Religious References in the Constitutions of the Arab World: Islamization of the Constitution or Constitutionalization of Religion?

Nathalie Bernard-Maugiron

Abstract
If Islam is given a privileged status in most constitutions of the Arab world, religious references coexist alongside other provisions, drawn from the concept of Western constitutionalism. This chapter examines the different forms of constitutional consecration of religion in the constitutions of the Arab world and claims that their impact on the political and legal orders of these countries remains under the close supervision of the secular elites. The inclusion of Islam as the religion of the State into the constitution therefore is as much a way to take into account the religious values of the majority of the population as a political motivation to strengthen the religious and political legitimacy of the rulers. It is therefore the way for politics to interfere into the religious sphere more than for religion to interfere into politics.

1. Introduction

After the revolts of 2011 in the Arab world, the debates around the identity of the State and the place of religion in the normative system were one of the main challenges in the process of constitutional drafting in Egypt and Tunisia. These provisions crystallized tensions, both inside and outside the constituent body, highlighting the lack of consensus within these societies on the definition of common values.

Islam, indeed, is given a privileged status in most of the constitutions of the Arab world, in different modes and degrees. However, these references coexist alongside other provisions, drawn from the concept of Western constitutionalism, alien to traditional Islamic *fiqh*. The fact that religious references appear in a document drafted by a secular state body and adopted by the people or its representatives alongside the principle of separation of powers or human rights provisions, is a sign of the reconfiguration of Islamic normativity to fit modern political conditions.

The spread of religious constitutional references is a relatively recent phenomenon. In the early constitutions of the Muslim world, notions specific to Islam were used primarily to place limits on the government and the legislator[1] and did not have real effects on the constitutional order. From the middle of the 20th century, the growth in the number of independent states and the generalization of the constitutionalization movement, however, multiplied the opportunities to meet religious references. In addition, the rise of Islamist currents has led to an increasingly participatory process of constitution drafting and increased pressure to include religious references in these texts, in particular in Egypt and Tunisia after 2011. Islam was put forward by governments and constitutions have started regulating the relationship between positive and *sharia* law and questioning the organization of the powers.

By adopting a constitutional design and integrating religious references in their supreme norms, Arab rulers rendered the political authority accountable to the *sharia* but also ensured that their constitution would be considered as acceptable. They also and foremost tried to increase their own legitimacy towards their people. Rulers claim that they are accountable to Islamic law while, actually, they keep the political and legal impact of Islamic normativity under their control. In most of these countries, indeed, religious references produced little effect on the organization of the political and legal systems, whose boundaries and contents are defined by the political elite.

The constitutional consecration of the religious referent can take different forms.[2] Some of these provisions deal with the political organization

1 Saïd Amir Arjomand, "Introduction." In: *Constitutional Politics in the Middle East. With special reference to Turkey, Iraq, Iran and Afghanistan*, Hart Publishing, 2008: 3.

2 Tad Stahnke and 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." *Georgetown Journal of International Law* 36, 2005: 947–1078. See also Abduallahi An-Naim, "Shari'a and Modern Constitutionalism." In: *Towards an Islamic Reformation*. Syracuse University Press: Syracuse, 1990: 69 and s.; Gianluca Parolin, "Religion and the Sources of Law: Sharīʿah in Constitutions." In: *Law, Religion, Constitution; Freedom of Religion, Equal Treatment, and the Law*, edited by W. Cole Durham, et alii. Farnham: Ashgate, 2013: 89–104; Clark Lombardi, "Constitutional Provisions Making Shari'a "a" or "the" Chief Source of Legislation: Where Did They Come from, What Do They Mean, Do They Matter", *American University International Law Review* 28. 3, 2013: 733–774; Abdelfattah Amor, "Constitution et religion dans les États musulmans." In: *Constitutions et religions*, *Actes de la dixième session de l'Académie internationale de droit constitutionnel*. Toulouse: Presses de l'Université des sciences sociales de Toulouse, 1994: 25–88; Julia Iliopoulos-Strangas, ed., *Constitution et Religion. Table ronde,*

of the state, others with the legal order. All of them, though, are exercised under the close supervision of the secular elites who control their impact on the political and legal internal orders of these countries.

2. Islam and the state's identity

Different types of references to Islam can be found in the political organization of the constitutions of the Arab world. Some proclaim the Islamic identity of the State, others translate this identity on the structure and functioning of the political regime. The concrete consequences of these provisions on the structure of the state are, however, limited by the structuring of these documents around their political leaders and the concepts of modern constitutionalism.

2.1. References to Islam as the religion of the state

Most constitutions of the region declare that Islam is the religion of the state.[3] Such a provision can be found for instance in Jordan (1952, art. 2), Kuwait (1962, art. 2), Oman (2021, art. 2), Bahrain (2002, art. 2), or Iraq (2005, art. 2). In Mauritania (1991, art. 5), Islam is the religion of the people and of the state and in the United Arab Emirates, the federal character of the state makes Islam the official religion of the federation (1971, art. 7).

