up before these courts. For example, Turkish cases are formulated around religious liberty rights and the Egyptian court has to deal with questions of institutional boundaries and the scope of proper legislation that expands or contracts individual rights. There are overlapping areas between the two, as both courts have struggled with the ways to limit the electoral and democratic channels through party banning and even more brazenly dissolving parliaments in face of the rise of Islamic parties.

The paper concludes that despite the unpromising record of these two courts in confronting the religious-secular divide, the more engagement of the courts as well as their choice of the reasoning method can actually help the courts to be more effective actors to increase the internal and democratic deliberation, to prevent a total capture by one social force, and to produce a more moderate and accommodating jurisprudence.