Athènes 22-26 mai 2002. Bruylant, 2005; Sabine Lavorel, *Les Constitutions arabes et l'islam. Les enjeux du pluralisme juridique.* Presses de l'Université du Québec, 2005; Dawood I. Ahmed and Tom Ginsburg, "Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions." *Virginia Journal of International Law* 54.3, July 2014: 615–695; Nathan J. Brown, "Islam and Constitutionalism in the Arab World", In: *Constitution Writing, Religion and Democracy*, edited by Ash U. Bâli et Hanna Lerner. Cambridge University Press, 2017: 289–316; Abdelouahab Maalmi, "Les constitutions arabes et la sharí'a." *Islamochristiana* 32, 2006: 159–171; Rainer Grote and Tilmann J. Röder, eds., *Constitutionalism in Islamic Countries between Upheaval and Continuity*. Oxford: Oxford University Press, 2012, and Rainer Grote, Tilmann Röder and Ali El-Haj, eds., *Constitutionalism, Human Rights and Islam after the Arab Spring*. Oxford: Oxford University Press, 2016.

3 The Ottoman Constitution of 1876 proclaimed for the first time Islam as the religion of the State (art. 11). The sultan was to be the caliph and protector of the Islamic faith (art. 3 and 4).

The constitutions that were adopted or revised after 2011 also declare Islam the religion of the state. This is the case in Morocco (Art. 3 of the 2011 Constitution) and in Algeria (Art. 2 of the 2020 revised Constitution). In Egypt, the Constitution of 2014 has taken over the same provision from the two previous ones (1971 and 2012): "Islam is the religion of the State. The principles of Islamic *sharia* are the main source of legislation". In 2012, though, the Constitution (art. 219) tried to define the meaning of "the principles of the Islamic *sharia*" by referring to extremely technical and complex concepts of the medieval Islamic legal tradition.[4] Although the intention of the Constituent Assembly, under the pressure of Salafists, was clearly to broaden as much as possible the body of principles to be included, in practice however, referring to such a large and diverse set of sources and fundamental principles of Islamic jurisprudence, from the most moderate and progressive to the most reactionary and archaic, could paradoxically have granted political and judicial bodies great freedom. In a decision of June 2013[5], the Supreme Constitutional Court applied Article 2 of the 2012 Constitution without taking into consideration Article 219.

In Tunisia, according to the Constitution of 2014, "Tunisia is a free, independent, sovereign state; its religion is Islam (*dinha al-islam*), its language Arabic, and its system is republican". The same provision was already included in the previous Constitution of 1959. There was a consensus in the Constituent Assembly to keep this provision despite or rather probably because of its ambiguity. It is not clear, indeed, whether Islam is the religion of the state or the religion of Tunisia as a nation. During the debates in the Constituent Assembly, Ennadha tried to include a provision stating that "No revision should undermine Islam as the religion of the State" (draft Art. 148), which would have removed the ambiguity of the said provision by privileging the interpretation of Islam as the religion of the State, but this proposal was rejected by the other members of the Assembly.

---

4 Nathan Brown and Clark Lombardi, "Contesting Islamic Constitutionalism after the Arab Spring. Islam in Egypt's Post-Mubârak Constitutions." In: *Constitutionalism, Human Rights, and Islam after the Arab Spring*: 245–260; Nathan Brown and Clark Lombardi, "Islam in Egypt's New Constitution." *Foreign Policy*, 13 December 2012, http://mideast.foreignpolicy.com/posts/2012/12/13/islam_in_egypts_new_constitution; Gianluca Parolin, "(Re)Arrangement of State/Islam Relations in Egypt's Constitutional Transition", NYU School of Law, *Public Law Research Paper* 13–15, 10 May 2013, https://ssrn.com/abstract=2251346 or http://dx.doi.org/10.2139/ssrn.2251346.

5 Supreme Constitutional Court, June 2, 2013, No. 41/26, *Official Gazette* 23 bis (b), June 10, 2013.

Some states also claim to be Islamic states, like Oman (art. 1), Bahrain (art. 1), Yemen (1990, art. 1) or Saudi Arabia (1992, art. 1). Mauritania and Morocco adopt a similar provision in their Preamble.

Several constitutions barred constitutional amendments that would diminish the religious nature of the state. In Morocco, for instance, "No revision may infringe the provisions relative to the Islamic religion" (art. 175). The Algerian Constitution (2020, art. 223) also prohibits constitutional amendments that would undermine Islam as the religion of the state. A similar provision can be found in the Bahraini Constitution (art. 120) that does not allow amending Article 1, according to which the religion of the state is Islam and the Islamic *sharia* a main source of legislation (*al-shari'a al-islamiyya masdar ra'isi li-l-tashri'*). In Tunisia, Article 1 states that "Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican. » Paragraph 2 adds "this provision shall not be amended."

In the Arab world, only Syria, Lebanon – a multi-confessional state - and the Sudan, do not consider Islam as the religion of the state. In Syria, though, the *fiqh* is a main source of legislation and the head of the state shall be a Muslim.

If defining the religion of the state as Islam or claiming to be an Islamic state has a very strong symbolic bearing on national identity, the real effects of such a proclamation on the structure of the state will, however, depend on the content that will be given to such expressions. How to determine the degree of "Islamicity" of a country? Islamic *fiqh* gives little guidance regarding the form a state based on Islam should take. Furthermore, the notions of an Islamic state or republic may appear to be intrinsically contradictory since neither the concept of state nor that of republic has their origin in Islam. Besides, how to reconcile the concept of the territorial nation state (*dawla*) with the ideal model of the *umma*, a community of believers united within the same identity? The poverty in the religious sources has given leeway to states in the choice of their political organization while claiming to apply an Islamic mode of organization of the power.[6]

6 Mohammad Hashim Kamali, "A Contemporary Perspective of Islamic Law." In: *Constitutionalism in Islamic Countries*: 22.

2.2. *Other types of religious references to the organization of the state*

Several constitutions give a special status to the head of state and/or establish religious bodies.

2.2.1. *The head of state*

Some constitutional provisions give a special status to the head of the state. In Morocco, thus, the King is the "Commander of the faithful" (*Amir al-mu'minin*) (art. 41). He shall ensure compliance with Islam and guarantee the free exercise of religion. Article 41 further specifies that the King "exclusively exercises by *dahir* (royal decree) the prerogatives inherent in the religious institution of *imarat al-mu'minin*."

This title of "Commander of the faithful" inscribes the King in the continuity of the first Caliphs and makes him the most powerful religious authority in the kingdom, thus grounding absolute obedience to him. His power in religious matters can be interpreted broadly, such as King Mohammed VI's support to the reform of the *Mudawwana*, the new family code, in 2003. Although the 2011 Constitution now distinguishes between the King "Head of State" (art. 42) and the King "Commander of the Faithful" (art. 41), it is hard to know if his *dahirs* were taken in his political or religious capacity. They are considered by all state bodies as superior to their own decisions. The Constitution also gives him leadership over the Higher Council of Ulema, a body empowered to issue fatwas or religious views.

In Saudi Arabia, the only religious status that can be claimed by the King is that of "custodian of the holy places of Islam" (*khadim al-haramayn al-sharifayn*). But his alliance with Wahhabi *ulema* allows the secular state apparatus to benefit from a form of religious legitimacy in the face of opposition and Islamist movements. It also puts the King in a position of dependence on the *ulema* who will try to defend their privileges against attempts to modernize the legal system, which they perceive as a threat to their own status and powers.

Some constitutions require that the head of the state be a Muslim, like Syria (art. 3), Tunisia (art. 74), Kuwait (art. 4), Algeria (art. 87), Mauritania (art. 23), Yemen (art. 106), Jordan (art. 28), Qatar (2003, art. 9), or Oman (art. 5).

In Lebanon, the 1926 Constitution, as amended in 1990, establishes a confessional regime based on a political balance. Article 24 states that the seats in the Parliament are to be divided equally between Christians

and Muslims, but Article 95 specifies that this division of public functions shall disappear in the long run. In accordance with an unwritten "National Pact" of 1943, the presidency of the Republic belongs to a Maronite Christian, that of the Council of Ministers to a *sunni* Muslim, the Speaker of the Parliament shall be a *shia* Muslim and its Vice-President a Greek Orthodox.

The constitution may also require the provision of a religious oath. Thus, in Yemen, the Constitution (1991, art. 160) provides that the President of the Republic, the Vice-President, the Prime Minister, the Ministers and Members of the Representative Assembly shall take an oath on the Quran and *sunna*. In Egypt, before assuming his functions, the President of the Republic shall take the following oath before the House of Representatives: "I swear by Almighty God (*uqsim bi-llah al-'azim*) to loyally uphold the republican system, to respect the Constitution and the law, to fully uphold the interests of the people and to safeguard the independence and territorial integrity of the nation." (art. 144).

2.2.2. Interference of religious bodies in the political field

Some constitutions allow religious bodies to interfere in politics. In Morocco, Article 41 refers to the Higher Council of Ulema. This body, presided over by the King, shall study the questions submitted by him. It is the sole instance enabled to adopt religious consultations (fatwas) on the questions that were referred to it "on the basis of the tolerant precepts and designs of Islam". The attributions, composition and modalities of functioning of the Council are established by *dahir*. Besides, the Council can only adopt recommendations, that the King may or may not follow. It allows the King to secure control over the religious sphere and to rely on official religious institutions to legitimize his power, while eliminating any risk of competition.

In Algeria, the Constitution (2020, arts. 206–208) organizes the Higher Islamic Council, instituted with the President of the Republic. The Council shall encourage and promote *ijtihad*, express its opinion with regard to the religious prescriptions on what is submitted to it and present a periodic report of activity to the President of the Republic. It is composed of fifteen members, including a President, appointed by the President of the Republic, among the high national experts in different sciences.

A Council of the Great Ulema (*hay'a kibar al-'ulama'*) is mentioned by the Saudi Basic Law of 1992 (art. 45). Established in 1971 by King Faysal, it has between 21 members who specialize in Islamic law, and is

led by the Grand Mufti. Since 2009, its composition has been enlarged to include a representative of each of the three other *sunni* schools (hanefite, shafeite and malikite), in addition to hanbalites. But it does not include *shia* members. A 2010 royal decree gave the Council a monopoly on the adoption of *fatwas*, allowing them to control the religious field.

In Egypt, the Constitution of 2014 (art. 7) declares that al-Azhar constitutes "the fundamental reference (*al-marja' al-asasi*) for religious sciences and Islamic issues". It does not specify, though, how al-Azhar shall intervene in the religious field and whether and when it shall be consulted. In practice, al-Azhar is regularly consulted by the legislator when drafting texts perceived to have a religious dimension, particularly family law reforms. It is also involved in censorship and the seizure of works relating to religion. Al-Azhar is very dependent on the state, especially financially, since its nationalization in 1961.[7]

In 2012, the Constitution adopted under Muslim Brotherhood President Mohammed Morsi, (art. 4) declared that the Council of Senior Scholars of al-Azhar[8] was to be consulted in matters pertaining to Islamic law. However, this Council, like in Morocco or Algeria, could only deliver opinions. Besides, the Constitution did not specify who was to seize the Council nor when and in which areas they had to be consulted, thus leaving a great deal of autonomy to the legislature, judges or government. This competence of al-Azhar was not depriving the Supreme Constitutional Court of its full power of judicial review of laws, even those that were challenged under Article 2 of the Constitution.[9]

---

7 Al-Azhar however has always been trying to keep its independence from the State. See for instance Nathan Brown and Mariam Ghanem, "The Battle over Al-Azhar, Carnegie Endowment for International Peace." May 31, 2017, https://carnegie-mec.org/diwan/70103 and Tamir Moustafa, "Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt." *International Journal of Middle East Studies* 32.1, February 2000: 3–22.

8 The Council of Senior Ulema of al-Azhar is made up of 40 members, known for their piety and knowledge, first appointed by the Sheikh of al-Azhar and then co-opted. The Council will be responsible for electing the new Sheikh of al-Azhar who, until 2012, was chosen by the President of the Republic.

9 Article 175 of the 2012 Constitution. For the only case implementing Article 4 under the Constitution of 2012 and its limited effects see Nathalie Bernard-Maugiron, "La place du religieux dans le processus constitutionnel en Egypte après 2011." *Archives des sciences sociales des religions*: *Le religieux à l'épreuve des révoltes et des contre-révoltes dans le monde arabe*, edited by Cécile Boëx and Nabil Mouline, 181, January–March 2018: 47–68.

A High Islamic Council has also been created in Mauritania (1991, art. 94). In 2017 it was replaced by a High Council for Fatwa and Grievances (*al-majlis al-a'la li-l-fatwa wa-l-mazalim*).

2.2.3. Effects of these provisions on the political organization of the State

If all constitutions in the Arab world give a privileged status to Islam, in few of them has such a status a significant impact on the political organization of the state. It is rare for the Islamic nature of the State to result in a theocratic regime and the association to power of religious authorities.[10]

Official religious bodies enable the executive power to secure its grip on the religious sphere and establish its authority by maintaining them in a relationship of subordination. Most of them are appointed by the Head of State and can only give advisory opinions, on the questions he submitted to them. They cannot give their opinions on a specific topic if they are not required to. Their integration into the state apparatus restricts their field of competence so that they do not arise as competitors.[11] But such a control of the executive power also contributes to discrediting these institutions in the eye of the community and the Islamist movements. The assertion of the Islamic character of the state does not necessarily imply the application of a hypothetical *Islamic model* for the organization of power. Institutional mechanisms remain modern and religious provisions are accompanied by references to modern constitutionalism. All these constitutions organize a more or less extensive separation of powers, even if the head of state remains at the center of the institutional system. Although constitutionalism was not born in the Muslim world, modern political terminology, such as democracy, elections, executive power, parliament, right of dissolution or motion of non-confidence, ended up being part of the vocabulary of the protagonists of the political scene. All these constitutions, besides, proclaim fundamental rights and freedoms and most of them invoke national or popular, not divine sovereignty,

---

10 Nathan Brown, "Official Islam in the Arab World: The Contest for Religious Authority." *Carnegie Endowment for International Peace*, May 11, 2017, https://carnegieendowment.org/2017/05/11/official-islam-in-arab-world-contest-for-religious-authority-pub-69929.

11 For attempts by these religious bodies to gain autonomy, see Nathan Brown, ibid., *Carnegie Endowment for International Peace*, May 11, 2017, https://carnegieendowment.org/2017/05/11/official-islam-in-arab-world-contest-for-religious-authority-pub-69929.

The Islamist parties that took part for the first time in constitution drafting processes in Egypt and Tunisia after 2011 have also placed themselves in the continuity of constitutionalism rather that within the traditional system of Islamic law, where law is the expression of the will of God as interpreted by theological jurists. Even if this adherence of Islamists to the principles of the modern state might seem purely tactical to many, it reinforces the legitimacy of these concepts.

Even the Egyptian Constitution of 2012, that was drafted by an Islamist majority Constituent Assembly, stated in its Article 6 that "The political system is based on the principles of democracy, consultation (*shura*), and citizenship, which together regulate public rights and duties among the citizens. It is also based on pluralism in politics and among parties, the peaceful transfer of power, the separation and balance of powers, the rule of law, as well as respect for human rights and freedoms, according to the provisions of this Constitution. No political party may be based on discrimination of gender or origin or religion". These principles are quite far from those of "Islamic" models of the organization of power.

If the political consequences of the proclamation of Islam as the religion of the state or the affirmation of its Islamic identity differ from country to country, in most cases, however, such provisions did not have significant effects on the organization of power. Their political system is organized on the Western model with a more or less thorough separation or the religious and state fields.

3. References to the normative value of the sharia

If several constitutions of the Arab world refer to the normative value of the *sharia*, the legal effects of such provisions, however, remain symbolic or limited to family law and, less often, to penal law.

3.1. Constitutional references to the sharia

Some Arab constitutions refer to the *sharia* as "a" or "the" source of legislation. Such a reference was introduced in the Arab world for the first time in the Syrian Constitution of 1950 where *fiqh* was to be the main source of legislation (*al-fiqh al-islami huwa al-masdar al-ra'isi li-l-tashri*') and has since then been adopted in several other countries, though most of them refer to the "*sharia*" rather than to the "*fiqh*".

Some states claim that the *sharia* is "a main source of legislation (*masdar ra'isi li-l-tashri'*)". Such a provision was included in the Kuwaiti Constitution of 1962 (art. 2), in the United Arab Emirates (1971, art. 7) or in Bahrain (art. 2).[12] In Qatar (2003, art. 1) « The Islamic *sharia* is a main source of its legislations (*masdar ra'isi li-tashri'atiha)*». In Syria (2012, Art. 3), "Islamic *fiqh*" is a main source of legislation (*al-fiqh al-islami masdar ra'isi li-l-tashri'*).

Other constitutions proclaim the *sharia* "the" main source of legislation. In Yemen, since 1994 (art. 3), thus, "the *sharia* is the source of all legislations" (*al-shari'a al-islamiyya masdar jami' al-tashri'at*) and in Oman (art. 2), the Islamic *sharia* is the "basis" for legislation (*al-shari'a al-islamiyya hiya asas al-tashri'*). In Sudan, according to the Constitution of 2005 (art. 5), "Nationally enacted legislation having effect only in respect of the Northern states of the Sudan shall have as its sources of legislation Islamic *sharia* and the consensus of the people ».

In Mauritania, the Preamble of the constitutional text considers the precepts of Islam (*ahkam al-din al-islami*) as the sole source of law (*al-masdar al-wahid li-l-qanun*). In Egypt, since 1980, "the principles" of Islamic *sharia* are the main source of legislation. Before the 1980 Amendment of Article 2, they were only "a" source of legislation.

In Saudi Arabia, the Basic law of 1992 proclaims that the Quran and *sunna* are the constitution of the country (*dusturuha kitab allah ta'ala wa sunna rasulihi*) (art. 1). The Basic Law adds that "the power derives its authority from the Book of God and the Prophet's *sunna*, which take precedence over the constitution and all other state laws" (art. 7). Such a provision can be considered as establishing the superiority of religion over politics but also as a way to legitimate the power of the King. Indeed, his authority does not emanate from the sovereignty of the people or the nation but from the Quran and *sunna*. The King, thus, places himself above the people by claiming to hold his power from God through the Quran and the Prophet.

The normativity of *sharia* can also be addressed through a negative approach: it is forbidden to adopt laws that would violate the *sharia*. Such a provision, known as the "repugnancy clause" was inserted for the first time in the Iranian Constitution of 1906 as amended in 1907. In the Arab world, the Iraki Constitution of 2005 declares that Islam (and not the *sharia*) is a main source (*masdar asas*) of legislation (art. 2) and adds that

12 W. M. Ballantyne, "The States of the GCC: Sources of Law, the Shari'a and the Extent to Which It Applies", *Arab Law Quarterly* 1.1, November 1985: 3–18.

it is forbidden to promulgate laws contrary to the fixed prescriptions of Islam (*thawabit ahkam al-islam*).

In some countries, in particular in the Arabian Peninsula, the constitution mandates the application of Islamic norms in specific areas. In the Kuwaiti Constitution, for instance "Inheritance is a right governed by the Islamic *sharia*" (*al-mirath haqq tahkumuhu shari'a al-islamiyya*) (art. 18). A similar provision can be found in the constitution of Yemen (art. 23): "The right of inheritance is guaranteed in accordance with Islamic *sharia* (*haqq al-irth makful lil-shari'a al-islamiyya*). A special law will be issued accordingly" or in Qatar (art. 51) "The right of inheritance is secure and governed by the Islamic *sharia* (*haqq al-irth masun wa tahkumu al-shari'a al-islamiyya*)" and Bahrain (2002 art. 5) (*al-mirath haqq makful tahkumhu shari'a al-islamiyya*).

States such as Algeria, Morocco, Jordan or Tunisia make no reference to the *sharia* in their constitutions.

3.2. Meanings of normativity of the sharia

On the legal level, the provisions that proclaimed the *sharia* "a" or "the" main source of legislation did not give any guidance on how legislation was to be derived from the *sharia* and who this injunction aimed at. Can judges decide to disregard the application of a law that they consider contrary to Islamic *sharia*? Should all *sharia* principles prevail over all levels of legislation, when it is designated as its primary source? How to identify these *sharia* principles?

From the point of view of classical Islamic orthodoxy, the authority of the *sharia* does not depend on human intervention and the Quran is the only constitution needed by Muslims. God is the only legislator and rulers shall only be executive authorities, with no power to legislate. Islamic law, therefore, does not contain provisions regarding the place to be given to religious and secular law respectively, even if public Islamic law has always acknowledged the right of the leader of the *umma* (*wali al-amr*) to enact administrative regulations deemed necessary to the good administration of the community of believers and the protection of public order (*siyasa shar'iyya*) on the condition that they would not violate the *sharia*.[13]

13 See for instance Amr Shalakany, "Islamic Legal Histories." *Berkeley Journal of Middle Eastern & Islamic Law* 1, 2008: 2–81 and the writings of Rudolph Peters and Khaled Fahmy on 19th century Egypt.

In most states that enshrine the norms of *sharia* law, there is no mention of a body that would be responsible for ensuring that laws conform to *sharia* law. In Egypt, though, this role was devolved to the Supreme Constitutional Court. This court, in charge of judicial review of laws and regulations, has the power to invalidate laws that violate the Constitution, including its Article 2. The Egyptian Supreme Constitutional Court is known for having adopted a liberal interpretation of Article 2. In two leading cases,[14] indeed, the Court has interpreted narrowly Article 2 and limited the normative value of Islamic law. It asserted the non-retroactivity of the 1980 Constitutional Amendment and made a distinction within the principles of *sharia*.

The Court distinguished between absolute Islamic principles and relative rules. For the court, only the principles "whose origin and meaning are absolute" *(al-ahkam al-shar'iyya al-qat'iyya fi thubutiha wa dalalatiha)*, that is to say the principles which represent non-contestable Islamic norms, whether in their source or in their meaning, must be applied compulsorily. They are fixed, immutable, cannot give rise to interpretative reasoning (*ijtihad*) and cannot evolve over time. They represent "the fundamental principles (*al-mabadi' al-kulliyya*) and the fixed foundations" (*al-usul al-thabita*) of Islamic law. To this body of absolute principles, the Court opposed a set of rules considered as relative (*ahkam dhanniyya*), either in their origin (*thubut*) or in their meaning (*dalala*), or in both. They are subject to interpretation, are evolving in time and space, are dynamic, have given rise to divergent interpretations and are adaptable to the changing nature and needs of society. The Supreme Constitutional Court, therefore, has granted a great deal of freedom to the state's authorities, that are only bound by the "absolute Islamic principles" and are empowered to adapt the "relative rules" to the transformation of the Egyptian society. Besides, the Court has attributed itself the power to define which principles of the Islamic *sharia* are absolute and which rules are relative.[15]

---

14 Supreme Constitutional Court, No. 20/1, May 4, 1985 and No. 7/8, May 15, 1993.

15 For a criticism of the decisions of the Court regarding the principles of the *sharia*, see Clark B. Lombardi, "Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Shari'a in a Modern Arab State." *Columbia Journal of Transnational Law* 37, 1998: 81 et s. See also Nathan Brown and Clark Lombardi, "Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law." *American University International Law Review* 21, 2006: 379–435." and N. Bernard-Maugiron and B. Dupret, "Les principes de la charia sont la source principale de la législation. La Haute Cour constitutionnelle et la référence à la loi islamique." *Égypte-Monde arabe* 2, new series, 1999: 107-125.

The role of judges will be all the more important since many of these constitutions contain contradictory provisions, with proclamations that Islam is the religion of the state or the *sharia* the main source of legislation, next to provisions protecting freedom of religion, giving a special status to religious minorities or proclaiming equality between men and women. In Saudi Arabia, the Basic Law of 1992 even states that "The State shall protect human rights in accordance with the *sharia*" (art. 26) and in Yemen, the Constitution declares that "Women are the sisters of men. They have rights and duties, which are guaranteed and assigned by *sharia* and stipulated by law" (art. 31).

Article 6 of the 2014 Tunisian Constitution states that "The state is the guardian of religion. It guarantees freedom of conscience and belief (*hurriyat al-mu'taqad wa al-damir*), the free exercise of religious practices (*mumarasa al-sha'a'ir al-diniyya*) and is the garant (*damina*) of the neutrality of mosques and places of worship from all partisan instrumentalisation. The state undertakes to disseminate the values of moderation and tolerance and the protection of the sacred (*al-muqadassat*), and the prohibition of all violations thereof. It undertakes equally to prohibit and fight against calls for apostasy (*takfir*) and the incitement of violence and hatred." This provision, the result of a compromise in the Constituent Assembly, contains several vague and contradictory notions that the constitutional court will have to define and interpret.

3.3. Sharia in the legal systems of the Arab states

In practice, the attachment to religion proclaimed in the constitution had little impact on national positive law. In contemporary legal systems in the Arab world, *sharia* applies only in personal status law and in penal law of a few Arab countries. All other branches have been secularized on the model of Western codes.

Family law continues to draw its norms from religious sources, but all these countries, except Saudi Arabia, have adopted a family code. Through the codification process, several rules were revised, to improve the status of women in marriage and divorce by using various techniques such as the choice of rules within the four *sunni* law schools (*takhayyur* and *talfiq*).

Conversely, the fact that the constitution does not enshrine the normative value of the *sharia*, like in Tunisia, Morocco, Jordan or Algeria, has not prevented the legislators of these countries from drawing from the normative corpus of Islamic *fiqh* when drafting family codes and from legitimizing the most daring reforms by invoking the right to reinterpret re-

ligious sources (*ijtihad*). When HabibBourguiba codified Tunisia's personal status law in 1956, he denied any break with *sharia* and stressed that all developments had been accomplished "in accordance with the teachings of the Holy Book". The Tunisian Constitution, though, does not make any reference to the *sharia*. In addition, Tunisian courts relied on Article 1 of the 1959 Constitution to raise the exception of public order against foreign decisions regarding custody and visitation rights they considered to be contrary to the *sharia*. Some courts also relied on this article to declare the marriage of a Muslim Tunisian woman with a non-Muslim man invalid.[16] A 1973 circular from the Ministry of Justice that prohibited civil servants from registering such marriages was finally repealed in September 2017 by former President Béji Caïd Essebsi but some municipalities and notaries continue to refuse to celebrate such marriages.

As for criminal law, all Arab countries except Saudi Arabia have adopted a penal code on the model of the French code. This is the case in countries that do not enshrine the normativity of *sharia* in their constitution, such as Algeria, Jordan, Morocco or Tunisia, but also of those who make the *sharia* a source of legislation, such as Egypt (1937), Syria (1949), Bahrain (1976) or Oman (2018). All these penal codes have shifted from Islamic criminal law and its categories (*hudud* / *qisas* / *ta'zir*) and its penalties, to adopt the French classification of penalties into crimes, offenses and misdemeanors. While some of these countries still punish behaviors considered to be the most serious crimes in Islamic criminal law (*hudud*), most of them, however, have replaced the corporal punishments provided for by *fiqh* with imprisonment and/or fines. In most countries, talion (*qisas*) has also disappeared and has been replaced by prison terms and/or fines and the death penalty in case of intentional homicide. Classical Islamic penal law remains applicable only in a few Arab countries, such as Saudi Arabia, the Sudan, Libya or Mauritania and in most of cases, it is so difficult to prove *hudud* that corporal punishments only rarely apply and are replaced by other penalties on the basis of *ta'zir*.

All these countries, besides, have entrusted criminal litigation to secular courts. Even in Lebanon, Jordan, Bahrain or Iraq, where religious courts survive, they are only competent in family law litigation. The civil courts to which criminal litigation has been transferred rule on the basis of a code

16 See the decisions of the Court of Cassation in favor of the impediment of inheritance for disparity of religion (Houriya decision, January 31, 1966) or declaring the nullity of the marriage of a Muslim woman with a non-Muslim husband (Court of Cassation, June 27, 1973).

of criminal procedure and a system of evidence also inspired by French law.

The reference to the normative value of *sharia*, therefore, does not necessarily entail a specific legal role for religious norms or a more rigorous application of the rules derived from the *sharia*. The Islamic referent often functions more as an identity marker than as an effective source of law. The reference to Islamic law can be a way for these states of distinguishing themselves from the West.

Sharia, therefore, has an ethical and symbolic dimension more than a legal one. Its invocation by Muslims means a desire for order, stability, a certain authenticity and for greater social justice. It is mainly a call for the implementation of moral or ethical religious prescriptions and for the improvement of public governance. In Egypt, thus, members of Islamic parties were marching in November 2012 and calling for the strengthening of the *sharia* in order to put an end to unemployment, drug trafficking and corruption.

4. Conclusion

Religious references in constitutions do not necessarily entail that the state will be a theocracy or that the *sharia* will be applied in all fields and in particular in penal law. *sharia* is associated to good governance and decreasing its official status could be considered by their population as entailing political corruption and lack of accountability of the regime. One of the main purposes of religious references in the constitutions of the Arab region, therefore, could be to provide religious legitimacy to the rulers who know that secularism has limited appeal and is seen as unacceptable by the majority of their population.

By inserting a constitutional provision recognizing the normative value of *sharia*, constituents also hope to counterbalance the rise of the Islamist opposition by promoting an official Islam. The mobilization of Islamic referents by rulers enables them to control religious institutions and ensure compliance with their conception of Islam. It is, however, a double-edged sword. The radical movements of political Islam will invoke, too, these constitutional references to found their challenge to power on it and demand that government practices be brought into conformity with their constitutional commitments. They will claim a range of measures such as re-Islamization of society, discrimination against women and non-Muslims, consultation with religious authorities before voting on bills, censorship of artistic creations, penalization of apostasy of Muslims, denial

of certain religions; etc. There is therefore a risk that each side tries to appropriate Islam to legitimize its own political action. Judges may also refer to these religious references to invoke the existence of an Islamic public order (ex. Egypt) or to give an extensive interpretation of provisions of the personal status code (ex. Tunisia).

Just as constitutional provisions on the separation of powers or on the protection of human rights often remain a dead letter in many Arab authoritarian states, articles affirming the constitutional status of Islam and *sharia* rarely have real legal or political effects. However, they retain a very strong symbolic value, which is found in discourses and sometimes even in court decisions, then turning against the power that wanted to instrumentalize religion for the purpose of legitimation.

The inclusion of Islam in the Constitution does not always serve to make the state politically responsible before Islamic law and therefore limit power, but on the contrary strengthens its control over society. Such provisions thus give the state a religious legitimacy based on divine sovereignty, in addition to its political one.

As to the constitution, it is more an instrument in the hands of the political elite than a tool to organize and limit the power. The inclusion of Islam in the constitution as the religion of the state, therefore, is as much a way to take into account the religious values of the majority of the population as a political motivation to affirm the preponderance of the state over the religious field. Politics interfere into the religious sphere more than religion does interfere into the political sphere. Religious references reflect the constitutionalization of Islam more than they are a sign of the Islamization of constitutions.

Anja Schoeller-Schletter [ed.]

Constitutional Review in the Middle East and North Africa

Nomos

KONRAD ADENAUER STIFTUNG

The Open Access-publication of the electronic version of this work was supported by Konrad-Adenauer-Stiftung, 10907 Berlin.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de

ISBN 978-3-8487-7151-6 (Print)
978-3-7489-1201-9 (ePDF)

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-7151-6 (Print)
978-3-7489-1201-9 (ePDF)

Library of Congress Cataloging-in-Publication Data
Schoeller-Schletter, Anja
Constitutional Review in the Middle East and North Africa
Anja Schoeller-Schletter (ed.)
405 pp.
Includes bibliographic references.

ISBN 978-3-8487-7151-6 (Print)
978-3-7489-1201-9 (ePDF)

1st Edition 2021

Published by
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-8487-7151-6 (Print)
ISBN 978-3-7489-1201-9 (ePDF)
DOI https://doi.org/10.5771/9783748912019

Onlineversion
Nomos eLibrary

Nahoststudien. Middle Eastern Studies

Edited by

Volume 4